The First Amendment in elementary schools

MOST FIRST AMENDMENT jurisprudence involving public school students has involved high school and junior high school students. But elementary school students have been involved in their fair share of First Amendment disputes, such as the right to read a Rush Limbaugh book, wear a football jersey or collect signatures from classmates on a petition.

Some recent cases have questioned whether elementary school students should be covered by *Tinker*. Take the case of Rocky Sonkowsky, a 5th-grader at a Minnesota public elementary school, who ran afoul of school officials because he insisted on wearing a Green Bay Packers jersey. When his class won a field trip to visit the Minnesota Vikings practice facility and then-star receiver Cris Carter, school officials refused to allow Sonkowsky to participate, saying they feared he would be disruptive and wear his Green Bay Packer attire.

The Associated Press

Rocky Sonkowsky's Green Bay Packers jersey led to a federal lawsuit.

"There is no constitutional right for a 9-year-old to wear a Green Bay Packers jersey to elementary school," a federal district court judge wrote regarding Sonkowsky's lawsuit against the school district.[1] The court cited another decision saying that "it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students."[2] Rocky and his father, Roy, appealed, but lost in the 8th Circuit. "Assuming Rocky, as a fourth-grader, has a constitutionally protected right to free expression at school, that right was not violated when school officials required adherence to directions on school projects."[3]

"The school principal and the courts did not take his expression and rights seriously enough," said Jodi Thome, the Sonkowskys' attorney. "If this decision stands, elementary school students in the 8th Circuit face onerous restrictions on their free-speech rights."

Amanda Walker-Serrano faced a similar plight when she attempted to collect signatures of her fellow 3rd-graders regarding a field trip to the circus. Amanda believed that the circus involved cruelty to animals and asked her

classmates to sign her petition, which stated: "We 3rd grade kids don't want to go to the circus because they hurt animals." At recess, Amanda persuaded more than 30 of her classmates to sign.

Her teacher instructed her to refrain from gathering signatures. The situation eventually led to a federal lawsuit. A federal trial court and federal appeals court sided with the school officials, finding that 3rd-graders possess few, if any, First Amendment rights. "In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited," the appeals court wrote. "Elementary school officials will undoubtedly be able to regulate much — perhaps most — of the speech that is protected in higher grades. When officials have a legitimate educational reason — whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students — they may ordinarily regulate public elementary school children's speech."[4]

"What education and messages will middle and high school students have about constitutional freedoms, if they are in an institution that does not respect such freedoms?"

— PAUL REINGOLD,
Michigan law professor

Gordon Einhorn, who represented Amanda and her parents in their federal lawsuit, said that the case is symptomatic of courts' deferring to school officials. "In general in the school setting, courts tend to be very deferential to school officials unless there is a very clear violation. That general rule becomes even more true in the elementary school setting."

In Walker-Serrano's case, Einhorn said that the trial court and the 3rd Circuit incorrectly determined that the petitioning activities caused a disruption. "The school showed no proof that the petition caused any disruption on the playground or in the classroom," he said.

Another federal appeals court rejected the First Amendment claim of a student suspended from school for uttering "I'm going to shoot you" to classmates on the playground during a game of cops and robbers.

In *S.G. v. Sayreville Board of Education*, a unanimous three-judge panel of the 3rd U.S. Circuit Court of Appeals ruled that school officials could punish the student for what they considered threatening speech.[5] School officials had dealt with recent incidents at the school involving students and guns. Only two weeks before, a 6-year-old in Flint, Mich., shot and killed a classmate, a tragedy that made national headlines.

Scot Garrick urged the lower courts that his son's statement must be taken in the context of a playground game of cops and robbers. But the appeals court sided with the school: "Although S.G. argues that the boys were only playing a game, the determination of what manner of speech is inappropriate properly rests with the school officials."[6]

In making its ruling, the appeals court panel cited other decisions that questioned the applicability of *Tinker* to elementary schoolchildren. Under *Tinker*, school officials can censor student-initiated expression if they can reasonably forecast that the speech would cause a substantial disruption of school activities or invade the rights of others.

Though the panel did not definitely state that *Tinker* did not apply to elementary-aged students, it wrote: "For our purposes, it is enough to recognize that a school's authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting."[7]

"When I was a little kid, kids used to say 'I'm going to kill you or shoot you' every other minute," says F. Michael Daily, Garrick's attorney. "In this case, the school tried to manufacture a disruption.

