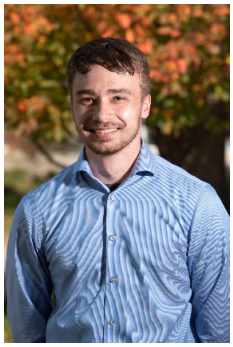

Are Window Display Bans at Public Universities Constitutional?

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Background

Historically, public universities have been a means for its student population to achieve a sort of freedom that they had not yet experienced during their high school lives. Traditional college students are finally away from their guardians and have a chance to be around people their age for the duration of their degree. Being on a college campus allows you so many opportunities to express yourself in every facet of your life. That includes their ability to express themselves through their freedom of expression. In the United States, most campuses provide numerous channels for students to express their feelings on a wide variety of topics including politics, religion, and more. The United States Supreme Court has protected an individual's right to free speech not just in private residences, but also on public college campuses. The question I am posing is whether there is similar protection in college dorm rooms as there is in private residences. Specifically, are window display bans in student housing at public universities constitutional? There are a series of issues that must be addressed when talking about this question such as content neutrality, the differentiation between public and private forums, and captive audiences which will be addressed below.

Examples of Relevant University Policies

Ohio State: "*Windows must remain clear from obstruction and university window coverings need to be visible from the outside. Posting, hanging or otherwise displaying signage, lighting or other materials in or around the residence hall windows or on university window coverings is not permitted.*"[1]

UW-La Crosse: *"Due to fire safety considerations and the possibility of damage to residence hall room windows, residents are prohibited from posting or hanging material on either side of residence hall windows. This includes but is not limited to signs, posters, flags, banners, paint, lights, post-its, or anything that partially obstructs windows."*[2]

UW-Green Bay: "Items posted on the outside of room/apartment doors or in room/apartment windows which are intended to demean an individual and create a hostile, and/or intimidating environment are prohibited."[3]

UW-Parkside: *"If an item is posted on or is visible in a student room door or room window*

that targets a specific individual or group in a harmful, harassing, or intimidating manner, the resident/s will be asked to remove it. If an item that is posted is generally discriminatory or distasteful, a discussion between the student and the Hall Director will occur."[4]

UW-Platteville: *"no items may be adhered to or displayed in windows. The only items that may be in a window are twinkle lights around the perimeter of the window."*[5]

UW-River Falls: *Residents posting items in a public manner that target specific individuals in a harmful, harassing, or intimidating manner or that are considered as hate/bias by UWRF will be required to remove these items.*[6]

UW-Eau Claire: *"To prevent damage to our facilities and maintain a welcoming atmosphere in the Residence Halls, residents may not display anything outside of their room, on a balcony, or in a residence hall window"*[7]

History of Free Speech

Since the United States constitution was ratified, there has been the notion of free speech. The United States' Constitution in the First Amendment states, "Congress shall make no law... prohibiting the free exercise thereof; or abridging the freedom of speech or of the press..."[8] The United States' government has shared the viewed that free speech is an important right that United States citizens possess. This means that at the federal level, the government could not make any law abridging an individual's freedom of speech, religion, etc.

The first case that involved the bill of rights being incorporated at the state level was the case *Barron v. Baltimore* (1833). This case does not pertain to free speech particularly, but it involves a state question that determines if individuals have rights from the Bill of Rights that protect them from state governments. At this point, it was already clear that United States citizens had rights granted by the federal government, but it had not yet been established if those are the same with state governments. In this case John Barron claimed that the city of Baltimore, in doing construction, diverted the water flow in the harbor area where his wharf was. He sued the state for a portion of his financial damages. The trial court determined he was entitled to $4500. The appellate court disagreed and struck that down. At the Supreme Court, they determined unanimously that the framer's intent in the bill of rights was an exclusive check on the federal government, not the state and federal jointly. Chief Justice Marshall thus came to the decision that the Supreme Court had no jurisdiction to hear this case. Marshall cited evidence from the defendants and Constitution and said, "This court, therefore, has no jurisdiction of the cause, and it is dismissed."[9] The major takeaway from this case was that, at the state level, the Bill of Rights was not incorporated, so the state government could infringe upon individual's rights. This would stand for continue for almost a hundred years.

