

FREEDOM OF SPEECH ON PUBLIC COLLEGE CAMPUSES:  
LEGALLY UNCERTAIN AND LEGALLY CONTESTED SPACE

By

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## ABSTRACT

The purpose of this paper is to discuss the First Amendment; more specifically, how freedom of speech is regulated or not regulated on public college campuses. Analyzing cases spanning half a century, this paper will look at the broad and somewhat narrow definitions and standards of speech. The Supreme Court has decided multiple cases relating directly and indirectly to speech on public college campuses, however, a finite answer as to what speech is accepted and not accepted is a debate still being argued today. This paper will help shed light on the subject, while also providing personal thought and contribution as to how speech cases and regulations should be viewed and analyzed. The conclusion, free speech has no definition, nor a narrow answer as to how public colleges should handle speech or how speech will be argued before the court. Free speech is still legally uncertain and legally contested space. This paper helps readers understand what free speech is and the standards and uncertainties that go along with it while providing insight along the way.

## I INTRODUCTION

The First Amendment asserts that “Congress shall make no law ... abridging the freedom of speech” (U.S. Const. amend. I, sec. 3). In a literal sense of the right, speech cannot be limited by Congress, but what is speech? Speech, if we were to look at a definition, is the act of speaking through the utterance of words. The Supreme Court has broadly included multiple other facets of speech, including signs, armbands, and newspapers. Matter-of-factly, the freedom of speech is not narrowly defined by a legal standpoint, the debate over what speech encompasses and what part of speech is protected remains an ongoing debate.

Free speech is not going away and the challenges regarding what speech is and how it will be regulated is left up to the courts. The Supreme Court has made significant strides in deciding cases which help shed light on what rights to speech are given to the public. In a narrow sense, the Supreme Court has provided insight into what rights to speech those on public college campuses have, and how far their right extends. Part II will examine such an example of limitations and autonomy for free speech on campus, with an example from the University of Arizona.

Part III will examine free speech in lower education and how standards have been defined by the Court to help guide schools on how to regulate speech. Part III will also provide standards which will be transcended to higher education, to help define the rights of students on public college campuses.

Part IV will examine the First Amendment for free speech beyond lower education, providing standards by the Court for public restrictions. These standards may be transferred to public college campuses and help uncover limitations and certain freedoms individuals enjoy whilst on campus. Further analysis of the University of Arizona and their dealings with speech

will furthermore convey the underlining message, that speech is still contested and without finite standards by the Court.

Part V will examine the First Amendment in a narrow sense, dealing directly with public college campuses and the field of academic freedom. The Supreme Court has decided multiple cases expanding academic freedom and student speech in scholarship and discussion. Using standards, as well as cases from lower education, the Court has made headway into revealing student rights to free speech, but due to vague and broad interpretations, speech is not defined, only further discussed and debated.

Part VI will examine the University of California, Berkeley and a recent happening with free speech. Berkeley will help shed light on the gray areas of free speech. Where can the line be drawn and what is the extent that universities can regulate speech? The situation is ongoing, as being a hub for speech activities, the University serves as a wonderful example of free speech in action, and the debates for regulation and deregulation of speech.

Part VII is the discussion, where free speech will be analyzed with all the tools from the previous parts. The discussion will help illustrate the unknowns of free speech on public college campuses, while also shedding light on the standards given by the Supreme Court. My personal thoughts and ideas to help discuss and look at free speech will be presented, but also noted as opinion. Because the debate is ongoing, the discussion will help underline the basic notions of free speech, while giving some advice as to how speech should be looked at.

Finally, Part VIII will be the conclusion and the summation of the paper. The issue will be restated and the findings reiterated. The paper will provide insight on free speech on college campuses, while giving the underlining message that the definitions, lines, and gray areas of the topic are still under debate and still legally uncertain and legally contested space.

## II. THE UNIVERSITY OF ARIZONA AND BROTHER DEAN

An example of how free speech is regulated and exercised on public university campuses is illustrated well with Dean Saxton, also known as Brother Dean. At the University of Arizona (UA), it is not uncommon to witness activism and free expression. Due to the University being a public college, a student attending the University of Arizona will not only observe the UA students, but guest speakers as well.

As a student attending a public university, the circumstances will be common that the student body will participate in protests and walk-outs, as well as student activists and individual community members disseminating their thoughts and beliefs.

Though the UA does elicit standards for free speech regulation:

*“The University may regulate the time, place, and manner of free speech and expressive activities in order to prevent unreasonable interference or disruption of its educational, research, outreach and business functions, normal or scheduled uses of University property by the Campus Community, as well as protecting public health, safety and welfare”* (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1).

The University does apply the freedom of speech protected under the United States Constitution by stating that there is a commitment to protecting free speech for students, faculty, and staff (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). Thus, unless there is a breach of the student code of conduct or the protected speech under the First Amendment, student speech is loosely regulated, and Brother Dean is such an example that embodies free speech standards on public campuses.

