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Jamin B. Raskin

American University Washington College of Law, raskin@wcl.american.edu

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Recommended Citation

Raskin, Jamin B., "Student Speech: The Enduring Greatness of Tinker" (2008). *Articles in Law Reviews & Other Academic Journals*. 1049.

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Student Speech The Enduring Greatness of *Tinker*

By Jamin B. Raskin



Associated Press, AP

Students protest for freedom of speech outside the Supreme Court in Washington, D. C.

The Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), did for the ideal of freedom in America's public schools what *Brown v. Board of Education*, 347 U.S. 483 (1954), did for the ideal of equality. It made a core value of the Bill of Rights spring to life for young people facing unjust policies and authoritarian treatment at the hands of adult officials in local school systems.

In his remarkable opinion for the majority, Justice Abe Fortas upheld thirteen-year-old Mary Beth Tinker's First Amendment right to wear a black antiwar armband to school by declaring censorship of student expression invalid unless a school can demonstrate that it causes "material disruption" of the educational process. To be sure, this powerful libertarian doctrine has been eroded (much like the egalitarian vision of *Brown*) by the sharp undertow of the Burger, Rehnquist, and Roberts Courts, but it still shines imperishably bright from the last cen-

tury as a beacon not only for student rights but for constitutional democracy in public settings generally. It expresses the idea that every social institution must respect freedom of speech unless the exercise of that freedom would thwart the very purpose of having the institution in the first place.

The Fixed Star of West Virginia v. Barnette

For a justice who served only four years on the Court, Fortas struck a historic blow for freedom in public schools, but he did not write on an empty blackboard. Even before *Tinker* gave students the right to speak their conscience, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), had given them the right not to have to speak *against* conscience.

The *Barnette* children were Jehovah's Witnesses who refused for religious reasons to pledge allegiance to the flag at school. It took unknown courage for them to sit it out in small town West Virginia in the middle of World War II. The Supreme Court in

Minersville School District v. Gobitis, 310 U.S. 586 (1940), had recently rejected a First Amendment attack on the pledge salute, and Witnesses across the country were facing official reprisals and vigilante harassment for their refusal to join in.

But Justice Robert Jackson came to their aid, writing the Supreme Court's first great student rights decision. "We set up government by consent of the governed," he wrote, "and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." 319 U.S. at 641. Then came these immortal words: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

Mary Beth Tinker and Her Black Armband

Yet as great as *Barnette* was, it was *Tinker* that proclaimed the right of America's children to speak out at school. After all, the Jehovah's Witnesses were religionists minding their own business, who wanted only to be left alone. But angelic-looking Mary Beth Tinker was an outspoken American rebel from the heartland, a precocious free spirit challenging, in wartime no less, the authority of the president, the military-industrial complex, and her school principal, who had gotten wind of her protest and hastily promulgated a rule banning black armbands. But Mary Beth, joined by her brother John and their friend Chris Eckhardt, insisted on expressing solidarity for Senator Robert Kennedy's call for a Christmas truce in

Vietnam. Defiant, she wore her black armband to school on December 16, 1965, making it to third period before she was sent down the hall. She refused to remove it and was suspended. Her family received death threats and had red paint splashed on their front door. But the Tinkers hung tough and, with the American Civil Liberties Union, took their case all the way to the Supreme Court.

At stake in *Tinker*, according to the school district, was nothing less than every school principal's power to maintain order against the anarchy threatened by children having political speech rights at school.

But Fortas rejected arguments that students have no First Amendment rights. "It can hardly be argued," he wrote, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506.

In tracing the contours of this freedom, Fortas found that schools can never censor out of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Rather, a school seeking to censor must show that a student's speech will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id.*, which means "material[] disrupt[ion] of classwork, substantial disorder or invasion of the rights of others." *Id.* at 513.