Several years after Barron v. Baltimore the United States adopted the Fourteenth Amendment. This amendment became a vital piece of the United States Constitution as it relates to free speech and the Bill of Rights. The Due Process Clause of the Fourteenth Amendment says, "Nor shall any State deprive any person of life, liberty, or property, without due process of law"[10]. This clause in the Constitution is very similar to a part of the Fifth Amendment which was used for the *Barron* case. In fact, it is almost the same text. The Fourteenth Amendment explicitly mentions the state. While this could be used to describe a country, it can also be used to describe

literal states in the United States. This would become very important in *Gitlow v. New York* (1925) when the Court heard a case involving the incorporation of the Bill of Rights at a state level.

As with almost every right listed in the bill of rights, the right needs to be incorporated at the state level for it to apply to the states. Fast-forward 134 years to 1925 and a case can be found in the United States Supreme Court that would incorporate the First Amendment's free speech clause. In *Gitlow v. New York* (1925), the United States' Supreme Court made a ruling for the incorporation of the amendment. In *Gitlow,* Gitlow who was a reported socialist and was arrented for printing and distributing copies of the book the "Left Wing Manifesto". In that book there are calls to action such as strikes. According to New York Courts, this was a violation of the New York Criminal Anarchy Law. This law punished those who were in favor of a forcible overthrow of the government. Gitlow made the argument that no negative action followed his distribution of the manifesto. While working through the New York state court system he was convicted by the trial court, then affirmed by both the appellate and Superior Court of New York. This posed the question of if a state can punish political speech that advocated for the overthrowing of the government. The Court upheld the constitutionality of the state's right to punish those who threaten to overthrow the government, but there is a caveat to it. The United States Supreme Court requested that there should be a resulting action that negatively impacts the government. Justice Sanford said, "The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement..."[11] The fact that the state could not provide evidence of unlawful action following the publication made this a constitutional issue caused by the state. Justice Sanford went on to say, "We may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States."[12] By the conclusion of this case, the United States Supreme Court decided that the Fourteenth Amendment incorporated the First Amendment to be applied to the individual states.

Limitations of Free Speech

The liberties granted to people in the Free Speech Clause are not absolute. There are a large array of issues that came up and continue to come up in the Courts that created exceptions to individuals having a right to free speech. For instance, a case the exhibited this exact exception to free speech was *Schenck v. United States* (1919). Charles Schenck and an acquaintance distributed a pamphlet that alleged that the draft was a violation of the Thirteenth Amendment of the United States Constitution. The product they handed out encouraged people to avoid the draft for World War I. They allegedly encouraged that this be a peaceful protest of the draft. The issue with this is, according to the Courts, it is a violation of the Espionage Act of 1917. The pair sued the government citing that this is a clear violation of the First Amendment. The Supreme Court, in a unanimous decision written by Oliver Wendell Holmes said that this did not violate the First Amendment. The Court concluded that the publication could interfere significantly enough to undermine the efforts of Congress to protect the country through the draft. Holmes in his decision said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an

injunction against uttering words that may have all the effect of force."[13] In that moment, the Court determined that a couple people handing pamphlets encouraging people to boycott the draft would undermine Congress's ability to perform the draft. Later, the United States' Supreme Court determined additional ways to limit free speech through their court decisions. The mentioning of the case is strictly because of its relevance to free speech and expression and to provide an account of other methods previously used since it was overruled in the next case.

The extent to which the Court could limit free speech was then put to the test again with *Brandenburg v. Ohio* (1969). In this case, Brandenburg, who was the leader of the Ku Klux Klan in that Ohio area, was challenging a law that limited his speech. He was holding a Klan meeting in Ohio where he spouted racist rhetoric that could have turned dangerous had the members acted on what was said. Brandenburg was arrested and convicted under Ohio's Criminal Syndicalism law. In essence, this law made it illegal to advocate for violence or unlawful methods of terrorism if it is to accomplish a type of political reform. The law also outlawed gatherings of any group whose purpose was to advocate for criminal syndicalism. Brandenburg challenged this law and his conviction on grounds that it was a violation of his First and Fourteenth Amendment rights. The Supreme Court determined that the Ohio law did in fact violate his right to free speech. To reason this they used a two-part test. The test as a whole reads, "Free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[14] First, there needs to be speech that occurs. Next, to meet this test, the speech needs to be proven to have incited violence. Looking at *Brandenburg*, the Courts partially overruled *Schenck* but not entirely. Since both methods are still used for interpreting free speech, the records do not directly say *Schenck* was overruled.

