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**THE CONSTITUTIONAL RIGHTS OF
SCHOOLCHILDREN**

**FIRST AMENDMENT IN THE
CLASSROOM**

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First Amendment in the Classroom

In 1969, the Supreme Court decided the landmark case of *Tinker v. Des Moines*¹ and established the first amendment rights of schoolchildren. The case came about when school officials suspended students from a public high school because they wore black armbands to school in protest of the Vietnam War. The students sued under 42 U.S.C.S. section 1983. The trial court dismissed the complaint, upholding the constitutionality of the school's action on the ground that it was reasonable in order to prevent the disturbance of school discipline. The circuit court affirmed. The Supreme Court reversed because the wearing of armbands was entirely divorced from actually or potentially disruptive conduct by those that participated in it. Petitioners' conduct was closely akin to pure speech which was entitled to comprehensive protection under the First Amendment, absent facts that might reasonably have led school officials to forecast substantial disruption of or material interference with school activities.

Since that decision, schools, students and courts have wrestled with the first amendment issues inherent in the actions of students. These important issues have manifested themselves in questions concerning, primarily, free speech and the free exercise of religion. To understand better these issues and how they apply to children, it is first necessary to understand the development of constitutional law in this area.

Although the twentieth century is rich with cases and analysis pertaining to the free speech clause of the first amendment, the modern foundation of first amendment law

¹ *Tinker v. Des Moines*, 393 U.S. 503 (1969).

can be traced to the 1969 decision in *Brandenburg v. Ohio*.² In this case, the court reversed the Ohio decision to convict Brandenburg for violating the state's criminal syndicalism statute and declared the statute unconstitutional. Brandenburg was a leader of the Ku Klux Klan and was convicted by the Ohio courts after a television news report was aired broadcasting speeches he made in front of a burning cross while holding a gun. During the interview, Brandenburg made numerous racist statements including "bury the niggers". The court held that Ohio's criminal syndicalism statute did not draw a distinction between teaching the need for force or violence and preparing a group for violent action, so the statute unconstitutionally intruded on the rights guaranteed by the fourth and fourteenth amendments. As a result, the court reversed Brandenburg's conviction because the statute upon which his conviction was based was unconstitutional.

This decision is of great importance because the court made it clear that speech, even if hateful and racist, would receive the same absolute constitutional protection that the court afforded other kinds of speech. Nevertheless, the court continued to identify an exception to this absolute protection for speech that advocates and illegal act and, as a result of that advocacy, presents a clear and present danger of imminent lawlessness. Although this exception to absolute protection is not highly relevant within the context of schoolchildren, other exceptions to the absolute protection of *Brandenburg* continue to gain acceptance in federal courts.

The Supreme Court has also carved out an exception for commercial speech. In *Central Hudson Gas and Electric Corp. v. Public Service Comm'r*³, the Court established a five part test to determine the level of protection afforded commercial speech. The

² *Brandenburg v. Ohio*, 393 U.S. 444 (1969).

³ *Central Hudson Gas and Electric Corp. v. Public Service Comm'r*, 447 U.S. 557 (1980).

Public Service Commission promulgated a regulation that banned all promotional advertising by electric utility companies operating in the state of New York. The utility company challenged a judgment from the state's highest court that ruled that the regulation did not violate the first and fourteenth amendments to the Constitution. On appeal, the Court reversed after applying the four-prong analysis relevant to commercial speech cases. The Court: (1) noted that the commission did not claim that the expression at issue either was inaccurate or related to unlawful activity; (2) ruled that the utility's promotional advertising was not unprotected commercial speech merely because appellant held a monopoly over electricity in its service area; (3) ruled that, while the state's interests in energy conservation and ensuring fair and efficient energy rates were substantial, the link between the advertising ban and appellant's rate structure was, at most, tenuous, and; (4) because the regulation reached all promotional advertising, it was more extensive than necessary to further the state interest in energy conservation. As such, the regulation impermissibly infringed appellant's First Amendment rights.

This case demonstrated the application of the five part test that Court has used ever since when analyzing cases involving commercial speech. The five components the Court evaluates in these situations are: whether the activity is lawful, whether the speech is misleading, whether there is a substantial government interest in prohibiting the speech, whether the regulation to speech directly advances the asserted government interest, and whether the regulation is not more extensive than is necessary to serve the government interest.

