



## Students' First Amendment right to free speech in public schools

Lesson plan by Farid Zakaria

### Who

High school students

### Suggested time

Three hours

### Objective

Introduce high school students to the First Amendment generally and its protection of free speech in particular. Illustrate the operation of that protection by examining three US Supreme Court cases involving speech in the public school setting. Explain the legal process by conducting an in-class exercise where students are asked to argue and decide a case involving speech in the public school setting.

### Introduction

Ask for a volunteer to read the text of the First Amendment to the class.

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*

Ask the class how many parts they see in the First Amendment.

Identify the rights protected under the First Amendment: religion, speech, press, association, petition.

Vocabulary of the First Amendment

- Abridge: to reduce in scope, to diminish
- Redress: to set right, to remedy
- Grievances: a cause for distress (as an unsatisfactory working condition) felt to afford reason for complaint or resistance

### Historical Background of the Bill of Rights

Adapted from [A History of the Bill of Rights](#) (American Civil Liberties Union-FL) and [The Constitution in the Classroom 2010, the Fourth Amendment Search and Seizure](#) (American Constitution Society)

In the summer of 1787, delegates from the thirteen newly-independent states assembled in Philadelphia to discuss the government of the United States. They drafted a Constitution which created a system of checks and balances between the executive, the legislative, and judiciary branches of government. By 1790, all states had ratified the new Constitution.

This Constitution, however, did not include a declaration of rights; it did not specify what the government could not do. The American people who had fought a war against the despotic English monarchy insisted that the new Constitution must include principles limiting the power of the federal government. As a result, Congress added provisions to the Constitution, known as “amendments,” that guaranteed certain rights to the people including free speech, freedom of religion, due process of law, and freedom from governmental search and seizure. These rights were listed in ten amendments which were ratified in 1791 and became known as the Bill of Rights.

The Bill of Rights assumes that we have certain basic and inalienable rights. In other words, the Bill of Rights does not create these rights. Rather, its purpose is to protect them from the power of the government. Thus, when the First Amendment says that Congress shall make no law interfering with freedom of speech, it assumes that we have the freedom to speak and think as we wish, and ensures that the government does not interfere with it.

When it was created, the Bill of Rights restricted only the power of Congress. Today, most of the rights guaranteed in the Bill of Rights are also applicable to the States. For example, the Supreme Court decided in 1925 that First Amendment is also applicable to laws passed by the states, including local governments.

So, the First Amendment applies to governmental action, be it state, federal, or local.

Discussion: Ask the students if they can come up with examples of governmental action that restricts freedom of speech (e.g. congress passes a law, school principal enacts rule that applies to the school, county board of education policy, etc).

## **The United States Supreme Court**

Questions for the class:

- Where is the Supreme Court building?
- Can you name a current Supreme Court Justice?
- How many Justices serve on the Court? How many must agree for the decision to be binding?

The Supreme Court of the United States is the highest court in our country, meaning that no further appeals may be made from its decisions. As an institution, it is required by the United States Constitution which provides in Article III, section 1, that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress from time to time ordain and establish.” In this section, “inferior Courts” refers to the other federal courts that are part of the federal judicial system.

Discussion: Ask the class if they know where the closest federal courthouse is.

The Constitution does not mandate the number of judges who must serve on the Supreme Court. It is up to Congress to decide that number. Under current law, the Court consists of nine judges (called Supreme Court Justices). The Constitution, however, provides the President with the power to nominate the Supreme Court justices in Article II, section 2. Before serving on the Court, the nominees must be approved by the Senate.

Article III, section 1 of the Constitution provides that “the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” This means that Supreme Court Justices and all federal judges may serve for the remainder of their lives.

Discussion: What are benefits for judicial independence when judges are appointed for life?

The power of the Supreme Court to hear cases is largely discretionary. This means that the Court can decide which cases it will review. Most of the cases that arrive at the Supreme Court are appealed either from the lower federal courts or from the State supreme courts.

