

Tinker v. Des Moines

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Essential Guiding Question

Do public school students have free expression rights under the First Amendment?

Content Objectives:

- ✓ Identify the five freedoms guaranteed under the First Amendment
- ✓ Explain the difference between pure speech and symbolic speech
- ✓ Define the doctrine of “in loco parentis” as it relates to students in educational settings
- ✓ Understand the Court’s rulings concerning student expression in *Tinker v. Des Moines*, *Bethel v. Fraser*, *Hazelwood v. Kuhlmeier*, and *Morse v. Frederick*
- ✓ Apply their knowledge of these cases to illustrate when student expression may or may not be limited in the public schools

Student Assessment:

STUDENT FIRST AMENDMENT RIGHTS



- ✓ Your assignment is to create a pamphlet to be given to incoming 10th graders at orientation to explain their First Amendment rights in public schools, specifically related to free expression.
- ✓ Make your pamphlet creative and informative. Use language/visuals you think teenagers would easily relate to and understand. It might be helpful to organize it in the format of “You May/ You May Not...”
- ✓ It is important to cover all aspects of free expression. You should use information from your text and the four cases we have discussed in class (*Tinker v Des Moines*, *Hazelwood v Kuhlmeier*, *Bethel v Fraser*, *Morse v Frederick*)

Historical Background

As the Vietnam War progressed, it became increasingly unpopular. Protests were commonplace. Some of the most outspoken critics of the war were young people. This trend began on college campuses and trickled down to our high school and junior high schools.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired - that is, until after New Year's Day.

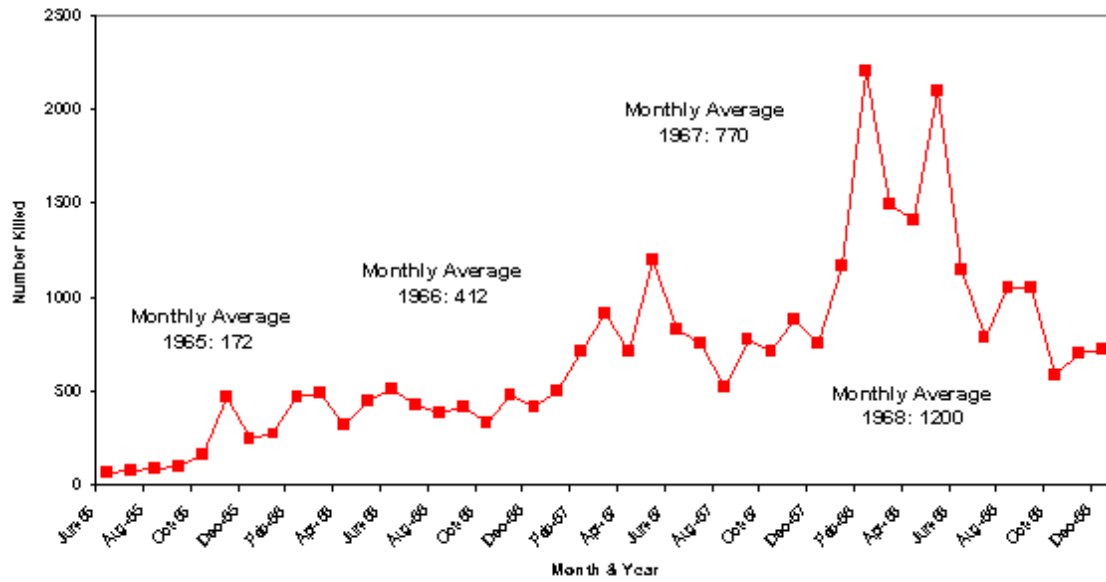
This complaint was filed in the United States District Court by petitioners, through their fathers, under 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld [393 U.S. 503, 505] the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F. Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966). 1