Perhaps the most relevant exception to the absolute protection of free speech with regard to schoolchildren is the non-content based restriction. The court often refers to

these regulations as time, place and manner restrictions. These time, place and manner restrictions follow a basic balancing formula that measures regulatory interests of the state (or in this case the school as an extension of the state) with alternative ways of communicating that are available to the speaker. First, the court determines whether the interference with speech is accidental or intentional. If the interference is intentional then the regulation is held unconstitutional as an encroachment upon the absolute protection of free speech. If the regulation is found to be accidental, though, and not an intentional effort to interfere with speech, the court then applies a test that balances the extent of accidental interference (value of the speech and alternative means of speech available to the speaker) versus the extent of the state's regulatory interest (the interest itself and alternative regulations to serve the same interest but do not interfere with speech as much).

The court has applied this four part test to cases where regulations also interfere with "symbolic speech". Although the court, at times, has tried to draw distinctions between the value of symbolic speech and other forms of communication, these efforts are not persuasive. Whether the speech involved is a verbal assault, as seen in *Brandenburg*, or is a symbolic action designed to have the same persuasive effect as verbal speech, such as the students wearing the black armbands in *Tinker*, the result should be the same. Speech is the communication of an idea, whether verbal, written, painted, performed or symbolically expressed. It should receive the highest absolute protection of our judicial system because free speech is a systemic right that defines and distinguishes our democratic system of government. Thus, although the court at times tries to make distinctions in the levels of protection based on whether the speech is verbal

or symbolic, the fact remains that intentional interferences with protected speech receives strict scrutiny from the courts and accidental interferences with speech, even symbolic speech, must survive the time, place and manner balancing test to be deemed constitutional. This process of applying the time, place and manner test to symbolic speech is most evident in the case of *United States v. O'Brien*.⁴

In this case of a man burning his draft card at a public protest the court vacated an appellate judgment holding that the 1965 amendment to the Universal Military Training and Service Act of 1948 ran afoul of the first amendment by singling out protesters for special treatment. The amendment prohibited the knowing destruction of Selective Service registration certificates. O'Brien was convicted and sentenced after he publicly burned his registration certificate in an attempt to influence others to adopt his antiwar beliefs. O'Brien argued that the amendment was unconstitutional in its application and as enacted because of Congress' alleged purpose to suppress freedom of speech. The court held a sufficient governmental interest justified the conviction because of the government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because the amendment condemned only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act frustrated the government's interest.

Rather than carving out an exception to free speech, some courts have taken the approach of treating certain messages as not speech at all. This tactic is prevalent with regard to schoolchildren. A recent memorandum opinion in the Western District Court of Virginia provides an excellent example of this approach. In *Newsom v. Albemarle County School Board*, a sixth grade student was required to turn inside out a shirt he wore to

⁴ *United States v. O'Brien*, 391 U.S. 367 (1968).

class that depicted the logo of the National Rifle Association positioned above the phrase “Shooting Sports Camp”. In bringing the case to federal court, the student argued that the regulation requiring him to turn the shirt inside out violated his first amendment right to free speech. The Court dismissed this claim, holding that the shirt did not amount to constitutionally protected speech because it was not likely that the message the shirt conveyed would not be understood by people viewing it. Furthermore, the Court attempted to distinguish this case from other speech cases on the ground that wearing this t-shirt amounted to symbolic conduct and not speech.

The Court’s reasoning, and the approach of characterizing speech as something besides speech generally, is flawed for several reasons. First, the displaying of a message by whatever medium, whether it be spoken aloud, in print or on a t-shirt should constitute speech, not conduct. Speech, by its very nature involves some kind of conduct, whether it be choosing the volume at which to convey audible speech, or the type of font used to convey printed speech. No court would argue that speech written in Times New Roman qualifies for absolute protection, but speech printed in Geneva font is more symbolic and thus does not garner the same protection. Second, the Court’s reasoning is flawed because under its analysis, to qualify as protected speech the message must be understood by the audience. While this qualification may make logical sense with regard to noise pollution, the Court is wrong to base the question of whether something is speech on whether another person understands it. Under this approach, the majority would always determine what speech qualifies for constitutional protection because courts would use the majority to determine if the speech is understandable. This approach is flawed because the entire reason our system of government has free speech is to protect the

views of the minority from the censorship of the majority. Fortunately, however, the Supreme Court has rarely taken this approach of disqualifying speech from protection simply because it is not “speech” under some narrow definition of the term.

While the court’s opinions concerning the free speech clause are generally consistent, the court’s series of decisions with regard to the free exercise clause of the first amendment is less cohesive. Different justices have different views regarding constitutional jurisprudence in this area. The prevailing view seems to be that intentional interferences with the free exercise of religion (which almost never happens) are pre se unconstitutional, but accidental interferences with the free exercise of religion are subject to the compelling state interest test that is akin to the *O’Brien* balancing test seen in the free speech area. In *Cantwell v. Connecticut*⁵, the Court stated that accidental interferences with free exercise should be subject to the compelling state interest test on a case by case basis.

