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IssueBrief

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Developments in Constitutional Law: Free Speech Protections in K-12 Public Schools

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Both the U.S. and Wisconsin Constitutions protect freedom of speech.[1] These protections apply when K-12 public schools restrict the speech or expression of students. However, student speech rights are "not automatically coextensive with the rights of adults in other settings."[2] This issue brief discusses U.S. Supreme Court decisions establishing the extent of students' free speech rights, including a recent decision concerning off-campus social media use.

THE *TINKER* TEST

The 1969 case, *Tinker v. Des Moines*, 393 U.S. 503, established that the First Amendment's free speech protections apply to public, K-12 school students. *Tinker* concerned three junior high and high school students who protested the Vietnam War by wearing black armbands. When they refused to remove the protest armbands, they were suspended from school.

The U.S. Supreme Court held that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] In light of the special characteristics of schools, the *Tinker* Court explained that schools may only forbid student speech that "materially and substantially interfere[s] with . . . the operation of the school" or which "inva[des] the rights of others."[4] A school must show more than fear of a disturbance or the unpleasantness that comes with unpopular opinions to justify restricting student speech. The Court also noted that school authorities had singled out a particular viewpoint for censorship rather than banning all political symbols (in fact, the schools allowed students to wear political campaign buttons and even Nazi symbols).

EXCEPTIONS TO *TINKER*

Tinker remains the predominant test for student free speech.[5] However, subsequent Supreme Court cases in 1986, 1988, and 2007 identified three situations in which the *Tinker* test does not apply.

The first exception to *Tinker* is lewd speech at school. In *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), the Supreme Court declined to apply the *Tinker* test when a student gave a speech filled with double entendres at a school assembly. Instead, because the student's speech did not convey a political message such as a Vietnam War protest, and because schools' educational mission includes teaching students to engage in appropriate, civil discourse, the school was permitted to punish vulgar and lewd speech.

School-sponsored speech is the second exception to *Tinker*. The *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), decision upheld censorship of student newspaper articles about teen pregnancy and divorce. Importantly, the school did not treat its newspaper as a public forum for student expression; it was part of the curriculum for a journalism class and was always approved by the principal prior to publication. The Supreme Court held that school-sponsored speech such as newspapers, theatrical productions, and "other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" are subject to the school's editorial control so long as the school's actions are "reasonably related to legitimate pedagogical concerns."[6] The Court gave three reasons for this editorial control of school-sponsored speech: (1) to ensure that participating students learn the lessons intended by schools; (2) to avoid exposing audiences to inappropriate material; and (3) to prevent the speaker's views from being erroneously attributed to the school.

The most recent *Tinker* exception allows schools to punish speech which can be reasonably interpreted as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393 (2007), involved a high school student

suspended from school for displaying a large banner reading "BONG HiTS 4 JESUS" at a school-sanctioned event.[7] Although his speech, unlike an article in a school newspaper, could not have been erroneously attributed to the school, the Supreme Court concluded that he could be punished because of the school's special interest in deterring illegal drug use. However, the Court declined to adopt a rule, proposed by the school district, that schools should have the power to restrict all "offensive" speech.

Recent Decision Regarding Off-Campus Social Media Use

A 2021 Supreme Court case applied *Tinker* to the modern phenomenon of social media and reached new conclusions about schools' power to restrict students' off-campus speech. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, concerned a high school freshman's vulgar Snapchat message.[8] Upset at the outcome of cheerleading and softball tryouts, outside of school hours and off campus, the student sent social media friends a picture of herself and a friend with middle fingers raised accompanied by the message "F*** school f*** softball f*** cheer f*** everything." The school suspended her from cheerleading, reasoning that her posts had been connected to school extracurricular activities.

Applying *Tinker*, the Supreme Court ruled that the student could not be punished because she did not substantially disrupt the school or invade the rights of others, but also held that schools have some power to regulate off-campus speech. Without creating a bright-line rule, the Court identified three key features of off-campus speech which diminish schools' First Amendment leeway. First, when students are off-campus, the school rarely stands *in loco parentis* (in place of the student's parents). Second, allowing schools to regulate both on- and off-campus speech risks allowing the school to ban particular types of speech entirely. Therefore, the Court was more skeptical of efforts to restrict off-campus speech than on-campus speech, and schools have an especially heavy burden where off-campus political or religious speech is at issue. Third, because public schools are "the nurseries of democracy" and benefit from a free marketplace of ideas, they have an interest in protecting students' unpopular speech.[9]

The Court also noted several factors about the student's speech that diminished the school's authority to punish her. Specifically, the student spoke off-campus, outside of schools hours, without identifying the school or any particular students, and transmitted her speech through a personal cellphone to a private audience of social media friends. Also, while her speech was crude, it was "pure speech" that communicated "criticism of the rules of a community of which [she] forms a part."[10]

However, the *Mahanoy* decision also noted that there are situations in which schools retain a significant interest in controlling off-campus speech, such as "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."[11]

The *Mahanoy* decision does not give schools a clear rule to determine whether they have the power to punish a student's off-campus speech. However, the Court strongly suggested that schools can regulate the categories of speech listed in the previous paragraph. Schools may have some power to restrict off-campus speech beyond those categories, but should carefully consider the factors analyzed in *Mahanoy*.

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[1] U.S. Const., amend. I, s. 3; Wis. Const., art. I, s. 3. Wisconsin courts interpret the two as providing the same speech protections. [*State v. Douglas D.*, 2001 WI 47, fn. 2.]
[2] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (citing *New Jersey v. T. L. O.*, 469 U.S. 325, 340-342 (1985)).
[3] 393 U.S. at 506.
[4] *Id.* at 513.
[5] *See, e.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); *N.J. v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022).
[6] 484 U.S. at 271, 273.
[7] The event, while technically off-campus, took place in front of the school, during school hours, and with school staff supervising. It was the passing of the Olympic Torch through Juneau, Alaska, on its way to Salt Lake City, Utah. [551 U.S. at 396.]
[8] Snapchat allows users to send photos, videos, and messages that disappear after a set period of time. [141 S. Ct. at 2043.]
[9] The Court stated that schools' interest in protecting unpopular ideas is especially strong when students express those ideas off-campus, but did not explain why this is the case. [*Id.* at 2046.]
[10] *Id.* at 2047.
[11] *Id.* at 2045.