

# Extended Controversial Issue Discussion Lesson Plan Template

**Lesson Title:** Student speech: is it protected in print and internet?

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**Appropriate for Grade Level(s):** 11-12<sup>th</sup> grades

**US History Standard(s)/Applicable CCSS(s):** C13.[9-12].6 Examine the rights of **citizens** and how these rights are protected and restricted.

**Discussion Question(s):** Under the First Amendment should a student be allowed to express him/herself in print or internet without censorship by their school?

**Engagement Strategy:** Structured academic controversy

**Student Readings (list):** <http://www.firstamendmentschools.org/freedoms/case.aspx?id=1673>

<http://www-bcf.usc.edu/~idjlaw/PDF/18-2/18-2%20Hoover.pdf>

[http://www.splc.org/news/report\\_detail.asp?id=250&edition=11](http://www.splc.org/news/report_detail.asp?id=250&edition=11)

<http://www.firstamendmentschools.org/freedoms/case.aspx?id=1687>

**Total Time Needed:** Two 60 minute periods.

**Lesson Outline:**

Time Frame (e.g. 15 minutes)	What is the teacher doing?	What are students doing?
5 min	Teacher posts question on the white board using a projector or writing it if needed: Under the First Amendment should a student be allowed to express him/herself in print or internet without censorship by their school?	Students respond to this question in writing.
5-10 min	Giving students each two pennies, instruct students that they will have to put their two cents into the conversation for participation points. One cent only earns them half credit, o	Students respond by placing a pennies in front of themselves in an orderly fashion, commenting upon the topic.

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	cents no credit. Ask students what they think should be the restrictions if any in student print or internet by their school?	
10mins	Teacher will count students off by fours, splitting the room into four different groups. Each student will be given a reading to peruse and answer questions. Students can help one another answer questions in groups. Teacher will float around room answering questions or providing clarification.	Students will read their sections silently (5 min) then begin answering questions independently but can help one another with some questions that may share overlap.
10-15 min	Students will be broken into groups of two, group members 1 & 2 on one side of the issue, group members 3 & 4 on the other side of the issue. Students will be asked to prepare an argument for their position using details from their reading. Teacher will float from group to group, making sure students are focused and helping structure arguments with details where necessary.	Students will break off from their larger groups, physically moving away from the large table to smaller groups to develop arguments from their readings.
15 min	Students will reconvene in groups of four and the two sides will take turns laying out their arguments in a structured academic controversy fashion. Teacher will reiterate the need for civility in this activity. Each side must not interject when the other is talking; just take down notes on their position.	Students will reconvene in groups of four and each side will be given an opportunity to make their case using supporting details from their reading. The other side will take notes on the opposing side. Then after each side has presented look for commonalities between the two sides. What can be agreed upon? What are the still the differences? Make sure each student fills out the questions pertaining to all group members' reading.
5 min	Teacher calls class back to together and asks for student input. Has any student's position been changed by this activity? Did students develop a stronger position on one side or the other? Teacher will assign homework of position paper and hand out rubric.	Students will be asked to come back together as a class and respond to the activity. Did their positions change or become stronger? What did they learn during this activity? Students will be given assignment complete with rubric to complete as homework or finished in the next class.
2 <sup>nd</sup> Day		
10 min	Teacher will hand out course reading, <i>Doninger v. Niehoff</i> , and ask students to read text silently.	Students will read text silently.
10 min	Teacher will read text out loud for reading fluency and comprehension.	Students will follow along word for word.
5-10min	Teacher will ask students to outline words that students do not understand and then begin defining text asking students to use context clues.	Students will underline words they don't understand and use context clues with teacher assistance to figure out their meaning.
15 min	Teacher will hand out guided reading questions.	Students will answer guided reading questions in groups of two.
5-10 min	Teacher will ask for student feedback and ask them who they would side with and why (line numbers and reasoning from text).	Students will use critical thinking skills to take a position and provide justification.
5-10 min	Teacher will assign writing assignment for	Students will receive writing assignment and

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	homework and handout rubric.	rubric, asking questions for clarification.

**Description of Lesson Assessment:** Students will be monitored by teacher in discussion, and each student will be responsible for filing out answer sheet for each student assigned reading as well as the structured academic controversy section. Students will also write a position paper using supporting details from their reading, which will be assessed by using a teacher designed rubric.

**How will students reflect on the process and their learning?** Students will have to think about both sides of the argument and note differences and similarities. Students will also have to take a stand in their writing of a position paper, which will include reflection and rational argument.

