



***Tinker v. Des Moines Independent Community School District*, 393 U.S. 502 (1969)**

Resources for Teachers and Facilitators

Key Points to Keep in Mind:

- The majority opinion held that symbolic (speech without words) is protected and that minors are included under the First Amendment. The majority further stated that for speech to be curtailed, school administrators must show that their reasons are more than just the discomfort of the speech.
- *Tinker* was not a unanimous decision so both sides certainly have compelling arguments. Two Justices wrote vigorous dissents. One of the dissents contended that “symbolic” speech is not protected in the Constitution and the other dissent contended that the armbands were disruptive to the learning environment and therefore the school was justified in banning the protest.
- One of the cases on the argument sheet is from a federal court of appeals. That case may be used to persuade the Supreme Court, but the Supreme Court is never obligated to follow any lower court.

What happened after *Tinker*?

The *Tinker* case established that minors have free speech rights. Cases following *Tinker* have refined the meaning of student free speech and delineated the limits on those rights.

- In *Bethel School District v. Fraser*, 478 U.S. 675 (1986) the Supreme Court considered the rights of a student to make a lewd speech in an assembly before the student body. The Court concluded that the First Amendment did not prohibit the school for forbidding vulgar and lewd speech.
- In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) the Supreme Court considered whether a high school could constitutionally censor articles written by students in the school paper on teen pregnancy and divorce. The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored

expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

- In *Morse v. Frederick*, 551 U.S. 393 (2007) known as the “Bong Hits for Jesus” case the Court considered whether a school was within its rights to discipline a student who held up a sign, “Bong Hits for Jesus” at a non-school-sponsored event, the Winter Olympics Torch Relay, for which the students had been released in order to observe. The Court ruled that a student’s free speech rights do not include the right to promote the use of illegal substances and that the school was within its rights to discipline the student.

Although the major cases following *Tinker* appear to signify a swinging of the pendulum away from the First Amendment to the school’s rights (ultimately under the Tenth Amendment), *Tinker* is well-accepted law in its declaration that students do have broad, but not unlimited free speech rights.

Additional Resources:

[United States Courts: The Tinker Case](#)

[Oyez: *Tinker v. Des Moines Independent Community School District*](#)

[The Tinker Tour](#)

[Smithsonian: 50 Years After Tinker](#)

Tinker v. Des Moines Independent Community School District

This moot court is based on the case of *Tinker v. Des Moines School District* which was decided by the United States Supreme Court in 1969.

Background Information

This case took place against the backdrop of the Vietnam War and the protests to the continuation of the war that arose around the country. In 1965, five students decided to wear black armbands to their public schools to protest the Vietnam War throughout the holiday season and to engage in a day of fasting. The students included siblings, Mary Beth Tinker, 13 years old, John Tinker, 15 years old, Hope Tinker, 11 years old, Paul Tinker 8 years old, and their friend Christopher Eckhardt, 16 years old. The principals of the Des Moines Public Schools learned of their plan and in response released a policy which stated that any student wearing an armband would be asked to remove it, and, if the student refused, the student would be suspended. The children wore their armbands to school and Mary Beth and Christopher Eckhardt were suspended on December 16, 1964 and John Tinker was suspended the following day.

Tinker in the Courts:

The Tinkers and Christopher Eckhardt filed a lawsuit contending that their suspensions violated their rights to freedom of speech under the First Amendment of the United States Constitution. The case was in the United States District Court for the Southern District of Iowa and with the request that the Court issue an injunction preventing the Des Moines School District from suspending students who wore armbands and for nominal damages. (Nominal damages are damages in a small amount such as \$1 which are issued to acknowledge that the plaintiffs have prevailed.) That Court ruled in favor of the school district and against the Tinkers. The Tinkers appealed the case to the 8th Circuit Court of Appeal which affirmed the District Court, agreeing with the decision of the lower court.

The Tinkers then filed a petition for writ of *certiorari* in the Supreme Court of the United States which was granted. A petition for writ of *certiorari* is designed to convince the Supreme Court that the case is a significant one and worth hearing, that it presents “a substantial federal question.” The Supreme Court today has almost total discretion as to what cases it will hear. In fact, the Supreme Court agrees to hear less than 3 percent of the cases requested. Briefs were submitted and oral arguments held. This moot court is held at this point - you will be involved in the oral argument before the Court.

Legal Concepts

First Amendment Freedom of Speech

The First Amendment states “Congress shall make no law. . .abridging the freedom of speech. . .” Beginning in the 1925 case of *Gitlow v. New York*, the Supreme Court has held that the Fourteenth Amendment’s guarantee that “No State shall. . . deprive any person of life, liberty, or

property, without due process of law. . . ” carries over to the states the First Amendment’s protection of freedom of speech. Therefore, Iowa and all state entities, including its school districts, are obligated to “make no law which abridges the freedom of speech.”

What is speech?

Speech communicates and historically includes words, both written and oral. The *Tinker* case presents the use of an armband instead of words and one of the questions to consider is whether an armband is the equivalent of speech and therefore entitled to protection under the First Amendment.

Tenth Amendment, States and Public Schools

The concept of federalism is basic to our system of government. Division of power refers to the division between the powers delegated to the federal government by the Constitution and the reserved or police powers retained by the States. The latter are protected by the Tenth Amendment which states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people

One of the rights that states have is to create and manage a public-school system. The rules that each state develops for its school system must, under the Tenth Amendment, be given deference by the federal courts. One of the questions presented by *Tinker* then is whether freedom of speech outweighs the way a state has decided to run its schools. The other is whether the behavior of *Tinker* and the others constitutes protected speech.

