REMEDYING THE DECLINE OF TINKER: EXPANDING STUDENTS’ FREE SPEECH RIGHTS THROUGH STATE AVENUES

Wellington Lyons

Robust freedom of speech protections in schools advance student learning in ways that planned curriculum and staged debates cannot. If schools are to serve their purpose of preparing adolescents for meaningful and self-sufficient citizenship, protections of student speech should go beyond what the Supreme Court has recently allowed. Advocates of strong student free speech rights have watched for nearly twenty-five years as the Supreme Court has chipped away at the importance of *Tinker v. Des Moines.* Confronted with this reality of diminishing rights, those who believe in the importance of robust student speech should explore state and local solutions, which may afford greater protections than federal courts are willing to dispense.

I. THE LEGAL FRAMEWORK

Student free speech rights reached their high-water mark in 1969, the last year of the liberal Warren court. The student speech at issue in *Tinker* was the symbolic wearing of black armbands to protest the Vietnam War, in contravention of a recently passed administrative code specifically banning such armbands. High school and middle school students were suspended for refusing to remove their armbands, and subsequently filed suit. In its seminal decision on the topic, the court held in *Tinker v. Des Moines Independent Community School District* that while the court recognized the “special characteristics of the school environment,” student

---

1 Candidate for Juris Doctor, Loyola University Chicago School of Law, 2011; B.A., Political Science, Middlebury College, 2005.
5 *Id.*
speech could be proscribed only “by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school.” This “material and substantial” disruption standard for restricting student speech in public schools is not satisfied by an administrator’s mere hunch or fear that disruption may ensue, but requires evidence and facts that would lead school authorities to anticipate that the speech would “substantially interfere with the work of the school or impinge on the rights of other students.” This standard respects students as persons under our Constitution and recognizes that they possess significant First Amendment rights. Unfortunately, a string of subsequent Supreme Court rulings has shown a diminished respect afforded to student speech, as measured by a reduced significance of the material and substantial disruption standard. Indeed, some courts have openly wondered whether Tinker remains good law today.

While it has become something of an axiom of American educational law that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” this statement is now misleading. Today, the memorable pronouncement of Tinker may more properly be thought of as an epitaph for the rights it once heralded. A more honest evaluation of the state of student speech rights might be “Students do not shed their constitutional rights to freedom of speech at the schoolhouse gate, except when they do, which is often.”

Beginning with Bethel School District No. 403 v. Fraser in 1986, the Supreme Court held that additional categories of student speech were excluded from the protections afforded by the First Amendment. In Fraser, a high school senior gave a nomination speech for a classmate

---

6 Id. at 513.
7 Id. at 509.
8 Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994).
9 Tinker, 393 U.S. at 506.
running for student body vice president. The speech was rife with sexual double entendres, but as one commentator has noted, “not within a country mile of the Court's definition of obscene.” Fraser was suspended for three days for his speech, and his name was removed from the list of students eligible to speak at graduation. In the majority opinion, the court noted that the rights of students in public schools are “not automatically coextensive with the rights of adults in other settings.” The court also emphasized the importance of the school’s educational objective to “inculcate the habits and manners of civility.” It held that the school district was acting within its authority in imposing disciplinary action against Fraser for his “offensively lewd and indecent speech.”

Of course, Fraser could have been decided under the Tinker test of material and substantial disruption, but was not. “Whatever approach Fraser employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by Tinker,” Chief Justice Roberts has dryly noted in a recent student speech opinion. In his dissent in Fraser, Justice Marshall argued that the case should have been considered within the Tinker framework, and found no reason to overrule two lower courts, both of which had found that the school district failed to show any substantial disruption of the educational process. While Fraser’s speech may have been in poor taste, it was neither obscene nor materially disruptive. True threats, patently offensive remarks and obscene speech would all fall within the Tinker rule, and be subject to appropriate disciplinary actions, as permitted by the special requirements inherent in maintaining

12 Fraser, 478 U.S. at 675.
13 Id. at 682.
14 Id. at 681.
15 Id. at 685.
16 Morse v. Frederick, 551 U.S. at 405.
17 Id. at 690.
a functioning school. Few would object as insufficient limiting student speech rights to just below an adult threshold. But by expanding the power of school officials to regulate speech which it merely finds to be in lewd or offensive, but not disruptive, is to make public schools institutions of hypocrisy. What is a student going to learn when she is taught the First Amendment, only to watch as school officials deny her those same rights?

The court further limited student free speech rights in *Hazelwood School District v. Kuhlmeier*, in which it held that as school newspapers bore the imprimatur or the school, administrators could “regulate the content of [the school newspaper] in any reasonable manner.”18 In *Kuhlmeier*, a principal deleted two pages of school newspaper containing articles written by students about pregnancy and divorce. Fearing that student speech in a school-sponsored medium, whether newspaper, theater production or other activity could be misattributed as reflecting the school’s viewpoints, the court gave school administrators near total control in deciding how to regulate such speech.19 The decision was met with disappointment by the leading national association of journalism educators.20 Again, while pretending to give deference to the precedent established by *Tinker*, the court chipped away at the expressive rights of students by carving out another exception to the substantial and material disruption rule.

