

# Religious Speech in Public Schools

National School Boards Association  
Council of School Attorneys

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## Presentation Overview



- Degree of judicial scrutiny
- Student religious expression
- Hate speech
- Compelled speech
- Religion in Schools
- Employee religious expression

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# DEGREE OF JUDICIAL SCRUTINY

## Clear precedent, or a tangled mess?

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## Degree of Judicial Scrutiny

*Tinker, Garcetti, and Smith*

Traditional standards v. Hybrid-rights theory



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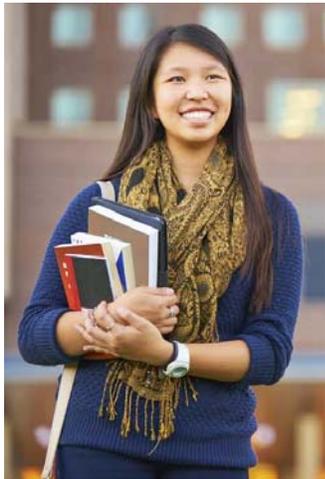
## Neutrality: The First Amendment's Mandate



“Public schools may not implicate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect.”

## STUDENT RELIGIOUS EXPRESSION Many Rights and Few Restrictions

## Student Religious Expression



- Students have broad freedoms:
  - To speak
  - To distribute materials
  - To espouse religious ideas
  - To pray and have religious meetings
- These freedoms have few limitations:
  - Disruptive
  - Vulgar, lewd, or plainly offensive
  - Obscene/libel/slandorous speech
  - Promotion of illegal substances/acts
  - True Threats/danger
  - Infringes on the rights of others

## Disruptive Speech



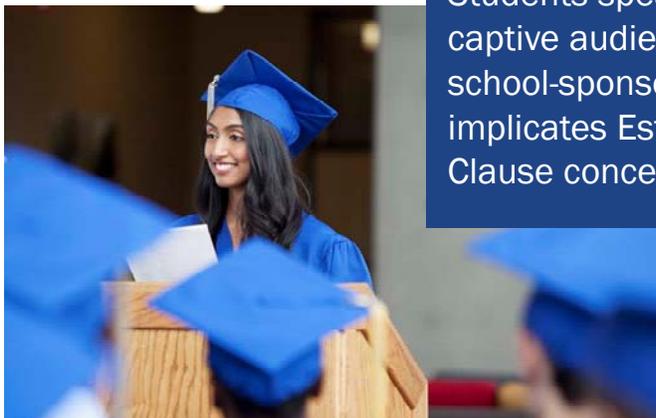
“It can hardly be argued that . . . students . . . shed their constitutional rights of speech or expression at the schoolhouse gate.”

## Student Religious Expression in Assignments

- Judged by academic standards and other legitimate pedagogical concerns
- Cannot censor student assignments based on religious content
- Teachers are educators, not gatekeepers



## Student Religious Expression at School Events



Students speaking to a captive audience at a school-sponsored event implicates Establishment Clause concerns

# “HATE SPEECH” What about it?

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## “Hate Speech”



**20%**  
increase in  
**HATE  
CRIMES**  
NATIONWIDE

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## “Hate Speech”

7 times more Muslims

10 times more Buddhists

9 times more Hindus

220 times more Sikhs

.....than in 1970

## “Hate Speech” - Rise of Intolerance

- More than 50% Muslims reported experiencing religious-based discrimination in past year
- 1 of 3 Hindu American children have been bullied
- 1 of 8 students report teachers made fun of their faith or tradition
- Significant increase in the number of hate groups

## Bullying: A Duty to Protect Students

Prevent and eliminate bullying based on a protected characteristic such as race, ethnicity, sexual orientation, gender, or religious belief

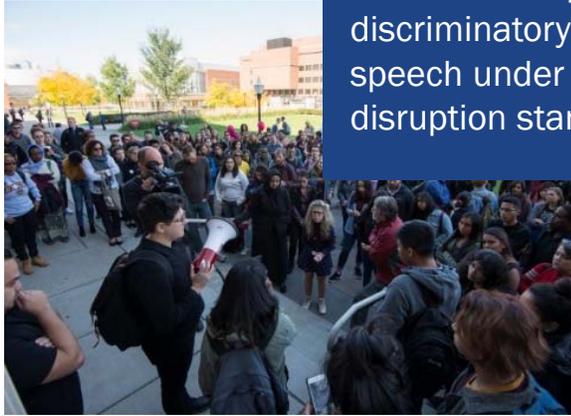


## Contradictory Supreme Court Mandates?

“The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

Individuals have a “very basic right to be free from sights, sounds, and tangible matter we do not want.”

