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Speech in Schools

An Inquiry Pack to Accompany [LegalTimelines.org](https://legaltimelines.org)

Inquiry Question: In what circumstances should public schools be permitted to regulate student speech?

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Introduction: The First Amendment and Free Speech in Schools

The First Amendment states that “Congress shall make no law ... abridging the freedom of speech”

However, that does not mean that everyone can say anything at any time. There are many limits to where and when people can speak and what they can say. Take for example the classic scenario of someone yelling, “Fire!” in a crowded place when there is no fire. A panic could break out and people could get injured as they run for the exits. The speech of the person shouting, “Fire!” can be restricted to protect public safety.

The government (federal and state governments) usually cannot restrict speech based on what is being said—the content of the speech. There are a few exceptions that do allow restrictions based on content: obscene language (profanity, etc.), slander and libel (false speech that damages a person’s reputation), “fighting words” (statements that likely will cause violence), false advertising, and seditious speech (statements about overthrowing the government).

The government may make reasonable rules governing the time, place, and manner of speech. These rules and laws control when, where, and how speech is allowed. For instance, a city may require protesters to obtain a permit to hold a rally in a public park or march down city streets. They may also put restrictions on the hours during which loudspeakers and megaphones can be used. They can restrict places where political posters may be displayed, for instance close to polling places where people are voting. However, these rules must be “viewpoint neutral,” meaning that they cannot censor a certain point of view while allowing others. Officials must also enforce the rules evenly and cannot grant or deny permits to groups based on whether they agree with the groups’ views or not.

There are also some special places where rules about speech may be different than in most public places. These special places include public schools, prisons, and the military. The Supreme Court has ruled that the government has a “compelling interest” (a very good reason) to make sure that the purpose of those institutions is not compromised, and order is maintained.

Public schools—which are run by local governments—present special First Amendment challenges. The rights of public-school students may at times conflict with the rights of others or interfere with the need to maintain a safe learning environment. Therefore, students in public schools have free-speech rights, but those rights are not the same as those that exist outside of schools. In some cases, courts must decide whether a student’s speech is protected by the First Amendment or if a school can discipline a student for their speech.

A landmark student speech case, *Tinker v. Des Moines Independent School District* (1969), established that students have free-speech rights at school as long as the speech does not cause a “substantial disruption” in the educational process or invade the rights of others. If student speech causes a substantial disruption, it can be restricted in school and the student can even be disciplined. This is sometimes called the “substantial disruption standard” or the “Tinker Test.” There is no exact definition of “substantial disruption,” so, given the facts of a situation, the courts must decide 1) if there is a disruption to learning and 2) if it is significant enough to allow the speech to be restricted. It is important to note, however, that courts have made it clear that “substantial disruption” cannot be hypothetical, but instead must be based on real events. If for instance, if a school regulates the wearing of a specific t-shirt that might be racially offensive on the basis that it will lead to disruption in the school, the school must be prepared to show a history of recent facts that indicate a disruption is likely based on the reaction that the message would likely produce (e.g., fights, walkouts, bullying, threatening social media posts).

With the increased use of social media apps, other advancements in technology, and the sudden switch to remote learning in many schools during the COVID-19 pandemic, the issue of student speech that occurs outside of school but has the potential to disrupt the educational process within school has become the focus of many court cases. The Court has recognized that schools have a responsibility to address bullying in the form of speech that is harassing or harmful to students even if that speech occurs away from campus. However, the Court has also warned that schools are “nurseries of democracy” and as such, school officials have a responsibility not only to protect, but at times to encourage unpopular student expression.

The Right Not to Speak in Schools

After an earlier decision upholding a mandatory flag salute, *Minersville School District v. Gobitis* (1940), the West Virginia Board of Education adopted a resolution requiring that all public schools include a salute and pledge to the American flag as a part of their regular activities. Students and teachers were required to salute the flag, and if they did not, they could be charged with insubordination and punished.