Needless to say, Mary Beth's principal asserted that her black armband was "disruptive." But Fortas found that, under the First Amendment, schools may not equate dissent with disruption. "In our system," he wrote, "state-operated schools may not be enclaves of totalitarianism," and "students may not be regarded as close-circuited recipients of only that which the state chooses to communicate. They may not be confined to the expression of views that are officially approved." *Id.* at 511. Rather, a school must have a compelling reason for silencing students, and "undifferentiated fear or apprehension of disturbance" can never be "enough to overcome the right to

freedom of expression." *Id.* at 508.

The Court's sweeping analysis advanced not only a theory of democratic rights but a democratic theory of education. Mary Beth was not to be the "close-circuited" recipient of information drilled into her mind by the school board. As a student, she must be an active participant in the learning process. Each student has something precious to offer the rest of the class and "intercommunication among the students" is not only "inevitable" but "an important part of the educational process." Indeed, the free exchange of thoughts and feelings among students "is not confined to the supervised and ordained discussion which takes place in the classroom," but

school." JOHN DEWEY, *DEMOCRACY AND EDUCATION* 410 (1916). Rather than punishing Mary Beth's activism, the school ought to have welcomed it. Her principal lacked the proper sense of democratic improvisation in the learning process.

The Proliferating Exceptions to *Tinker*

In following decades, the spirit of *Tinker* helped move the Court to forbid the removal of books from school libraries for political reasons (*Board of Education v. Pico*, 457 U.S. 853 (1982)) and to protect the free speech rights of religious groups obtaining equal access to school facilities after

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spills over to the whole school day, including athletic, extracurricular, and informal events. *Id.* at 512.

This rendering of school in a democracy closely resembles the thinking of John Dewey, who argued that students learn equally from the "formal" curriculum and the "informal" curriculum generated in the interstices of the school days, where banter, jokes, talk of current events, laughter, gossip, interaction with teachers, and the full play of social life acquaint students with cultural values and political ideas.

Far from disrupting the educational process, Mary Beth's silent protest enriched it. A good teacher would simply have noted the armband and moved on or picked up on it to teach about everything from war powers to post-World War II American foreign policy to free speech itself. But there was surely no reason to fear it because there is no reason to fear blurring the boundaries between school and the outside world. The boundaries are porous and, as Dewey put it, "learning in school should be continuous with that out of

hours (*Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). It also began to shift attitudes about student speech in lower courts and many school systems and prompted some states, like Massachusetts, to codify the *Tinker* standard in state law.

But the Court's hard turn to the right over the years caused it to reverse course in significant ways. It has carved out meaty exceptions to the *Tinker* rule, authorizing school censorship in the case of "lewd and indecent" student speech (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)), in the context of any "school-sponsored" student speech in newspapers, yearbooks, assemblies, theater productions, and other outlets that "the public might reasonably perceive to bear the imprimatur of the school" (*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988)), and most recently in the case of student speech that might be "reasonably viewed as promoting illegal drug use" (*Morse v. Frederick*, 127 S. Ct. 2618 (2007)).

The reasoning of the majority decisions in these cases is embarrassingly

literal-minded. In *Fraser*, the Court drew up the lewd and indecent speech exception to uphold suspension and other discipline of a mischievous student at Bethel High School in Pierce County, Washington, who gave a nominating speech for a fellow student running for student government based on—surprise, surprise!—a sophomoric sexual metaphor. He said, “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm,” etc.

Surely the teacher supervising might have rolled his or her eyes and spoken disapprovingly of wasting the opportunity on such a vacuous statement. But suspension—for what? Are not Shakespeare’s plays—*The Taming of the Shrew* and *Twelfth Night* come quickly to mind—filled with sexual metaphors, sneaky double entendres, and bawdy insinuations? Of course, the teenaged culprit was not Shakespeare, but surely a nimble principal could have told Fraser publically to channel his rudimentary comic instincts into literature rather than politics, where such speeches do not fare very well. This would have been a fair, stern, and educationally meaningful intervention.

