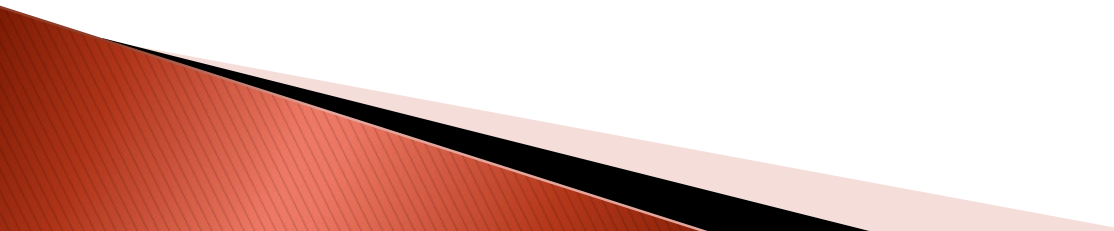




# Speech on Campus

Dave Stolier, Sr. Assistant Attorney General  
June, 2020

# Key Takeaway Points

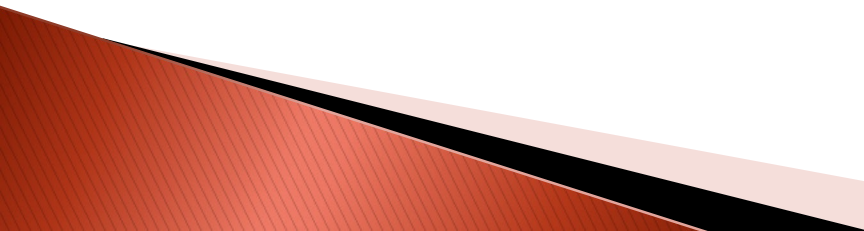
1. Pure speech, especially political speech (and religious speech), carries a high degree of constitutional protection
  2. Courts give some consideration to educational setting and mission
  3. Be thoughtful about campus policies around assembly and speech activities—Tailor to your needs
  4. Be careful about restricting pure speech in the name of protecting students from harassment. Be viewpoint neutral
- 



# Constitutional Provisions

- ▶ Congress shall make no law. . . Abridging the freedom of the speech, or the press. . . First Amendment to the U.S. Constitution
- ▶ Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

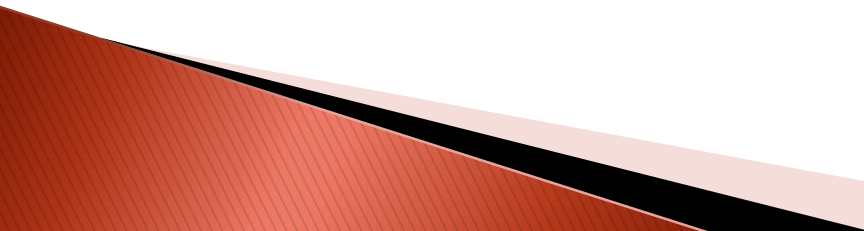
Article I, Section 5 of the Washington State Constitution





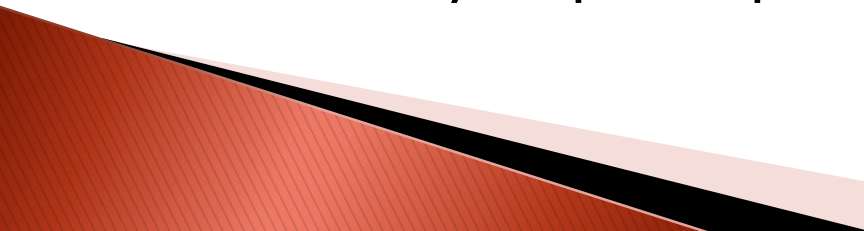
# Evaluating a 1<sup>st</sup> Amendment Claim

## 3-Part Test

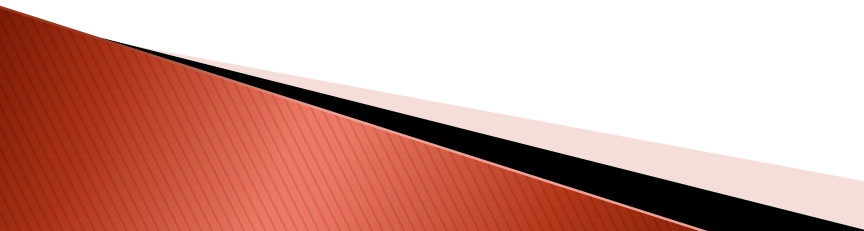
- ▶ 1. Whether the speech is protected
  - ▶ 2. Nature of the forum where speech is to occur
  - ▶ 3. Whether the government justification satisfies the applicable standard for burdening speech
- 