A group of students who were Jehovah's Witnesses, cited a religious objection to saluting the flag. It was their religious belief that saluting the flag was equivalent to idolatry, which is forbidden for Jehovah's Witnesses. When the students were expelled for refusing to salute the flag, their parents sued the state board of education. They argued that the compulsory flag salute was a violation of the First Amendment, in effect asking that the earlier case be overruled. However, as originally written, the Bill of Rights applied only to the national government, not state and local governments. To restrict the states from denying their inhabitants those rights, the 14th Amendment was ratified after the Civil War. It guarantees that "[no] state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." Using the Due Process Clause, over time the Supreme Court has applied most of the Bill of Rights protections to the states through a process called incorporation.

The case, *West Virginia State Board of Education v. Barnette*, came before the Supreme Court, which ruled that the compulsory flag salute was unconstitutional because it violated the Free Speech Clause of the First Amendment. The Court stated that a flag salute was a form of speech because it was a way to communicate ideas. The Court explained that in most cases the government cannot require people to express ideas that they disagree with, especially when the ideas conflict with their own religious beliefs. Through incorporation, the 14th Amendment allowed the Court to prevent West Virginia from depriving its citizens of their First Amendment right.

Source A: Majority opinion in *West Virginia State Board of Education v. Barnette* (1943)¹

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Source A Information: This source is an excerpt from the majority opinion in *West Virginia State Board of Education v. Barnette* (1943), written for the Court by Justice Robert Jackson.

Glossary of key terms from the source:

- *14th Amendment*: guarantees states cannot deny someone the rights set out in the Bill of Rights
- *discount*: regard as being unworthy of consideration because it lacks credibility
- *discretionary*: not mandatory, optional
- *platitude*: a remark that has been used so often it has lost its meaning
- *scrupulous*: diligent

Questions to Consider for Source A:

- 1. Observe:** What do you notice first about the excerpt from the majority opinion?
- 2. Reflect:** What reasoning does the majority opinion give for being so protective of the constitutional freedoms like the freedom of speech? According to the majority opinion, why does the school board have to abide by the 14th Amendment? Would you have reached the same decision the Supreme Court reached in *West Virginia State Board of Education v. Barnette*? Why or why not?
- 3. Question:** Write at least one question you have about this source.

Symbolic Speech in Schools

Students John and Mary Beth Tinker and Christopher Eckhardt opposed the war in Vietnam. To show their opposition, they planned to wear black armbands to school. Having learned about the students' plan, the principals in their district adopted a new policy prohibiting armbands. Despite the new policy, the students wore armbands to school and were suspended.

The students and their parents challenged the suspensions as a violation of the First Amendment's Free Speech Clause. They argued that the wearing of armbands was peaceful symbolic speech, which should be protected just as verbal speech is.

The case made its way to the U.S. Supreme Court, which ruled in favor of the students. The Court found that the symbolic wearing of armbands was speech. To restrict speech, a school must demonstrate that the speech would "materially and substantially interfere" with the work of the school or interfere with the rights of other students. In this case, the school did not prove that the wearing of the armbands caused a disruption that interfered with learning at the school.

Source B: Majority opinion in *Tinker v. Des Moines* (1969)²

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

...

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

Source B Information: This source is an excerpt from the majority opinion in *Tinker v. Des Moines* (1969), written for the Court by Justice Abe Fortas.

Glossary of key terms from the source:

- *advocacy*: act of supporting a cause
- *deviation*: departure
- *material interference*: significant hindrance or obstruction of another person's or group's rights
- *ordained*: ordered
- *substantial*: significant

Questions to Consider for Source B:

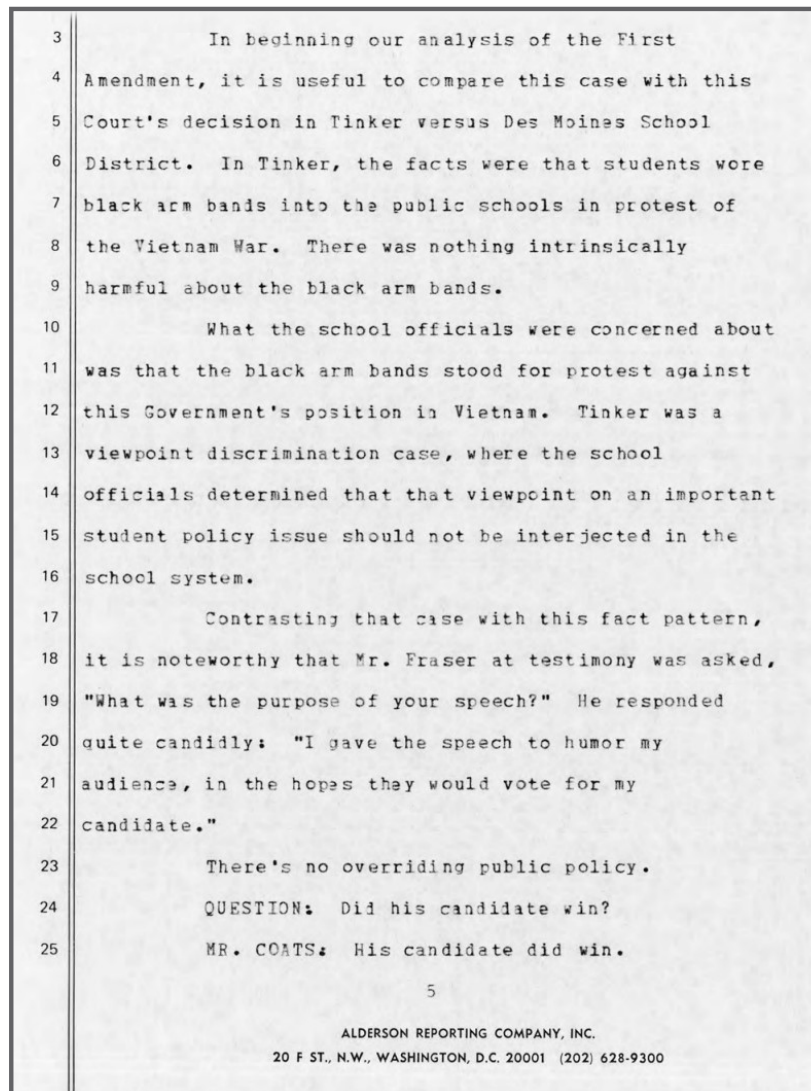
- 1. Observe:** What do you notice first about the excerpt from the majority opinion?
- 2. Reflect:** How would you rephrase the famous quote “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates” in your own words? What evidence did the majority opinion give to support its decision that the students’ speech could not be disciplined? Would you have reached the same decision the Supreme Court reached in *Tinker v. Des Moines*? Why or why not?
- 3. Question:** Write at least one question you have about this source.

Lewd Speech in Schools

During a school assembly at Bethel High School in Washington state, Matthew Fraser gave a speech to nominate a classmate for student government. The short speech was filled with lewd (vulgar) speech such as sexual references and innuendoes (sexually suggestive statements). The students reacted to the speech with hoots, cheers, and lewd motions. Fraser was suspended for three days. The Fraser family challenged their son's suspension as a violation of his First Amendment right to free speech.

The case, *Bethel School District v. Fraser*, was ultimately decided in the U.S. Supreme Court. Ruling in favor of the school district, the Court emphasized that students do not have the same First Amendment rights as adults. It explained that school officials may prohibit the use of lewd, indecent, or plainly offensive language, even if it is not obscene. Schools have an interest in preventing speech that is inconsistent with the school's "basic educational mission" and in "teaching students the boundaries of socially inappropriate behavior."

Source C: Official transcript of oral argument in *Bethel School District v. Fraser* (1986)³



Source C Information: This source is an excerpt from the official transcript of the oral argument in *Bethel School District v. Fraser*. It is a transcript of an exchange between William Coats, attorney for Bethel School District, and one of the justices.