A couple years later a new challenge revolving around free speech made it to the Supreme Court. A young man, Paul Cohen, wore a jacket that read "FUCK THE DRAFT. STOP THE WAR". Cohen opposed the war in Vietnam and used his jacket as a form of protest. His jacket allegedly violated California Penal Code 415 which outlawed an individual disturbing peace or quiet of any neighborhood or person… by… offensive conduct".[15] In a decision written by Justice John Harlan, the Court held that the California statute violated Cohen's right to free speech and expression. In his decision he mentioned, "it is nevertheless often true that one man's vulgarity is another's lyric."[16] This is an important precedent that the Supreme Court of the United States set. This quote by justice Harlan is vital for the foundation of free speech in the United States.

School Speech

The previous cases were examples of speech that could be limited regardless of location. The following case involve student speech in a school setting. One of the first cases involving student speech was *Tinker v. Des Moines* (1969). Students from a school in Iowa planned a form of passive protest displaying their support of a truce in the Vietnam War. To do this, the students wore armbands with anti-war messages. The school caught wind of this and created a policy banning the wearing of armbands. If they did not comply with the request to remove the band, they would be sent home and suspended. A couple of students tested this and were suspended. Their parents sued the school for allegedly violating the First Amendment rights of the students

at the Des Moines Independent Community School District. In the district court, the court held that the school's actions were reasonable and dismissed the case. The parents appealed this decision to the United States Court of Appeals and affirmed the district court's opinion. The Supreme Court of the United States then weighed in on the case and determined that the prohibition against armbands in a public school did violate student's rights of free speech. In the opinion of the Court, written by Justice Fortas, students do not shed their First Amendment rights upon stepping onto the school property. Justice Fortas in the opinion wrote that schools can limit speech if it would, "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school."[17]

Tinker set a solid precedent for schools. *Healy v. James (1972)* applied it to a college campus. A local chapter of a left-wing student group, the Students for a Democratic society, was the topic of discussion. Central Connecticut State College denied official student organization status to their local chapter of the Students for a Democratic Society. According to the school, it was denied because chapters of the organization were violent at other universities. This case eventually got to the Supreme Court of the United States and the Court held that the college could not deny the organization official status because they disagree with the ideas pushed by the organization. As it relates to free speech and college campuses, another important phrase was said during the *Healy* case. Justice Powell mentioned in his decision, "At the outset, we note that state colleges and universities are not enclave immune from the sweep of the First Amendment."[18]

After *Healy*, another prominent school speech case arose, *Bethel School District No. 403 v. Fraser (1986)*. This is a case where a high school student was running for a student elective office. While doing so, a friend of the candidate giving a speech used what some described as a graphic sexual euphemism. The school district found that it was a violation of their code of conduct and reprimanded the student on grounds that it violated their "substantially interferes with the educational process… including the use of obscene, profane language or gestures." As a result of this speech, Fraser was suspended from school. The United States Supreme Court held that the school could discipline a student for a lewd speech because it wasn't consistent with "fundamental values of public-school education."[19] The wording of this quote would make it seem as though this could cover all public school, potentially even college level public universities. However, most speech that occurs in a residence hall doesn't have a forum similar to this case, nor would the student be reprimanded if they did exactly this on a college campus as it is a completely different setting. In this case, the student provided a vulgar speech in front of a large crowd in an assembly. A forum like this would not be too common on a college campus usually because of the way college is structured. A college student likely would not be reprimanded like in this case because college is a more adult setting than a high school.

At the University of Missouri, a twenty-two-year-old graduate school student was involved in an underground school newspaper. She decided to do a piece that was an allegedly indecent political cartoon. The cartoon in question depicted a police officer sexually assaulting the Statue of Liberty. The University, in response to that publication, expelled Papish. The University requires that their students uphold a certain level of decency and prohibit speech that could be classified as indecent according to the university's General Standards of Student Conduct. Papish was allowed to stay on campus until the semester concluded but she was not given credit for one of the classes she passed. The lower courts involved prior to the United States Supreme Court upheld the expulsion of Papish. The Supreme Court determined the University of Missouri was wrong to expel the student for her publication as it is a violation of her free speech rights. The Court also determined that the university's action was not justified, and the university must give

Papish the credit she has earned for the class. Regarding the dissemination of ideas the Court deciding this case said, "We think *Healy* makes it clear that the mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of "conventions of decency."[20] The Court essentially made it clear that banning speech on the basis of decency is a difficult thing to do because there are several protections. Beyond that the Court also touched on the publication aspect of this case in saying, "[It's] clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. "[21]This precedent was found in *Cohen v. California* (1971) among other cases.

