

What Can I Say?

With freedom comes responsibility. “Defenders of free speech almost without exception recognize the need for some limits to the freedom they advocate.”¹ Some restraints on free speech are necessary to preserve a healthy society; however, those restrictions require scrutiny. For example, while the Supreme Court in *Tinker v. Des Moines* protected students’ First Amendment rights, the Court also explained that free speech at school should be restricted if it causes a “material and substantial disruption”.²

Tinker ruled it unconstitutional for a school to suspend students for wearing armbands to protest the Vietnam War. As Justice Fortas wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” But the Court also was clear there are limits to this freedom if the speech disrupts the school’s functioning.

The *Tinker* Court was not writing on a blank slate. More than a quarter century earlier, in 1942, the West Virginia Board of Education had required all students in public schools salute the American flag as part of their daily activities. Walter Barnette refused and was prosecuted for juvenile delinquency. In *West Virginia Board of Education vs. Barnette*³ the Court ruled this mandate violated the First Amendment, setting precedent that students could not be required to engage in certain expression-saluting the flag.

Students’ free speech rights were further confirmed in *Mahoney Area School District vs. BL*⁴ a case in which a high school student posted negative speech about her school online after she did not make the varsity cheer team. The Court protected B.L.’s speech as her actions occurred off campus and therefore did not disrupt the learning environment.

But *Morse v. Frederick*⁵ disrupted this trend. Joseph Frederick held up a poster at school with the message “Bong Hits 4 Jesus” and, the school principal confiscated the poster under the school’s policy against displaying material that promotes the use of illegal drugs. The Supreme Court upheld the principal’s authority because the student’s message undermined the school’s emphasis on discouraging illegal drug use and, therefore, was not protected.

So, what speech can be restricted as causing “substantial disruption”? Justice Black described in the dissent of *Tinker v Des Moines*, that any actions taking students’ minds off class work is enough to meet the standard and be restricted. *Disruptive Behavior in Schools* wrestles with the question of what and who defines disruptions in the classroom and describes the need to “know something about teacher-perspectives” because these decisions involve judgements about “what constitutes ‘good’ and ‘bad’ pupils, views of knowledge and teaching.” The analysis

¹ *Free Speech: A Very Short Introduction*, Nigel Warburton, (2009) pg.8

² *Tinker v. Des Moines School Dist.*, 393 U.S 503 (1969)

³ *West Virginia Board of Education v. Barnette.*, 319 U.S. 624 (1943)

⁴ *Mahoney Area School District v. BL.*, 393 U.S 50 (2021).

⁵ *Morse v. Frederick.*, 551 U.S. 393 (2007)

concludes that “different perspectives will have different views on what constitutes disruption.”⁶ In addition, “age can be an important factor in first amendment cases. Speech that is appropriate for a 17 year, certainly might not be appropriate for a 7-year-old.”⁷ So, whose perspective controls what speech can be restricted? There is a delicate balance in protecting the learning environment for students from disruption and allowing students to speak freely on school grounds.

The *Mahoney* Court protected a Pennsylvania high school cheerleader’s disparaging comments about her school on social media when it occurred off campus. Although her remarks involved school activities and may have been disruptive to some, they were protected perhaps because they were not made on school grounds. This may signal a high burden to restrict student speech as disrupting school when the speech occurs outside of school hours. This ruling suggests that no matter how angry, offensive, or morally concerning the message in a student’s expression, if it does not disrupt the physical in-person learning environment, it will be protected under the First Amendment. But would this decision be the same if this student had attended online school and arguably disrupted students from their online learning environment? And is there an element of what is acceptable in society to evaluating what speech or expression is protected?

While it is sound policy to protect students’ learning environment, First Amendment rights should not be restricted based on subjective determinations of what is disruptive versus protected expression based on what a majority of the population may deem as morally acceptable. This was a concern under the Court’s 1940 decision in *Minersville School District v. Gobitis*,⁸ where the Court upheld a Pennsylvania law that resulted in discipline to Jehovah’s Witnesses for refusing to salute the flag. Fortunately, the Court overturned that precedent in *West Virginia Board of Education*. Although many Americans might agree that it is a sign of respect to salute the American flag which symbolizes freedom, the Court struck down a mandate that students salute the flag and protected their right to express themselves by refusing to do so. What these cases reflect is that the scope of our constitutional rights cannot be defined by what the majority considers to be moral. Absent a showing that a student’s speech disregards their obligation to respect and help preserve the right of their peers to have a safe and productive learning environment free of disruptions, students’ rights to free speech and expression both on and off campus will be protected.

⁶ *Disruptive Behavior in Schools*, Neil Frude and Hugh Gault, (1971), pg. 117

⁷ *It’s Elementary, Children Have First Amendment Rights Too*, Posted on the Freedom Forum Institute Website by David Hudson Jr (Aug. 19 2010)(noting that while John Tinker, a high school student, and his sister Mary Beth, a middle school student, were punished for wearing the armbands in protest, their younger siblings in elementary school were not punished for the same behavior).

⁸ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

Bibliography

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