



Constitutional considerations

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OSBA leads the way to educational excellence by serving Ohio's public school board members and the diverse districts they represent through superior service, unwavering advocacy and creative solutions.



Agenda

- First Amendment
 - Freedom of speech
 - Student publications
 - Student dress
- Fourth Amendment
 - Search and seizure

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FIRST AMENDMENT

Guarantees freedom of religion, expression, assembly and the right to petition. Forbids Congress from promoting one religion over others and from restricting an individual's religious practices. Guarantees freedom of expression by prohibiting Congress from restricting the press or rights of individuals to speak freely.

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Freedom of speech

- Students do not shed their constitutional rights at the school-house door
- Reasonable regulations as to time, place and manner of speech
 - Student age and maturity
- Public school's main goal is instruction
 - Students' freedom of expression must yield to legitimate pedagogical concerns

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Freedom of speech

- Three main considerations:
 - Does the speech pose a threat of disruption?
 - Is the speech offensive?
 - Is the speech contrary to the school's basic educational mission?

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Freedom of speech

- *Tinker v. Des Moines Independent Community School District* (1969)
- *Bethel School District v. Fraser* (1986)
- *Hazelwood School District v. Kuhlmeier* (1988)

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Tinker

- **Issue:** Can school officials censor nonviolent student speech without showing a material and substantial disruption of school activities or infringement on others' rights?
- **Facts:**
 - Students wore black armbands to protest U.S. involvement in Vietnam
 - Board adopted no-armband rule
 - Students sued, claiming 1st Am. violation



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Tinker

- Students do not “shed their constitutional rights to freedom of expression or speech at the schoolhouse gate.”
- Except speech that:
 - is unprotected OR
 - creates a “material and substantial” disruption of normal school activities



Tinker

- Material and substantial disruption
 - More than controversial or offensive speech
 - Reasonable forecast of disruption
- Standard applied by lower courts, until...

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Fraser

- **Issue:** Can school officials prohibit vulgar and lewd speech at a student assembly even if the speech does not create a substantial disruption?
- **Facts:**
 - A high school student delivered a speech during a student assembly that included elaborate sexual innuendo
 - The student was suspended for violating the school's no-disruption rule, which prohibited obscene and profane language
 - Student sued arguing violation of 1st Am. rights

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Fraser

- Public school officials have a responsibility instill values.
 - It is appropriate for schools to prohibit the use of vulgar and offensive terms
 - The use of vulgar and offensive terms differs from the political message in *Tinker*
- Freedom to advocate for unpopular and controversial views in schools must be balanced against the interest of teaching students the boundaries of socially appropriate behavior.

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Hazelwood

- **Issue:** Can school officials censor school-sponsored student publications when material is considered inappropriate, or for reasons other than a material and substantial disruption of the educational process?
- **Facts:**
 - School newspaper produced by students as part of journalism class
 - Articles about teen pregnancy and impact of divorce on children
 - Principal removed the articles from the school newspaper
 - Students sued claiming 1st Am. violation

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Hazelwood

- Distinguished ability to censor:
 - student speech on school property
 - FROM
 - school-sponsored publications
- *Hazelwood* standard applies where there is an official policy of prior review or a history of prior review exists

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Public Forum

- Traditional or open public forum
 - Content-neutral time, place and manner restrictions
- Limited public forum
 - More prescriptive guidelines, but restrictions must serve a “compelling interest”
- Closed public forum
 - Restrictions allowable as long as they are reasonable and not based on a desire to suppress a particular viewpoint

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Hazelwood

- Speech that bears “the imprimatur of the school”
 - Can apply to other school-sponsored speech
- Allows actions reasonably related to “legitimate pedagogical concerns”
 - Cannot censor due to disagreement with expressed viewpoints
 - *Dean v. Utica Community Schools* (2004)

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Dean v. Utica Community Schools

- Student newspaper article about a couple suing the school district alleging husband’s lung cancer was caused by fumes from school buses idling at the school district’s garage
- Student researched and reached out to district and township officials for comment
- High school principal required removal of the story citing unreliable sources and inaccuracies, and claiming it was inappropriate for the student newspaper to write about a legal case involving the school district

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Dean v. Utica Community Schools

- Court considered eight factors:
 - Produced as part of high school curriculum
 - Students received credit and grades
 - Faculty member oversaw production
 - Student-run publication
 - Faculty exercised little or no control over content
 - No applicable written policies or procedures
 - Actual practice evidenced intent to create a limited public forum
 - Compatible with expressive activity

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Which standard applies?