The defendant, Cantwell, and his two sons were Jehovah’s Witnesses who spread word of their religion on the streets of New haven by playing a phonograph of a sermon. The city arrested them after they distributed the accompanying religious materials and the trial court convicted them. The defendants claimed that their activities were not within Conn. Gen. Stat. § 6294 but consisted only of distribution of books, pamphlets, and periodicals. After granting certiorari, the Supreme Court held that the applicable statute deprived defendants of their liberty without due process of law in contravention of the First and Fourteenth Amendments. The Court determined that the secretary of the public welfare council was authorized to withhold his approval if he determined that the cause was not a religious one. Such authority constituted a denial of liberty protected by the

⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

First and Fourteenth Amendments. Additionally, there was no showing that the co-defendant was noisy, truculent, overbearing or offensive when he was on a public street. The co-defendant's actions did not amount to a breach of the peace. The judgment was reversed and remanded.

Taking this balancing approach, though, is not without problems. Accidental interference analysis is harder in the religion context than in free speech because weighing the extent of the accidental interference with religion is subjective and personal. Unlike the speech context, one cannot argue that religion is a systemic right of our democratic system and thus should receive the highest level of protection. Consequently, a majority of the court has begun to recognize the argument that accidental interferences with religion do not pose any constitutional problem. Justice Scalia, the main proponent of this approach, outlines this reasoning in the case of *Employment Division v. Smith*⁶.

The case involved drug use and religion. The respondent employees were fired by a drug rehabilitation organization after ingesting peyote for sacramental purposes. The Employment Division denied them unemployment compensation because peyote use was criminal under Oregon law, making their discharge work-related "misconduct." The Oregon Court of Appeals reversed on first amendment free exercise grounds. The Oregon Supreme Court affirmed, but determined that the criminality of peyote use was irrelevant to respondents' constitutional claim. The Supreme Court ultimately held that the criminality of peyote use was relevant, but remanded for a determination of the applicability of the law to sacramental peyote use. On remand, the Oregon Supreme Court held that the statute prohibited religious use and violated the Free Exercise Clause. The U.S. Supreme Court reversed. The Court held the Free Exercise Clause inapplicable

⁶ *Employment Division v. Smith*, 494 U.S. 872 (1990).

because the law was not aimed at promoting or restricting religious beliefs. Because respondents' peyote use was prohibited and the prohibition was constitutional, Oregon could deny unemployment compensation.

Thus, after this decision, laws aimed at goals other than repressing the free exercise of religion should be held constitutional. Consequently, more attorneys in federal court are arguing that the issue in their cases is not free exercise, but rather free speech.

Whether the issue is free speech or free exercise for schoolchildren, the accidental interference analysis is the most applicable because most of the regulations certain schools or communities enact to govern their students involve time, place and manner restrictions. The District Wide Dress Code Policy for Metropolitan Nashville Public Schools provides an excellent example.⁷ The indirectly stated goal of the code is to promote an environment that is safe and does not disrupt the educational process. Applying a balancing test, that goal serves as the state interest. Most of the code prohibitions apply to the style and length of clothes, such as the length of shorts and skirts. One prohibition, however, specifically applies to any speech on clothing, stating that “language or writing that is otherwise inappropriate or offensive (sex, profanity, racial or ethnic slurs, gang related attire, etc) may not be worn.” The code does not define what language or writing qualifies as “offensive”. Thus, a lawyer could argue that the undefined use of a vague word like “offensive” makes the code more restrictive than it needs to be. The state would have to prove that whatever dress it deems “offensive”

⁷ Metropolitan Nashville Public Schools District-Wide Grades 5-12 Dress Code Policy *available at* http://www.nashville.k12.tn.us/general_info_folder/dresscode.html

directly impacts the stated objective of the code: to promote a better learning environment.

Conversely, under a balancing approach, the state could argue that the accidental infringement on free speech is minimal and that the objective of safety and a better educational environment are more important than this minimal interference. If students wish to convey an “offensive” message through their clothing, they may do so before and after school.

Ultimately, it is for a federal court to decide if codes such as the one discussed here violate the protections of the first amendment. *Tinker* established the constitutional rights of children in the school environment and subsequent decisions have carved out enclaves of protection for first amendment freedoms. As a result, state and local governments must be careful not to tread upon the rights of their students when passing codes that pertain to free speech or the exercise of religion.