

K–12 Expression and the First Amendment

By [FIRE](#) April 14, 2017

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Public school students “do not shed their [constitutional](#) rights to [freedom of speech](#) or expression at the schoolhouse gate.” *Tinker v. Des Moines* (1969). Such rights must, however, be considered in the context of “the special characteristics of the school environment.” This means that while public school students possess free speech rights at school, school officials can regulate speech more as educators than governments can as sovereign.

Students did not always possess free speech rights at school. In the 19th and early 20th centuries, court decisions held that students had no free speech right to blow the whistle on school safety, challenge a dress code, or write a poem critical of school officials. The consistent theme behind these cases was that schoolmasters had ultimate control over students.

A Remarkable Reversal

This did not change until the mid-1940s, when the Supreme Court ruled in *West Virginia State Board of Education v. Barnette* (1943) that the First Amendment prohibited public school officials in West Virginia from punishing two elementary school girls, the Barnette sisters, for refusing to salute the flag and recite the Pledge of Allegiance for religious reasons. The girls were Jehovah’s Witnesses and believed that saluting the flag was akin to worshipping a graven image.

Prior to *Barnette*, the legal landscape was ill-disposed to students, as the Court had upheld a similar Pennsylvania flag salute law in *Minersville School District v. Gobitis* (1940). By a vote of 8–1, with only Justice Harlan Fiske Stone dissenting, the Court ruled that religious liberty must give way to political authority. This decision, handed down during the jingoistic time of World War II, led to a wave of violence against Jehovah’s Witnesses.

This caused the Supreme Court to review another flag salute case. The Court ruled 6–3 in *Barnette* that public school officials could not compel the Barnette sisters to salute the flag. In oft-celebrated language, Justice Robert Jackson wrote that “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

The Court’s decision was important because it explained that the government could not compel people to engage in certain expression. But, the decision was even more important for public school students, because it established that they possessed some level of free expression rights. However, the Court did not develop a test to determine when students’ speech was protected or prohibited.

The *Tinker* Decision

Many decades later, in [*Tinker v. Des Moines*](#) (1969), the Court developed a test to determine when public school student speech should be protected. Mary Beth Tinker, her brother John Tinker, Christopher Eckhardt, and several other students wore black armbands to school to protest the Vietnam War, support Robert Kennedy’s Christmas truce, and mourn those who had died in the conflict. School officials learned of the impending protest and quickly passed a rule prohibiting armbands. The students wore the armbands anyway and faced suspensions.

After losing in the lower federal courts, the students took their case to the Supreme Court. In a 7–2 opinion, the Court emphasized the passive, political nature of the student’s symbolic speech that was “akin to pure speech.” The Court also noted that there was little to no evidence that the armbands disrupted school activities.

The Court, per Justice Abe Fortas, explained that public school officials could [censor](#) student speech only if they could reasonably forecast that the student speech would cause a substantial disruption of school activities or invade the rights of others. In *Tinker*, the armbands caused at most a very minor disruption, certainly nothing approaching “substantial” or “material.” Instead,

school officials acted based on what Justice Fortas referred to in his majority opinion as “undifferentiated fear or apprehension of disturbance.”

The most common application of the *Tinker* standard involves the substantial disruption inquiry. However, the other prong of *Tinker* provides that school officials can prohibit student speech when it invades the rights of others. The Court has never explained the contours of this test, but some lower courts have determined that homophobic and sexually harassing speech can invade the rights of others. At a time when more and more school districts face problems with cyberbullying, expect more controversies in this area.

Other Tests

In the 1980s, the Burger Court and then the Rehnquist Court decided student speech cases that are considered exceptions to *Tinker* or carve-outs to the *Tinker* standard. In [*Bethel School District v. Fraser*](#) (1986), the Court ruled 7–2 that public school officials could discipline a student for delivering a speech before the student body imbued with sexual innuendos. The so-called *Fraser* standard allows school officials to prohibit student speech that is vulgar or lewd.

Two years later, the Court ruled 5–3 in [*Hazelwood School District v. Kuhlmeier*](#) (1988) that a high school principal did not violate the First Amendment when he ordered the removal of two articles from the school’s newspaper, produced by a high school journalism class. The two articles concerned teen pregnancy and divorce. Three student editors, including lead plaintiff Cathy Kuhlmeier, challenged the principal’s actions.

In *Hazelwood*, the Court created a new standard for school sponsored student speech, as opposed to student initiated speech. School sponsored speech includes many school newspapers, school plays, school mascots, and other speech that bears the imprimatur of the school.

The new standard provides that school officials can prohibit student speech as long as their actions are reasonably related to legitimate pedagogical or educational concerns.

For nearly 20 years, there was a trinity of student speech cases to look to—*Tinker*, *Fraser*, and *Hazelwood*. Then in 2007, the Court addressed an interesting case involving a high school student from Alaska who skipped school to see the Olympic Torch Relay pass through a public street near his school. The student, Joseph Frederick, and others displayed a banner with the message “BONG HiTS 4 JESUS.”

School principal Deborah Morse was less than pleased and rushed over, ordering the students to drop the banner. All complied except Frederick, whom she summoned to her office. She eventually gave him a 10-day suspension. Frederick fought his suspension and his case eventually reached the Supreme Court. The Court ruled 5–4 in [*Morse v. Frederick*](#) (2007) that the principal did not violate the First Amendment when she punished a student for speech that she reasonably believed promoted the illegal use of drugs.

Current Legal Landscape

The *Tinker*, *Fraser*, *Hazelwood*, and *Morse* rulings control many student speech cases. *Fraser* applies to vulgar and lewd student speech; *Hazelwood* applies to school-sponsored student speech; *Morse* applies to speech advocating the illegal use of drugs; while *Tinker* applies to most other speech.

However, these cases do not cover all student speech. Sometimes student speech may cross the line into the unprotected category of [true threats](#). This unprotected category of speech is applied broadly when it comes to violent speech in schools. Occasionally, school officials have alleged that a student’s expression (such as writings, drawings, poems, or short stories) conveys a message that a reasonable recipient might regard as a serious expression of the intention to commit harm.

Tragic school shootings have contributed to a legal environment in which judges sometimes defer extensively to school officials and interpret the true threats category broadly. As I explained in “[Let The Students Speak!: A History of the Fight for Free Expression in American Schools](#)” (2011),

“Students have been thrown in jail, subject to intrusive psychological probing, expelled on an emergency basis, and kicked out of school permanently even if they uttered no true threat or caused no substantial disruption.”

The legal landscape remains muddled with regard to off-campus, online speech. Most school districts have adopted policies prohibiting cyberbullying, but oftentimes such online bullying takes place on social media posts created far from school. Questions remain as to how far the arm of school authority extends to such off-campus posts.

Additional Reading

Erwin, Chemerinsky. “Students Do Leave Their First Amendment Rights at the Schoolhouse Gate.” *Drake Law Review* 48 (2000): 527.

Foster, James. [*Bong Hits 4 Jesus: A Perfect Constitutional Storm in Alaska’s Capital*](#). University of Alaska Press (2010).

Hudson, David. [*Let The Students Speak: A History of the Fight for Free Expression in American Schools*](#). Beacon Press (2011).

Johnson, John. [*The Struggle for Student Rights: Tinker v. Des Moines and the 1960s*](#). University of Kansas Press (1997).

Ross, Catherine. [*Lessons in Censorship: How Schools and Courts Subvert Students’ First Amendment Rights*](#). Harvard University Press (2015).

Tinker, Mary Beth. “Foreword: Reflections on Tinker.” *American Law Review* 58 (2009): 1119.