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Say What? Free Speech in the Public Arena

I. Overview

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 redress of grievances.

The Fourteenth Amendment

> … No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Regulation of Speech: General Principles

When considering the free speech implications of a regulation, one must consider: (a) whether the speech protected by the First Amendment; (b) what is the forum, context, or place where the speech takes place; and (c) whether the speech restriction satisfies the requisite standard. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439 (1985). Free speech claims include oral speech/advocacy, written speech, and symbolic speech. The First Amendment protects both content and conduct.

Speech may be regulated if it is obscene, defamatory, or creates a clear and present danger, such as "fighting words" and "true threats." Hate speech is generally protected. "[T]he First Amendment permits a State to ban 'true threats,' … which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals…. The speaker need not actually intend to carry out the threat. Virginia v. Black, 538 U.S. 343, 344, 123 S. Ct. 1536, 1539 (2003) (internal citations omitted).

Regulations may not be overbroad, such that they prohibit substantially more speech than necessary, unless a court has limited construction of the regulation to remove the threat to constitutionally protected expression. See Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191 (2003).

Laws and regulations are void for vagueness if they fail to give persons reasonable notice of what is prohibited, in violation of the Due Process Clause. This principle is applied fairly strictly in the First Amendment context. See Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839 (1972).

The freedom to speak, includes the free not to speak in that the government may not compel an individual to express a message with which he or she disagrees. See W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943) (state cannot force public school children to salute flag or recite pledge of allegiance).

Prison speech is governed by a different standard. Prison regulations will be upheld so long as they are reasonably related to legitimate penological interests.

Public Forums and Speech Restrictions

Traditional public forums include all forms of public property, such as streets, sidewalks, and parks. Designated or limited public forums include Village meeting rooms and schools. The government may regulate speech in public and designated public forums with reasonable time, place, and manner regulations. See Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).

Content-based speech restrictions must be narrowly tailored to serve a compelling state interest, and leave open alternative channels of communication (strict scrutiny). Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501 (1991). Narrowly tailored means they may not burden speech more than necessary to further a significant government interest. Content-based restrictions are presumptively unconstitutional.

Content-neutral restrictions must be narrowly tailored to achieve a significant governmental interest (intermediate scrutiny). For example, in Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008), the court found that a statute prohibiting disruptions to funeral and burial services served a significant public interest in protecting mourners against disruptions, it was narrowly tailored because it only restricted picketing and protests directed at funeral and burial services, and it afforded the protestors alternative channels of communication.

II. Sign Ordinances / Public Forum Speech

Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015):

In 2005, Gilbert, Arizona adopted a municipal sign ordinance that regulated the manner in which signs could be displayed in public areas. It distinguished between different types of signs, including: "Ideological Signs," defined as signs "communicating a message or ideas" that did not fit in any other category; "Political Signs," defined as signs "designed to influence the outcome of an election"; and "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event." Each category was subject to a different set of restrictions.

When the town's Sign Code compliance manager cited a local church for violating the ordinance with its temporary directional signs, the church sued, arguing the ordinance violated its First Amendment right to freedom of speech.

The Court, by Justice Thomas, held that the town's sign ordinance was content-based on its face because it defined categories of temporary, political, and ideological signs on the basis of their messages, subjecting each to different restrictions. The Court held these content-based restrictions did not survive strict scrutiny because the town failed to show that the differentiation between temporary directional signs and other types of signs were narrowly tailored to further a compelling government interest.

In Left Field Media LLC v. City of Chicago, Ill., 822 F.3d 988 (7th Cir. 2016), cert. denied, 137 S. Ct. 1065 (2017), baseball magazine editor Matthew Smerge of Left Field Media sold magazines on the public sidewalk outside of Wrigley Field before Chicago Cubs' home games. On the day of the Cubs' home opener in 2015, a patrol officer forced him to move across the street to comply with the municipal code that prohibited all peddling on the streets adjacent to Wrigley Field. Smerge refused and was ticketed. Applying Reed, the Seventh Circuit held the ordinance was content-neutral, as it "applies as much to sales of bobblehead dolls and baseball jerseys as it does to the sale of printed matter."

In Cent. Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625 (4th Cir. 2016), a radio station owner was cited for posting a 375 square foot banner on the side of its building which stated, "50 YEARS ON THIS STREET / 78 YEARS IN NORFOLK / 100 WORKERS / THREATENED BY / EMINENT DOMAIN!" They claim the sign restriction was unconstitutional because it exempted certain "flags or emblems" and "works of art." The Court held the City's desire to promote its "physical appearance" and "reduce the distractions, obstructions and hazards to pedestrian and auto traffic" were not compelling government interests justifying the content-based restrictions.

In Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C., 846 F.3d 391 (D.C. Cir. 2017), cert. denied sub nom. Muslim Am. Soc'y Freedom Found. v. D.C., No. 17-274, 2017 WL 3608642 (U.S. Oct. 10, 2017), the District of Columbia enacted regulations permitting signs to remain on public lampposts for up to 180 days, but required event signs to be removed within 30 days of an event thereby distinguishing between signs for events and non-events. The regulation was later amended to allow signs "not relate[d] to the sale of goods" to be affixed to lampposts for up to 60 days; election signs for D.C. candidates for public office were exempt from that overall limit but had to be taken down within 30 days after the

election; and signs intended to aid neighborhood crime prevention were exempted from the time limits.

Plaintiffs, two non-profit organizations were cited for posting event signs advertising their rallies, with the combined messages of advocacy and references to specific events. The court concluded that the regulation did not impose a content-based distinction because it regulated how long event-related signs may be maintained on public lampposts, not the content of their messages. Applying intermediate scrutiny, the court found the regulations to be reasonable time, place, and manner restrictions that were narrowly tailored to further the "significant governmental interest in avoiding visual clutter." Id. at 396.

In Luce v. Town of Campbell, Wisconsin, 872 F.3d 512 (7th Cir. 2017), the local Tea Party organization draped banners with messages such as "Honk to Impeach Obama" across a pedestrian overpasses. This led the legislature to enact an ordinance forbidding all signs, flags, and banners (other than traffic-control information) on any of the three overpasses, or within 100 feet of the end of these structures. While the court credited the Town's concerns that the banners may affect traffic because drivers are likely to slow down to read the signs, and even honk at them, it noted the dearth of evidence to support the 100 foot rule and remanded to the district court on that issue.

In Contest Promotions, LLC v. City & Cty. of San Francisco, 874 F.3d 597 (9th Cir. 2017), the plaintiff rented space on buildings to sell advertising to third party businesses. The signs would invite people to patronize the businesses and win prizes. The San Francisco Planning Code distinguished between "general advertising signs" for business at locations other than the locations of the signs, and "business signs" located at the premises of the sign. It also distinguished between commercial and non-commercial signs, the latter of which was exempted from the regulation altogether.

The Court held that because the regulation applied only to commercial signs, it was a regulation of commercial speech subject to intermediate scrutiny. Under that test, the court held the regulations did not violate the First Amendment because the City's interests in safety and aesthetics (blight, visual clutter, and commercialization of public space) were significant governmental interests.

III. Public Employee Speech

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734–35 (1968).

The Court in Pickering held that comments by public employees on "matters of public concern" are protected under the First Amendment even if they are directed against their superiors. But it provided a framework to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id.

Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006):

Deputy District Attorney Richard Ceballos prepared memoranda to his supervisors, and then attested in court, that an affidavit used by police in obtaining a critical search warrant had contained serious material misrepresentations. He was then subjected to retaliatory employment actions, including reassignment to another position, transfer to another courthouse, and denial of a promotion. The Ninth Circuit held that Ceballos had engaged in protected speech on a matter of public concern.

The Supreme Court reversed. In addition to determining whether the employee spoke on a matter of public concern, and balancing that interest against the government justification for treating the employee differently under Pickering, courts must determine whether the employee is speaking pursuant to his employment responsibilities. If so, he does not speak as a citizen, but rather as an employee and is not protected by the First Amendment. Ceballos' speech was made in his capacity as a Deputy District Attorney, not as a citizen on a matter of public concern and, therefore, it was not protected.

In Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), plaintiff Jackler was a probationary police officer who had written a report stating that a police sergeant unlawfully struck a suspect, who was in custody, in the face after the suspect called the sergeant a "dick." After Jackler's supervisors unsuccessfully tried to get him to change his report, his probationary appointment was terminated. He sued, alleging First Amendment retaliation. The district court dismissed the case on Garcetti grounds. The Second Circuit reversed, holding that the refusal by probationary police officer to retract his truthful report and make statements that would have been false constituted speech by officer as citizen on matter of public concern, effectively carving out an exception to Garcetti.

The D.C. Circuit in Bowie v. Maddox, 653 F.3d 45 (D.C. Cir. 2011) dealt with a strikingly similar fact pattern as Jackler, at nearly the same time. The court criticized the Second Circuit for its holding in Jackler, stating, "A test that allows a First Amendment retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue." Id. at 48. Both Jackler and Bowie were reviewed in committee by the Supreme Court together, but the Court declined certiorari.