The American legal system follows the doctrine of *stare decisis*. According to this principle, a prior Supreme Court decision will be taken into consideration when the Court is confronted with a case that deals with similar legal issues. A decision is binding on subsequent cases when at least five justices agree on the outcome. The Court can overrule its own decisions only if there is a strong reason to do so but this happens rarely.

The principle of *stare decisis* also requires courts to abide by the rulings of superior courts. Thus, lower courts are obligated to follow the decisions of the Supreme Court when they rule in their own cases.

## **Supreme Court case law dealing with speech in the public school setting**

### ***Case #1: Tinker v. Des Moines Independent Community School District (1969)***

#### *Facts of the case*

The petitioners were two high school students, ages 15 and 16, and one junior high school student, age 13, in Des Moines, Iowa. In December 1965, a group of adults and students met at the home of one of the petitioners and decided to show their opposition to the Vietnam War by wearing black armbands during the holiday season.

The principals of the schools that petitioners attended became aware of the group’s plan to wear armbands. They adopted a policy that any student wearing an armband to school would be asked to remove it. Under the new policy, if the student refused, he or she would be suspended until he or she returned without the armband.

When the petitioners came to school with black armbands and refused to remove them, they were suspended. They did not return to school until the end of the holiday season in keeping with their group’s plan.

The petitioners sued in federal court and argued that the policy implemented by the school principals violated their First Amendment right to free speech. They asked the court to prevent the principals from continuing that policy.

#### *Group activity*

Divide class into groups of 5 students. Each group makes arguments in support of either Tinker or the school. Allow 15 minutes for group discussion.

Reconvene class. Each group presents its arguments.

#### *Court's opinion – Summary*

The Court pointed out that both teachers and students continue to enjoy their constitutional rights to free speech and expression in school. As a result, a school policy that limited a teacher or a student's free speech is illegal unless it is justified by the need to maintain order or conduct normal school work. Wearing the armbands, however, constituted "silent, passive expression of opinion" and did not create disorder or disturbance. It did not interfere with school work or the other students' right to be secure and let alone. In fact, the Court stated that wearing the armbands was entitled to very strong protection under the First Amendment because it "was entirely divorced from actually or potentially disruptive conduct by those participating in it."

The lower court had decided that the policy was reasonable based on a fear of disturbance. This was unconvincing, the Supreme Court explained, because "apprehension of disturbance is not enough to overcome the right to freedom of expression."

Thus, when it cannot be proven that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the school policy is illegal under the First Amendment.

The Court also indicated that school officials cannot be given absolute power over what sentiments students are allowed to express. It was important that students be exposed to different points of views, a principle that is fundamental to democracy. The classroom operates as the "marketplace of ideas" and students should be encouraged to express their opinions even on controversial subjects so long as they do not interfere with discipline or the rights of other students.

#### *Dissents*

In his dissent, Justice Black argued that sufficient evidence was presented in the case showing that the armbands distracted other students from school work. They were distracting, he stated, because they called attention to the soldiers who died or were wounded in the Vietnam War. This as a result caused students to think about the War rather than their school work.

He also argued that both teachers and students do not enjoy the same First Amendment rights in the school setting. Teachers are hired to teach subjects that are part of a curriculum. Similarly, students attend school to obtain an education, not to publicize their political views.

Optional: Discuss Justice Black's dissent with the class. Shouldn't students think about wars that our country is engaged in?

Justice Harlan also dissented. He argued that schools officials should be given great authority in maintaining discipline and order. He would not hold a school policy illegal unless the petitioners could show that it was motivated by a purpose other than legitimate school concerns such as a desire to prohibit the expression of an unpopular view point.

***Case #2: Bethel School District v. Fraser (1986)***

*Facts of the case*

In 1983, Matthew Fraser, a high school student gave a speech before an assembly of 600 students in which he nominated a fellow student in a student election. The assembly was part of an educational program in self-government. The students participating in the assembly were as young as 14 years old.

Two of Fraser's teachers had seen the speech he prior to the assembly and had counseled Fraser against giving it because it was inappropriate. They also informed him that he might face severe consequences if he gave the speech.

A rule at the high school specifically prohibited the use of obscene, profane language or gestures.

