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Tinker v. Des Moines: Anchoring Students' Free Speech Rights

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Half a century later, *Tinker v. Des Moines* Independent Community School District (1969) remains the Supreme Court's authoritative ruling on symbolic speech and the First Amendment rights of K-12 students to express their political views.

Delivered in the context of the widespread social activism that defined the 1960s—anti-racism, anti-sexism and anti-war protests—Justice Abe Fortas's 7-2 landmark opinion upheld the right of students to wear black armbands in school as means of demonstrating their opposition to the Vietnam War. Justice Fortas famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

Mary Beth Tinker, a 13-year-old 8th grader, along with her brother John and friend Chris Eckhardt, both high school students, displayed their opposition to the war on December 16, 1965, by wearing black armbands in their respective schools in Des Moines. School district officials had gotten wind of their plans and had issued an order prohibiting armbands from city schools, even though students often displayed political campaign buttons and Iron Crosses and engaged in other forms of symbolic speech. The prohibition was aimed at anti-war speech, which, on its face, violated Supreme Court rulings that banned the state from practicing "viewpoint discrimination." Nonetheless, as

expected, the students were suspended from school for violating the district's policy. Members of the school board, after a heated public meeting, voted to maintain the ban and suspension of students.

The students went to court, represented by the Iowa Civil Liberties Union. A federal district judge acknowledged that the armbands represented a form of symbolic speech and thus deserved First Amendment protection. But that right, the court ruled, was secondary in importance to the school's greater need to maintain a "disciplined atmosphere" in the classroom. On appeal, the 8th Circuit Court of Appeals was equally divided, leaving the lower court ruling in place and setting the stage for a showdown in the U.S. Supreme Court.

Until *Tinker v. Des Moines*, the Supreme Court had said little about the rights of schoolchildren, but what it had said was memorable. In 1943, in *West Virginia Board of Education v. Barnette*, Justice Robert H. Jackson's opinion for the Court upheld student's freedom of religion and speech but established no test or standard. Jackson wrote of the role and duty of public schools: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes."

Justice Fortas's opinion grasped the opportunity to thread the needle between the school's interest in classroom discipline and the right of students to express themselves. The Tinkers' armbands, he agreed, "may start an argument or cause a disturbance." But "our Constitution says we must take this risk." He added, "This hazardous freedom—this kind of openness—is the basis of our national strength and independence" in an often "disputatious society."

The record, Justice Fortas explained, indicated no evidence of disruption in the schools, no finding or showing of forbidden conduct in the classroom. School officials' "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." The test or standard, he wrote, must be evidence of a "material disruption" of classroom activities to censor speech.

The "material disruption" test is fair and reasonable. A lesser standard would drain freedom of expression of its meaning. The state's interest in imposing a prohibition on a "particular expression of opinion," Fortas wrote, cannot be justified by a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." If discomfort became the standard for denying constitutional protection, there would be little or no protection for speech that challenged convention, strangling, as it were, in the words of Justice Jackson, "the free mind at its source."

Students are "persons" too, Justice Fortas pointed out, "in school as well as outside school, possessed of fundamental rights that the state must respect." Three members of the Court challenged the idea that students enjoyed the same constitutional rights as those possessed by adults. Justice Potter Stewart wrote a brief concurring opinion, indicating his doubts about such constitutional equivalence.

But it is Justice Hugo Black's stinging dissent, joined by Justice John Harlan, that surprised many familiar with his long and distinguished record of defending freedom of speech, to the point where he was described by some as nearly an "absolutist" when it came to the First Amendment right of expression.

Black, in his 80s and, in the estimation of some friends, growing "crotchety," was of the old school that believed children should be seen and not heard. Black's dissent asserted that the Court's opinion was ushering in "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." He lumped the students, who were entirely peaceful and passive in their symbolic protest, with the "loudest-mouthing" students who "have too often violently attacked" their classmates. Justice Black wasn't the first, and won't be the last, Justice to engage in hyperbole.

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