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

Document 1

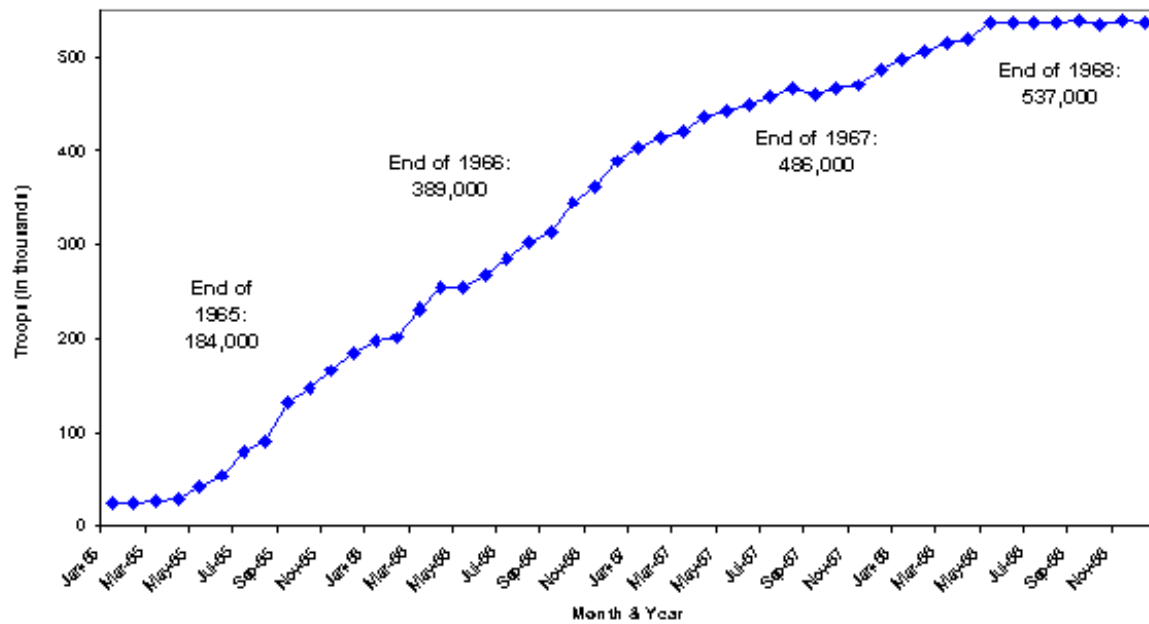
Graph A

**The War in Vietnam & President Lyndon Johnson: U.S. Personnel Killed in Action,
Monthly, June 1965-December 1968**



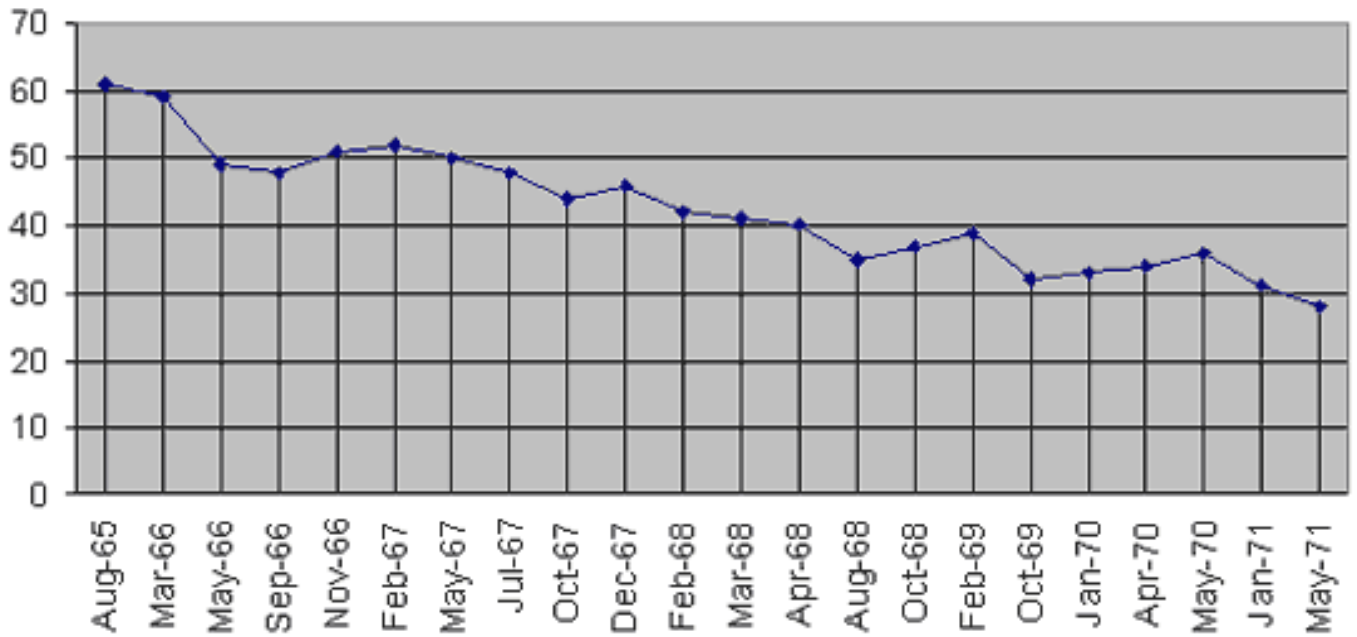
Graph B

The War in Vietnam: Lyndon Johnson & The Escalatory Phase
U.S. Troops Stationed in Vietnam (in 1000s)
June 1965-December 1968