Discussion with other Publications

In *Free Speech on Campus* written by law professors Erwin Chemerinsky and Howard Gillman, they address this exact issue on a specific page. The authors talk about what the public universities can and cannot do to limit speech of their students. In the section they mention *Frisby v. Schultz* (1988) in the paragraph prior to this quote. The authors say, "but even regulations meant to protect a captive audience cannot be based on the ideas espoused. What is placed on walls or bulletin boards or in dormitory windows may be regulated so long as the rules are content neutral and applied in a content-neutral manner"[22]. This sets up a university to ban whatever they choose within reason. By content neutral the authors mean, "A campus could have a rule preventing students from affixing anything to the windows of their dormitory rooms, but a campus could not prohibit just the display of Confederate flags on dormitory windows"[23]. These quotes are almost in succession of each other. Basically, since dormitories are considered private forums and there could be a captive audience, there can be more limitations to speech granted it is content neutral.

I take issue with some things said by these authors. The first thing that I take issue with is the idea of a dorm building being a captive audience. The definition of a captive audience is, "a person or people who are unable to leave a place and are thus forced to listen to what is being said" according to the Merriam Dictionary. That is not at all the way I see the dormitory setting. The authors Chemerinsky and Gillman referenced *Frisby v. Schultz* (1988). The *Frisby* case has totally different circumstances surrounding it. The parties involved were Sandra Frisby and Robert Braun. Frisby and Braun gathered several like-minded people to stand outside of the home of a doctor who performed abortions. This group of people picketed outside of his home making it difficult for him to leave his house. The United States' Supreme Court determined that the city's ordinance outlawing picketing outside of residential homes was constitutional. The Court held that the ban was indeed content neutral, served a significant government interest, and is narrowly tailored enough to allow for adequate alternatives.[24] When the Court describes a law that is narrowly tailored, they mean a law that allows for other channels to be left open for ideas to be expressed. In this case, the interest is to prevent a captive audience. All three of these criterion must be met to meet the intermediate level of scrutiny that this case calls for. In this case, the Court determined that all three items were satisfied. Now, comparing *Frisby v. Schultz* (1988) to the dorm window display ban that the authors describe, they appear very different. It starts to blur the line of what really is a captive audience. A captive audience is someone who is forced to listen to what someone else has to say. When comparing the hypothetical case from the authors and *Frisby v.* Schultz, the definitions of a captive audience seem completely different. I would argue that saying a captive audience extending to members of a dormitory or residence hall is stretch.

The authors pointed out *Frisby v. Schultz* (1988) in particular, however there is a case that is much more suited to use. The case I think would be more appropriate to use is as it pertains to window signage specifically would by *City of Ladue v. Gilleo* (1994). In this case the City of Ladue implemented an ordinance that banned signage as an effort to minimize clutter. This ordinance was determined to be not content neutral as there was other signage that was permitted. Gilleo placed signs in her yard and the sign was knocked over. The police said she could not place a sign there due to a city ordinance which was intended to minimize clutter. She filed a petition then challenged the law even further by putting a sign in the window of home. The United States Supreme Court held that the city's ordinance has a significant government interest but fails in content neutrality as well as leaving ample channels open. In the Court decision written by Justice Stevens the Court said, "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there."[25] In this quote the Court determined that there is a special respect given to people and their right to speech in their homes. Additionally, it could be said that someone's home is a private forum and not a traditional public forum like it was in *Frisby v. Schultz* (1988).