In Lane v. Franks, 134 S. Ct. 2369 (2014), the former director of a community college's program for underprivileged youth alleged retaliation for his testimony against an Alabama State Representative who had not been reporting to work, which led to her conviction. When he was then terminated (with 28 other employees) to address an alleged budget shortfall, he alleged First Amendment retaliation. The Court held plaintiff's sworn testimony in court was "citizen speech" eligible for protection, distinguishing it from Garcetti. The Court held the First Amendment protects a public employee who provides truthful sworn testimony, under a subpoena, outside the scope of his normal job responsibilities.

In Buehrle v. City of O'Fallon, Mo., 695 F.3d 807, 813 (8th Cir. 2012), the Court held that a police officer's speech about recommendations for procedural changes, and comments and opinions about corruption, was speech pursuant to his official duties not insulated by the First Amendment.

IV. Student Speech

Although students do not shed their First Amendment rights at the schoolhouse gate, schools are entitled to impose reasonable restrictions on student speech to further the educational process, prevent exposure of other students to indecent material, and assure the views of individual speakers are not erroneously attributed to the school.

The important line of student speech cases began with the Supreme Court's pronouncement in 1969 that "[i]t can hardly be argued that either students or teachers shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733 (1969) (students had First Amendment right to wear armbands protesting the Vietnam War). Since then, courts have grappled with where to draw the lines on student speech.

In Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676, 106 S. Ct. 3159, 3160 (1986), the Court held that the First Amendment does not prevent a school district from disciplining a student for giving an offensively lewd speech at a school assembly. "The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Id. at 682.

In Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988), the Court held a high school newspaper was not a "public forum," and school officials could impose reasonable restrictions on its content. The Court held schools may regulate student speech to (a) assure participants learn whatever lessons expressive activities are designed to teach; (b) prevent readers or listeners from being exposed to inappropriate materials; and (c) assure the views of individual speakers are not erroneously attributed to the school.

Morse v. Frederick, 551 U.S. 393 (2007):

At a school-sanctioned and school-supervised event in which student watched and participated as the Olympic torch was marched through their town of Juneau, Alaska, several students unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." Principal Morse demanded they remove the banner. All but Frederick complied, and he was suspended for 10 days.

Frederick suggested the words were nonsense, an attempt to attract television cameras. But the principal claimed the banner may be interpreted by other students as promoting illegal drug use. The Court upheld Morse's actions, holding that schools may take steps to "safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."

In Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668 (7th Cir. 2008), **t**wo high school students engaged in homophobic activities by wearing anti-homosexual t-shirts such as "Be Happy, Not Gay," in a protest against the school Gay/Straight Alliance's Day of Silence, which was aimed at drawing attention to harassment of homosexuals. The school banned the shirt based on a school rule prohibiting derogatory comments about race, ethnicity, religion, gender, sexual orientation, or disability. The Seventh Circuit granted plaintiff a preliminary injunction, limited

to allowing the student to wear the offending shirt, but noted that on remand "[t]he district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity."

In DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71 (2d Cir. 2010), after a Hispanic student from plaintiff's high school died in a motorcycle accident, the plaintiff was alleged to have stated, "One down, forty thousand to go." After he and his family were faced with death threats by other students, his mother requested that either he or the principal be able to read a statement in his defense or distribute it to the students. The principal denied the requests on the grounds that further attention to the issue would aggravate tensions. He sued, alleging violations of his First Amendment rights. The Second Circuit granted qualified immunity, holding (a) it was reasonable for the principal to forecast substantial disruption or interference with school activities if plaintiff was permitted to make his statement; and (b) the school would be further diverted from its core educational responsibilities by the need to dissipate anger or confusion over the veracity and sincerity of plaintiff's statement, and ancillary questions concerning the extent to which the school endorsed it.

In Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013), plaintiff was prohibited from, and then punished for, wearing clothing that displayed a Confederate flag in school. The court found no First Amendment violation, reasoning that it will not second guess the reasonable decisions of school officials who forecasted a substantial disruption stemming from racial tensions.

Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014), involved a high school with a history of gang violence and racial tensions that was celebrating cultural appreciation on Cinco de Mayo. Confrontations arose between students wearing American flags on their shirts and Mexican students. The administrators directed the students to either turn their shirts inside out or take them off, but the students refused to comply. The Ninth Circuit held that requiring students to change clothing that depicted the American flag did not violate the students' First Amendment rights. The school officials' actions were tailored to prevent violence and focused on student safety. The court noted that while the students were restricted from wearing certain clothing they were not punished.