

FACT SHEET

Free Speech and Academic Freedom in Higher Education

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The First Amendment and legal precedents established by the Supreme Court of the United States (SCOTUS) and lower district courts provide some guidance on how to balance the interests of Free Speech, Academic Freedom, and inclusive learning environments free from harassment and discrimination on college campuses. What follows is a summary of guiding principles from case lawⁱ. Most highly-publicized speech controversies emerge as a result of events (demonstrations, speakers, events, etc.) that happen on campus, but NOT in structured classroom settings. Private institutions are not held to the same standards as publicly-funded ones; therefore, this guidance applies primarily to public institutions.

Students may	Students may not
<ol style="list-style-type: none">1. Opt out of standing for the pledge of allegiance or national anthemⁱⁱ2. Distribute materials about political or religious events and activities as long as you respect policies about “time, place, and manner”ⁱⁱⁱ3. Wear clothes and symbols that represent your gender & cultural identities^{iv}.4. Participate in walk-outs and silent protests^v, but may be subject to discipline due to unexcused absence policies5. Express themselves freely on social media as long as they post using their own devices outside of school time and as long as it does not “substantially disrupt” the learning environment at school^{vi}	<ol style="list-style-type: none">1. “Substantially disrupt”^{vii} the learning environment (see Box A below)2. Engage in lewd and obscene speech, harassment, threats of physical violence, “fighting words” or incitements to lawless action^{viii}3. Wear clothing that has words or symbols that have a history of inciting violence locally^{ix} (racist, homophobic, anti-religious, etc.)4. Damage school property (vandalism, graffiti, etc.) and expect to be protected by the first amendment

A) What counts as a “material and substantial disruption”?

1. Interrupting class so that instruction or learning activities cannot continue
2. Threatening others
3. Harassment (see box C on hate speech)
4. Fights or violent behavior on campus property

B) Can professors restrict what is said in classes?

1. The classroom is not considered a “public forum” and faculty have more control over the content of what is shared as part of their curriculum.
2. Faculty have a responsibility to maintain order and meet the objectives of their curriculum and therefore they have broad latitude to make decisions in order to ensure study safety and learning are maximized.
3. Faculty may evaluate students based on their adherence to participation guidelines and expectations set out in the syllabus and in class presentations and interactions.
4. If a student is being disruptive, or poses a threat to others’ safety, faculty may implement campus policies for removing or addressing problematic student behaviors.

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Faculty may	Faculty may not
<ol style="list-style-type: none"> 1. Take action if student expression is causing a “material and substantial disruption”^x 2. Make decisions over what to include in curriculum, class discussions, and assessment criteria consistent with university policies^{xi} 3. Restrict the “time, place, and manner” of student expressive activities^{xii} as long as the application of these policies is reasonable and nondiscriminatory. 4. Engage in political or religious activities as a private citizen on your own time^{xiii}. 	<ol style="list-style-type: none"> 1. Penalize a student for creating/sharing expression that they disagree with or dislike^{xiv}. 2. Use class time to lecture about personal views unless they are directly related to course content or their research expertise^{xv}. 3. Lead prayers or other religious or political activities as part of their official duties. 4. Post on social media about students, work-related matters, or content that may impair their functioning as a government employee^{xvi}.

C) What counts as a “hate speech”?

1. No agreed-upon legal definition currently exists.
2. Some consider it to fall under the definition of “fighting words” which, “by their very utterance inflict injury or tend to incite an immediate breach of peace.”^{xvii}
3. Government institutions/actors may not prohibit speech unless it will incite “imminent physical violence”^{xviii} even if it finds the ideas “offensive or disagreeable.”^{xix}
4. Harassment may fall in this category and is defined as behaviors targeted against a protected class^{xx} of persons that are “severe, pervasive, or objectively offensive” and that prohibit a student (or students) from accessing the full benefits of an education.^{xxi}

D) What about academic freedom?

1. Most universities place a high premium on academic freedom and provide their faculty wide latitude in this regard.
2. However, if a faculty is speaking as an employee or “pursuant to their official duties” courts may balance the employee’s interests against the employer’s interests.
3. Teaching and research by faculty are not explicitly protected by the First Amendment as noted in the Garcetti decision by Justice Kennedy, “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence,” and therefore Garcetti does not “decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” Garcetti, 547 U.S. at 425
4. Courts generally provide “great respect for the faculty’s professional judgement” over decisions related to academics (research, teaching, and tenure decisions)^{xxii}.

Additional Resources^{xxiii}

1. American Association of University Professors – Academic Freedom
2. Bill of Rights Institute – Debating Free Speech on Campus
3. First Amendment Center - primers
4. Foundation of Individual Rights in Education – campus speech codes
5. National Center for Free Speech and Civic Engagement
6. Psychology Today: Gender and Schooling blog – “Free Speech vs. Hate Speech”

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Endnotes

- i I would like to thank Patrick O'Rourke, Counsel for the University of Colorado for sharing his memo that summarizes much of the legal decisions that are included here. O'Rourke, P. (2018). Memo to the Regents of the University of Colorado: Intersection of Articles 1, 5, and 7 of the Laws of the Regents and associated policies — Free Speech and Academic Freedom University of Colorado. Denver, CO.
- ii *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)
- iii *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993)
- iv *Arocha v. Needville ISD*, 2010
- v "Tinker standard" from *Tinker v. Des Moines* (1969)
- vi *J. S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000)
- vii Tinker standard"
- viii *Cohen v California*, 403 U.S. 15, 21 (1971); *Watts v United States*, 394 U.S. 705, 708 (1969); *Chaplinsky v New Hampshire*, 315 U.S. 568, 570-71 (1942), *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Planned Parenthood v Am. Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002).
- ix *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) and *West v. Derby Unified School District No. 260*, 99-2039 (2000)
- x *Tinker*
- xi *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006)
- xii *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).
- xiii *Pickering v. Bd. of Education*, 391 U.S. 563 (1968)
- xiv *Boman v. Bluestem Unified Sch. Dist. No. 205*, 2000 U.S. Dist. LEXIS 5297, Case No. 00-1034-WEB, (Dist. Kan.) (Feb. 14, 2000)
- xv *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006)
- xvi *San Diego Unified Sch. Dist. V. Comm'n on Prof'l Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. Ct. App. 2011), *Craig v. Rich Township High Sch. Dist.*, 736 F.3d 1110, 1113 (7th Cir. 2013), *Czaplinski v. Board of Educ. of Vineland*
- xvii *Chaplinsky v New Hampshire*, 315 U.S. 568, 570-71 (1942)
- xviii *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- xix *Snyder v. Phelps*, 562 U.S. 443 (2011)
- xx Protected classes vary by state, but federally include: race, color, religion, national origin, age, gender, disability, pregnancy, and veteran status. (Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act)
- xxi *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)
- xxii *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).
- xxiii Inclusion in this list is not an endorsement of these organizations' viewpoints. They vary in their interpretation and motivations for protecting First Amendment issues on college and university campuses. Please evaluate these materials carefully to determine if they are useful and relevant to the issues at your institution.

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