Brother Dean is a religious activist and former student at the University of Arizona, notably acknowledged for demonstrations proclaiming that “Frat Boys Are The Rapists” and

“Sorority Girls Are Whores,” as well as suggesting at times that women wearing short shorts in 90-degree weather are asking to be raped (Huffington Post, 2013). During these demonstrations, a multitude of students complain to the Dean of Students Office about the apparent atrocity that is being seen and heard. During an interview with *The Daily Wildcat*, the office stated that the speech by Brother Dean is vulgar, distasteful, and repugnant, but that the speech so far is protected by the First Amendment (*The Daily Wildcat*, 2013).

Kathy Adams Riester, Associate Dean of Students is quoted saying that “A hard reality is that the level of speech that can be tolerated is much higher at a public institution than it will be in high schools” (*The Daily Wildcat*, 2016). This can be seen with such cases as *Tinker* and *Healy*. Riester is also quoted, giving examples of what would constitute an overreach of free speech on the University campus that is subject to corrective action and restraint. Such standards include: The University being able to place restrictions and regulate the place, manner and time of free speech occurring on campus, and that the University primarily looks at whether speech is disruptive or not to the surrounding areas (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). Thus, Brother Dean’s actions must disrupt the surrounding area in order for it to be restricted.

During a demonstration in September of 2016, Brother Dean was vocalizing another speech protected rally until an overstep of protected actions took place. A freshman approached him nonviolently, and was instantly kicked in the chest. Onlooking students contacted the Tucson Police Department, who in turn arrested Brother Dean and charged him with a class one misdemeanor for assault. The result is a one-year exclusionary order which forbids him from being on the University campus for the next year (*The Daily Wildcat*, 2016).

Though his speech was protected his actions were not (408 U.S. 192). So where is the line drawn? This will be a question asked throughout this paper. Knowing the line is vague and has no conclusive answer, but in the case with Brother Dean there was an overstep from free speech to assault, a clear breach of university policy and a crossover to threatening behavior. As Kathy Adams Riester stated: “My best hope is that students understand that their right to freedom of speech, as well as everyone else’s and the ability to say and share what you’re thinking is really important,” continuing. “But it’s also important to practice respect to each other, and violence is never an answer when you disagree with speech. Really the answer is more speech” (The Daily Wildcat, 2016).

Free speech has its limitations, and Brother Dean is a clear example of how much speech is allowed on public university campuses, but also the limits that can ultimately be placed on speech. However, there is evidence that shows a difference between public schools and public colleges, where public schools are treated with tighter restraints when constitutional rights are reviewed. The Supreme Court uses standards and has ultimately come up with ways of dealing with public schools as opposed to college campuses.

### III. FIRST AMENDMENT DEFINED IN LOWER EDUCATION PUBLIC SCHOOLS

First Amendment rights to freedom of speech are regulated in various ways in many different variations of institutions. For instance, public school administrations have broad standards created by the Supreme Court to use when there is a need to suppress student speech believed too distracting, offensive, presenting a harmful image for the school, or even promoting illegal drug use. Though broad, a few cases do provide guidance when looking at student speech, and how there are times when the regulation content is deemed constitutional.

#### A. TINKER V. DES MOINES SCHOOL DISTRICT (1969)

In 1965, the Tinker family protested the Vietnam War by wearing black armbands. The children wore the armbands to school as well. The Principal set in place a policy which made wearing armbands liable for suspension. Due to the Tinker children wearing the armband, the Principal suspended the kids indefinitely, or until they removed the armbands (393 U.S. 503).

Through the parents, the Tinker family sued the school district for violating the students First Amendment right to freedom of expression. The case was dismissed, upholding the school's decision. The U.S. Court of Appeals for the Eighth Circuit also affirmed the decision (393 U.S. 503).

The question asked was, whether or not wearing the armbands were protected by the First Amendment (393 U.S. 503)?

In a seven-to-two decision, the court found that wearing the armbands was protected by the First Amendment. The majority, written by Justice Fortas, ruled that the armbands were close to pure speech and passive. He further stated that the First Amendment does not stop when going into school and that the armbands posed no real disruption. Finally, the Court decided that student speech may only be disciplined when school administrations assume the speech to elicit "...substantial disruption of or material interference with school activities" (393 U.S. 514).

In a dissenting opinion, Justice Black argued that the First Amendment does not apply to school, and that the decision should be based upon school judgement (393 U.S. 503).

#### B. BETHEL SCHOOL DISTRICT NO. 403 V. FRASER (1986)

During a school assembly with an audience of around 600 students, Matthew Fraser announced the nomination for a fellow student for an elected position within the school student body. Inlaid throughout his speech were sexually graphic metaphors that were used to help

promote his classmate for the elected position. As a result, Bethel High School enforced their policy of prohibiting behavior that is deemed to be obscene or vulgar. Mathew Fraser was suspended for two days (478 U.S. 675).

The question being reviewed was, whether or not there is a right through the First Amendment to allow the prevention of a school district from conducting disciplinary action against a high school student, due to the student exhibiting lewd speech at a high school assembly (478 U.S. 675)?