- Is it school sponsored?
- Is it part of the curriculum or created by the school to impart particular skills and supervised by a faculty member?
- Is there a board policy or practice creating an open forum or allowing students the authority to make content decisions?
 - If so, can school officials show that censorship is based on a reasonable forecast of material and substantial disruption or an invasion of the rights of others? (*Tinker*)
 - If not, can school officials show a valid educational purpose for censorship? (*Hazelwood*)

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Underground student publications

- Distributed off school property
 - *Thomas v Board of Education* (1979)
- Distributed on school property
 - *Tinker* standard
 - *Bystrom v. Fridley High School* (1987)
 - *Scoville v. Board of Education of Joliet Township High School District* (1970)
 - Time, place and manner restrictions
 - Public forum consideration

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Thomas v. Board of Education

- **Issue:** Can school officials punish students for content of publications created and distributed off-campus?
- **Facts:**
 - Students published a newspaper titled *Hard Times*
 - The paper was created on their own time and distributed off-campus
 - The newspaper publicly criticized the school environment
 - Students were suspended for five days, and subsequently sued claiming 1st Am. violation

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Bystrom v. Fridley High School

- **Issue:** Does a board have the ability to adopt policy regulating distribution of underground newspapers on campus where the newspapers are pervasively vulgar?
- **Facts:**
 - Students distributed underground school newspaper titled *Tour de Farce* on school property
 - Board adopted policy allowing district the right to review such publications prior to distribution on school property, and prevent distribution unless the publication complied with board policy
 - Students sued, arguing that the board policy in question is unconstitutional

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Scoville v. Board of Education of Joliet Township High School District

- **Issue:** Can school officials suspend students without a reasonable forecast of substantial disruption?
- **Facts:**
 - High school students published an underground newspaper called *Grass High*, which was distributed on campus
 - The paper criticized school policies
 - The students were suspended because school officials found the paper's content to be "inappropriate and indecent"
 - The students sued claiming 1st Am. violation

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Student dress

- Most arguments fall into one of three categories:
 - 1st Am. freedom of expression
 - 1st Am. freedom of religion
 - 14th Am. parental rights relating to child rearing

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Student dress

- Courts have applied a number of different standards:
 - “Expressive conduct” test
 - *Tinker* standard
 - *Fraser* standard
 - *O’Brien* standard

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“Expressive conduct” test

- Determines whether nonverbal conduct constitutes speech for 1st Am. purposes
- Court considers:
 - Did the student intend to convey a particularized message?
 - Would a reasonable observer understand that particularized message?

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O’Brien standard

- A dress code policy is constitutional if:
 - The policy is authorized under state law;
 - The policy furthers an important governmental interest;
 - The policy is unrelated to suppression of free expression; and
 - The incidental restriction on 1st Am. freedoms is no more than necessary to further the governmental interest.

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FOURTH AMENDMENT

Provides security from unreasonable searches and seizures of property by the government. Protects against arbitrary arrests, and provides basis for laws regarding search warrants, stop-and-frisk, wiretaps, and other forms of surveillance.

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Search & seizure in schools

- Reasonableness standard
 - Is the search justified?
 - Is the search, as conducted, reasonably related in scope to the circumstances that gave rise to it?

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Search & seizure in schools

- *New Jersey v. T.L.O.*
- *Vernonia School Dist. v. Acton*
- Recent Ohio Supreme Court decision
 - *State v. Polk*

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New Jersey v. T.L.O.

- **Issue:** Can school officials carry out a search of a student's bag without probable cause or a search warrant?
- **Facts:**
 - A 14-year old student was caught smoking in the bathroom at school
 - The school principal searched the student's purse after she denied smoking
 - The search uncovered evidence of drug use/sale, which was used against the student in a delinquency trial in juvenile court

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New Jersey v. T.L.O.

- Students maintain 4th Am. rights, but those rights must be balanced against the school's responsibility to maintain a safe and educational environment.
- School officials need only a reasonable suspicion

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Vernonia School Dist. v. Acton

- **Issue:** Is a student athlete drug policy an unreasonable restriction that violates student 4th Am. rights?
- **Facts:**
 - Due to a district-wide drug problem a student athlete drug testing policy authorizing random drug testing of student athletes was adopted
 - A 7th grade student refused testing, was prohibited from participating in football, and subsequently sued the school district

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Vernonia School Dist. v. Acton

- Students' 4th Am. rights must be balanced against the school's responsibility to provide a safe environment.
- The court found no 4th Am. violation here due to the need to address the district's drug problem and the reasonableness of the district's policy.

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State v. Polk

- **Issue:** Should evidence seized during a warrantless search of an unattended book bag be suppressed?
- **Facts:**
 - A school safety employee glanced in a student's unattended bag, saw the student's name, recognized the student as a rumored gang member, and took the bag to the principal's office, where he and the principal dumped the bag, per district policy, finding bullets
 - The student was located and the bag he was found carrying also was searched, uncovering a handgun
 - The bullets and handgun were used by the state as evidence against the student, who filed a motion to suppress both items on the basis of 4th Am. violations

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State v. Polk

- Court considered appropriate balance between the student's expectations of privacy and school officials' responsibilities to maintain a safe learning environment.
- Court applied *Acton*, weighing importance of government's interest and search protocol's accomplishment of that governmental interest, against the nature of the privacy interest involved and the intrusiveness of the search.

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