

# Students, the First Amendment and the Courts

## Section Objectives

After reading this section, you will be able to:

- Trace the development of student First Amendment rights.
- Identify significant court rulings that affect student press rights.

## The Bill of Rights and Schools

The First Amendment, along with the rest of the Bill of Rights, became the law of the land in 1791, but 216 years later in 2007 Supreme Court Justice Clarence Thomas wrote in *Morse v. Frederick*, “As originally understood, the Constitution does not afford students a right to free speech in public school.”

Thomas is an *originalist*, one who tries to interpret the Constitution and the Bill of Rights according to what the Founding Fathers—the original authors—intended. Since public education was almost nonexistent in 1791, it is not surprising that the Founders were not specifically concerned about the rights of public school students.

Fortunately for the student press, the other eight justices viewed the case differently and instead debated *which* First Amendment rights students have. They looked at past court decisions for *precedents*, that is, earlier rulings by the court, that set a rule or pattern for deciding similar cases.

The precedent for almost a hundred years was the 1833 Supreme Court decision in *Barron v. Baltimore*, which said the Bill of Rights applied only to the federal government. According to *Barron*, “Congress shall make no law abridging freedom of speech, or of the press.” Although Congress was restricted from changing these laws, states, cities and even schools could and did make laws that supported certain churches with tax money, abridged free speech and freedom of the press, and limited the right to assemble. “A local school teacher was not Congress within the meaning of ‘Congress shall make no law,’” said David L. Hudson Jr. in “Let the Students Speak!” Only the federal government was forbidden to make such laws.

The Supreme Court began to apply the Bill of Rights to the laws and practices of states starting in 1925 with *Gitlow v. New York*. By 1965, in *Gideon v. Wainwright*, the court indicated that all forms of government, not just the federal government, were restrained by the Constitution and its amendments, including the Bill of Rights. Public schools are a form of government.

## Students and the First Amendment—*West Virginia v. Barnette*

Not coincidentally, the Supreme Court first linked the two phrases *First Amendment rights* and *public school students* in 1943, in *West Virginia State Board of Education v. Barnette*. All earlier cases involving students and the schools had been decided—often against the students—on the basis of whether the punishment was excessive or whether it was the schools’ or the parents’ right to discipline the student. These cases did not directly address the rights of students.

The *Barnette* decision, “established that public school students do have First Amendment rights and the First Amendment applies in public schools,” according to Hudson. Justice Robert H. Jackson wrote:

*That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at*

*its source and teach youth to discount important principles of our government as mere platitudes.*

The Barnette decision left many questions unanswered. In what ways are students in school different from citizens in a town or state? Under what conditions could a school abridge student First Amendment rights? How much disruption to the school day could be tolerated in the name of the First Amendment? Could school officials punish students for expression that took place off campus? What sorts of speech were protected, what sorts were not?

## **Tinker v. Des Moines**

The Supreme Court answered some of these questions in the 1969 *Tinker v. Des Moines Independent Community School District* decision. Justice Abe Fortas reaffirmed student First Amendment rights. He wrote “It can hardly be argued that either students or teachers shed their First Amendment rights at the schoolhouse gate.”

### **Content Neutral**

Justice Fortas noted that the school district, which had punished students for wearing black armbands to protest the Vietnam War, allowed students to wear political campaign buttons and Iron Crosses, associated in many minds with Nazi Germany. The Tinker children, it appeared, were punished not because political symbols were against the rules, but because the administration did not approve of the ideas associated with their choice of political symbols.

The *Tinker* decision held that any limitation to student First Amendment rights must be applied in a way that is *content neutral*, that is, in a way that applies equally to opinions the administration likes and dislikes. If it is legal to wear a symbol supporting Green Peace, it should also be legal to wear a symbol supporting the National Rifle Association. If you can wear a button supporting a Republican candidate for office, you can also wear one in support of a Peace and Freedom candidate.

### **Substantial Disruption**

The school district had argued that the Tinker children’s armbands disrupted the school. Justice Fortas wrote that the administration’s “undifferentiated fear” of disruption was not a good enough reason to abridge freedom of speech. In Fortas’s words, such censorship would be justified only when there was a “reasonable forecast of substantial disruption.”

When the attorney for the Des Moines school district, which served about 18,000 students, argued before the Supreme Court that the armbands did cause a real disruption, Justice Thurgood Marshall asked how many students had worn the armbands. “Seven,” the attorney said.