In a seven-to-two decision, the Supreme Court ruled that the school district could prohibit obscene and vulgar language. In the majority opinion by Chief Justice Burger, it was established that an exemption to *Tinker* be put in place to allow the action taken by the school district, even though the behavior presented by Fraser did not elicit any disruption. Because of Fraser, the Court recognized a new model: that speech conflicting with the "fundamental values" of public school education by ways of being obscene and offensive may be banned (478 U.S. 675).

#### C. HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER (1988)

At Hazelwood East High School, a school-sponsored newspaper called *The Spectrum*, was run by students. The school's principal, upon receiving proofs for the upcoming month's issue, removed two articles due to the content being inappropriate for publication. As a result, three members from the newspaper filed suit basing their argument on prior restraint due to the principal not being a part of the paper (484 U.S. 260).

The question asked by the Supreme Court was, whether or not the actions by the principal to remove two articles from the newspaper violated the students' First Amendment rights (484 U.S. 260)?

In a five-to-three decision, the court ruled in favor of the principal. The majority, written by Justice White, affirmed that the school paper could publish content that could challenge school functions. However, student rights are different than regular press. The opinion includes *Tinker*, but states that the situation is different because the issue is curriculum and not political views. Furthermore, the principal only needs good judgement since the paper is not a public forum. His job is to set reasonable standards, not compelling interests. Thus, the Court established a new standard, allowing student speech to be regulated when the speech is issued through the school (484 U.S. 260).

#### D. MORSE V. FREDERICK (2007)

During an off-campus and school-supervised event, Joseph Frederick made a banner and held it during the event. The banner read “Bong Hits 4 Jesus,” and as a result, Frederick was suspended for ten days. The justification given by the principal was based on the banner promoting illegal drugs. As a result, Frederick filed suit stating his First Amendment rights had been violated. In the first proceeding, the District Court ruled in favor of the principal, sighting no violation of Frederick’s First Amendment rights. The U.S. Court of Appeals for the Ninth Circuit reversed the ruling, citing *Tinker*, where First Amendment rights are protected. However, there are exception such as when the speech disrupts school functions. Since the banner was proclaiming a message, the speech was not deemed a disturbance, thus the punishment was ruled unconstitutional (551 U.S. 393).

The question asked by the Supreme Court was, whether the banner was protected by the First Amendment (551 U.S. 393)?

In a five-to-four decision, the Court ruled in favor of the punishment. The majority, written by Chief Justice Roberts, states that the banner and its message are still considered school

speech and the event was still school sanctioned, despite being off-campus. The majority further stated that at some level, the banner was advocating for drug use, and as a result, the principal had the right to restrict the speech. Chief Justice Roberts sighted *Tinker*, writing that it was different as the case did not elicit disruption and that the high standards brought from the opinion do not always apply. The majority continued by reiterating that students do not have the same rights when in school, and that the school, as well as the state, had a compelling interest, whereas there was peer-pressure and pro-drug speech (551 U.S. 393).

In a concurring opinion, Justice Thomas stated that he believes there are no First Amendment rights for students and that *Tinker* should be overturned. In another concurring opinion, Justice Alito was fine with prohibiting the message, but stressed that the decision only coincided with pro-drug speech and not the broader spectrum of political speech (551 U.S. 393).

Overall, the decisions within these four cases by the Supreme Court elicit four standards on how to regulate student speech on public school campuses. When looking at *Tinker*, the Court ushered in a criterion where school administrations have the right to control student's First Amendment rights for free speech, when the speech has the potential to cause a disruption or interference towards class learning and events (393 U.S. 503). Under *Fraser*, an exception was introduced that would allow school administrations to control student speech if the content was deemed to be obscene and vulgar, thus being offensive to the student body and staff. Ultimately, the exception is allowed without there being an explicit disruption from the speech content (478 U.S. 675). The decision in *Kuhlmeier*, the Supreme Court's decision officiated a new standard that would allow regulation of student speech, if the administration viewed the content as representing the school (484 U.S. 260). Lastly, in *Morse*, the Supreme Court held that student speech could be restricted if the content has the effect of endorsing illegal drug use (551 U.S.

393). Thus, there are at least four standards that the Supreme Court may use when considering student speech when dealing with public school, however, the same rules do not always apply to college campuses.

#### IV. THE FIRST AMENDMENT BEYOND LOWER EDUCATION

When looking at free speech, there are cases that have developed which do not deal directly with university campuses, however, they can be used to determine public campus regulations. This reason is due to the campus being a public entity. The buildings may be administered by the school's administration, but much of the space in between is liable for regulation through the Constitution and Supreme Court rulings, in this case free speech. One such ruling by the Court that may be used to review campus free speech is *Chaplinsky v. New Hampshire*, which deals with "fighting words" and a direct link to free speech. The case in a vague sense, allows the regulation of student speech if the content is deemed to elicit threats to individuals and to prescribe violence. Broadly stating, *Chaplinsky* regulates public speech, which can be used for public colleges. So, what are "fighting words"? In an overtly vague and broad implication as defined loosely by the Court, they are words which through the act of utterance, "inflict injury or tend to incite an immediate breach of the peace" (315 U.S. 572).