"My view is that when you say stuff like 'Kids have no constitutional rights because they're in elementary school,' that should work both ways," Daily explained. "If elementary school kids have no constitutional rights, then they shouldn't be subject to the penalties and discipline imposed on older kids."

He also argued that the 3rd Circuit created "too loose" a standard for school officials in determining when they can punish student expression. "The court has opened up a standard that is completely subjective, giving school officials free reign to determine what speech is socially acceptable," he said.

Another federal appeals court has said that "grammar schools are more about learning, including learning to sit still and be polite, than about robust debate."[8] The problem with this approach, according to some free-speech advocates, is that young children are not taught the importance of freedom of speech.

"The younger the kid, the more we ought to be sending the message that our country is about freedom," said Michigan law professor Paul Reingold, who has represented students in First Amendment lawsuits. "What education and messages will middle and high school students have about constitutional freedoms, if they are in an institution that does not respect such freedoms?"

Garrick appealed to the U.S. Supreme Court, which refused to hear his case.

Teachers' First Amendment rights

WHEN SPEAKING ABOUT students' rights, it's easy to forget about teachers. Often, people think of the student as the First Amendment victim and the educator as the government censor. But teachers have First Amendment rights, too. If teachers do not feel that they can speak freely and convey important information to students, the learning process is harmed. In other words, the rights of students are closely intertwined with the rights of their teachers — and vice versa.

In 1968, the U.S. Supreme Court determined that a public high school teacher has a First Amendment right to speak out as a concerned citizen even against school board policies with which he or she disagrees. In *Pickering v. Board of Education*, the Court ruled that high school science teacher Marvin Pickering's First Amendment rights were violated when school district officials terminated him for his letter to the local newspaper.[1]

In 1968, the U.S. Supreme Court determined that a public high school teacher has a First Amendment right to speak out as a concerned citizen even against school board policies with which he or she disagrees.

The very next year, in the 1969 *Tinker* decision, the U.S. Supreme Court wrote: "It can hardly be argued that either students or *teachers* (emphasis added) shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] While the *Tinker* case generally is viewed as a student free-speech case, the language clearly states that teachers also do not lose their First Amendment rights when they teach at school.

Even before *Tinker*, the Supreme Court recognized the importance of teacher's and students' being "free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." Unfortunately, a series of recent decisions has caused some legal experts to wonder if public school teachers still have any First Amendment rights when they push young minds to expand their horizons.

In a case that raises concerns about both teachers' rights and the rights of students to express themselves creatively, school officials in East St. Louis,

Mo., fired a teacher for not censoring students' creative expressions. North Carolina school officials transferred a teacher whose students performed a play that addressed lesbianism and teen pregnancy. Colorado school officials fired a teacher who showed his class Bernard Bertolucci's anti-fascism film *1900*.

Lacks v. Ferguson

In October 1994, Cecilia Lacks, an award-winning English teacher in East St. Louis, assigned her 11th-grade class the task of writing plays about themes central in their lives. She did not encourage the students to use profanity in their works, but several students wrote plays that examined subjects in their neighborhoods and lives, such as gang violence and coarse language.

Several of the plays contained words such as "fuck" and "nigger." After a complaint, the principal investigated. The district superintendent charged Lacks with "willful or persistent violation of and failure to obey" the school district's no-profanity rule.[3]

The school district fired Lacks, even though the evidence showed that the "no-profanity" rule was never applied to students' creative work in the classroom. The rule was generally applied to punish students or school employees who used profanity outside the classroom context.[4]

Lacks fought her termination, filing a lawsuit in Missouri state court. She alleged several violations of her constitutional rights, including First Amendment and racial discrimination claims. (Lacks was white, while the principal and district superintendent were black.)

The school board removed the case to federal court. In August 1996, a federal district court refused to dismiss Lacks' case. "The record as a whole clearly indicates that there was in practice an unwritten exception in the district for profanity in the classroom," the district court wrote. "The evidence presented to the board was overwhelming that many administrators and teachers in the district allowed class-related profanity depending on the context and degree of profanity."

In November 1996, a federal jury awarded Lacks $500,000 on the First Amendment claim and $250,000 on the racial-discrimination claim. But on appeal, the 8th U.S. Circuit Court of Appeals, in its June 1998 opinion, reversed the jury award. The 8th Circuit wrote that "a school district does not violate the First Amendment when it disciplines a teacher for allowing

students to use profanity repetitiously and egregiously in their written work."

The 8th Circuit acknowledged that Lacks produced "some evidence that confusion existed in the school district as to the profanity policy." However, the panel said that "what went on in Lacks' classroom went far beyond the reading aloud of a novel containing the occasional 'damn.'[5]

"A flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally accepted social standards," the panel concluded.[6]

Lacks appealed the 8th Circuit decision to the U.S. Supreme Court, which declined to review the case.