## **. Freedom of Speech: How far does it go in protecting students' first amendment rights?**

**By Sam O'Brien**

As a high school teacher primarily servicing at-risk youth for the last eight years; I have often found myself reprimanding and redirecting student usage of profanity. I invariably hear the defense of questionable speech by the invocation of the first amendment or the lamenting of all rights being stripped from students as they enter the school building. The answer is somewhere between those two extremes. Freedom of speech in the classroom has largely been defined by the seminal Supreme Court ruling of *Tinker V. Des Moines* (1969) that held that five Des Moines high school student's wearing of black armbands in protest of the Vietnam War was akin to pure speech and the court did not find it disruptive of the educational environment, insofar that it warranted censorship.<sup>1</sup> Justice Fortas writing for the majority went on to further note that violence and disruptions did not result from the wearing of the black armbands and found that barring the arm bands by the school board to avoid controversy, and yet allowing other students to wear political or religious symbols without recourse or action, rang of inconsistency and hypocrisy.<sup>2</sup> The court decided 7-2 in favor of the students,

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<sup>1</sup> Johnson, John W. The Struggle for Student Rights, (University Press of Kansas, 1997), 171-172.

<sup>2</sup> Ibid,172-173.

building on prior precedent and expanding the court's interpretation of student's symbolic speech in the classroom and is still used to decide controversial student expression cases today.<sup>3</sup>

Prior to the 1950's the Supreme Court heard few court cases pertaining to education.<sup>4</sup> The ruling in *Tinker v Des Moines* (1969) was the seminal case in early Supreme Court decisions regarding student expression, and gave students the right to express themselves freely, unless their speech disrupted the educational setting causing disorder or serious infringement of other students' rights.<sup>5</sup> *Tinker* stood unchallenged until two court cases decided in the 1980's.<sup>6</sup> The first decided in 1983, *Bethel School District No. 403 v Fraser*, found in favor of the school in the disciplining of Matthew Fraser for "obscene and lewd" language. Fraser sued the school district for violation of his First Amendment rights of expression. The court ruled against him in departing from *Tinker's* ruling of upholding students' first amendment rights based on several reasons: the speech wasn't political, it was profane, and it occurred during a school assembly allowing the school to intervene in an effort to uphold appropriate speech found in a school environment.<sup>7</sup> The court ruled in favor of the school's interpretation of what it considered "lewd", speech that would not be limited outside of school.<sup>8</sup> In *Hazelwood School District v. Kuhlmeier* the Supreme Court further restricted student speech by ruling in favor of the school's censorship of a student newspaper that dealt with the sensitive issues of teen pregnancy and divorce. The court based its ruling on preserving the educational integrity and mission of the school, finding that the school could limit student speech even if it was not disruptive of the broader school

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<sup>3</sup> Ibid, 216-217.

<sup>4</sup> Chapa, Justin R. "Stripped of Meaning: The Supreme Court And The Government As An Educator", in The Brigham Young University Educator and Law Journal, 2011, Issue 1, p.129.

<sup>5</sup> Mollen, Abby Marie In "Defense Of The Hazardous Freedom Of Controversial Student Speech", in The Northwestern University Law Review, 2008, Vol. 102, Issue 3, P. 1503.

<sup>6</sup> Ibid, 1508.

<sup>7</sup> Ibid, 1508-1509.

<sup>8</sup> Wolking, Tova. "School Administrators As Cyber Censors: Cyber Speech And First Amendment Rights", in Berkeley Technology Law Journal, in 2008, Vol. 23, P.1511.

environment.<sup>9</sup> So long as the limitation of student speech was related to reasonable educational concerns. In the recent Supreme Court ruling in *Morse v. Frederick* (2007) the court ruled against then 18-year-old student Joseph Frederick for displaying a banner that read “BONG HITS 4 JESUS” at a school sponsored viewing of the 2002 Olympic relay event. The court found that the student speech was not protected due to the drug related message, and ruled in favor of the school principal, Deborah Morse, who suspended Frederick, adding that the school had a “compelling interest” to dissuade illicit drug use at school.<sup>10</sup> The Supreme Court effectively through *Fraser*, *Kuhlmeier*, and later *Morse* limited student speech that they found inappropriate even though it did not cause “substantial disruptions” in the school environment.<sup>11</sup> The question to be asked of course is how will the Supreme Court rule when student political speech also includes what the court finds as “lewd” or includes a drug related reference? Student speech is obviously is not as protected as adult speech; they do indeed “shed some rights at the schoolhouse gate.”

The internet has posed interesting questions concerning student speech. While it is commonly held by *Khulmeier* that a school may discipline student internet postings done at school that are deemed offensive in nature or potentially disruptive to the school setting, student speech outside of school that finds itself penetrating the school walls and affecting the educational environment have proven more challenging. The Supreme Court so far has not heard student speech cases that have occurred outside the purview of the physical school setting. The Second Court of Appeals in *Thomas v Board of Education Granville School District* (1979) found that students could not be disciplined for off campus distribution of satirical material critical of the school.<sup>12</sup> This ruling was later disregarded in *Doninger v. Nieloff* (2008) where District Judge Kravitz ruled in favor of Karissa Niehoff, principal at Lewis S. Mills High School in Connecticut who had forbidden Avery Doninger from running for class secretary due to an offensive blog posting criticizing school administrators for

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<sup>9</sup> *Ibid*, 1511.

<sup>10</sup> *Ibid*, 1512.

<sup>11</sup> *Ibid*, 1512.