Furthermore, in the 2003 case *Virginia v. Black*, Justice Sandra Day O'Connor proclaimed that states may ban "true threats" and defined the threats as "...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" (538 U.S. 344). *Black* can be paralleled with *Chaplinsky* and used to help define the limitations of speech for public college campuses. An example of *Chaplinsky* and *Black* can be seen at the University of Arizona campus with the eventual removal of Brother Dean.

As mentioned earlier, Brother Dean is a vocal religious activist who has been quoted stating on the university campus that “All Muslims are pedophiles” or “You deserve rape” (Huffington Post, 2013). These utterances may seem derogatory and offensive, and to many these statements justify his forced removal from the campus, though this speech was not enough to get Brother Dean removed. Remember, his statements were protected speech. However, the moment Brother Dean kicked a bystander of his rally, he had forfeited his rights to be allowed on the campus (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). Though not directly related, Brother Dean can be seen as an example of eliciting “fighting words” to spawn violence and unrest. Due to his actions, *Chaplinsky* and *Black* can be theoretically used to draw the line for Brother Dean’s free speech and action, and the regulations the public universities can place on individual First Amendment rights to free speech (315 U.S. 568) (538 U.S. 343). Because of the violent actions, he was forced off campus. If challenged in court, there is no doubt that *Chaplinsky* and *Black* would be referenced to assist in the actions the University took in removing Brother Dean.

Overall, *Chaplinsky* as well as *Black* can be used to help define boundaries to Free Speech on college campuses (315 U.S. 568) (538 U.S. 343). These cases illustrate some of the limitations that can be considered when dealing with speech, such as “fighting words” and what they represent and how they can be regulated. As a unrelated case to help determine Free Speech rights on public college campuses, *Chaplinsky* and *Black* should not go unnoted as it serves as a broad, but useful guideline to help enlighten the gray area of First Amendment free speech.

#### V. FIRST AMENDMENT: ACADEMIC FREEDOM

Academic freedom has been at the forefront of debate when dealing with Free Speech on public college campuses. Through a series of cases, the Supreme Court has ruled on numerous

cases recognizing student and faculty rights to academic freedom (354 U.S. 234). In a series of cases the Court has acknowledged *Tinker* as applying to both public schools and public colleges, as well as defining academic freedom and recognizing student and faculty rights to free expression of ideas, teachings, and other writing pertaining to scholarship and ideals (385 U.S. 589) (408 U.S. 169). Though broad, the Court has laid the groundwork to student free speech rights pertaining to the First Amendment.

#### A. SWEEZY V. NEW HAMPSHIRE (1957)

The case centers around Paul Sweezy a guest lecturer at the University of New Hampshire. Sweezy was a known member of the Progressive Party, a classical Marxist and socialist. Due to Congress giving the Attorney General the right to investigate subversive activities, Paul Sweezy was asked on multiple occasions to answer questions about his knowledge of the Communist Party, Progressive Party, the members within the organizations and the content of his lectures. Refusing to answer these questions, the Attorney General petitioned for Sweezy to stand trial, which the court agreed. Sweezy again refused to answer the questions and was jailed as a result (354 U.S. 234).

Sweezy appealed his case to the Supreme Court of New Hampshire, who affirmed the Attorney General's beliefs that Sweezy was subversive with the intent to inflict harm on the government. The ruling held that state interest overshadows his First Amendment right to speech, and the Fourteenth Amendment right to the "due process of law" (354 U.S. 234).

The question asked was whether Sweezy's right to free speech and due process were violated (354 U.S. 234).

In a six-to-two decision, the Court ruled in favor of Sweezy, thus overturning the Supreme Court of New Hampshire's previous ruling. The majority opinion by Chief Justice

Burger, stated there was an invasion of Sweezy's right to academic freedom and the First Amendment. The ruling also stating that the state's concerns about the subversive intent of an individual does not trump the Bill of Rights. Overall, the majority emphasized the vital need for academic freedom in higher education with regard to faculty and students, specifically attributing to scholarship and the need for the freedom to inquire, evaluate, and study (354 U.S. 234).

The concurring opinion by Justices Frankfurter and Harlan reiterated the need for freedoms to inquiry and discovery on university campuses while stating that these freedoms are the right of the university and they may determine who may teach, what academics may be taught, how they are taught, and who may study (354 U.S. 234).

#### B. KEYISHIAN V. BOARD OF REGENTS OF UNIV. OF STATE OF N.Y. (1967)

Harry Keyishian as well as other faculty at the University of Buffalo were subject to regulations that were meant to prevent employment of subversive persons. This was due to the fact that the University was merged with the State University of New York system, which required the regulation. Because Keyishian and other faculty refused to sign papers stating their noninvolvement with the Communist party, each were subject to be let go by the college. Keyishian and with other faculty sued, basing their argument on a violation of their constitutional rights. A Federal Court, deemed the regulation as constitutional. In an appeal, the case was brought before the Supreme Court for further review (385 U.S. 589).