During the speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. His speech contained the following:

*I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm.*

*Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.*

*Jeff is a man who will go to the very end—even the climax, for each and every one of you.*

*So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.*

When he was called to the principal's office, Fraser admitted that he deliberately used sexual innuendo in his speech. He was suspended for three days and his name was removed from the list of candidates for graduation speaker at the school's commencement ceremony. He served two days of his suspension and was allowed to return on the third day.

Fraser then sued in federal court and argued that the school had violated his First Amendment to free speech.

Optional: conduct same group activity as in case #1.

### *Court's opinion – Summary*

The type of speech that Fraser used must be distinguished from the black armbands that were at issue in *Tinker*. While the armbands in *Tinker* represented the passive and nondisruptive expression of a political message, Fraser's speech, by contrast, was lewd and offensive.

In a democratic society, divergent political and religious views must be tolerated. In keeping with this principle, students are free to advocate unpopular and controversial views in schools. However, that freedom needs to be balanced against society's interest in promoting respect for the personal sensibilities of others. Even in the most heated political discussions, the participants must take into consideration the sensibilities of the audiences.

Moreover, even though the First Amendment protects the right of adults to use offensive speech, it does not necessarily mean that students enjoy the same right in school. One of the school's functions is to educate students on the appropriate form of civil discourse and political expression. The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students and undermined that function. The speech in fact could be seriously damaging to the young students (especially the girls) present in the assembly who were not yet aware of human sexuality.

In brief, the school administration could determine that the type of speech that Fraser used undermined the school's educational mission. Here, the school determined that the essential of civil, mature conduct cannot be conveyed in an environment that tolerates lewd, indecent, or offensive speech. In so doing, the school did not violate the First Amendment.

### *Dissents*

Justice Marshall dissented because in his opinion the school failed to demonstrate that Fraser's speech was indeed disruptive of the educational process.

Justice Stevens also dissented. He argued that even though the school was entitled to regulate speech that interfered with its educational mission, a student who is to be punished for using offensive speech should be given a fair warning of the scope of the prohibition and the consequences of its violation. He should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate that he would be punished. The school rules were not sufficiently clear as to whether his speech was prohibited. In addition, the teachers' response also was not sufficiently clear that he would be punished if he did decide to give the speech at the assembly.

### ***Case#3: Morse v. Frederick (2007)***

#### *Facts of the case*

In early 2002, the Olympic Torch Relay passed in front of high school in Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. Deborah Morse, the school principal decided to permit students and staff to attend the event as an approved social event or class trip. Students left class to watch the relay from either side of the street.

Joseph Frederick was a senior at the high school. He and his friends attended the event while standing across the street from the school. When the torchbearers and camera crews passed by,

they unfurled a 14-foot banner that contained the phrase: “Bong Hits 4 Jesus.” The words were large enough to be seen from the other side of the street.

Upon seeing the banner, the principal immediately asked that Frederick and his friends take it down. Everyone complied except for Frederick. As a result, she confiscated the banner and asked Frederick to report to her office. She suspended Frederick for ten days. Principal Morse believed that the banner encouraged illegal drug use and that it violated a school policy that prohibited such messages.

Frederick appealed his suspension but the school district superintendent upheld it. The superintendent also believed that the banner advocated the use of illegal drugs. Frederick’s speech, he explained, was not political; it did not advocate the legalization of marijuana or certain religious views.

Optional: conduct same group activity as in case #1.

#### *Court’s opinion – Summary*

First, Frederick’s speech must be considered school speech because it occurred during normal school hours and at a school-approved social event. Therefore, the school speech case precedents apply.

The message on the banner is ambiguous; it could be offensive to some, amusing to others, or may mean nothing at all. Even though Frederick claims that he intended it to be just nonsense so as to attract the attention of the cameras, the message on the banner could be interpreted as “take bong hits,” or “bong hits are a good thing,” or “we take bong hits.” Therefore, the principal’s belief that the students and parents viewing the banner would interpret it as promoting illegal drug use was reasonable.