<sup>12</sup> *See Thomas*, 607 F.2d at 1045

cancelling a Student Council organized event.<sup>13</sup> *Doninger*, although disqualified, garnered a majority of votes through a write in campaign, but Principal Niehoff appointed the second place finisher to the secretary position. Judge Kravitz ruled that under *Fraser V Bethel* schools had the right to discipline a student for lewd or indecent off campus speech, and that the position of class secretary was an extracurricular activity and it was unclear if participation in said activity constituted a constitutional right.<sup>14</sup> Without Supreme Court guidance on the issue of student online speech, lower courts have found this topic difficult.<sup>15</sup> In *Doninger*, critics have pointed out that barring a student from student government may inhibit instead of encourage civic engagement, which should be an aim of all high schools.<sup>16</sup> A report released by The John S. and James L. Knight Foundation in 2005 found that a majority of students were apathetic or largely ignorant about freedom of speech and expression rights protected by the First Amendment.<sup>17</sup> The idea of curtailing student expression and political speech, albeit at times coarse and disrespectful, in times of low levels of student interest and engagement in our civic form of government is troubling. What students learn in adolescence dramatically affects their later political lives.<sup>18</sup> To ensure an informed and active citizenry, students must be educated and encouraged to participate in political action.

Student speech although once protected and enjoyed under *Tinker*, has been assailed and eroded by a number of court cases in the last three decades. With the advent of the internet, student speech has become magnified and can exist simultaneously on and off campus. The danger to student speech and engagement in our republican form of government is school censorship, which has been generally been supported by the Supreme Court as well as lower courts in recent years since *Tinker*. The 2008 *Doninger* Case reinforces this fact. School officials blocked a student's campaign and even required student removal of t-shirts promoting

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<sup>13</sup> "First Amendment- Student Speech- Second Circuit Holds That Qualified Immunity Shields School Officials Who Discipline Students For Their Online Speech", in *Harvard Law Review*, in 2012, Vol.125, P.812.

<sup>14</sup> *Ibid*, 812-813.

<sup>15</sup> *Ibid*, 815.

<sup>16</sup> *Ibid*, 817-818.

<sup>17</sup> Dautrich, Kenneth., A. Yalof, David., & Lopez, Hugo Mark. *The Future Of The First Amendment: The Digital Media, Civic Education, And Free Expression Rights In America's High Schools*, (Rowman & Littlefield Publishers, 2008), 1.

<sup>18</sup> *Ibid*, 26-27.

Doninger for class secretary based upon profane and lewd language she posted online at home that made its way onto the school campus.<sup>19</sup> Doninger didn't just post lewd comments, she also posted a letter her mother had written to the school administration critical of their handling of the Student Council sponsored concert and encouraged others in the community to follow with written complaints.<sup>20</sup> This doesn't just seem like a student posting lewd comments; it also includes a student exercising her First Amendment rights of press, speech, assembly, and petition. I don't think the censoring of a student based on a few inappropriate comments that the school administration takes offense to, justifies the stifling of political action that is not only written in the Constitution but encouraged in our public discourse.

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<sup>19</sup> "First Amendment- Student Speech- Second Circuit Holds That Qualified Immunity Shields School Officials Who Discipline Students For Their Online Speech", in Harvard Law Review, in 2012, Vol.125, P.812-813.

<sup>20</sup> *Ibid*, 812.



## **Student Readings:**

### ***Thomas v. Board of Ed. v. Granville Cent. Sch. Dist., 607 F.2d 1043 (2nd Cir. 1979)***

#### **Facts:**

Several students published a newspaper entitled *Hard Times* that lampooned the school environment. The students created the newspapers largely on their own time and distributed the paper off-campus. Nonetheless, school officials suspended the students for five days for publishing an allegedly "morally offensive, indecent, and obscene" publication.

The students sued, claiming a violation of their First Amendment rights. They argued that school officials did not have the authority to punish them for their off-campus activities. A district court sided with the school. The students then appealed.

#### **Issue:**

Whether school officials can, consistent with the First Amendment, punish students for the content of publications that were created and distributed off-campus.

#### **Holding:**

In a unanimous panel decision, the Second Circuit ruled that the authority of school officials does not extend beyond the schoolhouse gate, certainly in the context of regulating purely expressive activity.

#### **Reasoning:**

School officials must have broad discretion to oversee their many responsibilities. "But our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." The students' publication was printed and distributed outside the school. The panel reasoned that "any activity within the school itself was 'de minimis'" or very minimal.

