

UVA LAW | The Evolution of Students' Free Speech Rights

FREDERICK SCHAUER: I am delighted to be here. Thank you for inviting me. Let me apologize in advance. I will be in and out over the course of the day. I find myself as Chair of the Faculty Appointments Committee. We have a visitor who is here today.

Being Chair of the Committee involves being tour guide, taxi driver, real estate agent, spousal employment agent, referee, and various other things. So I'm looking forward to hearing bits and pieces of what goes on today. But excuse me if I'm in and out.

So let me commend the Law Review for picking this quite important topic. We often get hung up on Supreme Court cases. But if we actually examine the array of free speech cases that are litigated in the lower courts, one of the things we discover is that that array is dominated by cases of two varieties, one, speech cases involving the speech of government employees, and the other, speech of students.

Student speech and government employee speech are a much higher percentage of the group or array of free speech litigation in the lower courts than you would guess just by looking at a First Amendment casebook or just by looking at Supreme Court cases alone.

So let me just repeat, then, this is a currently important topic and not just an important anniversary event. I don't want to pre-empt what is about to come, so I am not going to talk about whether *Tinker versus The Des Moines School District* is still good law after *Bethel School District versus Fraser*, after *Hazelwood versus Kuhlmeier*, and after *Morris versus Frederick*. That's an interesting and important topic that I will leave that to others.

I'm not going to talk either very much about the topic of the second panel. But I do want to touch on it a little bit. So let us consider, as others will mention over the course of the day, the most famous line from the *Tinker* case, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

But is that true now? Was that true then? If you pass the line carefully, the one that I've just quoted, it invites us to look at the rights that students and teachers have outside the schoolhouse gate, that is if the claim is that what students and teachers have outside the schoolhouse gate is largely preserved, once they are inside the schoolhouse gate.

Evaluating that question, evaluating that issue requires that we think a little bit about what are the rights that students and teachers would have in the public square, in the public forum, outside the schoolhouse gate, or however we might want to imagine it.

So let's look, in order to think about that question, let's look at some actual cases or actual controversies. So there is the right to suggest that African-Americans be sent to Africa and Jews be sent to Israel, *Brandenburg versus*

Ohio, 1969. There is the right to wear Ku Klux Klan clothing and regalia, *Forsyth versus The Nationalist Party*.

There is the right to dress in Nazi uniforms, jackboots, swastikas, and all, *Collin versus Smith*, the Skokie litigation of the late 1970s. There is the right to display pictures of puppies being crushed by high heeled shoes, *Stephens versus The United States*.

There is the right to burn a cross, *Virginia versus Black*, the right to display explicit pictures of male homoerotic sexual activity, the Institute of Contemporary Art Robert Mapplethorpe Exhibition and controversy in Cincinnati some years ago. There is the right to tell intentional flat out lies about your past in order to get a job, *United States versus Alvarez*.

There is the right to display a sign saying, quote, "God hates fags," *Snyder versus Phelps*. There is the right to disclose the name of a classmate who has been raped, *Florida Star versus BJF*, the right to shred an American flag, *Texas versus Johnson*.

Now this is to some extent a cherry picked list of First Amendment cases involving particularly unattractive litigants saying particularly unattractive things. But it's not very much cherry picked.

That is much of the history of the American First Amendment, not all, much of it, and certainly not the case on the individual that we recognize today, but much of the history of the First Amendment involves pretty miserable people saying pretty miserable things.

And in order to evaluate the claim that students and teachers do not shed their constitutional rights, The Freedom of Speech or Expression, once they enter the schoolhouse gate, then we have to at least confront seriously the question whether the miserable people saying miserable things that dominate the First Amendment docket, that dominate the history of the American First Amendment, is the array that is appropriate once one enters the schoolhouse gate.

Now, all of you are clever enough, smart enough, and creative enough to be able, with respect to each of the cases that I have mentioned, to say, that's different once you're in school. Maybe it's disruptive. Maybe it affects the learning environment of others, and so on, and so on, and so on. With respect to each of those, that's probably true.

But then the question is, what's left? In a recent article, Richard Moon, a distinguished Canadian commentator on freedom of expression in Canada, observed that a commitment to free speech means protecting speech for reasons independent of the truth or merit of its contents.

That is, if we are talking about protecting nice speech, or good speech, or speech that we agree with, then it turns

out that the underlying truth or merits of the speech is what makes a difference and not the speechness of the speech. Moon's point is that the speechness of the speech, the very fact that it is speech independent of its truth or merits, might be what justifies protection.

And if you go through the array of cases, including ones like the ones that I have just mentioned and say, not that in school, and not this in school, and not that in school, and not this in school, it may turn out that what's left is not a reinforcement of the notion that there are rights to free speech and free expression inside the school, but that in fact, there are no such rights.

That puts it a little extremely. But that's at least something to think about, something to contemplate. You get the point from all of these examples. And if we look at modern cases in the lower federal courts and in the state courts, and even the post *Tinker* Supreme Court cases, we discover that most of these cases deal with teenagers, mostly boys, mostly boys, teenage boys trying to be outrageous, or to put it somewhat differently, sophomores being sophomoric.

That's *Bethel School District versus Fraser*. That's possibly *Hazelwood versus Kuhlmeier*. It's certainly *Morse versus Frederick*. And it's certainly lots of the lower court cases.

Lots of the lower court cases these days deal with Confederate flags, Nazi symbols, guns, anti-LGBTQ slogans, anti-abortion slogans, and a large number of others, some of which reflecting the serious beliefs of those who are saying these things, or more commonly, wearing clothing displaying these things, but some of them just involving teenagers trying to be outrageous, trying to provoke.