Graph C

"In view of developments since we entered the fighting in Vietnam, do you think the U.S. made a mistake sending troops to fight in Vietnam?" (Gallup)



Vertical Axis = Percentage Answering "No"

Mintz, Stephen. "Explorations: The Vietnam War As History." Digital History.

http://www.digitalhistory.uh.edu/learning_history/vietnam/vietnam_pubopinion.cfm (accessed July 21, 2009).

Questions

1. What inferences can you make about the American public's feelings about the war in December 1965 when the students wore their armbands to school?
2. What developments in 1965 might the students have been reacting to that inspired them to wear their armbands?
3. Do you think the school administration would have reacted differently if the students had first worn their armbands in 1967 or 1968?
4. The Supreme Court heard arguments in the Tinker case in November 1968 and made its decision in February 1969. How might developments since December 1965 have influenced the way the public or the Supreme Court viewed the Tinker case?

Document 2

Tinker v. Des Moines—Key Excerpts from Oral Arguments by Attorney Representing Students

MR. JOHNSTON: The conduct of the students essentially was this: that at Christmas time in 1965, they decided that they would wear small black armbands to express certain views which they had in regard to the war in Vietnam. Specifically, the views were that they mourned the dead of both sides, both civilian and military, in that war and they supported the proposal that had been made by United States Senator Robert Kennedy that the truce which had been proposed for that war over the Christmas period be made an open ended or indefinite truce...

The principals of the secondary schools, the high schools and perhaps the junior high schools in the city of Des Moines public school system met prior to the time that any of the armbands had been worn and enacted a policy which was not written but which was agreed upon among themselves that no student could wear an armband in the Des Moines public school system for this purpose; that if a student came to school wearing the armband he would be asked to remove it; failing that, the student's parent would be contacted and their assistance would be solicited in getting the student to remove the armbands; failing that, the students would be sent home - would be, in effect, suspended from school until such time as they were willing to return to school without the armbands...

Mr. Eckhardt went to school, had the armband on, but knowing of the policy against the wearing of the armbands because as I stated had been announced, he went quite immediately to the office of the principal and said I'm wearing the armband. I know it is in violation of the school policy.

The principal carried out the dictates of the policy which were to tell the student to remove it. The student said that he could not in good conscience remove the armband, that he thought he had a right to wear it. The student's mother was called and she supported her son in the activity and then young Mr. Eckhardt was suspended from school...

Mary Beth Tinker also wore her armband on that first day. However, she wore it throughout the entire morning without any incident related to it that in any way disrupted the school or distracted. She wore it at lunch and she wore it, where there was, by the way, some conversation between herself and other students in the lunch room about why she was wearing the armband and whether or not she should be wearing it and then wore it into the first class in the afternoon and it was in the afternoon that she was called to the office and the procedure was followed for contacting her parents, apparently asking her to remove it and she did remove the armband and then returned to class. However, in spite of the fact that she had removed the armband and returned, and was returned to class, she was later called out of class and suspended...

[O]n the first day John Tinker did not wear the armband to school... [O]n the next day, Friday, John Tinker wore an armband to school, wore it throughout the morning hours without any toward incident, without any substantial or material disruption to the school, wore it at lunch where there was again some discussion about it in a period that's generally free and open for discussion among students and then wore it into the first class in the afternoon where he was suspended...

Questions

1. In the wake of the turmoil surrounding the Vietnam War, explain why some observers may have thought the students' motives for wearing the armbands may have been more than simply mourning the dead on both sides.
2. Explain why you believe the principals at the Des Moines schools were acting or were not acting within their authority when they issued the armband restriction.
3. Explain how the principal at the Des Moines Junior High School failed to adhere to the district's armband policy when he suspended Mary Beth Tinker.
4. Make a list of five or six rules about expression that would help your school maintain "a scholarly, disciplined atmosphere within the classroom" while ensuring the right to symbolic speech.
5. Pretend you are one of the Des Moines students. Write a letter to the school board explaining your reasons for wearing the armband and asking to have your suspension removed from your school records.

Document 3

Tinker v. Des Moines—Key Excerpts from Majority Opinion by MR. JUSTICE FORTAS

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...

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder... Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students...

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State [school officials]...to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint...

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says...

[T]he 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...

