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Students' Rights to Free Speech Off-Campus

Freedom of speech is one of the most cherished rights retained by the American people, and one of the most vital. It is essential in furthering ideals such as democracy and limited government. From its original incorporation in the first amendment, which states "Congress shall make no law... abridging the freedom of speech," the right to free speech has been consistently upheld and expanded, with few significant exceptions. In the 1971 Supreme Court case *Cohen v. California*, it was held to protect even vulgar language, and the right to symbolic speech was likewise affirmed in such cases as *Texas v. Johnson* in 1989, which struck down laws prohibiting flag-burning. But the right to free speech is not unlimited in scope, either. One oft-quoted illustration of this is Justice Oliver Wendell Holmes' example of "falsely shouting fire in a crowded theater," which demonstrates the unprotected status of a speaker with the intent and likelihood of inciting imminent lawless action.

Probably the most notable exception to this standard is applied to students in school, as the standards for determining what speech may be constitutionally curtailed are much broader in a school environment than elsewhere. The landmark case for determining student rights of free speech in school is *Tinker v. Des Moines Independent Community School District*, decided in 1969. In what has come to be known as the *Tinker* standard, the Supreme Court ruled that for school authorities to legally curtail free speech rights, the speech in question must "disrupt the work and discipline of the school." Since then, however, the Supreme Court has ruled that there are exceptions to the *Tinker* standard. Specifically, a school may censor school-sponsored expression as long as the censorship upholds a legitimate educational interest, as the court ruled in *Hazelwood v. Kuhlmeier*, or if the student speech is lewd or sexually suggestive, as in *Bethel School District v. Fraser*. The recent Supreme Court case *Morse v. Frederick* added another exception, as the court's decision held that school officials could censor speech "that can be reasonably regarded as encouraging illegal drug use." If it falls under one of these exceptions, student speech does not have to be proved to be disruptive to be censored by school officials.

However, these cases – *Tinker*, *Hazelwood*, and *Bethel* – all apply to student speech on campus. *Morse v. Frederick* is slightly different, as the speech took place on a public road, but the court ruled that since it was at a school-sponsored event it should be considered to be a school speech case. The rules governing student speech off campus are much less well-developed. The famous statement from the court's decision in *Tinker v. Des Moines* maintaining that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," though, does imply that outside of school, students enjoy the same first amendment rights as other citizens.

In the context of normal speech, these rights are generally not abridged – if only because it is often difficult to determine the source of spoken word, or because speech off campus is unlikely to cause a disturbance on campus. But the increasing use of electronic communication has become something of a grey area, as communication on the internet can often be viewed by the public as well as accessed on school campus, even if it was not written there. In the decision of a recent Connecticut appellate court case, *Doninger v. Niehoff*, a case involving school officials

punishing a student for a blog post, the court acknowledged that “The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that... does not occur on school grounds or at a school-sponsored event.” Even so, the court used the *Tinker* standard of substantial disruption in the school environment, maintaining that if there was a “foreseeable risk” of the off-campus speech reaching campus, the standard still applied. Unsurprisingly, given the landmark nature of the *Tinker* decision, appellate courts seem to be using it to rule on off-campus student speech cases in the absence of Supreme Court precedent on the subject, for example in cases such as *Wisniewski v. Board of Education* and *Beussink v. Woodland R-IV School District*.

Whether the Supreme Court will agree with this interpretation of student rights to free speech is yet to be seen. However, it is notable that the aforementioned quote from the written decision for *Tinker v. Des Moines*, in which the Supreme Court stated that their ruling was partly based on the assumption that students are not stripped of their first amendment rights while in school, implies that the court in that case was specifically ruling on student rights on campus, rather than outside of it. *Doninger v. Niehoff* in particular seemed to apply this standard somewhat narrowly. Due to the nature of the internet, any communication posted by a student that is not specifically private, such as an e-mail sent to only one other person, can almost certainly be said to have a “foreseeable risk” of being seen by other students and school administrators. As a result, according to the court, the *Tinker* standard can be applied. The internet, though, is a very important tool for communication, information sharing, and social networking, especially among today’s students. Interaction and expression of opinion on the internet is a vital part of most students’ growth as social and political individuals. But communication on the internet also poses some dangers, in that anything written hastily or rashly will probably leave a lasting record. To introduce the possibility of school oversight on this, as well as other off-campus speech, is somewhat troubling. The original *Tinker* decision indicated that someone in a school environment may have limited first amendment rights, but applying the standard to off-campus speech as well indicates that students, as a group, do not have the same first amendment rights as other citizens.

It should also be mentioned that many courts have used the *Tinker* standard in a manner protective of the first amendment rights of students. In *Killion v. Franklin Regional School District* the court held that a student’s e-mail to friends about a teacher that was later distributed on campus by a third party could not be punished by the school. Likewise, in *Beussink v. Woodland R-IV School District*, the court ruled a student could not be punished for creating a website with inappropriate language that was critical of his school administration. Even in *Doninger v. Niehoff*, the ruling was very limited. In the written decision, the court noted, “we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.” Even so, all three maintain that if the off-campus speech had a foreseeable risk of causing a disruption in the school, the school authorities would have been within their rights to censor it.

In any case, the issue will not be fully resolved until the Supreme Court rules on it. With the growing use of internet communication, such a case seems increasingly likely. Hopefully, when it is held, the Supreme Court will consider the benefits that students can gain from having the same free speech rights in their own homes that all other Americans enjoy.