In that sense, *Tinker versus The Des Moines Independent School District* was an unusual case, perhaps not so unusual for the times, but very unusual if we think about the nature of school speech litigation now.

But thinking about the difference between the issues that were raised in *Tinker* 50-some years ago and the issues that come up now raises an even deeper and larger issue about the dramatically changed politics and sociology of the First Amendment, the dramatically different politics and sociology of free speech over the last 50 years ago-- for the last 50 years.

50 years ago, most free-speech claimants and their supporters were left of center civil rights demonstrators, left of center anti-war protesters, and left of center advocates of sexual freedom.

If we look both at lower court cases and Supreme Court cases from the 1950s and 1960s, one of the things we discover is that with very few exceptions-- and *Brandenburg* involving Clarence Brandenburg and his fellow Klansman is the exception, not the rule-- most of the litigants, and therefore most of the creators, of the modern American free speech tradition were civil rights demonstrators and anti-war demonstrators or crusaders for more

sexual freedom and more sexual openness, crusading against the rigid application of 19th century obscenity law.

Now, as we think about all of this, let me just interject a long footnote. After all, it would be inappropriate for a Law Review event not to have a footnote, so allow me an oral footnote. One of the characteristics of modern free speech discussion and modern free speech issues is that the United States is a protective outlier compared to every other country in the world.

And I am not just saying that the United States is a protective outlier compared to North Korea, Saudi Arabia, and Zimbabwe, but the United States is a protective outlier compared to every other liberal industrialized democracy in the world.

We see that in issues of racist speech and other forms of hate speech. Excuse me. We see that with respect to defamation. We see that with respect to commercial advertising.

We see that with respect to privacy, and on, and on, and on. Interestingly, almost all of the divergence between the US and the rest of the liberal industrialized democratic world is a function of American legal developments starting in 1964 with *New York Times versus Sullivan* and going through 1976 with Virginia Pharmacy and the protection of commercial speech.

Almost all of what sets the US apart took place during that 12-year period with respect to defamation, hate speech, and so on, and so on, and so on.

Were it not for that 12-year period, characterized and substantially influenced by civil rights demonstrators, and anti-war protesters, and the like, the US would not look very different from Western Europe, Australia, New Zealand, South Africa, large numbers of other industrialized democracies. It was during that 12-year period that the US went off in what now looks like a very different direction. So end of footnote.

So as I was saying, during the period that I've just described, most of the strong free speech arguments came from political forces or sociological forces that to oversimplify might be characterized as being on the political left.

Compare that to today. Think about the debates regarding campaign finance. Citizens United is just the most noteworthy case in these debates. But on the entire issue of campaign finance, and campaign contributions, and campaign advertising, those who in 1964 in 1976 would have been strongly on the free speech side of the debates are now strongly sympathetic to some form of regulation.

So too, once we understand a great deal of pornography as endorsing and encouraging sexual violence, so too with cigarette advertising, so too with protests at abortion clinics, so too with racist speech and various other forms of hate speech, so too with the debates about Confederate flags, Confederate statues, and to make reference to

Walker versus the Sons of Confederate Veterans in the Supreme Court, Confederate license plates.

If we put all of this together, one of the things we discover is that the politics of free speech in 2020 have flipped the politics of free speech in 1968 and 1969. We could ask why this has happened. One theory that is commonly offered is what we might call the Hypocritical Liberal Theory.

That is non-liberals in talking about these developments will say, this just shows that liberals were hypocrites, that when they liked the anti-war protesters, they liked campaigners for sexual freedom, and when they liked the civil rights demonstrators, they liked free speech.

They can mention *Brandenburg* just to show they're bona fides. But basically, they were on the side of speech that they liked and not speech just because it was speech. And once the claimants of free speech rights looked very different than hypocritical liberals, so the argument goes, got off the bus.

There's an alternative explanation. The alternative explanation might have something to do with the economics and sociology about speech itself. So one of the traditional tropes of free speech argumentation and free speech theory is the idea of the marketplace of ideas. That is the idea that if there is an open and governmentally unregulated marketplace of ideas, knowledge will increase, truth will increase, bad ideas will be exposed, good ideas will be fostered, and so on.

Although it is an argument that we most associate historically with John Milton, who is a poet, and John Stuart Mill, who is a philosopher, it is basically an empirical argument. It is an empirical argument that says that a certain form of or a certain structure of public argumentation will produce a certain kind of consequence.

It is an empirical argument that says that the truth or soundness of an idea, has greater explanatory force in determining which ideas will be accepted and which ideas will be rejected than the frequency with which something is said, the charisma of the speaker, the prior attitudes and prejudices of the listeners, and so on, and so on, and so on.

Once we understand the claim in those terms, then it's somewhat surprising how many people over time have believed it, that is, at least an alternative hypothesis for the dramatic change in the political valence of free speech argumentation is that people now, in ways they might not have earlier, have recognized that in the marketplace of ideas, money matters, power matters, sociological power matters, and everything else.

Or if I may extend the metaphor perhaps beyond its breaking point, in the marketplace of ideas, it helps to own the store. And if in the marketplace of ideas it helps to own the store, we should not be surprised that in the marketplace of ideas, political power matters. Economic power matters. Wealth matters. Sociological power

matters, and a whole bunch of other things.

This dramatic change in the politics of free speech may reflect these kinds of ideas. This dramatic change in the politics of free speech is the shadow beneath which these issues are now being talked about today. Thank you very much for inviting me to do this. And I look forward to at least hearing part of what happens over the rest of the day. Thank you very much.

[APPLAUSE]