# Unprotected Speech

- ▶ Speech that promotes the imminent prospect of actual violence or harm (e.g., Fighting Words, inciting violence)
  - ▶ True threats
  - ▶ Defamation
  - ▶ Obscenity
  - ▶ False & deceptive advertising
  - ▶ Speech causing an actual, material disruption of school operations or interfering with rights of others. *Tinker v. Des Moines Indep. Comm. School*
  - ▶ \*Protected class harassment. If, sufficiently severe, pervasive, and/or persistent to deny another student the ability to participate in the education program.
- 

# School-sponsored speech. Great latitude to regulate

- ▶ Speech that bears the mark or imprimatur of the College is the College's speech
  - ▶ Messages in college publications
  - ▶ Public television or radio
  - ▶ University issued transcripts
  - ▶ Approval of theses and dissertations
  - ▶ Social media messages from school to public
- 



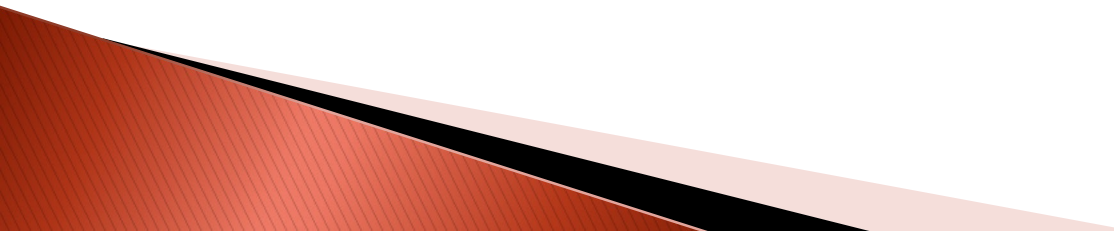
# Reasons for Restricting Speech

- ▶ Controlling the curriculum
- ▶ Ensuring safety, security, and order
- ▶ Preserving architectural aesthetics
- ▶ Protecting the educational experience of students in furtherance of the College's mission
- ▶ Limiting volume of commercial solicitations
  
- ▶ But, restricting pure speech based on its content is constitutionally disfavored.



# Forum Analysis – Taxonomy

*Perry Education Ass'n* (1983)/*Cornelius* (1985)

1. Traditional Public Forum
  2. Designated or Limited Public Forum
  3. Non-public Forum (closed forum, or non-forum) – e.g., admin offices
- 



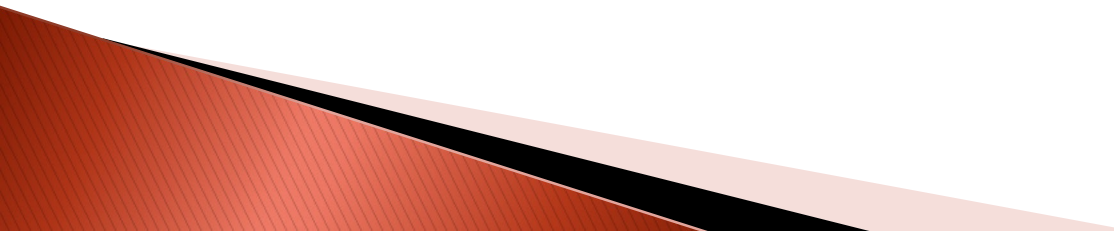


# Forum Analysis –Variety of potential forums for speech on campus:

- ▶ Classrooms
- ▶ Private offices
- ▶ Concert halls and auditoriums
- ▶ Bulletin Boards and Kiosks
- ▶ Open spaces--College lawns, streets, and sidewalks
- ▶ Email system
- ▶ Yearbooks
- ▶ Alumni magazines
- ▶ Stage productions
- ▶ Social media platforms



# Students Versus Non-students

- ▶ “A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. **We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.**” *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981).
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# Public Forums – Time, Place and Manner Restrictions

Gov't may place reasonable **time, place, or manner** restrictions if:

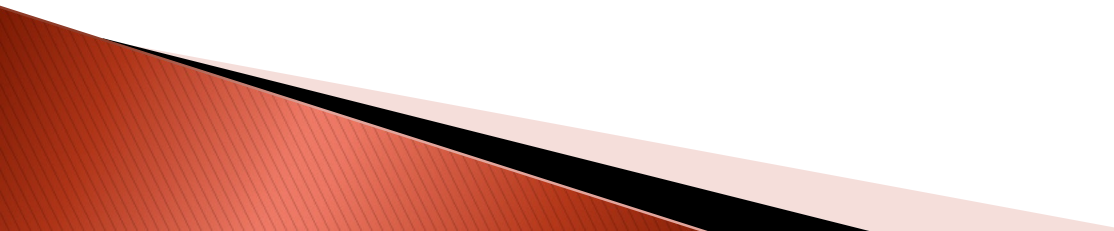
- (a) **Content-neutral**
- (b) Narrowly tailored to serve a significant/compelling government interest (1<sup>st</sup> Amendment/WA const.)
- (c) Leave open ample alternative channels of communication



# Reasonable Time, Place and Manner Restrictions

- ▶ Limitation on amplifiers or other noise thresholds
- ▶ Time of day limitations
- ▶ No blocking building entrances
- ▶ Limitation on size of placards
- ▶ Limitation on number of people
- ▶ Dead zones during exams
- ▶ Speech zones should be reasonable in size and location
- ▶ No Camping?

# Heckler's Veto

- ▶ Stifling disfavored speech content because some, many, or most people disagree.
  - ▶ Stifling controversial speech because it may draw opponents and cause disruption.
  - ▶ Insufficient to legally silence protected speech.
- 




# Harassment Codes

- (1) Does the code burden any speech?
- (2) If so, does it meet the *Tinker* std--  
actual, material disruption of school  
operations or interfering with rights of  
others.



# Harassment Codes

- ▶ To the extent such a code reaches protected speech, it may be held to be unconstitutionally vague or overbroad, or considered viewpoint discrimination
  - ▶ “[W]e do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.”  
DeJohn v. Temple U.
- 



# Harassing Speech

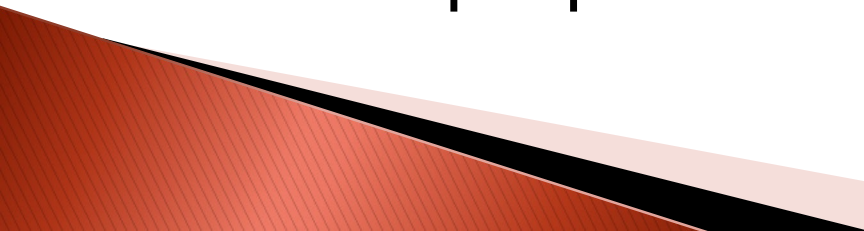
- ▶ How can the college protect students from peer to peer racial or sexual harassment?
- ▶ 1. Focus on the effect, not on motivation or intent.
- ▶ 2. Focus on conduct. Speech may be an incidental portion of conduct that is sufficiently severe, persistent, or pervasive to the point of limiting or denying another student's ability to participate in or benefit from the educational program



# Tools to Combat Hate Speech

- ▶ Counter speech
- ▶ Remove material violating content-neutral posting rules
- ▶ Enforce conduct code provisions related to
  - ○ Damaging or defacing property
  - ○ Obstructing egress and ingress
  - ○ Physical assault or abuse
  - ○ Discriminatory harassment
- ▶ Law enforcement for criminal conduct
- ▶ Safety plan, document, build case

# Classroom Speech

- ▶ Is it curriculum–related?
  - ▶ Does it substantially interfere with other students' ability to learn/cause actual material disruption?
  - ▶ Free expression of students' ideas and views without administrative reprisal versus interest of educators in educating in an environment free of purposeless distractions.
- 



# Social Media

- ▶ If inviting interaction and comment, you are creating a public forum
- ▶ All the same speech and due process principles apply to speech/conduct through the use of social media
- ▶ Courts are just now starting to grapple with some of the unique issues presented by social media
- ▶ Misconduct through social media often brings questions regarding the nexus between off-campus conduct and impact to the campus community



# Safe Harbor for Penalizing Conduct Containing Speech

- ▶ Actual, material disruption of school operations or interfering with rights of others.
  - ▶ Interference with rights of others: sufficiently severe, pervasive, (and, or) persistent to limit or deny another student's ability to participate in or benefit from the educational program
- 