In the journal article, *Walls, Halls and Doors: First Amendment Issues for Public Spaces in Housing*, authors Tess Barker and Amanda McLittle discuss many issues that are currently relevant in the public university setting. In their publication they directly mention externally-facing windows. Barker and McLittle determined "exterior facing windows are not a default traditional public forum and the institution can impose standards and limits".[26] Later in that section they say, "If the housing contract already does not have this existing policy, the staff cannot ask residents to take down a flag, unless it is a fire hazard, even if others find it offensive or distasteful."[27] The authors then add their opinion on the Captive Audience Doctrine. They say, "Once the institution allows residents to use their doors, windows, or other forum for expression, it cannot exclude the resident who wishes to use that forum to express offensive but protected speech."[28] According to this, some of the university policies at the beginning of this paper are potentially problematic.

Another important topic of discussion is the notion that universities are not allowing for nearly as much speech as they previously did. Many universities have policies for reporting bias incidents. In a letter from the University of Chicago's Dean Ellison, he said, "Bias incidents… include any actions that are motivated by bias, even if they do not include the elements required to prove a hate crime or a violation of University policy."[29] This is not to say that this is bad policy, this can help deal with students feeling intimidated. When this policy continues to go further, that is when it becomes too restrictive. Greg Lukianoff, the author of *Unlearning Liberty: Campus Censorship and the End of American Debate,* said, "Administrators have been able to convince well-meaning students to accept outright censorship by creating the impression that freedom of speech is somehow the enemy of social progress".[30] The sentiments of this author are strong and may go too far, but it relates to universities implementing policies restricting free speech.

Conclusion

So, is a university's ban on window displays constitutional? It depends on several factors. The restriction must prove to be content neutral, leave other channels open, and serve a significant government interest. In the cases of late involving universities, they appear to be content neutral for the most part. The part that could become an issue is if a student challenges whether there are ample channels of expression still available or if there is a significant government interest being met. I think that it would be wise to yield to the *City of Ladue v. Gilleo* (1994) case. In that case

it was determined that reducing city clutter was a significant government interest. However, there were not ample alternatives, and it was not content neutral. Many campus enacting regulations such as the display bans have been wise enough to make their ban content neutral. The problems that lie ahead are whether the "significant interest" the public university is citing is actually significant. One could assume that if clutter to a city is significant enough, damage to university property or safety concerns would also be covered. If this ever is taken to the United States Supreme Court, the Court may want to look at what was said in *Ladue* (1994), "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there". This begs the question, does a residence hall dorm room classify as a home. Throughout my time on a college campus, I have always heard university officials refer to the residence halls as our homes regardless of the campus I visited. If that is the case, shouldn't there be a special respect held for students to display their views from the window of their home (dorm window). This creates an interesting wrinkle in things that leaves much to be desired for students in the future.

One thing can be inferred from this research though. Some university policies are content neutral like Ohio State University, UW-La Crosse, and UW-Eau Claire's policies. There is a claim to be made that these universities are not offering ample channels to express themselves. For instance, when you look at UW-Eau Claire, you will notice that the policy is restrictive of what students can put in their windows. This does allow for them to post material in their rooms, just not in the window. There is nothing in the policy that would prohibit other forms of expression though. Examples of expression that are permitted by the policy are oral speech, or any of the other forms mentioned in cases mentioned in this paper. There are several channels for students to use their rights, they just may not be as passive or convenient as a window display. Continuing the discussion about UW-Eau Claire, there are limited channels open on lower campus such as areas you must reserve there are not many known areas in which students can express themselves with speech or protest. Despite there being several channels available to students who wish to use their free speech, they may just be uninformed of the methods they can. In contrast to UW-Eau Claire and UW-La Crosse, other policies are not content neutral, like UW-Green Bay, UW-Parkside, UW-River Falls, and UW-Platteville. The policy at UW-Green Bay is potentially problematic because the speech they are attempting to discourage is speech that is intended to create an intimidating environment. This is not content neutral. UW-Parkside's policy is attempting to limit speech that harasses a specific group of people. This is also not a content neutral rule. At UW-River Falls, the speech they are attempting to restrict is the speech that targets specific people or groups of people. This is not content neutral either. Finally, UW-Platteville's policy restricts what students can put in windows to twinkle lights around the window. This is potentially not content neutral because it is not all or nothing. The previous four universities potentially fail the content neutrality portion of immediate scrutiny. The two universities mentioned before them could fail to meet the part of the test stating the rule must be narrowly tailored enough to allow for ample other channels. For the moment, what my research shows is that there are several universities policies around the UW System that are not as content neutral as they need to, and others may violate the narrowly tailored portion of the immediate scrutiny.

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