The latest chapter in the assault on student free speech rights was handed down by the court in 2007, in *Morse v. Frederick*. In *Morse*, students unfurled a large banner at a school-sanctioned event.21 The banner had a nonsensical message. It read “BONG HiTs 4 JESUS.”22

19 *Id.* at 271.
21 *Morse v. Frederick*, 551 U.S. at 396.
22 *Id.* at 397.
As soon as the high school principal saw the banner he immediately ordered the students to take it down; one of the students refused, and was subsequently suspended for eight days.\textsuperscript{23} The Ninth Circuit Court of Appeals found that the administration had failed the \textit{Tinker} test by showing no threat of substantial disruption from the unfurling of the banner.\textsuperscript{24} In its ruling reversing the Ninth Circuit, the Supreme Court again avoided applying the \textit{Tinker} rule. While pretending to defer to the language of \textit{Tinker}, the court managed to restrict the student’s speech, never finding that his banner would have led to a substantial and material disruption of the educational process. Instead, holding that as Frederick’s banner was speech at a school event and reasonably interpreted as advocating illegal drug use, school officials did not violate his First Amendment rights by restricting his arguably pro-drug speech.\textsuperscript{25}

Writing that “Tinker’s mode of analysis is not absolute,” the court found yet another exception to the substantial disruption rule, and again stripped student speech of some of its protections.\textsuperscript{26} The result is that after \textit{Morse}, students apparently shed any constitutional right to convey what may be reasonably interpreted as pro-drug messages well before they reach the schoolhouse gates. Stevens’ dissent raises important questions about the applicability of the holding. Certainly, it is constitutionally permissible to punish a speaker who advocates illegal conduct when the advocacy rises to a level of “incitement to imminent lawless action.”\textsuperscript{27} But it is questionable whether Franklin’s banner even advocated illegal drug use, and there is no evidence whatsoever that it incited others to imminently experiment with marijuana. Stevens argued that “carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is

---

\textsuperscript{23} Id. at 398.  
\textsuperscript{24} \textit{Morse v. Frederick}, 439 F. 3d 1114, 1121-1123 (2006).  
\textsuperscript{25} \textit{Morse v. Frederick}, 551 U.S. at 394.  
\textsuperscript{26} Id.  
inimical to the values protected by the First Amendment.”28 The dissent concludes that under the majority’s opinion, even a banner which read “WINE SiPS 4 JESUS” could be banned from school for advocating the use of substances illegal to minors.29

What remains of Tinker after Fraser, Kuhlmeier and Morse? Justice Alito’s concurring opinion in Morse suggests that the ban on student speech advocating illegal drug use is at the far limits of what the First Amendment allows.30 This may bring a sigh of relief to student speech advocates fearing that an “interference with a school’s educational mission “ test was around the corner.31 Such a test, writes the justice, would “strike at the very heart of the First Amendment.”32 Instead, we are left with the weakened, but still standing rule from Tinker: absent evidence of a material and substantial disruption of the educational process, student speech is protected by the First Amendment and cannot be suppressed… unless the speech is vulgar, lewd, indecent or plainly offensive, but below the threshold of obscene; or unless it is school-sponsored, or unless it may reasonably be interpreted as having a pro-drug message. Taken together, these restrictions on student free speech rights reveal an educational system that while proclaiming to be open and tolerant, at times prefers censorship to discussion, even when such speech cannot be shown likely to cause any substantial disruption of the learning environment.

Opponents of stronger student speech protections have argued that little of what is restricted in student speech cases would qualify as high political discourse discourse. A quick glance of recently litigated student expression cases tends to show that many of these cases

---

28 Morse v. Frederick, 551 U.S. at 438-439.
29 Id. at 446.
30 Id. at 425 (concurring opinion).
31 Id. at 423.
32 Id.
concern speech that is juvenile at best, and threatening or alarming at worst. However, dismissing student speech as being of lesser value due to its lack of eloquence entirely misses the point.

II. HOW CENSORSHIP HAMPERED EDUCATION

Paternalistic speech codes underestimate the intellectual ability of students and devalue the critical educational goal of promoting tolerance. If students are going to become thoughtful citizens capable of participating in a modern democracy, they need to learn how to distinguish arguments based on fact, and learn how to confront opinions with which they may disagree.

While the special circumstances of public education may demand slightly greater censorship of student speech, other circumstances make the school an ideal place for learning how to express oneself and the ins and outs of advocacy and debate: “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

The marketplace of ideas is no different from any other marketplace in which certain goods are proscribed - an underground market soon develops. Official censorship often gives weak ideas an unfounded importance. Conspiracy theories are best countered by allowing them to be aired in the public arena, where they may flourish or wither on their own merits. The same is true of most other forms of expression or advocacy. Openness leads to thought, which leads to debate, discussion and informed decision-making.

Justice Stevens, in his dissent in Morse, expressed what many parents and teachers already know: “most students... do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it.”

