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## Academic Connection: Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights

Lauren Brauer

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*Academic Connection:*  
**Lessons in Censorship: How Schools and Courts Subvert  
Students' First Amendment Rights**

*By: Lauren Brauer*

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Justice Fortas wrote these words in *Tinker v. Des Moines*, a Supreme Court case regarding students' First Amendment Rights. In this seminal case, two students wore black armbands to school in order to protest the Vietnam War. When the students refused to remove the armbands, the principal suspended them until they came to school without the bands. The students returned after the allotted protest days and brought suit against the school for violating their First Amendment right of free speech.

The Court found in favor of the students, stating that students have First Amendment rights even in school settings. Under *Tinker*, the standard for First Amendment speech protection was relatively simple. Student speech was allowed, so long as it did not disrupt the classroom. However, Justice Black discussed in his dissent, how the students' armbands nonetheless created a disruption because other students raised questions about the armbands, interrupting the classroom environment. Thus, Justice Black asserts that these particular students' speech should have been restricted, justifiably, because such disruption was just the issue that the Court intended to protect against.

In her book “Lessons in Censorship: How Schools and Courts Subvert Student's First Amendment Rights,” Catherine Ross continues the analysis raised in *Tinker* regarding the issue of censorship in schools. Ross begins by discussing *Tinker* and the four cases that shape the right to free speech within school. This Article will give an overview of the cases that Ross cites as having the greatest impact on students' First Amendment rights. It will then discuss how schools apply these cases in the classroom. Next, it will address Ross' concerns with First Amendment Speech in school. This Article concludes with suggestions on how schools can use students' First Amendment right as a learning tool to empower children.

### **Seminal Supreme Court Cases**

Twenty years prior to *Tinker*, the Supreme Court decided another First Amendment case that Ross relies on in her reasoning. In *West Virginia School District v. Barnette*, the Supreme Court opined that students did have the right to refuse to salute the American flag during the Pledge of Allegiance. In this case, the students were objecting to a statute that required a salute that looked much like Hitler's salute, during the Pledge. According to the statute, if a student refused to salute the flag, they would be expelled until they agreed to comply. The students said this statute violated their First Amendment rights. The Court agreed and determined that a school could not compel a student to salute the flag.

After deciding *Tinker*, the Supreme Court decided three more cases that impacted what schools were able to censor. After *Tinker*, the make-up of the court changed into a

more conservative bench that began limiting First Amendment rights within the school. In *Bethel v. Fraser*, a student gave a speech to nominate his best friend for class president at a school assembly. The speech contained many sexual and lewd remarks. The school suspended the student for three days and removed his name as a potential speaker for the commencement ceremony. The student brought suit saying this was a violation of his First Amendment rights under *Tinker*. The Supreme Court majority was no longer willing to consider the broad rights guaranteed to students in *Tinker* and determined that "the purpose of public education in America is to teach fundamental values." These fundamental values must "include consideration of the political sensibilities of other students." The Court held that the First Amendment would protect offensive expression if it was used to make a political point, but in general, this type of speech could be censored. This case narrowed *Tinker* considerably by forbidding students from using vulgar and profane language in school that is not politically affiliated.

In 1988, the Supreme Court held in *Hazelwood School District v. Kuhlmeier* that schools had the right to censor a school newspaper, so long as it was a school-sponsored activity and "their actions [were] reasonably related to legitimate [educational] concerns." In *Hazelwood*, two high school girls wrote a newspaper article discussing teen pregnancy and the long-term effects it would have on high school students. The student quoted pregnant teens from their school about the impact that pregnancy had on the student's life. The school was concerned that this would glorify teen pregnancy and could potentially embarrass the students. The Court relied heavily on the reasoning in *Bethel*, to come to the conclusion that schools had the right to censor what is considered school sponsored speech, such as that written in a newspaper from a journalism class.