#### **Majority:**

"When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends." (Judge Irving R. Kaufman)

# THE FIRST AMENDMENT IMPLICATIONS OF FACEBOOK, MYSPACE, AND OTHER ONLINE ACTIVITY OF STUDENTS IN PUBLIC HIGH SCHOOLS

BRANDON JAMES HOOVER\*

## I. INTRODUCTION

The protections of the First Amendment are some of the most basic and fundamental rights guaranteed to all Americans. These protections, however, are not absolute. Although some surveys show that as many as sixty-nine percent of Americans are aware of the First Amendment right to freedom of speech<sup>1</sup>, it is doubtful that nearly as many Americans are aware of the limitations that have been placed on this enumerated fundamental right. For example, obscene speech<sup>2</sup>, commercial speech<sup>3</sup>, indecent speech<sup>4</sup>, speech tending to incite violence or an imminent responses, and various other forms of speech are not given full constitutional protection. In addition, the free speech rights extended to high school students in public schools are not co-extensive with the rights of adults. In 1969, the Supreme Court held, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> However, since the decision in *Tinker*, the United States Supreme Court has consistently reduced students’ First Amendment free speech rights. The Court appears to have created a web of tests to determine whether high school students’ First Amendment rights have been violated, and these tests tend to limit First Amendment rights as opposed to expanding those rights. However, with the emergence of social networking websites, a new problem has emerged as to how to balance a student’s free speech rights online with the school’s interest in maintaining an educational learning environment. Several lower courts have attempted to deal with this issue. The United States Supreme Court has yet to speak on the issue. This Paper will first discuss the emergence of social networking websites and their popularity with America’s youth. Further, this Paper will discuss the basic legal framework for analyzing free speech rights of high school students. This Paper will next consider a sampling of lower court decisions where students were punished in school for online postings and use of social networking websites. This Paper will conclude with an analysis of these cases, and whether they fit within the basic framework already established. Further, this Paper will discuss the on-campus, off-campus dichotomy of speech. Finally, this Paper will discuss whether the Court’s current trend is the best approach in balancing a student’s free speech rights against the school’s educational mission.

## IV. FIRST AMENDMENT CASES DEALING WITH SOCIAL NETWORKING WEBSITES AND OTHER ONLINE ACTIVITY OF HIGH SCHOOL STUDENTS

### A. *BEUSSINK V. WOODLAND R-IV SCHOOL DISTRICT*

In this case, plaintiff Brandon Beussink filed suit because he believed his First Amendment rights had been infringed upon when his school district suspended him for ten days because his web page used crude language to criticize his high school.<sup>74</sup> The web page in question was created by Beussink outside of school. On the site, Beussink encouraged others to contact the principal to communicate their opinions about the school to him. Further, the page had a link directly to the high school’s web page.<sup>75</sup> Several months after he posted this page, a classmate of Beussink’s who knew about the site, purposely accessed it and showed it to the computer teacher at the school. The computer teacher subsequently reported the page to the principal of the school who became upset and “made the decision to punish Beussink *immediately* upon viewing the homepage.”<sup>76</sup> Testimony provided to the District Court did not provide information on how many times Beussink’s page had been displayed at the school. However, the librarian did witness Beussink open the page, and the computer teacher allowed some of her students to access the page to view it later in the day. Additionally, another group of students found the page at some point in the day. However, all told, the computer teacher reported that no real disruption occurred in her class because of the page.<sup>77</sup> Beussink, however, was suspended ten days for his page and ultimately, he and his family brought this suit to enjoin the school district from enforcing his suspension, claiming it violated his First Amendment rights.<sup>78</sup> In assessing the merits of the First Amendment argument, the District Court recognized the oft-quoted line in *Tinker* that “students do not shed their First Amendment rights at the schoolhouse gate.”<sup>79</sup> However, the court did recognize that the First Amendment rights of school students do not parallel those of adults. The court articulated that pursuant to *Tinker*, in order to justify a curtailment of the student’s free speech rights, the school must show that the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>80</sup> Further, the court noted that speech may be limited upon a fear of a

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disruption. However, the fear of the disruption must be reasonable.<sup>81</sup> The District Court determined that on the record present, Beussink would likely succeed on the merits of his First Amendment claim because the school district did not suffer a material or substantial disruption due to Beussink's web page, and because the principal immediately after seeing the web page sought to discipline Beussink because of its *content* and *not* because of a *fear of disruption*.<sup>82</sup>

## Hacker instructions result in expulsion Federal appellate court boots student from school during senior year

© 1998 Student Press Law Center

**WISCONSIN** – Rather than spending the last half of his senior year coasting through classes and kicking back with friends, one student journalist has found himself tossed out of school.

Justin Boucher was expelled from Greenfield High School in January after a federal appeals court decided that the school board could continue his expulsion until his trial concludes.

"The utter defeat of the board's disciplinary efforts when confronted by a self-proclaimed 'hacker' is clearly a substantial harm," the three-judge panel ruled in *Boucher v. School Board of Greenfield*, No. 97-3433 (7th Cir., Jan. 9, 1998).

In June 1997, the Greenfield School District voted unanimously to expel Boucher after his article that described how to hack into school computers appeared in an underground newspaper, *The Last*. The newspaper expressed its commitment to free speech, claiming: "No censorship is impossible to achieve and wouldn't make for a very good paper, so we'll settle for a minimum of censorship. We will accept anything so long as it has some point or at least some interesting quality."