## “Hate Speech” Regulated as Disruptive



Courts have upheld regulation of discriminatory or hateful student speech under the substantial disruption standard

## Regulating “Hate Speech” When it “Impacts Others”



Districts *may* be able to regulate speech interferes with an identified or targeted student’s physical or psychological ability to attend/participate in school based on a student’s protected status

Developing, unsettled law

**Pending Before the Supreme Court:  
When is religious speech discriminatory?**



- Baker refuses to bake a cake for a same sex wedding
- Baker contends the government cannot compel him to endorse a message against his religious beliefs
- The government contends this is discrimination
- Opinion in June 2018

**COMPELLED STUDENT EXPRESSION  
Conflicting with a Student's Beliefs**

## Kneeling During the Pledge or Anthem



## School Curriculum Controls over Parent Rights

- Parents cannot control school curriculum
- Schools are not obligated to fully exempt or opt children out of *required* school courses
- State law may provide specific opt out rights
- Instruction must be provided through an academic, historical, and scientific perspective
- The principles allows for instruction about the historical accomplishments of LGBTQ+ persons **and** religion

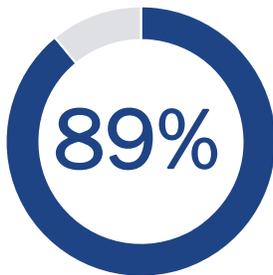
# RELIGION IN SCHOOLS



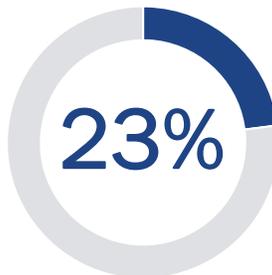
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## Religion in Schools

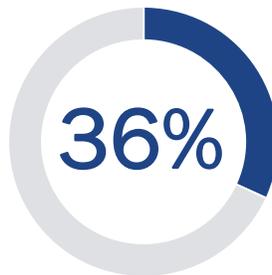
Public school teachers cannot lead class in prayer



Public school teachers can read from the Bible as an example of literature



Public schools can offer comparative religion classes



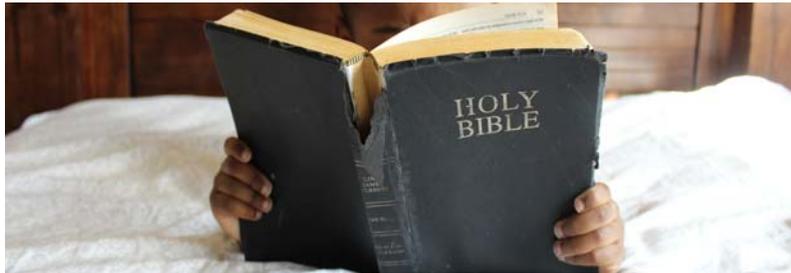
SOURCE: Pew Research Center



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## Teaching About Religion

- Religious studies is now an eighth core Social Studies discipline
- National Council for Social Studies Framework and Guidance Documents available



## Civic Framework

Academic	vs.	Devotional
Awareness		Acceptance
Study		Practice
Expose		Impose
Educates		Promote
Educates		Denigrate
Informs		Conform

## EMPLOYEE RELIGIOUS EXPRESSION

Private Expression Permitted  
Government Expression Limited



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### Staff Religious Expression - Restrictions

- When in “official capacity,” staff cannot:
  - Participate in flag pole meetings
  - Initiate or participate in prayer with students
  - Participate in student religious meetings
  - Participate in graduation prayers
  - Proselytize

“Official Capacity” is all time at school or at a school sponsored event, before or after instructional day.



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## ***Kennedy v. Bremerton School District***

### **Ninth Circuit weighs in on employee religious speech:**

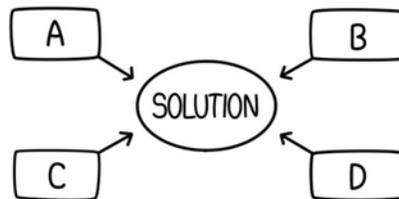
- High school football coach disciplined for praying on 50-yard line after football games
- Ninth Circuit held he was speaking as an employee
- Regulation not a violation of his free speech rights



**MOVING FORWARD: SOLUTIONS**

## Systemic, Proactive Solutions

- “Common Ground Task Force”
- Student, staff and community training
- Curriculum changes: World Religions course?
- Student-led focus groups
- Policy Changes: “Religion in Schools” policy?



## Take-Aways

1. Take the “Sacred Pause” before acting
2. Student free speech and religious expression rights are broad and fact-specific
3. Staff – be neutral with respect to politics and religion
4. Consider systemic solutions: Task Force



## Questions



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