The question asked by the Court was, whether or not the regulations to renounce Communism were overly broad as well as vague to the extent that they are unconstitutional (385 U.S. 589)?

In a five-to-four decision, the Court overturned the Federal Court's decision and ruled in favor of Keyishian with the majority given by Justice Brennan. After considering the regulation,

the Court deemed that being a member of a subversive group was not enough to terminate employment at a public college. Added to the decision was the unconstitutionality of public institutions forcing faculty and staff to sign loyalty oaths to maintain employment (385 U.S. 589).

Due to the rejection of the regulation, the Court then focused on a mandate that required the termination of faculty when “treasonable or seditious” speech is uttered. The Court first noted that the regulation was too vague and could easily place a chilling effect on campus speech. Also, the Court recognized the importance of providing ample opportunity to faculty and students the right of political discussion. The Court held that there is no greater importance on college campuses than having free and open dialogue where faculty and students maintain the academic freedom of pursuing research, writing, teaching, and publishing material without fear of vengeance due to the scholarly material being unpopular. The Supreme Court went so far as to describe academic freedom as being “a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom” (385 U.S. 603).

Overall, the case projects the Court’s description of academic freedom while also gaining First Amendment rights towards faculty, students and public colleges. As a frequently cited case for academic freedom, *Keyishian* provides a standard for academic freedom while also citing that regulations with a potential chilling effect over freedom of discussion are unconstitutional. Public colleges are cited as needing freedom of open discussion, research, teachings, and published materials (385 U.S. 589).

#### C. HEALY V. JAMES (1972)

At the Central Connecticut State College, a group of students organized a campus chapter of the Students for Democratic Society (SDS). The SDS was known as a militaristic “anti-

establishment” group that posed civil disobedience as well as violent disruption in higher education. The students advocating for the creation of the chapter filed for official acknowledgement by the committee for campus organizations. The committee endorsed the organization’s official recognition as a school society. However, the president withdrew the support stating his thoughts of an adverse impact with the group against school policy (408 U.S. 169).

The students filed suit, stating that the rejection violated their First Amendment rights to freedom of expression. The Federal Court ruled in the College’s favor, in which the Supreme Court granted certiorari (408 U.S. 169).

The question asked was, whether the rejection of the students’ organization violated the First Amendment (408 U.S. 169)?

In a unanimous decision, the Supreme Court ruled in favor of the students, thus overturning the Federal Court’s decision. Justice Powell, leading the decision, contended that the ruling holds that institutions of higher learning do not have the right to refuse student organizations, based on the fear of disruption. Instead, the fear of heavy burden which constitutes a “prior restraint”. An important remark stated by the majority was the recognition that *Tinker* pertains at least as powerfully within higher education (408 U.S. 179).

The court relied on the First Amendment’s implied right to freedom of association, because of the students being refused to organize the SDS charter. The majority stated that “...the critical line for First Amendment purposes must be drawn between advocacy which is entitled to full protection, and action, which is not” (408 U.S. 192). Thus, because the students made clear their intent to follow institutional rules regarding conduct and made no notion of unjust action, they were justified to be recognized as a school organization. Though in a

concurring opinion, Justice Rehnquist made clear that school administrators are permissible to implement regulations on students.

These three cases of academic freedom illustrate some standards in which the Supreme Court goes by to determine student First Amendment rights for free speech. First, in *Sweezy*, the Court iterated that state concerns about the subversive intent of an individual does not trump the Bill of Rights. There is a vital need for academic freedom in higher education, including four freedoms which were provided by Justice Frankfurter. These freedoms elicit an environment within public colleges for discovery and free inquiry: who may teach, what academics may be taught, how they are taught, and who may study (354 U.S. 234). In *Keyishian*, the Court found regulations to be vague and with an adverse chilling effect on student speech to be unconstitutional, reiterating the need for discovery and free inquiry while also defining academic freedom as: “a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom” (385 U.S. 603). Within *Healy*, the Court recognized that *Tinker* pertains just as much to public colleges as it does public schools. This is momentous as *Tinker* ushered in student free speech rights which are able to be regulated only when the speech has the potential to cause a disruption or interference towards class learning and events. The Supreme Court in *Healy* also was able to draw the line between advocacy, which is protected speech, and action which is not (408 U.S. 169). Overall, these cases bring forth standards and guidelines for regulation of free speech on college campuses, while also iterating the broadness and ranges of freedoms that students and faculty may enjoy.

## VI. THE UNIVERSITY OF CALIFORNIA BERKELEY AND FREE SPEECH

An issue which is ongoing, involves First Amendment rights to free speech at the University of California, Berkeley. The University is known as one of the founders of the free

speech movement in the 1960s, and has been a centerfield for individuals using their right to speech on a public college campus (Chicago Tribune, 2017). Recently, Berkeley has been the center of debate for the possibility of restricting student speech beyond what the Constitution may allow.