The school district's expulsion of Boucher stemmed from its belief that his article had endangered school property. Boucher disagrees, arguing that "So You Want To Be A Hacker" was intended to show a lack of security in the school's computer system.

As a result of the expulsion, Boucher filed a lawsuit arguing that the school board had trampled his First Amendment rights and the free speech provision in the Wisconsin constitution. With the help of the American Civil Liberties Union, Boucher contended that "The article did not result -and was not likely to result -in materially or substantially disrupting the work of Greenfield High School or in impinging upon the rights of other students."

A federal district court agreed and granted an injunction that temporarily prevented the school from expelling Boucher.

Yet in a January ruling, the U.S. Court of Appeals for the Seventh Circuit vacated the injunction and sided with Greenfield's argument that Boucher's article was a substantial threat to the school. "Boucher does not contend that the article was intended merely as some sort of parody of anarchist high school hackers .... Instead, spiced with warnings, emphasizing stealth, the article's agenda is palpably transgressive," Judge Richard D. Cudahy wrote in the opinion.

Boucher will not fight the expulsion. Instead, his attorney, Meesh Leiker, requested that the court order the school board to allow him to attend Greenfield or provide him with home schooling. The board opted to give Boucher home schooling to avoid court arguments, according to Leiker.

He has taken the school board up on its offer to provide him with home schooling. If he completes his courses, he will receive a Greenfield High School diploma.

As for the court's decision, Boucher commented, "I didn't think it was very fair after another judge already said I could stay in school. But it was their decision." However, Boucher plans to move forward with the civil trial, which is scheduled for November 17, and he will be represented by the ACLU.

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"The ACLU strongly feels Justin was expelled for one year not for his article on hacking, but because the school felt he was hacking. The activity in question was a First Amendment issue about a written article, not hacking itself," Leiker stated.

## J.S. v. Bethlehem Area School District, 807 A.2d 803 (Pa. 2002)

### **Facts:**

A middle school student created his own Web site, which contained derogatory comments about his algebra teacher and the school principal. The site featured a picture of the teacher's head dripping with blood, showed her face morphing into Adolf Hitler, and contained language offering money to find a hit man to kill the teacher. The teacher allegedly suffered extreme distress after learning of the site. The site also contained derogatory comments about the principal.

The school suspended the student and then brought expulsion proceedings against him. The student argued that the web site contained mere hyperbole and was not a true threat.

### **Issue:**

Whether school officials could punish a student for his derogatory and allegedly threatening online comments about a teacher.

### **Holding:**

In a 6-0 decision, the Pennsylvania Supreme Court held that school officials could punish the student because the student's web site created a substantial disruption of school activities.

### **Reasoning:**

The state high court first reasoned that the student's comments did not constitute a true threat, finding the web site to be a "sophomoric, crude, highly offensive and perhaps misguided attempt at humor." However, the court still ruled in favor of the school district because the student's web site had a "demoralizing impact on the school community." First, the court determined that school officials were justified in punishing the student for his web site, even though it was created off-campus, because there was a "sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus." The court then determined that the school district's actions were protected by both the Fraser standard of lewd and offensive speech, and the *Tinker* standard of substantial disruption. "In sum," the court wrote, "the web site created disorder and significantly and adversely impacted the delivery of instruction."

### **Majority:**

"Unfortunately, the United States Supreme Court has not revisited this area [of First Amendment rights of public school students] for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech. Indeed, Tinker's simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world." (Justice Ralph J. Cappy)

Name \_\_\_\_\_

Under the First Amendment should a student be allowed to express him/herself in print or internet without censorship by their school?

### **Student speech protected outside the classroom**

*Thomas v. Board of Education*

<http://www.firstamendmentschools.org/freedoms/case.aspx?id=1673>

1. What was at the heart of the controversy in this particular case? Why were the students disciplined?
2. How did the court decide? Why?
3. What were the far-reaching implications of this case?

*Beussink v. Woodland R-IV School District*

<http://www-bcf.usc.edu/~idjlaw/PDF/18-2/18-2%20Hoover.pdf>

(Or see handout)

1. What was Brandon Beussink charged with? How was his case similar/ different from *Thomas v. Board of Education*?
2. How did the district judge use the *Tinker* case in his rationale?

### **Student speech censored outside the classroom**

*Boucher v. Sch. Bd of Sch. Dist. Of Greenfield, 134 F.3d 821 (7<sup>th</sup> Cir. 1998)*

[http://www.splc.org/news/report\\_detail.asp?id=250&edition=11](http://www.splc.org/news/report_detail.asp?id=250&edition=11)

1. Who was Boucher and what was he accused of? How did his school respond?
2. On what grounds did he file a lawsuit against the school district?
3. How did the court rule? What was their justification for this ruling?
4. What did the ACLU say about the decision? What was this case about in their minds?

*J.S. v Bethlehem Area School District*

<http://www.firstamendmentschools.org/freedoms/case.aspx?id=1687>

1. How did the justices rule in this case? How did they interpret *Tinker* and *Fraser*?

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2. How have free speech cases changed since *Tinker*? How does this change student expression in and out of the classroom?

