Analyzing the First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Parts of the First Amendment	Meaning
Religion	
Speech	
Press	
Assembly	
Petition	

First Amendment to the U.S. Constitution

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First Amendment Cases Handout

Freedom of speech includes the right:

- to criticize the government. *Bond v. Floyd* (1966)
- to advocate and teach hatred and discrimination if it is not likely to incite or produce imminent lawlessness. *Brandenburg v. Ohio (1969) R.A.V. v. St. Paul, (1992)*
- not to speak (specifically, the right not to salute the flag). *West Virginia Board of Education v. Barnette*, (1943).
- of students to wear black armbands to school to protest a war ("Students do not shed their constitutional rights at the schoolhouse gate."). *Tinker v. Des Moines*, (1969).
- to use certain offensive words and phrases to convey political messages. *Cohen v. California*, (1971).
- to advertise commercial products and professional services (false advertising not allowed; government may regulate where they demonstrate a substantial governmental interest). *Central Hudson Gas and Electric v. Public Service Commission (1980)*
- to engage in symbolic speech, e.g., burning the flag in protest. *Texas v. Johnson*, (1989); *United States v. Eichman*, (1990).

Freedom of speech does not include the right:

- to incite actions that would harm others (e.g. "[S]hout[ing] 'fire' in a crowded theater."). *Schenck v. United States*, (1919).
- to make or distribute obscene materials. *Miller v. California*, (1973)
- to burn draft cards as an anti-war protest. *United States v. O'Brien*, (1968).
- to permit students to print articles in a school newspaper over the objections of the school administration. *Hazelwood School District v. Kuhlmeier*, (1983).
- of students to make an obscene speech at a school-sponsored event. *Bethel School District #43 v. Fraser*, (1986).
- of students to advocate illegal drug use at a school-sponsored event. *Morse v. Frederick*, (2007).
- to picket or protest anywhere, at any time, and in any manner. *Snyder v. Phelps* (2011)

Guide for Creating a Free Speech Narrative

The following must be included in each group's free speech narrative:

1. An explanation of what happened. What did the individual or group do that caused the government to restrict or stop the action/speech?

2. In order for the First Amendment to apply there must be government involvement. What government passed the law or regulation (federal, state, or local laws, school regulation)?

3. What does the law/regulation say? Write down the wording of the law or regulation.
   a. Remember the following when writing your scenario:

   The Supreme Court has said that some regulation of speech is okay. **Regulations on speech are constitutional when they serve a compelling interest and are narrowly tailored to meet those interests without regard to content of the speech.**

   b. Consider what would be a compelling government interest.

   c. Consider whether the law or policy is narrowly tailored. Make sure the law or policy is narrowly tailored to achieve the compelling governmental goal or interest. If the government action encompasses too much (overbroad) or fails to address essential aspects of the compelling interest (under-inclusive), then the rule is not considered narrowly tailored.

      For example: "Regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

4. Explain why the law or regulation was created. What problem was the law intended to solve?

5. To whom does the law or regulation apply? Does it apply to everyone or just a particular group of people?

Case Details

Circumstances Influence Freedom of Speech

Schenck v. United States, 1919

Charles Schenck, Secretary of the Socialist Party of America, was responsible for printing, distributing, and mailing pamphlets to prospective military draftees during World War I. These mailings included 15,000 pamphlets that advocated opposition to the draft. Schenck was charged with conspiracy to violate the Espionage Act by attempting to cause insubordination in the military and to obstruct recruitment.

In this case, the Supreme Court determined that character of every act depends on the circumstances. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." During wartime, utterances tolerable in peacetime can be punished. [Court's decision?]

School Speech Cases

Tinker v. Des Moines Independent Community School District, 1969

In this case three students, John Tinker (15 years old), his sister, Mary Beth Tinker (13 years old), and Christopher Echardt, (16 years old), wore black armbands to school to protest the Vietnam War. School administrators became aware of their plan to wear the armbands to school and immediately adopted a new policy that prohibited them from wearing the armbands. Furthermore, students who refused to remove them would be suspended until they agreed not to wear them to school. These three students, who were aware of the policy, wore the armbands to school and were suspended.

In a 7-2 decision the Supreme Court held that the students had the right to wear the black armbands to school. In the ruling, the Court emphasized that students do not lose their First Amendment rights when they enter the school building. Justice Abe Fortas acknowledged that the Court had upheld the authority of school officials to "prescribe and control conduct in the schools." In this instance, however, the "school officials sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." In addition, there was "no evidence whatsoever of petitioners' interference, …with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students." In the end, the school officials had failed to show that the wearing of the armbands warranted disciplinary action.