But the principal ordered, and the Court affirmed, Fraser’s suspension and other punishment. If the Court had to go in that direction, Justice William Brennan, in his concurring opinion, offered the right way to justify it. There was no reason to carve out a separate category for lewd and indecent speech, he argued, since Fraser’s speech had actually “substantially disrupted” the school’s pedagogical mission to teach mature public advocacy. *Tinker* should have been applied, not shoved aside.

All in all, the *Fraser* case is not too big a deal, but heavy frontal damage was inflicted on *Tinker* in *Hazelwood*. There, Principal Robert Reynolds censored two articles written by students for their school newspaper and approved by the teacher of the journalism class. One article concerned the impact of parental divorce on students and the other was about the problem of teen

pregnancy as seen through the experiences of three pregnant students. Under *Tinker* and *Fraser*, the articles were plainly protected speech and neither disruptive nor lewd or indecent. Indeed, they were written in a mature and thoughtful way about serious problems much on the minds of the student body. But the principal thought that the discussions of sex and birth control in the latter story were “inappropriate for some of the younger students” and that the former story was unbalanced and might invite controversy.

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The Court majority found that, while *Tinker* governs the voluntary independent speech of students, greater latitude must be granted to educators to exercise “editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns.” 484 U.S. at 273. It promptly found Reynold’s censorship of the newspaper articles reasonable and not based on viewpoint discrimination. This decision prepares young journalists to be not only edited by editors but squelched by puritans in power.

The dissenting justices—William Brennan, Thurgood Marshall, and Harry Blackmun—rallied around the forsaken virtues of *Tinker*, observing that the school’s journalism class had itself committed to publishing all arti-

cles that do not “materially and substantially interfere with the requirements of appropriate discipline.” *Id.* at 278. It is indeed interesting to note how many schools after *Tinker* quickly embraced its intuitive free speech formula.) The dissenters insisted that mere political disagreement between students and administration should never be sufficient grounds for censoring speech in a school publication. After all, principals do not own their schools and school publications belong to the school community itself, which is governed as a state actor by the First Amendment.

Of course, educators can require students to learn the contents of a course, but this truism is “the essence of the *Tinker* test, not an excuse to abandon it,” as the dissenters insisted. *Id.* at 283. They agreed that high schools do not have to publish student articles that are “ungrammatical, poorly written, inadequately researched, biased or prejudiced,” *id.*, but pointed out that “we need not abandon *Tinker* to reach that conclusion, we need only apply it.” *Id.* at 283-84. What is crucial is that school officials cannot act as political “‘thought police’ stifling discussion of all but state-approved topics and advocacy of all but the official position.” *Id.* at 285. If the school found fault with the articles about teen pregnancy and the meaning of divorce for kids, it had every right simply to print an institutional disclaimer or publish opposing views.

After *Hazelwood*, the Court’s 2007 decision in *Frederick* seems depressingly predictable, as the Court again exfoliated vast acres of free expression to kill the mosquito of adolescent humor. The student culprit in the case, Joseph Frederick, was a high school senior in Juneau, Alaska, who used the occasion of the Olympic torch relay to make a bid for national television coverage by unfurling a banner bearing the phrase “Bong Hits 4 Jesus.” The majority upheld his ten-day suspension based on a new doctrine withdrawing First Amendment protection from speech advocating illegal drug use.

It is tempting to dismiss the importance of a case based on such frivolous facts, but Stevens's lucid and passionate dissenting opinion points out the dramatic change effected by the majority. The new exception to *Tinker* discards the Court's prior commitment to maintaining official viewpoint neutrality at school by approving "stark" efforts to suppress one side of the national debate about drugs. Furthermore, the Court dropped *Tinker's* understanding that a censoring school must show an *imminent* substantial disruption. Frederick's "nonsense message" posed no threat of any kind, much less a threat of immediate substantial disruption. The likely effect of his silly and surreal slogan was—nothing at all. As Stevens memorably put it: "Most students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it." 127 S. Ct. at 2649.