Using what you have read and learned complete the structured academic controversy activity in groups of four (two on one side of the issue, two on the other side of the issue). Take ten to fifteen minutes in preparing your argument for or against censorship of student expression outside the classroom. Each side present for several minutes while the other takes notes. Find commonalities between the two sides.

Under the First Amendment should a student be allowed to express him/herself in print or internet without censorship by their school?

Preparing My Argument

My Claims and Reasons

My Evidence & Examples

The Other Side of the Issue

Opposing Claims & Reasons

Opposing Evidence & Examples

Common Ground & Further Questions

We Can agree that.....

We need further clarification on.....

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# DONINGER v. NIEHOFF

Avery DONINGER, Plaintiff–Appellee–Cross–Appellant, v. Karissa NIEHOFF, Paula Schwartz, Defendants–Appellants–Cross–Appellees.

Docket Nos. 09–1452–cv (L), 09–1601–cv (XAP), 09–2261–cv (CON).

Argued: Jan. 12, 2010. -- April 25, 2011

Before KEARSE, CABRANES, and LIVINGSTON, Circuit Judges.

Jon L. Schoenhorn, Jon L. Schoenhorn & Associates, LLC, Hartford, CT (Sara J. Packman, on the brief), for Plaintiff–Appellee–Cross–Appellant. Thomas R. Gerarde, Howd & Ludorf, LLC, Hartford, CT (Beatrice S. Jordan, on the brief), for Defendants–Appellants–Cross–Appellees.

We are once again called to consider the circumstances in which school administrators may discipline students for speech relating directly to the affairs of the school without running afoul of the First Amendment. More precisely, we must determine if the defendant-school-administrators before us are entitled to **qualified immunity** on the plaintiff-student's claims that they violated her First Amendment rights by (1) preventing her from running for Senior Class Secretary as a direct consequence of her off-campus internet speech, and (2) prohibiting her from wearing a homemade printed t-shirt at a subsequent school assembly.

Defendants appeal the district court's partial denial of their motion for **summary judgment**, asserting that they are entitled to qualified immunity on Doninger's remaining First Amendment claim—a claim alleging that her rights were violated when Niehoff prohibited her from displaying in a school assembly a homemade t-shirt emblazoned with “Team Avery” on the front and “Support LSM Freedom of Speech” on the back. We reverse the district court on the basis that Defendants are entitled to qualified immunity on this claim as well, since, given the legal framework and the particular factual circumstances of this case, the rights at issue were not clearly established.

## BACKGROUND

### I. Factual Background

At the time of the events relevant to the instant dispute, Doninger was both on the Student Council and serving as the Junior Class Secretary at LMHS, a public high school in Burlington. The school district had in place a policy regarding **eligibility** to represent its schools in such positions. The district's policy stated:

All students elected to student offices, or who represent their schools in **extracurricular activities**, shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student's principal, but in no case, except

Protection of federal employees from the violation of an individual's constitutional rights

Ruling of a court for one party over another without a full trial

Right to run for office

After school events or activities

when approved by the board of education, shall the time exceed twelve calendar months.

The dispute at the heart of this case arose over the scheduling of an event called “Jamfest,” an annual battle-of-the-bands concert that Doninger and other Student Council members had helped to plan. Jamfest was scheduled to take place in the School's new auditorium on Saturday, April 28, 2007, but shortly before the date of the event, the School's administrators learned that the LMHS teacher responsible for operating the auditorium's sound and lighting equipment, David Miller, would be unable to attend on that date. As a result, at an April 24 Student Council meeting, which occurred prior to the start of the school day, the students were informed that Jamfest could not be held in the auditorium without Miller, and that they had the option either to keep the scheduled date and hold the event in the cafeteria, or to find a new date. This announcement upset Doninger and her fellow organizers, who wanted to hold the event in the auditorium that weekend, as planned. They were unable to see Niehoff immediately, but Doninger volunteered to return to the principal's office during her study hall to help schedule a meeting for later in the day.

That night, from her home, Doninger posted a message on her publicly accessible blog hosted by livejournal.com, a website unaffiliated with LMHS. The blog post began as follows:

jamfest is cancelled due to douchebags in central office. here is an email that we sent out to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing all together. andddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andddd.. [sic] here is the letter we sent out to parents.

19 J.A. at 167. Doninger reproduced the email that she and the other Student Council members had sent that morning and then continued:

And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im down.—

Id. Doninger next reproduced an email that her mother had sent to Schwartz earlier in the day concerning the dispute. Doninger testified that her use of the word “douchebags” in the blog post “referr[ed] to anyone involved in the cancellation of Jamfest,” including Schwartz. P.I. Hearing Tr. at 379:6–7. The purpose of her blog posting, she testified, was to encourage more people to contact the administration in an effort to change its position that Jamfest could not be held in the auditorium on April 28. Several LMHS students posted comments to the blog, including one that referred to Superintendent Schwartz as a “dirty whore.” J.A. at 168.