Most recently in 2002, the Court heard *Morse v. Frederick* in which a student held a banner that read, "bong hits 4 Jesus" at a school sponsored event viewing the passing of the Olympic torch. The principal asked the student to take the banner down and the student refused, stating that it was within his First Amendment right to hang the sign. The principal disagreed and suspended the student for his inappropriate speech. The Court determined that the school had a right to punish student speech that glorified drug use, as this was a school-sponsored event. Conversely, the dissent recognizes the lack of message in the student's sign and says this is an extreme violation of student speech. These four cases, along with *Tinker*, are what Ross relies on when she discusses censorship in schools.

### How This Plays Out

Throughout her book, Ross critically analyzes how these cases actually play out in schools. Teachers and administrators do not get a "First Amendment 101" class prior to their first day of teaching. Instead, many teachers find themselves weaving their way through this confusing web of First Amendment jurisprudence without substantial guidance or training. Thus, teachers and administrators regularly and unjustifiably limit student speech with few consequences. School professionals receive qualified immunity in court proceedings. In turn, if suit were brought against the school, as long as a teacher reasonably believed that he or she was not violating the student's rights, he or she would be immune from litigation. Not only does this deter students from bringing cases alleging

First Amendment violations, it also allows teachers and administrations blanket protection against litigation.

Ross further concludes that students continue to face unjustifiable censorship because of teachers' and administrators' lack of knowledge on how to properly apply the First Amendment. Lower courts have heard many cases involving alleged violations of these rights, yet the holdings of *Bethel*, *Morse*, and *Hazelwood* remain the strongest. Although *Tinker* is still good law, schools more frequently rely on the other three main cases to censor student speech. This speech comes in a variety of forms from cursing in the hallways, to discussing lewd messages, to continuing censorship in school papers. Sometimes saying one curse word under a student's breath can cause that student to be suspended. These three cases strengthen the power of a school and continue to tip the scales in favor of school rather than the student.

It is also interesting to note that in *Hazelwood*, the local newspaper printed the student's article and the reasons why it was not in the school newspaper. Ross notes that this has typically been the case when schools have decided to censor inappropriate material. In another case in New Jersey, a school refused to publish an article that it thought made the school look bad. Residents who lived next to a school bus facility that left its buses idling, were suing the school district for polluting the air. Students researched this allegation, asked for quotes from all parties and wanted to publish their findings in the student newspaper. When the school refused, the local paper printed the article with a note as to why the school refused. Ross points out the contradictory nature of this, such that schools are limiting speech because they are concerned of the disruption, yet the disruption is not avoidable simply by not printing the article. In many cases, these articles may end up printed in another source, as was the case here. Schools would be closer to their intended goal by just printing the controversial article rather than giving it more publicity by refusing to publish.

In some schools, teachers face harsher speech limits than even students do. Ross raises an example from a school where a teacher was teaching a lesson in a special education classroom on homonyms (words that sound like each other but have different meanings i.e. bark, date). Students began asking questions about inappropriate words that may have multiple meanings such as "hell." The teacher quickly realized that the situation was getting out of hand, so she had a brief conversation about appropriate language in school and ended the lesson. The school found that this was inappropriate speech in the classroom and fired the teacher.

In another school, a teacher was covering current events in the news as part of the mandatory curriculum. One newspaper clipping was about recent local protests of a war. One student asked if the teacher had ever participated in a war protest and the teacher responded that she had. After numerous complaints from parents, the school decided not to renew the teacher's contract. Ross points out the difficult situation that this lesson put the teacher in. This was part of a mandatory curriculum and the teacher was faced with a damning choice with either option she chose. She could lie to her students and say that she never protested the war, or she could be honest and use it as a teaching moment. Ultimately, her contract was not renewed when the school did not agree with her choice to disclose this information.