"Right now, teachers don't know what will happen to them if they talk about anything that someone might consider controversial, such as religious topics, cultural topics or reading certain books."

"I had hoped that I would be remembered for my 25 years in the public schools and my good teaching," Lacks said. "However, if this decision stands, my name will cause panic to teachers across the country. And that would be a horrible thing."

Diana Ayton-Shenker, director of the Freedom to Write program for PEN (Poets, Playwrights, Essayists, Editors and Novelists) said, "If we don't protect the free-speech rights of students to express themselves freely, especially in the context of a creative-writing class, then we will stifle the minds of the future. What I also fear is that this decision will lead to self-censorship in the classroom on the part of teachers."

"Right now, teachers don't know what will happen to them if they talk about anything that someone might consider controversial, such as religious topics, cultural topics or reading certain books."

— CECILIA LACKS, *teacher*

Boring v. Buncombe Board of Education

Margaret Boring taught drama at Charles D. Owens High School in Buncombe County, N.C. In fall 1991, she chose the play *Independence* for four students in her advanced acting class to perform in a state competition.

The play *Independence*, in the words of Boring's lawsuit, "powerfully depicts the dynamics within a dysfunctional, single-parent family — a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." It also, Boring said, "is a play about love, compassion, communication and forgiveness — all family values." However, school

officials emphasized the lesbian character, a four-letter curse word and the illegitimate child.

The students performed the play in a regional competition and won 17 of 21 awards. However, in preparation for the state finals, the students performed the play in another teacher's classroom. After the parent of a student in the class complained to the principal that some of the topics in the play were unsuitable for young minds, the principal ordered certain scenes deleted from the play. The students won 2nd place. In June 1992, the principal transferred Boring to another school, citing "personal conflicts resulting" from the controversy over *Independence*.

"It was very important to me to establish that teachers were covered by the First Amendment. As much of the educational community waited with bated breath, the case proved that we are not."

— MARGARET BORING, *teacher*

Boring sued in federal court, contending that she was punished for exercising her First Amendment right to select the play *Independence* for her students. A federal district court dismissed her lawsuit. On appeal, a three-judge panel of the 4th Circuit reinstated her First Amendment suit. However, in February 1998, the full panel of the 4th Circuit ruled 7-6 against Boring.[7]

The majority applied a test articulated by the U.S. Supreme Court for the free-speech rights of public employees. In order for a public employee to prevail, she must show first that her speech was on a matter of public importance, or public concern. Second, she must show that her free-speech interests outweighed the employer's interests in an efficient workplace.

The majority wrote: "Plaintiff's selection of the play *Independence*, and the editing of the play by the principal, who was upheld by the superintendent of schools, does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, plaintiff has no First Amendment rights derived from her selection of the play."[8] According to the majority, the school, not the teacher, "has the right to fix the curriculum."

Six judges dissented, led by Judge Diana Gibbon Motz. "School administrators must and do have final authority over curriculum decisions," she wrote. "But that authority is not wholly unfettered. Like all other state officials, they must obey the Constitution."[9]

Motz showed particular concern that applying traditional public free-speech law to teachers "fails to account adequately for the unique character of a teacher's in-class speech." She determined that Boring's speech was not "ordinary employee workplace speech nor common public debate. … Any attempt to force it into either of these categories ignores the essence of teaching — to educate, to enlighten, to inspire and the importance of free

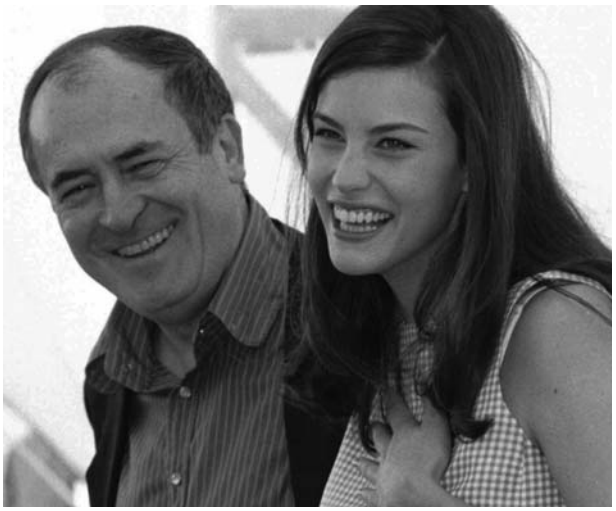
speech to this most critical endeavor."[10]

Boring said her ordeal showed that teachers possess few, if any, First Amendment rights. "It was very important to me to establish that teachers were covered by the First Amendment," she said. "As much of the educational community waited with bated breath, the case proved that we are not."