The University canceled a speech that was supposed to be given by an outspoken conservative, Ann Coulter on April 27, 2017. The administration's excuse for the cancellation was that the speech may jeopardize safety on the campus, calling for a "heckler's veto" – which administrations use to silence speech deemed to elicit violence from a crowd. Later, the school's administration changed their position and moved Ms. Coulter's speech to May 2 of 2017. The change was announced after much dismay from the students, especially from the University's College Republicans, who proclaimed a violation of free speech (Chicago Tribune, 2017) (The New York Times, 2017).

Looking at this issue, there are some guidelines that can be used from previous Supreme Court cases that may be used to theoretically go over the Berkeley situation, and their use of the "heckler's veto". In the Supreme Court case *Forsyth County v. Nationalist Movement* (1992), where in the state of Georgia, a local government could incorporate certain fees for events where it was thought that police protection might be needed. In a five-to-four decision, the Court ruled against the fees incited on events deemed to need police protection. The majority, written by Justice Blackmun, stressed that the ordinance contained no clear standard for the government's administration to calculate fees. Overall, the majority declared that "...speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob" (505 U.S. 134). This statement shows a clear standard put forth by the Supreme Court that may be used in opposition to the decision made by the Berkeley

administration. However, as with most Supreme Court rulings, this standard is not without open interpretation.

A case that may be brought in favor of the “heckler’s veto”, which cements the non-universality of the *Forsyth* decision is *Feiner v. New York* (1952).

The question asked by the Court was, whether Feiner, a student at Syracuse University, was rightfully arrested due to a believed breach of the peace during a speech he gave, where the police felt violence would ensue by the public.

In a six-to-three opinion, the Court ruled in favor of the police decision to arrest. The majority authored by Chief Justice Vinson, cited that the police arrest of Feiner was the in the greatest interest to maintain the peace and avoid violence. The majority opinion also provides a standard for regulating speech, acknowledging that policy authority cannot be used to suppress views held as unpopular. However, when a speaker moves away from arguments and towards inciting violence and rioting, the speaker is then without power to prevent the violence, therefore, suppression of speech may take place (340 U.S. 315).

Thus, although it is a Supreme Court supported reasoning for the students to file suit against Berkeley, there is also Supreme Court supported reasoning for the administration to limit the speaker’s speech (340 U.S. 315). Personally, I feel as if the administration cannot limit the speaker yet, at least not until she is speaking. If during the speech the surroundings become hostile, then the school has reason to limit by use of the “heckler’s veto”.

Berkeley is an example of how free speech on public college campuses is vague. Where the line is drawn in this situation is still undetermined. There is a right for the school to remove a speaker due to the possibility of violence from the crowd, however there is also standing by the students and the speaker that their free speech is being limited unconstitutionally due to adverse

political ideology. The ruling has yet to be brought to any court, but the findings would go a long way in providing much desired standards for free speech of public college campuses.

## VII. DISCUSSION

After reviewing Supreme Court cases relevant to the issue of freedom of speech on public college campuses, it is evident that some guidance has been given. First, in *Sweezy*, there is a recognized right by the Court to academic freedom, especially scholarship and the need for the freedom to inquire, evaluate, and study (354 U.S. 234). Secondly, in *Keyishian*, the Court set the standard for academic freedom as not allowing "...laws that cast a pall of orthodoxy over the classroom" (385 U.S. 603). *Keyishian* also recognized that restrictions put forth by the college that administer a potential chilling effect, are deemed unconstitutional. Lastly, in *Healy*, the Court recognized that *Tinker* applies just as strongly on college campuses. This means that speech may only be regulated on campus when the speech is deemed to elicit "... substantial disruption of or material interference with school activities" (393 U.S. 514). In addition to *Tinker* being implemented towards higher education, the Court also recognized that a line needs to be drawn between advocacy, which was deemed to have full protection, and action, which does not (408 U.S. 192). These are the clear regulations set forth by the Supreme Court to help define the boundaries of free speech, specifically towards public college campuses. However, though these standards exist, they are loosely defined and vague. The line might have been mentioned, but the degree to which the line exists is questionable, and the regulations for free speech remain a gray area for legal discussion.

There is guidance when dealing with free speech on public college campuses, but a lot is still not known. Where academia can draw the line for free speech is uncertain and left up for interpretation. There are cases such as *Chaplinsky* and *Black* that stand alongside Supreme Court

cases dealing indirectly with public college campuses and may be used to help develop standards, but they too are vague in interpretation, where the line is drawn remains the question. In *Chaplinsky* the Court ruled that “fighting words” are unconstitutional, defining them as any words that “inflict injury or tend to incite an immediate breach of the peace” (315 U.S. 572). In *Black*, Justice O’Conner stated that there can be a restriction of speech when such “...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” (538 U.S. 344). But what words inflict injury or incite a breach of peace? What statements intend to commit an act of violence? These are left up to interpretation, by every public institution.

