

# Public Assembly

## Use of Public Space/Free Speech for WTCS Colleges



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# Tinker v. Des Moines Independent Community School District (1969)

- A. “The university is a marketplace of ideas and it cannot be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”



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## Tests regarding legality of free speech policies

- A. What type of forum is the public university?
- B. Is each university's free speech policy narrowly tailored to serve a legitimate governmental/regulatory interest?
- C. Is the policy over broad?
- D. Is the policy content neutral?



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# How to identify the various forums?

- A. The traditional public forum
- B. The designated public forum
- C. The limited public forum
- D. The non-public forum



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# Why does the determination of non-public or limited public forum matter?

- A. If limited public forum, the courts apply the reasonableness standard to the university's free speech policy
- B. Is the policy narrowly tailored to meet a legitimate government interest?
- C. Does it provide an adequate alternative for protected expressive activity?



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# Restrictive Policy Minimum Requirements

- A. Be narrowly tailored to meet a significant government interest
- B. Be content neutral
- C. Must leave open ample channels of communication



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## Define “narrowly tailored”

- A. The government’s policy must not burden more speech than necessary in furthering its legitimate interest
- B. Federal courts have stricken “free speech zones” or designated areas where first amendment freedoms are guaranteed in public regions
- C. If the size of a free speech zone on a university campus is undersized or unreasonably located, then free speech may be unreasonably subdued as free speech may not be equally protected in non-free speech zones of the same public region



# What is policy content neutrality?

- A. It requires that the policy restricting expressive activity must do so without primary regard to the view point
- B. Evenhandedness that applies to all individuals without regard to the content of their message
- C. The policy fails the content neutral test if it grants an inordinate amount of discretion to the administrators



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# Alternate channels of communication

- A. In re-assigning a space, time, or manner, how much has the size of the audience been reduced?
- B. Has the restriction substantially limited the types of audiences to be address?



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# Free Speech Exceptions

- A. True threats
- B. Inciting or producing an imminent lawless action
- C. Fighting words (generally ineffective)
- D. Obscenity
- E. Harassment
- F. Libel and defamation
- G. Disruption of the educational environment



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# Model Policies

- A. It is critical for colleges to envision their common areas as traditional public forums for its students, faculty, and staff (or generally consider these designated public forums)
- B. Policies may come in a variety of settings, but careful drafting is crucial:
  - 1. Conduct or Civility/Harassment
  - 2. Computer/Internet Usage
  - 3. Posting Restrictions
  - 4. Political Activities
  - 5. Facility Use and Third-Party Use
    - a. After Hours Restrictions
  - 6. Noise “Ordinance”
  - 7. Free Expression / Demonstration
    - a. Counter-Movements



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# Permitting

- A. Use of campus policy with a limit on sound amplification is a permissible limit on speech.
- B. Spears v. Ariz. Bd. of Regents (D. Ariz. 3/6/19)
  1. Plaintiff attended a festival at Univ. of Ariz. and used sound amplification device to preach the Gospel.
  2. Univ. requested he turn off the microphone because he did not have a permit to emit amplified sounds.
  3. When Plaintiff refused, he was eventually arrested.
  4. Court found the Univ.'s property to be a limited public forum and that the ban and arrest were due to sound violation not speech.



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# Security Costs

- A. Security fees can be assessed as a function of permission to use a building.
- B. Imposition of the fees must be facially neutral.
  - 1. Factors may include the size of the group.
  - 2. Note, this is a target issue of 1<sup>st</sup> Amendment groups.



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# Sponsor Requirements

- A. Courts generally uphold requirements that outside speakers obtain student sponsors before speaking on campus.
- B. Requires, however, that the requirements be:
  - A. Content neutral; and
  - B. Justified.
- C. Note, Courts have struck down policies requiring speakers to publicly disclose their identities because First amendment protects anonymous speech.



## Notice Periods

- A. Courts have upheld requirement to have prior notice of the activity in advance.



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# Limits on Duration or Frequency

- A. Courts generally uphold limits on duration and frequency of speech.
  - 1. The particular limit must be justified by competing uses of the property at issue.
  - 2. Requires careful analysis –
    - a. Bloedorn v. Grube (11<sup>th</sup> Cir.) (upheld limit of 90 minutes no more than once a month)
    - b. Bowman v. White (8<sup>th</sup> Cir.) (struck down cap of 5 eight-hour days of public speaking per individual per semester)
- B. Hours restrictions for buildings





# Barring Use of Designated Area at Particular Times

- A. Careful application, but courts have upheld limitations in designated forums during examination periods.



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## Executive Order (Mar. 21, 2019)

- A. Directs 12 agencies in charge of federal grants to ensure colleges are complying with the law and their own policies to promote free inquiry and debate.
- B. Applies to federal research and education grants, but not to student aid.
- C. Agency implementation is unknown.
  - 1. Will they rely on case law or create new interpretations?



# Situation Discussion

- A. Online Speech
- B. Outside Speaker
- C. Employee Speech
  - 1. Citizen or employee hat?
    - a. Is it within the scope of duties?
  - 2. Matter of public concern?
  - 3. Adequate justification for disparate treatment?
- D. Occupation of President's Office
  - 1. Response Plan?



# Questions?



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Thank you!



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