Joan Bertin, executive director of the National Coalition Against Censorship, decried the *Boring* decision as "another example of the courts failing to protect the First Amendment rights of teachers. The *Boring* and *Lacks* decisions threaten creative teaching."

Board of Education of Jefferson County School District R-1 v. Wilder

Al Wilder served as a language arts instructor at Columbine High School (the same school that became known nationwide after the 1999 shooting there) in Littleton, Colo., from 1980 until his termination in 1995. In the spring of 1995, Wilder showed his debate class the film *1900* by the famed director Bernardo Bertolucci. The film addressed the lives of two youths in Italy during the rise of fascism and contained scenes of nudity, masturbation, drug use, profanity and violence.



The Associated Press

Director Bernardo Bertolucci and actress Liv Tyler. Columbine High School officials dismissed a high school teacher after he showed a Bertolucci film to students.

After a parent complained to the principal about her daughter's having seen the movie, the principal placed Wilder on administrative leave. In August 1995, the school district superintendent recommended to the Board of Education that Wilder be dismissed, alleging that Wilder had violated a school district policy that requires teachers to provide 20 days' written notice to school principals before presenting a "controversial learning resource."

Wilder objected to the charges and requested an evidentiary hearing pursuant to state law. The hearing officer determined that Wilder should be reinstated because most teachers at Columbine were not aware of the policy. The hearing officer also noted that the policy was not contained in any faculty handbook.

In April 1996, the Board of Education rejected the hearing officer's findings and dismissed Wilder. They noted the school district's argument that Wilder's dismissal was also based on other misconduct, such as leaving classes

unattended, and insubordination, and called the showing of the film *1900* "the straw that broke the camel's back."

Wilder appealed the decision to the Colorado Court of Appeals. The appeals court ruled that the board had violated Wilder's First Amendment rights because he was not given proper notice of what conduct was prohibited.[11]

The appeals court determined that "a teacher is entitled to notice of what classroom conduct is prohibited, and a school district cannot retaliate against speech that it did not prohibit." Because Wilder did not have advance knowledge of the regulation requiring advance review, the termination "violated Wilder's First Amendment interest in choosing a particular pedagogical method for a course," the court wrote.

On appeal, the Colorado Supreme Court reversed, finding that the Board of Education had the right to regulate the showing of *1900*, as long as the regulation was "reasonably related to a legitimate pedagogical concern" — the *Hazelwood* standard.[12]

The Colorado high court noted that the U.S. Supreme Court in *Hazelwood* ruled that school officials can control school-sponsored speech on "potentially sensitive topics," such as drug use, irresponsible sex or violence.

Controlling the curriculum and regulating student exposure to profanity, violence, vulgarity and other material, the majority wrote, furthers reasonable educational concerns. The Court concluded that "Wilder has no First Amendment right to use non-approved controversial learning resources in his classroom without following the district's policy."[13]

Three justices dissented, finding that the film *1900* is not "patently offensive" and "deals with the fascist counterpart to Nazism in the same era as *Schindler's List*."

The dissent noted that school officials had approved off-campus viewing of the movie *Schindler's List* in another class. "Most, if not all, of the logic and debate students were about to graduate and enter into the adult world, a particularly appropriate time to view such a film that focuses on the rites of passage of two boys during a turbulent period in history when the democratic countries were struggling against the fascist and Nazi regimes for their survival," the dissent wrote.[14]

"When we quell controversy for the sake of congeniality, we deprive

democracy of its mentors," the dissent read. "The students of Wilder's class learned a valuable lesson at the expense of their teacher's job: one person's expression of ideas in the interest of critical thought and learning may be another person's 'controversy.'"[15]

Bertolucci himself protested the actions of the Colorado school officials, calling Wilder's termination "dark (and) medieval." Joan Bertin of the National Coalition Against Censorship criticized the termination as "a significant and outrageous interference with a teacher's academic freedom and students' right to learn."

Bertin said that the judicial opinions in the *Lacks, Boring* and *Wilder* cases all "glossed over important aspects of First Amendment values and academic freedom. None of these cases took into account the special nature of the educational mission."