Glossary of key terms from the source:

- *candidly*: honestly
- *interjected*: inserted
- *intrinsicly*: essentially
- *viewpoint discrimination*: discrimination against speech that is based on the content of the speech

Questions to Consider for Source C:

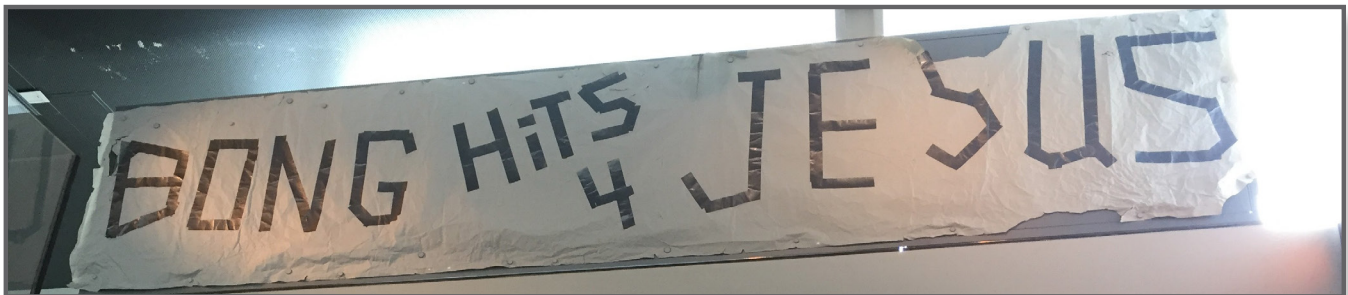
- 1. Observe:** What do you notice first about the excerpt from the official transcript of the oral argument?
- 2. Reflect:** How does the attorney for Bethel School District compare and/or contrast *Tinker v. Des Moines* with *Bethel School District v. Fraser*? Do you think the attorney wants the Court to reach the same decision as in *Tinker v. Des Moines* or a different decision? What questions would you have asked the attorney for Bethel School District? What questions would you have asked the attorney for Matthew Fraser?
- 3. Question:** Write at least one question you have about this source.

Speech About Drug Use

A school in Alaska took students on a walking-field trip to watch the Olympic torch passing near their school. Joseph Frederick, a student, did not come to school that day but joined his classmates at the field trip and unfurled a banner reading “BONG HiTS 4 JESUS.” The school’s principal, Deborah Morse, suspended him for displaying a banner that advocated drug use. Frederick, who claimed he was not in school at the time, sued the administration for violating his First Amendment right to free speech.

The case, *Morse v. Frederick*, was ultimately decided by the U.S. Supreme Court, which ruled for the school’s principal, concluding that she did not violate the First Amendment by confiscating a pro-drug banner. The Court dismissed Frederick’s argument that this case did not involve school speech because he was not at school. It emphasized that the field trip was approved by the school, monitored by teachers, and occurred during school hours, and, although he did not report to school, he was present at the event. The Court ruled it was reasonable for the principal “to conclude that the banner promoted illegal drug use—in violation of established school policy.”

Source D: BONG HiTS 4 JESUS banner⁴



Source E: Majority opinion *Morse v. Frederick* (2007)⁵

Held: Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick. Pp. 400–410.

(a) Frederick’s argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district’s student conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school. Pp. 400–401.

Sources D and E Information: Source D is the banner Joseph Frederick made and unfurled at the field trip. At the time of the photo, it was displayed at the Newseum in Washington, DC. Source E is an excerpt from the majority opinion in *Morse v. Frederick* (2007), written for the Court by Chief Justice John Roberts.

Glossary of key terms from the source:

- *confiscating*: seizing, taking away
- *expressly*: in definite terms
- *sanctioned*: authorized

Questions to Consider for Sources D and E:

- 1. Observe:** What do you notice first about the photograph (Source D)?
- 2. Reflect:** How might you have reacted to seeing the banner at a school field trip? Would you have thought the banner was advocating drug use? What evidence did the majority opinion give to support its decision that the students' speech could be disciplined? Would you have reached the same decision the Supreme Court reached in *Morse v. Frederick*? Why or why not?
- 3. Question:** Write at least one question you have about this source.

Off-Campus Speech

B.L. was a cheerleader at Mahanoy Area High School in Pennsylvania. On Saturday while off campus, B.L. posted a message on Snapchat. Her snap was a picture of B.L. and a friend with their middle fingers raised and the caption, “F*** school f*** softball f*** cheer f*** everything.” (Note: B.L. did not use *** and wrote out the full word.) The cheerleading coaches determined that B.L. violated their code of conduct and removed her from the team for the school year, but she faced no further disciplinary action.