Bethel v. Fraser, 1986

Matthew N. Fraser, a student at Bethel High School, was suspended for two days for delivering an obscene and provocative speech to the student body. In this speech, he nominated his fellow classmate for an elected school office. The Supreme Court held that his free speech rights were not violated which means that students do not have a First Amendment right to make obscene speeches in school.

Hazelwood v. Kuhlmeier, 1988

The principal of Hazelwood East High School removed two pages of the school newspaper, *The Spectrum,* which contained articles on teenage pregnancy as well as the impact of divorce on students. The principal defended his action on the grounds that he was protecting the privacy of the pregnant

students described, protecting younger students from inappropriate references to sexual activity and birth control, and protecting the school from a potential libel action.
The Supreme Court held that the principal acted reasonably and did not violate the students' First Amendment rights. The Court states that a school is not required to tolerate student speech "that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."

In addition, the Court found the newspaper was part of the journalism class's curriculum and subject to regulation by a faculty member. The school newspaper was meant as a "supervised learning experience for journalism students" and a forum for the public expression of ideas. The Court also concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

The Court strongly suggested that supervised student activities that "may fairly be characterized as part of the school curriculum," including school-sponsored publications and theatrical productions, were subject to the authority of educators. The Court cautioned, however, that this authority does not justify an educator's attempt "to silence a student's personal expression that happens to occur on the school premises."

Counts v. Cedarville School District, 2003:
The school board of the Cedarville, Arkansas school district voted to restrict students' access to the Harry Potter books, on the grounds that the books promoted disobedience and disrespect for authority and dealt with witchcraft and the occult. As a result of the vote, students in the Cedarville school district were required to obtain a signed permission slip from their parents or guardians before they would be allowed to borrow any of the Harry Potter books from school libraries. The District Court overturned the Board's decision and ordered the books returned to unrestricted circulation, on the grounds that the restrictions violated students' First Amendment right to read and receive information. In so doing, the Court noted that while the Board necessarily performed highly discretionary functions related to the operation of the schools, it was still bound by the Bill of Rights and could not abridge students' First Amendment right to read a book on the basis of an undifferentiated fear of disturbance or because the Board disagreed with the ideas contained in the book.

Morse v. Frederick, 2007
18-year old student Joseph Frederick displayed a sign at a school event (across the street from the Olympic Torch Relay) that read "Bong Hits 4 Jesus" and was suspended from school for ten days.

In a 5-4 ruling, the Supreme Court ruled that school officials can prohibit students from displaying messages that promote illegal drug use. Chief Justice John Roberts's majority opinion centered on the fact that although students do have some right to political speech even while in school, this right does not extend to pro-drug messages that may undermine the school's mission of discouraging drug use. In the Court's decision it was held that the message on the banner promoted marijuana use equivalent to "[Take] bong hits" or "bong hits [are a good thing]." This case also challenged the standard set by *Tinker* and that it would not always be applied.

Minors and First Amendment

American Amusement Machine Association, et al., v. Teri Kendrick, et al (2001)

Enacted in July 2001, an Indianapolis, Indiana, city ordinance required video game arcade owners to limit access to games that depicted certain activities, including amputation, decapitation, dismemberment, bloodshed, or sexual intercourse. Only with the permission of an accompanying parent or guardian could children seventeen years old and younger play these types of video games. The Seventh Circuit Court of Appeals found the law unconstitutional stating that "children have First Amendment rights." On Monday, October 29, 2001, the U.S. Supreme Court denied certiorari.

Brown v. Entertainment Merchants Association (2011)

A California law that imposed restrictions and labeling requirements on the sale or rental of "violent video games" to minors was challenged under the First and Fourteenth Amendments. The government claimed the right to regulate the “obscene” speech under the First Amendment. The lower court held that (1) violent video games did not constitute "obscenity" under the First Amendment, (2) the state did not have a compelling interest in preventing psychological or neurological harm to minors allegedly caused by video games, and (3) even if the state had a compelling interest, the law was not narrowly tailored enough to meet that objective. The Supreme Court held that the First Amendment bars a state from restricting the sale of violent video games to minors. The Court reasoned that, "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection."

Triad Questions

Government Must Answer:

- **What is the governmental restriction?**
- **Why is the restriction permissible under the First Amendment?**
  - **Is it a content-neutral time, manner, place restriction?**
  - **If is not a content-neutral restriction:**
    - **What is the compelling governmental interest?**
    - **Is the restriction narrowly tailored to meet that interest?**

Person Claiming First Amendment Violation Must Answer:

- **What speech is being regulated?**
- **Why is the regulation/law not permissible under the First Amendment**
  - **Does it regulate content?**
  - **How is the restriction on speech unreasonable?**
  - **Is it overbroad or vague?**

Judge Must Decide:

- **Does the regulation/law violate the First Amendment?**
- **Explain why the regulation/law does or does not violate the First Amendment.**
- **What precedent supports your decision?**