While these cases demonstrate the silencing of the First Amendment rights of public school teachers, an equally troubling issue is the number of teachers who remain silent and engage in self-censorship in order to avoid the same type of backlash suffered by these instructors. In certain school districts, for instance, teachers have been punished for discussing homosexuality. If controversial topics and ideas are kept from inquiring young minds because their teachers fear reprisal, opportunities to challenge, inform and enlighten students are being missed in the nation's public schools.

While these cases demonstrate the silencing of the First Amendment rights of public school teachers, an equally troubling issue is the number of teachers who engage in self-censorship.

Conclusion

IN THE WAKE of school shootings, gang activity, racial tensions and many other problems that face educators, school officials and legislators continue to seek ways to ensure that schools are places where students can learn in safety. In 2001, the Colorado legislature passed a bill that requires school districts to adopt anti-bullying policies. In March 2002, the Washington legislature passed a similar measure. As this report has discussed, some of their solutions have already been the subject of litigation. While few would criticize an attempt to encourage civility, some schools may have gone too far in adapting harassment policies that forbid uncivil remarks.

While few would criticize an attempt to encourage civility, some schools may have gone too far in adapting harassment policies that forbid uncivil remarks.

A recent federal appeals court decision casts doubt on the validity of some of these policies. In *Saxe v. State College Area School District*, the 3rd U.S. Circuit Court of Appeals struck down a Pennsylvania school district's anti-harassment policy,[1] which defined harassment:

> *Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written materials or pictures.*

Another section of the policy prohibits harassment on the basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values."

The 3rd Circuit determined this policy simply went too far under the Constitution. "By prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse — the lifeblood of constitutional self-government (and democratic education) and the core concern of the First Amendment," the court wrote.

The appeals court determined that the school could not justify the speech code under the deferential *Hazelwood* standard because much of the

prohibited speech is student-initiated and must be analyzed under *Tinker*. The court determined that the policy also swept too broadly to be justified under *Tinker*'s substantial-disruption standard.

The appeals court wrote that the policy "fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy."

Government leaders must recognize that in the search for solutions to the difficult issues facing school officials, the Bill of Rights cannot be discarded.

Kevin O'Shea, publisher of *First Amendment Rights in Education*, said the decision was troubling. "The ruling creates even more confusion regarding the appropriate standard for determining how far is too far when it comes to the rights of public school students under the Free Speech Clause of the First Amendment," he wrote.[2]

He said that the 3rd Circuit decision could lead to a "legal atmosphere in which it is difficult for school districts to know precisely what authority they possess."[3]

O'Shea also said, however, that school districts should turn a careful eye to their policies and make sure they do not punish mere teasing. "As objectionable as such behavior may be, it is all but impossible to prohibit harassment without also barring speech protected under the First Amendment."

Robert Richards, a law professor and First Amendment author, said the decision was "fairly consistent with settled principles of constitutional law. You couldn't read this policy and really understand what type of speech was being prohibited. Routine discussions could be censored under this policy."

The *Saxe* decision epitomized the dilemma faced by school officials. They realize they must provide a safe learning environment where education is the primary goal. However, they must do so in a way that comports with the Constitution.

Government leaders must recognize that in the search for solutions to the difficult issues facing school officials, the Bill of Rights cannot be discarded. Students are the future leaders of our country and should not have their voices silenced. Many believe, in fact, that schools should provide more forums for students to air their grievances and express their feelings.

Students express themselves in many ways, ranging from the clothes they wear to the clubs they join. Students must be allowed to learn in an environment where, to quote Judge Rodney Sippel in the *Beussink* case, they can "see the protections of the United States Constitution and the Bill of Rights at work." Otherwise, as noted constitutional scholar Erwin Chemerinsky has warned, "students [will] leave most of their First Amendment rights at the schoolhouse gate."[4]

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School uniforms and dress codes

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The First Amendment in elementary schools

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2 Id., citing Muller by *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996).

3 *Sonkowsky v. Board of Education for Independent No. 721*, 327 F.3d 675,677 (3rd Cir. 2003).

4 *Walker-Serrano v. Leonard*, 325 F.3d 412, 418 (3rd Cir. 2003).

5 http://www.ca3.uscourts.gov/opinarch/022384p.pdf

6 *S.G. v. Sayreville Board of Education*, 333 F. 3d 417, 423 (3rd Cir. 2003).

7 Id.

8 Muller by *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538 (7th Cir. 1996).

Teachers' First Amendment rights

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2 *Tinker*, 393 U.S. at 506 (1969).

3 *Sweezy v. New Hampshire* 354 U.S. 234 (1957).

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6 Id. at 724.

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Conclusion

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