B.L.’s parents filed a lawsuit against the school district alleging that B.L.’s First Amendment right to free speech was violated because the school disciplined her for off-campus speech.

Ultimately the case, *Mahanoy Area School District v. B.L.*, went before the U.S. Supreme Court to decide whether the precedent set in *Tinker v. Des Moines Independent Community School District* (1969), that public school officials may regulate speech that would substantially disrupt the work of the school, applies to student speech that occurs off campus. The Court ruled in favor of the student (B. L.), finding that the school violated her First Amendment rights.

Source F: Majority opinion in *Mahanoy Area School District v. B.L.* (2021)⁶

Held: While public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school are not sufficient to overcome B. L.’s interest in free expression in this case. Pp. 4–11.

(a) In *Tinker*, we indicated that schools have a special interest in regulating on-campus student speech that “materially disrupts class-work or involves substantial disorder or invasion of the rights of others.” 393 U. S., at 513. The special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school’s regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices.

Source F Information: This source is an excerpt from the majority opinion in *Mahanoy Area School District v. B.L.* (2021), written for the Court by Justice Stephen Breyer.

Glossary of key terms from the source:

- *breaches:* gaps or openings in a barrier
- *held:* decided by the Court
- *implicate:* convey without directly stating
- *materially disrupts:* significantly hinders another person’s or group’s rights
- *substantial:* significant
- *sufficient:* enough

Questions to Consider for Source F:

- 1. Observe:** What do you notice first about the majority opinion?
- 2. Reflect:** What evidence did the majority opinion give to support its decision that B.L.'s speech could not be disciplined? How did the majority opinion apply the decision in *Tinker v. Des Moines* (the "Tinker test") to B.L.'s speech? Would you have reached the same decision the Supreme Court reached in *Mahanoy Area School District v. B.L.*? Why or why not?
- 3. Question:** Write at least one question you have about this source.

Inquiry Question

In what circumstances should public schools be permitted to regulate student speech?

Extension Inquiry Question

How should the Supreme Court define “off-campus school speech” when considering whether student speech can be regulated?

In *Mahanoy Area School District v. B.L.*, the majority of eight justices accepted that B.L.’s speech was off-campus speech. However, in his dissenting opinion, Justice Clarence Thomas questioned that assumption.⁷

Third, and relatedly, the majority uncritically adopts the assumption that B. L.’s speech, in fact, was off campus. But, the location of her speech is a much trickier question than the majority acknowledges. Because speech travels, schools sometimes may be able to treat speech as on campus even though it originates off campus. Nobody doubts, for example, that a school has *in loco parentis* authority over a student (and can discipline him) when he passes out vulgar flyers on campus—even if he creates those flyers off campus. The same may be true in many contexts when social media speech is generated off campus but received on campus.

Glossary of key terms from the source:

- *in loco parentis*: in the place of parents, parental rights

How should the Supreme Court define “off-campus school speech” when considering whether student speech can be regulated? Draft a definition that takes into consideration technological advancements and new social media platforms.

Notes

¹ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). From Library of Congress U.S. Reports, <https://tile.loc.gov/storage-services/service/ll/usrep/usrep319/usrep319624/usrep319624.pdf>.

² *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). From Library of Congress U.S. Reports, <https://www.loc.gov/item/usrep393503/>.

³ “Official Transcript Proceedings Before the Supreme Court of the United States: *Bethel School District No. 403, et al., Petitioners v. Matthew N Fraser, a minor and E.L. Fraser, guardian ad litem*,” March 3, 1986, https://www.supreme-court.gov/pdfs/transcripts/1985/84-1667_03-03-1986.pdf.

⁴ Cathy Ruffing, “Bong Hits 4 Jesus banner,” July 29, 2017.

⁵ *Morse v. Frederick*, 551 U.S. 393 (2007), From Library of Congress U.S. Reports, <https://tile.loc.gov/storage-services/service/ll/usrep/usrep551/usrep551393/usrep551393.pdf>.

⁶ *Mahanoy Area School District v. B.L.*, 594 U.S. ____ (2021), https://www.supremecourt.gov/opinions/20pdf/20-255_g3bi.pdf.

⁷ See note 6.