One such public institution, The University of Arizona, is a wonderful example of having a policy for free speech that parallels the Court’s decisions on regulating First Amendment rights; as one might expect, the policy leaves little to be definitively defined. Firstly, the UA policy for free speech maintains the statement that administrations recognize the “... Campus Community’s rights to free speech and expressive activity within public and designated public forums, while preserving public health, safety and welfare” (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). Seems simple enough, but where is the line for public health, safety and welfare? Secondly, the UA puts forth in its policy that the administration may “... regulate the ... manner of free speech and expressive activities in order to prevent unreasonable interference or disruption of its educational, research, outreach and business functions”. Here, there is a clear allusion to *Tinker*, as there is a restriction of free speech if the speech becomes disruptive towards school functions. However, where is the line? What is meant by unreasonable or disruptive? Finally, “... protecting public health, safety and welfare” (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). From a

legal standpoint, where is the line drawn for public health, safety and welfare? Though the terms and interpretation are vague for legal proceedings if any arise, it is not random or an afterthought by the University to implement a policy concerning free speech.

If there is anything to learn from this paper, it is that the issue with regulating free speech on public campuses is ongoing, there are few clear answers, only vague references which have been done intentionally. My personal interpretation of the UA policy comes from this way of understanding free speech, that the vague wording and standards are intentional and with much consideration. When dealing with free speech, the University knows that the subject is unclear, thus to standardize speech, they implement the same unclear terminology and guidelines. There is no line because the Supreme Court has chosen not to define one, and to me the Court has not defined the line because what should be regulated is too complicated to put into a precise standard. Thus, the UA policy follows the Court, leaving the policy up for interpretation.

If the policy is challenged, the UA can fall back on the fact that their terminology can be interpreted in different fashions. For example, the policy forbids speech that is “disruptive”, what is known about disruptive speech is that the restriction is still being argued. *Tinker* may have created the restriction, but *Tinker* has been used in multiple cases, such as *Kuhlmeier*, where the Court referenced *Tinker* but stated that the situation dealt with curriculum and not political speech; so, is *Tinker* limited to just political speech? The answer is “it depends”, because the Court has never addressed the issue (484 U.S. 260). Another example, such as *Frederick*, where the majority felt that the high standards brought forth by *Tinker* do not always apply; so, what standards should be used (551 U.S. 393)? The answer is “it depends”. The UA has a *First Amendment Basics* fact sheet where terms are provided for disruptive speech; such terms include, but are not limited to: threatening behavior, imminent violence and incitement (Political Activity

Fact Sheet, 2017). What is illustrated here is the broad spectrum in which the UA can regulate disruptive behavior. Thus, disruptive speech can take many forms, and due to the indefinite meaning, the UA can be unclear too. The University therefore maintains a legal buffer for a defense, if ever their policy is challenged. The lesson here is that the language within the free speech policy for the UA has gray areas due to the almost limitless interpretations of free speech standards.

How to interpret the first amendment when the situation is dealing with public college campuses is difficult and has definitive standards, so how should someone go about reviewing the subject? My answer, though just an opinion, is that each situation should be looked at on a case-by-case basis. After reviewing a multitude of cases from *Tinker* to *Healy* the underlining theme of the majority decision is that each case is looked at individually with references and additives from previous cases, hence, the details are what matter. The facts behind each case are the key. In my opinion, when dealing with the First Amendment on public college campuses, each situation deserves its own separate review. Each time Brother Dean speaks on the UA campus, his words and actions should be reviewed separately from his previous engagements. The facts and factors per situation are the key to interpreting free speech.

Factors that hold relevance to speech on public college campuses include whether the speech takes place on the campus itself, what specifically is being spoken or demonstrated, is the speech directed to someone or a group specifically or is the speech broad, at what point has the speech turned to action, is the speech considered hate speech, violent, disruptive, or threatening to any reasonable individuals' ideals? These are just a few factors which must be asked when dealing with speech on public college campuses.

For instance: suppose an individual is on the University of Arizona's campus and they are preaching about a contested subject. Many of the factors listed above will be used in determining whether the speech is constitutionally upheld by the First Amendment or if the speech is deemed unconstitutional and in violation of the University's policy.

If the language is specifically targeting a group, the speech may still be allowed, however, if the speech turns to action in the form of violence, the administration may ban the speaker from speaking. The reason can be found in the Supreme Court case *Chaplinsky*, where the Court found that if speech was shown to "inflict injury or tend to incite an immediate breach of the peace", the regulation and halting of the speech may take place. In addition, the University of Arizona's policy states that violent acts may be reprimanded and is unprotected (315 U.S. 572) (UA Policy and Regulations Governing the Use of the Campus, 2012, p. 1). If the speaker is blocking student and faculty paths to buildings, or preaching in classroom designated areas or halls, the speech may be perceived as disorderly; and because of *Tinker*, the speech may be deemed unprotected and able to be regulated (393 U.S. 503).

