

Tinker v. Des Moines / Background •••—Answer Key

John and Mary Beth Tinker and Christopher Eckhardt were public school students in Des Moines, Iowa, in December of 1965. As part of a group against American involvement in the Vietnam War, they decided to publicize their opposition by wearing black armbands to school. Having heard of the students' plans, the principals of the public schools in Des Moines adopted a new policy concerning armbands. This policy stated that any student who wore an armband to school would be asked immediately to remove it. A student who refused to take off their armband would be suspended until agreeing to return to school without the band. They communicated the new rule to the students.

Two days later and aware of the school policy, John, Mary Beth, and Christopher wore armbands to school. Upon arriving at school, the students were asked to remove their armbands and they refused. They were subsequently suspended until they returned to school without their armbands.

The students returned to school without armbands after January 1, 1966, the date scheduled for the end of their protest. However, their fathers filed suit in U.S. District Court. This suit asked the court for a small amount of money for damages and an injunction to restrain school officials from enforcing their armband policy. Although the District Court recognized the children's First Amendment right to free speech, the court refused to issue an injunction, claiming that the school officials' actions were reasonable in light of potential disruptions from the students' protest. The Tinkers and Eckhardts appealed their case to the U.S. Court of Appeals but a tie vote in that court allowed the District Court's ruling stand. They then decided to appeal the case to the Supreme Court of the United States.

The case came down to this fundamental question: Does the First Amendment right of free speech extend to symbolic speech by students in public schools? And, if so, in what circumstances is that symbolic speech protected? The First Amendment states "Congress shall make no law . . . abridging the freedom of speech." The 14th Amendment extends this rule to state governments as well, which includes school systems. The Supreme Court had decided that some types of speech are not protected. For example, it is not clear whether hate speech against an individual or group is protected. Neither does the First Amendment specify what types of expressive actions—such as wearing an arm band—should be considered speech.

The Supreme Court of the United States has made many attempts to determine what types of symbolic speech are protected under the First Amendment. In 1919, the Court decided in *Schenck v. United States* that an individual could be punished for distributing pamphlets urging non-compliance with the WWI draft because the pamphlets "create[d] a clear and present danger that they will bring about [a] substantive evil[. . .] Congress has a right to prevent"—(i.e.,

draft obstruction. The Court wrestled with the issue of the right to symbolic speech again in the case of *Thornhill v. Alabama* (1940) when it ruled that picketing was a form of symbolic speech protected by the First Amendment because no clear and present danger of destruction of life or property or of breach of the peace was inherent in the action. Three years later in a case about saluting the flag, *West Virginia v. Barnette* (1943), the Court extended the First Amendment protection of symbolic speech to students in public schools. In *Barnette*, the Court held “[i]f 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 . . .”

In 1968 the Supreme Court of the United States agreed to hear the Tinkers’ case and consider the constitutionality of the Des Moines principals’ anti-armband policy. The Court’s decision in *Tinker v. Des Moines* was handed down in 1969.

Questions to Consider

1. Do you think that the school policy banning armbands was fair? Why or why not?
Student answers will vary. Some students will argue that it was fair because in certain localities, schools place restrictions on the way students dress. The armbands could be viewed as an article of clothing that could be subject to these rules. Others will argue that the policy was unfair in that it put unnecessary or discriminatory restrictions on students. Unlike other articles of clothing, like bandanas, which can be indicative of gang activity, and skimpy clothing, which can be provocative, the armbands did not disrupt or threaten to disrupt the school.
2. The students knew they would be suspended if they wore armbands to school and chose to do so anyway. Why do you think they ignored the rule?
They ignored the rule because they thought it was unfair. They viewed wearing the armbands as a way of making expressing their objections to the war, and they believed that they would not harm any other students by doing so.
3. The First Amendment says, “Congress shall make no law . . . abridging the freedom of speech.” Why do you think the Supreme Court of the United States has ruled that certain actions should have the same protection as verbal speech? Are these reasons valid?
The Supreme Court of the United States has ruled that certain actions have the same protection as verbal speech because actions can be a way of expressing an opinion. Some students will argue that these reasons are valid on the grounds that, at times, an action is the most effective way to express an opinion—sometimes these actions can make a point more forcefully than words can. As long as these actions do not violate the law or harm or threaten to harm anyone else, they should be allowed. Others will say that they are invalid on the grounds that the Constitution protects free speech and not free action. The government cannot mandate that people feel a certain way or speak a certain way but can regulate their behavior. Actions fall into the category of behavior.

4. In both *Schenck* and *Thornhill*, the Court seemed to make a rule that certain actions were guaranteed protection under the First Amendment's freedom of speech clause, but some were not. What rule or test did the Court seem to make?

Finish the sentence: Actions are guaranteed protection under the First Amendment's freedom of speech clause as long as those actions do not . . .

In both *Schenck* and *Thornhill*, the Court seemed to make a rule that certain actions were guaranteed protection under the First Amendment's freedom of speech clause as long as those actions did not pose a "clear and present danger."

5. Pretend that students in your school wanted to protest the school-wide ban on smoking. Should they legally be allowed to protest by wearing t-shirts that read "Up with 'Butts!'"? Why or why not?

Student answers will vary. Some students will argue that students should legally be allowed to protest by wearing T-shirts that read "Up with 'Butts!'" because the message on the T-shirts is a form of speech or expression that is protected by the First Amendment. Others will say that this message is offensive, encourages illegal behavior, and could be disruptive to the learning environment, so it should not be allowed.