On May 17, 2007, Doninger went to Niehoff's office to accept her nomination for Senior Class Secretary. At that time, Niehoff confronted Doninger regarding the post and requested that Doninger apologize to Schwartz, show the blog entry to her mother, and withdraw her candidacy for Senior Class Secretary. Doninger agreed to comply with the first two requests, but did not agree to the third. In response, Niehoff refused to allow Doninger to run for a senior class officer position, although Doninger was permitted to retain her current position as Junior Class Secretary. Niehoff testified at the preliminary injunction hearing that she took this action because she felt that the blog post failed to demonstrate good citizenship, which was significant because Doninger was "acting as a class officer at the time that she created the blog," P.I. Hearing Tr. at 559:7–8, and because it violated the principles governing student officers set out in the student handbook that Doninger had signed.<sup>6</sup> Niehoff determined that Doninger's name would not appear on the election ballot nor would she be permitted to give a campaign speech at a May 25 school assembly regarding the election. Doninger was not otherwise disciplined for her blog post.

Some time before the start of school the next day, when elections were scheduled to be held, Niehoff learned that an undetermined number of students planned to wear "Vote for Avery" t-shirts to that day's assembly, where candidates were to give speeches before approximately 600 of their fellow students. It was also rumored that supporters of Doninger were planning a write-in campaign on her behalf. Niehoff relayed this information to Schwartz and Vice-Principal Bogen by email early on the morning of May 25.

That morning, Niehoff stationed herself outside the auditorium as several hundred students made their way in through two entrances to hear the candidate speeches. A few students wearing "Team Avery" shirts attempted to enter the auditorium prior to the beginning of the assembly. Niehoff instructed them to remove their shirts.<sup>8</sup> One student testified that, in asking him to remove the shirt, Niehoff stated that it was "disruptive" and "set[ ] a bad example." P.I. Hearing Tr. at 213:19. Niehoff herself testified that she was acting to prevent the wearing of "any shirt that [she] felt would cause disruption" at the assembly, id. at 590:12–13, and that it was her opinion that the shirts at issue would have caused disruption. There is no evidence in the record that Niehoff (or any other school official) made .

## I. First Amendment Claims

As we did in *Doninger II*, we begin with some basic principles of First Amendment law. While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), the constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Instead, these rights must be applied in a manner consistent with the "special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Thus, school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. Because schools have a responsibility for "teaching students the boundaries of socially appropriate behavior," *Fraser*, 478 U.S. at 681, offensive speech that would receive full constitutional protection if used by an adult in public discourse may, consistent with the First Amendment, give rise to disciplinary action by a school, *id.* at 682. Additionally, educators are permitted to exercise editorial control over "school-sponsored expressive activities such

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A court order prohibiting both sides carrying out an action prior to final decision of case

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as school publications or theatrical productions,” Doninger II, 527 F.3d at 48, so long as their actions are “reasonably related to legitimate pedagogical concerns,” Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Finally, and most recently, the Supreme Court has determined that public schools may “take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use,” Morse v. Frederick, 551 U.S. 393, 397 (2007), because of the special nature of the school environment and the dangers posed by student drug use, id. at 408.

#### A. Discipline for the Blog Post

We begin with Doninger's claim that her First Amendment rights were violated when Niehoff prohibited her from running for Senior Class Secretary in response to Doninger's blog post. Citing Fraser, the district court concluded that “Doninger's First Amendment rights were not violated when she was told that she could not run for class secretary because of an offensive blog entry that was clearly designed to come on to campus and influence fellow students.” Doninger III, 594 F.Supp.2d at 221. Alternatively, the court determined in its qualified immunity analysis that any First Amendment right claimed by Doninger “not to be prohibited from participating in a voluntary, extracurricular activity because of offensive off-campus speech when it was reasonably foreseeable that the speech would come on to campus and thus come to the attention of school authorities” was not clearly established. Id. at 222.

Doninger's principal argument to the contrary is that under Supreme Court precedent and this Court's decision in *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir.1979)

This Court's 1979 decision in *Thomas* similarly fails to establish that off-campus speech may never properly be disciplined. In *Thomas*, public school students were punished for publishing and distributing to their peers a lewd, satirical newspaper. 607 F.2d at 1045–46. The production, publication, and distribution of the paper occurred almost entirely off campus, although some copies eventually found their way to school grounds and drew the attention of school officials. Id. This Court concluded that because the students' activities were deliberately designed to take place away from school.

To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities.

Here, however, pursuant to *Tinker* and its progeny, it was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was not free to engage in such behavior while serving as a class representative—a representative charged with working with these very same school officials to carry out her responsibilities.