What may be evident now is that the actions and speech must be specific as well as the context. Just speaking words, does not cause regulation or constitutionality, it is the content of the speech, the actions of the language and the place that brings into question the legality of the speech. The Courts examined some of these specifics and contexts, but because of the narrow examination, the opinion and ruling can only be interpreted for situations similar to the cases viewed. For instance, what is meant by this is, just because the Court ruled in favor of the student organization's right to congregate in *Healy*, does not mean that the Court will give the same ruling to every school organization. The context of the case focused around universities not having the right to deny clubs their right to meet due to an assumption that the club may be

disruptive or violent, but what if the administration feels that the club will pose a threat to students, or if the group targets individuals over social media? Furthermore, the case defined advocacy as protected speech and action which is not, but what is the extent of advocacy – surely there is advocacy that should not be protected such as terrorist attacks or shootings; and not all actions are not protected, such as armbands or nonthreatening signs (408 U.S. 169). Overall, the Court was specific in their opinion, which means the circumstances would have to be extremely similar to allow the same ruling to occur again, leaving the situation up for interpretation for other comparable situations.

These interpretations call into question the action of all speech. The Court may have stated that the assumptions of disruption may not be constitutional for regulating speech, or that advocacy is protected where action is not, but these are all broad terms that are without narrow definitions by the Court.

The Supreme Court has neglected to define what disruptive speech is, and where the line is drawn for advocacy and action. Like this paper, the interpretations of the cases are without a concrete answer, the Court has not decided context, they have only decided circumstances in specific settings, case-by-case. The Court may weigh lower education as needing more restrictive rights than higher education, but beyond lower education, the rights of students and faculty remain clouded by vague answers given in circumstantial cases.

I do not believe the Court has given a wrong opinion on any of the cases stated, and while the rulings may be vague, I believe that it has been done with purpose. To have a case ruling that cements a belief is almost impossible, too many factors and contextual details must be defined and looked at to make the result worthwhile. With such fast moving times, circumstances are quick to be evolved and situations likely to be diverse.

Suppose that one year a student while on a public college campus targets a woman, say that she should be raped or killed; it is without a doubt that the speech may be regulated. However, a year later a student is found to be saying similar things about a woman, but the words are written on a website unrelated to the university, can the university then regulate the speech? The answer is 'it depends'. The context, which site, the factors the exact phrasing and where the student posted the threatening speech. The Court would likely judge the situation individually, relating cases such as *Chaplinsky* or *Black*, but the ruling would most likely be vague again, only looking at the specific context and factors of the situation, leaving other similar situation up for debate.

Take for instance, reasonable persons. Perhaps a rule should be, if a reasonable person sees the speech as threatening or disruptive, the speech can be regulated on campuses, however, what is a reasonable person? The view of one individual will be slightly if not totally different than another person. Similarities may exist, just like circumstances between cases, but it is the details, the specific factors that make the answer unknown and contested. My view of a reasonable person, which is a person makes rational decision, will be different than someone else's, and their thoughts behind rational decisions may differ even further. The point is that context and factors matters, such as where the speech is taking place, what is being advocated, is the speech disruptive or threatening, these to me are the ones that matter, but they may not be as important to others. This just further absolute the underlining theme, that context matters, the facts matter, and that each situation must be viewed separately and in its own framework.

Free speech is legally uncertain and legally contested space, no answers are finite and each case is different. UA's policy is vague because there is no correct answer and they want to be legally sound if their policy is ever challenged. The Supreme Court rulings are vague because

there will be times when the situation calls for an alteration of a previous opinion, such as *Tinker* in *Kuhlmeier*. The facts: what happened, what was spoken, what actions were taken... are the most important aspects of free speech, because there are only limited and uncertain guidelines to follow. Judging cases as they come along is the only future for free speech, this is because if there ever is a narrowly defined definition for each aspect of free speech two things may happen. First, there will be no end to the definition or second, the definition will be so limiting that within a few years, the definition will not be inclusive enough or incorporate the speech of an ever-developing world. With technology changing, who knows what speech will be like in the coming years. To have vague standards, with case-by-case facts and interpretations will ensure that free speech is duly handled, maybe not always in the way the public wants, but such is legality. If we take a step back, the questions being asked are often similar, but with their own individuality. Where academics draw the line for speech will vary, and will often be challenged. But, maybe the gray areas are what is needed. Interpretation on a case-by-case basis is almost a must. In addition, it must be noted that this is my opinion, and should be taken as such. There are no right answers, only questions that remain. My analysis is only one that provides some facts, and discusses some unknowns and possible solutions, but the subject remains contested and without conclusion.

## VIII CONCLUSION

Free speech on public college campuses is not going away. The debate is ongoing, and though there is guidance, a lot is still not known. In this paper, we have looked at free speech in many different contexts, beginning at lower education public schools, to higher education public schools, and then to general free speech cases that can be connected to public campuses. The findings are that there are standards, but they are vague and often without a definition. Where the

line should be drawn for speech is legally uncertain and legally contested space. Though each case and the facts should be looked at individually, and standards should be tailored separately, this is an opinion and not an answer that is universally accepted. What was shown in this paper is that free speech on public college campuses is an issue that is here to stay. With few cases dealing directly with speech on public college campuses, and other broad cases creating an umbrella of uncertainty, the subject is ongoing and very much at the forefront of debate.

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