Questions

1. Explain why you agree or disagree with the statement, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
2. Justice Fortas wrote that the Des Moines School District banned armbands “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Explain how a teenager might effectively deal with a viewpoint he or she disagrees with other than avoiding it.
3. According to the majority decision, under what circumstances may student speech be limited?
4. Why is important for a democracy to protect unpopular or controversial expressions?
5. Did the Tinker decision in any way make schools less safe or less conducive to academic achievement? Explain your answer.

Document 4

Tinker v. Des Moines—Key Excerpts of the Dissenting Opinion by JUSTICE BLACK

. . . As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech'" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. . . .

. . . Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech. . . .

. . . While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. . . .

. . . I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. . . .

. . . [D]etailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons. . . .

. . . It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. . . .

. . . I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. . . .

Questions

1. How does Justice Black differ from the majority on how the balance between conflicting rights should be resolved in this case?
2. Give an example to support Justice Black's contention that Americans do not have a constitutional right to say whatever they want, whenever they want.
3. Do you agree with Justice Black that the disruption was significant enough to allow the administration to step in? If so, what type of protest behavior would be acceptable for a public school setting? If not, how serious would a disruption have to be to justify suppressing student speech?
4. Do you believe Justice Black's concerns that the *Tinker* case would lead to [a] surrender [of] control of the American public school system to public school students" was well-founded? Why or why not?

Document 5



Mary Beth Tinker



Joseph Frederick

ACLU audio clip (available for streaming or podcast download)

Mary Beth Tinker, plaintiff in the 1969 Supreme Court free speech case *Tinker v. Des Moines*, discusses First Amendment rights with Joseph Frederick.

<http://www.aclu.org/scotus/2006term/morsev.frederick/28710res20070227.html#podcast>

Questions

1. Frederick says, “The words on the banner were insignificant. What I was really saying was ‘I have free speech rights, and here is my manner to prove it.’” Could Frederick have chosen a more respectable phrase that would have still made his point and drawn attention to the issue of free speech?
2. In the *Tinker* case, the students told the school administration about their plans in advance. In the *Morse* case, Frederick’s actions were unannounced. Do you think this distinction had any influence on how the school administrations each reacted?
3. In the *Tinker* case, the students were reacting to an issue that was already part of the national dialogue while Frederick was influenced by his own interest in testing whether or not he really had the rights described in his textbooks. Do you think this had any impact on the reaction to the two student actions?
4. Frederick claims that while most students today are concerned about their rights they are not willing to really stand up and fight for them. Do you agree with his analysis? Identify specific examples from your own school community to support your response?

Frederick, Joseph and Mary Beth Tinker. Interview with Jedd Miller. March 2007. American Civil Liberties Union. Podcast. <http://www.aclu.org/scotus/2006term/morsev.frederick/28710res20070227.html> (accessed July 21, 2009)

Document 6



A



B

C Bethel v. Fraser (1986) —This landmark case established the test about whether or not student speech is lewd or indecent.

Text from student speech: "I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most [of] all, his belief in you the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end - even the climax, for each and every one of you. So please vote for Jeff Kuhlman, as he'll never come between us and the best our school can be." [Long pause after the word "come" on oral delivery, but no comma in the written version, according to Matthew Fraser]

D Hazelwood v. Kuhlmeier (1988) — This landmark case established the test about whether or not schools may limit speech in student publications when the publications are sponsored by the school.

Excerpt of the Majority Opinion delivered by JUSTICE WHITE: [The principal] was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Citation A: "Student Speech: Canary in the Coal Mine?" American Constitution Society. <http://www.acslaw.org/archive/200903?page=7> (accessed July 22, 2009).

Citation B: "Free Speech." Where's The Outrage? <http://www.wheretheoutrage.net/word-press/wp-content/uploads/2007/09/bong-hits-4-jesus.jpg> (accessed July 22, 2009).

Citation C: "Bethel School District No. 403 ET AL. v. Fraser, a Minor, ET AL." UMKC School of Law. <http://www.law.umkc.edu/faculty/projects/ftrials/firstamendment/bethel.html> (accessed July 22, 2009).

Citation D: "Hazelwood v. Kuhlmeier (1988)." Landmark Supreme Court Cases. <http://www.landmarkcases.org/hazelwood/home.html> (accessed July 22, 2009).

Questions

1. Given your knowledge of the cases, what do you believe was the main objective of the student's speech in each case?
2. Looking specifically at the photos, what similarities/differences do you notice between the students?
3. In your opinion, which of the plaintiffs had the best argument that their speech should be protected under the First Amendment? Which plaintiff had the weakest argument? Explain.