33 See generally, Allison Hayes, From Armbands to Douchebags: How Doninger v. Niehoff Shows the Need to Address Student Speech in the Cyber Age, 43 Akron L. Rev. 247 (2000).
35 Morse v. Frederick, 551 U.S. at 444.
students is that they are not treated as adults. School censorship inherently treats students as individuals incapable of exposure to debates taking place outside the confines of the schoolhouse gates, and yet a crucial element of engaged citizenship is the ability to separate meritorious arguments from ones unsupported by fact. One need only look to the recent health care debate to see that speech in our country, even at the highest levels, is not always marked by order and decorum, or even a basis in fact. Acquiring the tools necessarily to recognize spurious or counterfactual arguments, whether from teachers, politicians, or fellow students is an important educational goal - perhaps the most important - and students should be exposed to divergent and contentious arguments so as to hone critical thinking skills.

The real world is not a safe haven of courteous debate. By allowing students to engage in controversial dialogue with one another and to express themselves in school in ways that do not substantially disrupt the educational process, educators help students find their voices, self-confidence, and the skills requisite to challenging viewpoints with which they disagree. The best way to ensure that we do not “teach youth to discount important principles of our government as mere platitudes” is to protect their free speech rights to as close an approximation of adult free speech rights as will not prevent substantial educational disruptions: in short, return to Tinker.36

It has been said, “the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.”37 But would a jacket emblazoned with Cohen’s expressive language cause a substantial disruption in a public high school today? As plainly offensive speech, such an expression is clearly censorable under Fraser. Putting aside the question of whether a more subtle message would be more effective at winning over adherents, wouldn’t permitting a student to wear a controversial t-shirt, and allowing students to discuss the

37 Thomas v. Board of Educ., Granville Central Sch. Dist., 607 F.2d 1043, 1057 (CA2 1979) (concurring opinion).
message at the lunch table be an educational experience, particularly if the students didn’t realize
just how much they were learning? In a society where the Vice President openly describes the
passage of the health care bill in the same terms as Cohen, are we really afraid of letting high
school students use strong language to express strong opinions?38 And wouldn’t we be better off
letting them learn firsthand the ineffectiveness of their approach when a fellow student trumps
expletives with reasoned argument? To quote Justice Fortas in his majority opinion in Tinker,
“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.”39 A return to the reasonable regulation of student speech
- something more akin to the rights afforded adults - would be an important civics lesson in and
of itself.

III. WHAT CAN BE DONE TO PROTECT STUDENT FREE SPEECH RIGHTS

Tinker struck an appropriate balance between student free speech and the rules
necessary to maintaining an orderly school system. Requiring that student speech be shown
likely to “materially and substantially disrupt the work and discipline of the school” provides
broad free speech protections while allowing administrators to discipline students whose speech
falls so far outside the norm of accepted behavior as to impede the educational process. This
standard is at once both flexible - what may cause a disruption in middle school may be very
different from what causes a disruption in a senior level class - and straightforward. By
requiring a showing of substantial disruption, school administrators will be less likely to single
out students for expressing views with which they may disagree. Certainly, a return to a more

38 See, David Herszenhorn, “At White House, Biden’s Expletive Caught on Open Mike,” The Caucus Blog.
cought-on-open-mic/?scp=1&sq=biden%20big%20deal&st=cse
39 Tinker, 393 U.S. at 507-508.
permissive standard will result in some uncomfortable and heated confrontations between parties with opposing views.

Of course, barring any drastic personnel changes, the Supreme Court is unlikely to suddenly revitalize a test it has consistently been narrowing for over twenty-five years now. As such, advocates of strong student speech protections should turn to their state legislatures to grant what the federal courts have taken away.

Currently, five states have passed laws protecting public high school students’ rights to free speech.\textsuperscript{40} The Massachusetts law exemplifies the best aspects of these laws. It proclaims, in relevant part, that “the right of students to freedom of expression in the public schools of the commonwealth shall not be abridged” so long as such expression foes not cause “disruption or disorder within the school.”\textsuperscript{41} Under the Massachusetts law, student freedom of expression includes the right to express ones opinions, verbally, symbolically, through writing, or by peaceably assembling.\textsuperscript{42} Each state law uses the “material and substantial disruption” standard from \textit{Tinker} as the test to be used.\textsuperscript{43} Where legislatures are unwilling to pass pro-student speech measures, students may turn to their state constitutions and state courts for protection. Every state grants its citizens free speech rights under its own constitution, and many states have interpreted their constitutions to afford more protection than is required as a federal minimum.\textsuperscript{44}

Of course, students and concerned parents may always choose to fight these battles at the local level as well, by approaching school boards to amend disciplinary policies pertaining to student speech rights. Whatever the course of action, avenues exist. The Supreme Court’s

\textsuperscript{42} \textit{Id}.
\textsuperscript{43} Lloyd, \textit{supra} note 40 at 313.
whittling away at the significance of *Tinker* need not be the last word on the matter of student free speech. Indeed, students should talk back to the Supreme Court and stand up for their free speech rights. Doing so would allow students to learn firsthand lessons about the disputatious but vibrant nature of our society and give meaning to otherwise abstract conceptions of constitutional rights.