### The Effects and Future of Student Speech

Ross expresses her concern about the well being of children who are silenced in school. If children are not allowed to share thoughts and ideas in the classroom, where they can be fostered, they are deterred from the creative thinking that comes with adulthood. From a practical standpoint, schools face difficult choices when deciding what limitations they should put on student speech. Ross raises the paradoxical question that if the administration in *Fraser* allowed the student to make the speech with its many sexual innuendos, what precedent would they be setting? Furthermore, is there a way to always turn speech into a teachable moment? If a teacher attempts to make a teachable moment and fails, the school ultimately can choose to fire the teacher, and this unilateral power may deter many teacher from capitalizing on these moments.

As Ross points out, it is easy for schools to take any speech and limit it based on the wide precedent these cases have held. However, Ross points out that there are many negative consequences that come from limiting student speech where schools have immense latitude to do so. In some schools limiting speech can be as simple as banning books and vulgar language. In other schools however, censorship may be much more pervasive and come in the form of school uniforms and class discussions. Limiting speech also prevents teachers from having discussions that could help students to understand and question a topic they disagree with. Some even suggest that limiting student speech has a disproportionate impact on minority students and limits their voices even more because of differences in language between individuals.

We can see from current events the continued limitation on student speech that Ross extracts from the *Bethel*, *Morse*, and *Hazelwood* holdings. These cases become less likely to be litigated over time because of the wide deference the courts have given schools to limit speech. For example, a student in Houston, Texas in 2015 was sent home for wearing a "Black Lives Matter" t-shirt. This is strikingly similar to the arm bands worn in protest in *Tinker*, yet, that holding was ignored and the student was still sent home. Further highlighting the trend of selective jurisprudential observation, in Los Angeles, a student wanted to wear a traditional Middle Eastern headdress in his school yearbook picture, even though this was not his typical dress. He wanted the photo printed to actively call out the teachers and students who discriminated against the students from the Middle East. Again, ignoring the line of thinking in *Tinker*, the school refused to print the photo.

In contrast, in a school outside of Pittsburgh, Pennsylvania two teens posted a photo of themselves defiling a flag in school. While this is a protected form of speech, rather than punishing the students for suggesting this is a school wide belief, the school made a statement clarifying the school's view. Furthermore, the school addressed the issue that they did not know if the students were actually protesting something. Rather than immediately disciplining the students for their speech, the school was able to clarify its position, as well as use the photo as a teachable moment.

These current examples demonstrate how students' First Amendment rights are not consistently recognized across the nation. Ross identifies the lack of knowledge from teachers and administrators surrounding student rights as the main concern. In advocating

for wider knowledge of students' rights, Ross inserted a flowchart in her book that teachers can follow in order to determine if censoring speech is proper. She further suggests that that all teachers and administrators get an overview of First Amendment rights when they begin teaching. Lawyers for schools should educate the staff so there are not violations of First Amendment Rights. Ross suggests "freedom of speech in schools is essential to preserving democracy and intellectual inquiry."

### Conclusion

As much as *Tinker* seemed to expand the rights of students, in actuality, students continue to face unjustifiable censorship everyday. Where students are limited in what they can say, administrators have the broad ability to censor almost all speech. Even if a student does use some form of protected speech, the likelihood that the school will be aware that the speech is protected is low. Furthermore, schools are protected from improperly censoring speech through qualified immunity. Ross points out in her book the need for schools to protect these rights of students. Students need to ask questions and find a voice in order to grow. This is not possible when speech is censored to the point where a child does not know if their statement will be celebrated speech or will have them suspended from school.

Ross has high hopes for student's rights in schools, however, it may be difficult to implement these ideas in a school setting. Teachers are required to make split second decisions everyday regarding how to best keep control of their classrooms and further students education. The Supreme Court has established a difficult and often contradictory precedent to follow, which is incredibly challenging for teachers to apply on a daily basis. Although Ross' ideas for student speech would protect the rights of students as well as have massive educational benefits, they would also place a large burden on teachers who would find difficulty in properly implementing her ideas in a classroom environment. Nevertheless, Ross raises an important issue which is the delicate balance that must be struck between a student's constitutional right to free speech with a school's need to limit disruption and inappropriate conduct.

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