Our mission in this Moot Court

Our moot court begins at the point that the United States Supreme Court is considering whether to agree with the *Tinkers* that School District’s promulgation and enforcement of a rule suspending students for wearing armbands in protest constitutes a violation of their free speech rights. The *Tinkers*, through their attorneys, will argue that their constitutional free speech rights include wearing armbands and that even as children they have free speech rights. The *Tinkers* will, of course, also argue that their suspensions violated their free speech rights. On the other hand, the School District will contest whether the *Tinkers* engaged in speech and argue that their behavior disrupted the educational mission of the schools. In addition, they will raise the issue of whether as juveniles that they have First Amendment protections.

Brainstorming

Break into three groups:

Group 1: Attorneys representing the *Tinkers*

Group 2: Attorneys representing Des Moines Independent Community School

Group 3: Justices who will ask probing questions and decide the case.

Suggestion for the attorneys representing the Tinkers: First put yourself in the position of Mary Beth Tinker. What were her goals in wearing the armband? What would Mary Beth say about her hopes in wearing the armband? Once you spend a few minutes considering that aspect of the case, then develop your legal arguments.

Suggestion for the attorneys representing Des Moines Independent Community School Systems: Spend a few minutes considering the view of the one of the teachers, concerned with educating students. What issues do you see the armbands presenting? Once you consider that aspect of the case, then develop your legal arguments.

Each side will have 15 minutes to present their arguments. Those representing the Tinkers will go first and may reserve 5 minutes for rebuttal. Justices will interrupt the arguments with questions.

Summary of tasks:

1. Engage in general brainstorming of arguments for your side or if you are a justice of questions to ask.
2. As part of that brainstorming, review and consider the arguments on the *Argument Sheet*. Use both those arguments and the ones you developed in brainstorming.
3. Attorneys: Write out a bullet point list of the arguments you want to make and begin with the most persuasive. Use the *Attorney Worksheet*.
4. Attorneys: Think of counters to those arguments and develop answers. Do the same with the arguments you think the other side will develop.
5. Justices: Fill out the Justice worksheet
6. Attorneys: Designate the person to make the argument (All attorneys can answer questions posed by the Justices)
7. Attorneys for the Tinkers: Remember to reserve 5 minutes for rebuttal if you wish.

Argument Sheet

Review the arguments below and use them to help you craft your argument to the Supreme Court, or if you are a Justice, to help you in developing questions for the parties. But also use the arguments that you developed in brainstorming. Consider whether each argument helps your side or helps the other side or helps both side or neither side. Then, if you are representing the Tinkers or Des Moines School District, determine how you will use all of your arguments in your overall presentation to the Court.

_____ In *Burnside v. Byars*, 363 F. 2nd 744, 1966 the 5th Circuit Court held that the wearing of freedom buttons that contained slogans such as "One Man, One Vote" could not be prohibited by schools unless the exercise of such rights in the school materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.

_____ In *West Virginia v. Barnette* 319 U.S. 624 (1943) the Supreme Court held that students in public school may not be compelled to salute the flag.

_____ Only a few of the 18,000 students in the Des Moines school system wore the black armbands. Only five students were suspended for wearing them.

_____ Detailed testimony by some of the students revealed that their armbands caused comments, warnings by other students and that they were the subject of mockery.

_____ Experienced school authorities in Des Moines feared a disturbance from the wearing of the armbands.

_____ In *Ginsberg v. New York*, 390 U.S. 629 (1968) the Supreme Court held that juveniles do not have the identical free speech rights as adults. The case involved the prosecution of a store owner for selling adult magazines to minors.

_____ In *Cox v. Louisiana*, 379 U. S. 536, 554 (1965), the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

_____ Wearing the armband made John Tinker "self-conscious" in attending school with his armband.

_____ A math teacher testified that Mary Beth Tinker's wearing of the armband "ruined" his math class.

_____ In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), a case involving adults, the Supreme Court held that the purpose of speech is to invite disputes even where the speech incites

people to anger. The Court also acknowledged in the case that free speech is not limitless and can be curtailed in certain circumstances.

Attorney Worksheet

Remember that you will begin by stating, my name is _____. May it please the Court I represent _____. [If you are representing the Tinkers and wish to reserve five minutes for rebuttal state that now.]

List your key arguments below so you can rely on this sheet in arguing to the Court.

What will the other side argue? What are your counters to those arguments?

Justice Worksheet

You are a Supreme Court justice hearing *Tinker v. Des Moines Independent Community School District*. Please answer the following questions. Be sure to reference the facts and the relevant cases on the argument sheet.

1. Pretend that you are listening to the oral arguments of the attorneys representing the Tinkers. What two questions would you ask?

A.

B.

2. Pretend that you are listening to the oral arguments of the attorneys representing Des Moines Independent Community School District. What two questions would you ask?

A.

B.

3. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of Tinker or Des Moines. Remember that you need to consider whether the Tinkers engaged in speech that is protected under the First Amendment and, if so, if those rights outweigh the needs of the public-school system to maintain order.

_____ Tinker

_____ Des Moines

4. Prepare a bullet point list of your reasons. Include why you rejected the losing side's arguments.