*Tinker* and *Fraser* reached their conclusions through different modes of analysis. *Tinker* emphasized on the question of whether the speech caused “substantial disruption” to school activities. The Court’s analysis in *Fraser* is not clear but it did not use *Tinker’s* “substantial disruption” standard. Rather, *Fraser* noted that the First Amendment rights of students were limited in school because of the special circumstances in the school environment. *Fraser* also established that the *Tinker* “substantial disruption” standard is not absolute, meaning that courts were not always obligated to apply it.

The concern in this case is not that Frederick’s speech was offensive but that it was reasonably viewed as promoting drug use. Deterring drug use among students is an important interest. In fact, drug abuse can cause severe and permanent damage to the health of young people. The dangers associated with drug abuse are more severe for students because school years are the time when the physical, psychological, and addictive effects of drugs are more severe. Children can become chemically dependent more quickly than adults and children’s nervous systems are more severely damaged than adults.

Moreover, peer pressure is probably the most important factor leading students to take drugs. Students are more likely to use drugs if it is portrayed as an accepted activity in the school environment.

### *Dissent*

Three justices dissented. Frederick and his friends did not address the banner to their fellow students. Rather, they wanted to get the camera crews' attention. They argued that the school was not justified in disciplining Frederick because he made an ambiguous statement that contained an oblique reference to drugs.

The Court is correct in noting that the school has an important interest in deterring student drug abuse. The school was entitled to prohibit messages that encouraged students to use drugs. However, Frederick's speech was not intended to persuade anyone to do anything.

Frederick should not have been disciplined because his message did not violate an appropriate rule and because he did not advocate conduct that is illegal or harmful to students.

### **Class Exercise**

*Students are presented with the following fact pattern that they must analyze in light of the Supreme Court precedents presented above.*

George Washington High School (GWH) sponsored a race to promote breast cancer awareness and research. The race took place during the winter break when no classes were in session. Blake Anderson, a senior at GWH, decided to participate in the race to support his mother and other breast-cancer survivors. Blake's mother was diagnosed with breast cancer a few years ago. She has undergone surgery and chemotherapy.

Blake is an outstanding student and athlete. He has received a full scholarship to attend a prestigious university. He learned about the race in June and obtained permission from his mother to participate. He trained daily for six months until he was confident that he could win the race.

The race was held at a park across the street from GWH. At the race, Blake wore a pink T-shirt designed specifically to express support for the legalization of marijuana. The T-shirt stated, "George Washington Athletes for Medical Marijuana," on the front and, "Don't just survive, take bong hits and thrive" on the back with a pink ribbon that is symbolic for breast-cancer awareness. Blake knew that the race had news media coverage. He wanted to support California's Compassionate Use Act and to protest the federal government's criminalization of the use of medical marijuana. Many GWH students and their families attended the race.

Before the race started, principal David Richards approached Blake. Although Blake was not on school grounds, Mr. Richards ordered him to remove the T-shirt. Blake responded that he was wearing the shirt to honor his mother's battle with cancer, and that medical marijuana is legal in California. When Mr. Richards insisted that he remove the T-shirt, Blake stated that he had a First Amendment right to wear the T-shirt. Then, Mr. Richards called the race officials over, and asked them to remove Blake from the race. Blake tried to explain that he had a First Amendment right to wear the T-shirt, but Mr. Richards angrily stated that Blake was suspended for the first two weeks

of the January semester. Mr. Richards claimed that he ordered Blake to remove his T-Shirt because it encouraged illegal drug use. However, principal Richards did not think that wearing the T-shirt disrupted classroom instruction or that it was obscene or offensive. He also didn't believe Blake used illegal drugs or alcohol.

Blake contested his suspension. The school board held a hearing but ultimately upheld Blake's suspension. Mary Anderson, Blake's mother, is suing the school board and Mr. Richards on behalf of her son for the violation of his First Amendment rights. How should the court rule based on the cases described above?

Divide class in three teams: lawyers for student suspended for speech, lawyers for the school and the principal, and judges. Lawyers present arguments based on the cases covered in this module. Judges must decide who wins. All teams must explain their reasoning and how *Tinker*, *Fraser*, and *Frederick* apply to this case.