The broader consequence, Stevens observed, is a severe chill placed on student speech questioning the war on drugs. This is a chill we can ill afford, he pointed out, as free debate was the catalyst for changing the disastrous policies of the Vietnam War and—even more on point—Prohibition. Given the mounting costs and casualties of drug prohibition, Stevens warned against "silencing opponents of the war on drugs," and stated that, in "the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment." *Id.* at 2651. Here Stevens identified the freedom to dissent at school with the freedom to dissent in the society at large.

A New Birth of Student Freedom?

The various blows against *Tinker* have led to accelerating censorship of school newspapers, yearbooks, magazines, and theatrical productions around the country, as well as stepped up discipline of students who inject "inappropriate" language into the school environment. Many administrators now view themselves like (most)

private shopping mall owners, who get to control who says what and when on their premises. Of course, even when *Tinker* was riding high, its sweeping message did not penetrate all public schools and its spirit was often honored in the breach. Constitutional literacy exists at alarmingly low levels in the country, and precious few students know what their rights are, much less how to fight for them or where to go for help. (Despite *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and other cases rejecting official prayer in school contexts, I still frequently meet students who have been asked to pray together at school, on the football field, or at graduation.)

Yet *Tinker* is still good law. Its enemies have managed to place it in a straitjacket but failed to give it the guillotine. Of course, there are still those calling for its head. In his startling concurring opinion in *Morse*, Justice Clarence Thomas tried to refute the idea that students have any First Amendment rights at all and cited approvingly cases from the nineteenth and twentieth centuries in which courts upheld severe discipline, including corporal punishment, of students for speaking against their masters, including a California appeals decision affirming expulsion of a student for criticizing unsafe conditions at his school that added up to what he saw as a significant fire hazard.

The irony, of course, is that while *Tinker*—like *Brown*—stands as a towering symbol of constitutional ideals rather than a complete statement of how the world actually works, the reasoning of the case seems ever more visionary and relevant. All across the country schools are struggling with the proper treatment of student groups protesting or supporting the Iraq war and groups defending or opposing the rights of lesbian-gay-bisexual-transgender students. Moreover, the advent of the Internet means that a whole new generation of issues has grown up around official efforts to punish off-campus student speech on websites

that gossip about student life or disparage school officials or teachers. In these cases, which have not made it to the Supreme Court yet, the lower courts seem clear that the only speech on students' private websites punishable by schools is that which threatens actual harm to other members of the community or otherwise substantially disrupts the educational process. *Tinker* thus not only makes school internally safe for democratic freedom but provides the surest guidance to school officials on how to proceed in disentangling fair criticism and personal opinion uttered off campus from those true threats made to members of the learning community.

Handled properly, the Internet age could usher in a new birth of student freedom of expression. Given that websites are radically free and off limits to official control in all but the most extreme cases, shrewd officials might think twice before using their handy *Hazelwood-Fraser-Morse* powers at school to censor student expression and drive it off campus into the wild world of cybertalk, where teachers have no sway at all. It will benefit everyone if educators resist the urge to censor and instead engage students in serious intellectual and political dialogue at school, test their youthful dogmas and probe their provisional certainties, tease out their valuable and provocative insights, and help them trim away that which is unfair, sleazy, or irresponsible. This is the path of true education, which is to say the path of true freedom. It is a path many schools have already chosen. It is the path of *Tinker*.

Jamin B. Raskin is a professor of constitutional law at American University's Washington College of Law and a state senator in Maryland. He cofounded the Marshall-Brennan Constitutional Literacy Project, which has sent hundreds of law students into public high schools across America to teach about the Constitution. He is the author of We the Students (3d ed. 2008) and Overruling Democracy: The Supreme Court versus the American People (2003).