Qualified immunity “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably .” Pearson, 129 S.Ct. at 815. Under the qualified immunity doctrine, government officials such as the school administrators here “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

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reasonable person would have known.” Harlow, 457 U.S. at 818. They are entitled to the protection of qualified immunity unless the unlawfulness of their actions was apparent in light of preexisting law. See Anderson, 483 U.S. at 639–40. There was no such apparent unlawfulness here. Instead, it was **objectively** reasonable for Niehoff and Schwartz to believe they could prohibit Doninger from running for Senior Class Secretary without violating her First Amendment rights, given the “specific facts and context of the case.” Gilles, 511 F.3d at 244. We thus conclude that Niehoff and Schwartz were properly afforded qualified immunity as to Doninger's blog post claim.

## B. The T–Shirt Controversy

### ii. Defendants' Entitlement to Qualified Immunity

We turn now to the merits of Defendants' qualified immunity claim. Unlike the blog post, the t-shirts at issue in this case constituted student speech on, not beyond, school grounds. The t-shirts were not vulgar, see Fraser, 478 U.S. at 683, did not promote drug use, see Morse, 551 U.S. at 409, and were not student speech that could reasonably be perceived to “bear the **imprimatur** of the school,” Hazelwood, 484 U.S. at 271. Defendants assert that the t-shirts were banned to prevent two kinds of disruption to school activities: (1) vocal outbursts or other disruptions in the assembly to which the students were reporting; and (2) a possible write-in campaign to elect Doninger as Senior Class Secretary even though she had been removed from the ballot.

“School principals,” as the Supreme Court has recently noted, “have a difficult job.” Morse, 551 U.S. at 409.. A reasonable jury could find that a school official who believed the threatened disruption here was sufficiently substantial was, under the circumstances, mistaken. We cannot conclude, however, that such a mistake was anything but reasonable—the very sort of mistake for which the qualified immunity doctrine exists to shield officials against unwarranted liability.

## CONCLUSION

We have considered all of Doninger's contentions on appeal and have found them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED IN PART** and **REVERSED IN PART**: This matter is remanded for the district court to enter judgment for Defendants. The dismissal of Doninger's state claims without prejudice is **AFFIRMED**

Impartially

Approval

## *Doninger V Niehoff*

1. What is at the heart of the case? (Lines 11-18)
2. What was so important about lines 19-27? What did the district court reverse?
3. Where did Doninger post her criticisms of the administration?(Cite line numbers)  
Is this within her first amendment rights? Why or why not?
4. What other First Amendment right did Doninger exercise when encouraging other people to complain to the administration? Cite line numbers.
5. What was questionable about Doninger's speech? Cite line numbers.
6. How did the court rule on Doninger's First Amendment claims? Cite line numbers.
7. Why didn't the court accept Doninger's argument that her speech was protected from the early court ruling of *Thomas v Board of Education 1979*? Cite line numbers.
8. How did the court rule on claims that the principal suppressed student political speech with requesting the removal of "Team Avery" t-shirts? What was their justification? Cite line numbers.

## Writing assignment

You will write a five paragraph position paper in favor of the principal and superintendent or in favor of Avery Doninger. It will be a classic five paragraph paper with an introduction, body, and conclusion. It will look like as follows:

### Paragraph # 1

Hook and background. You need to grab your reader's attention here, why should someone read this?

The question: in this case should Avery Doninger have been blocked from running for Student Council, and should students have been forbidden to wear political t-shirts supporting her nomination?

Thesis and how you are going to lay out the paper: where do you stand on this issue and how will you make that clear in the following paper?

### Paragraph # 2

Include first point, complete with line numbers where this appears and reasoning as to why this supports your position.

### Paragraph # 3

Include second supporting detail with line numbers and reasoning to further your argument.

### Paragraph # 4

Include third supporting detail with line numbers and reasoning.

### Paragraph # 5

Conclusion: restate position in an original fashion accompanied by new insight.



## The 4 essay includes:

- Engaging and coherent opening complete with a restatement of the question, a thesis statement, and an outline of the paper.
- Clearly organized with persuasive ideas, complete with support, line numbers, and reasoning.
- Demonstrates critical thinking skills and through understanding of the topic.
- Is well- written with few errors in sentence structure, spelling, punctuation, and capitalization.
- Original and summative conclusion.

## The 3 essay includes:

- Includes an opening with a restatement of the question, a thesis, and a clear direction.
- Organized paragraphs with persuasive ideas but support may be incomplete.
- Demonstrates some critical thinking and understanding of topic.
- May contain a few errors but doesn't detract from overall effectiveness of piece.
- Strong conclusion that restates thesis and summarizes argument.

## The 2 essay includes:

- An opening with an incomplete thesis that lacks focus and direction.
- Some organization but incomplete ideas with minimal support and reasoning.
- Demonstrates little critical thinking, repetition of facts but little extension of ideas, adequate understanding of topic.
- Text is coherent and understandable but rift with careless errors.
- Includes a conclusion that may restate thesis and some support but does little else.

## The 1 essay includes:

- An incomplete opening without a workable thesis or general outline of the paper.
- Chaotic organization that lack ideas with little or no support.
- Little or no critical thinking or knowledge of the topic.
- Errors, sentence structure, and poor grammar make the text incomprehensible.
- Does not include a conclusion, does not restate thesis or make an attempt to end the paper.