Justice Marshall appeared incredulous. “Seven out of eighteen thousand, and the school board was afraid that seven students wearing armbands would disrupt eighteen thousand? Am I correct?”

## Applying the Tinker Standard

Justice Fortas acknowledged the “special characteristics” of schools in the *Tinker* decision, but did not spell them out. Several cases after 1969 framed the differences between First Amendment rights in schools and those rights in the broader society. None of these cases reached the Supreme Court. However, a judge deciding a future case that involved similar legal disputes is likely to look to these cases for guidance in interpreting *Tinker*.

- **Could a school punish a student for expressing himself by wearing an emblem of the Confederate flag on his jacket sleeve?** Yes, if the school already suffered from racial unrest, and, like Brainerd High School in Chattanooga, Tennessee, had banned the rebel flag and the song “Dixie” as school symbols and at all school events. The school had been recently integrated, had been closed because of racial tension, and had summoned the police during several racially charged confrontations at school. The courts held there was a “reasonable forecast of substantial disruption” that could arise from the Confederate symbol displayed on the sleeve of a student’s jacket. *Melton v. Young*, 1972
- **Could students carry signs and protest on campus under *Tinker*?** Yes, if the school, like Canyon del Oro High School in Arizona, had no rule against carrying signs. The Ninth U.S. Circuit Court of Appeals ruled that the sign-carrying student, Steven Karp, had not violated a school rule in doing so, and carrying a sign was “pure speech” and therefore protected. *Karp v. Becken*, 1973
- **Are mass demonstrations and leaving class protected forms of speech under *Tinker*?** Not if the demonstrations or walkouts disrupt school activities, as protesters did at John Tyler High School in Tyler, Texas, when nearly 300 African-American students left classes to protest the racial balance of the newly chosen cheer squad. *Dunn v. Tyler*, 1972
- **Do student journalists have a right under *Tinker* to distribute a survey** to high school students at school asking the students about their specific sexual attitudes and personal experience? No. The Second Circuit ruled in

1977 that the school acted reasonably when it banned the survey. The school argued that the survey could potentially do emotional harm to younger students. The judge wrote that the First Amendment does not protect a student from censorship when they are asking questions that could reasonably cause psychological harm. *Trachtman v. Anker*, 1977

- **Do students have a right under *Tinker* to distribute an underground paper that appears to advocate drug use** and takes advertisement from a head shop, a shop that sold drug paraphernalia? No. School officials could halt distribution of an off-campus student publication such as the *Joint Effort* that encourages actions that endanger the students’ health and safety. *Thomas v. Granville Schools*, 1979
- **Could school officials punish students for the content of a paper the students published and distributed outside of school?** No. The judge wrote, “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.” *Thomas v. Board of Education, Granville Central School District*, 1979
- **Could school officials demand to see a student newspaper before it was printed?** Maybe.

*Tinker* protected the student press from *prior restraint*—administrative control of the student media. *Prior review*, on the other hand, means that the administration looks at it before it is published.

Some courts ruled that while prior restraint was forbidden under *Tinker*, prior review was not. School officials said they needed to check the adviser’s and the students’ work, to look over the paper before it was published to check for content they were allowed to censor under *Tinker*, that is libelous material, or material that would incite students to break the law or that would substantially disrupt the school.

Other courts held that prior review was a form of prior restraint on student expression and violated the First Amendment and the *Tinker* standard. (Prior review creates dangers for the school district. See *Four Cases in Which Districts Were Sued for the Content of Student Media* on page 14.)

The Court	The Case	The Story and the Ruling	The Implication
U.S. Court of Appeals, Sixth Circuit	1972 <i>Melton v. Young</i>	<p>Brainerd High School, Chattanooga, Tennessee, had been <i>The Rebels</i>, and they had flown the Confederate battle flag at football games. After desegregation, racial tensions developed over the nickname, flag and the song “Dixie,” which had been played at school events. School officials barred the flag and song and ruled that “provocative symbols on clothing will not be allowed.”</p> <p>Rod Melton wore a jacket with a Confederate flag on the sleeve to school and was suspended for doing so two days in a row.</p> <p>He filed a federal lawsuit, saying his First Amendment right to free speech was being violated and that the rule on provocative clothing was “too vague.” He said he wore the jacket to show his pride in his Southern heritage.</p> <p>The Circuit court ruled against Melton, saying there was sufficient evidence of potential disruption. The school had been closed on two different days because of racial tensions and that “much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol.”</p>	<p>The courts ruled that the school was justified in banning an individual student’s use of the provocative symbol—a form of speech—if there was a reasonable forecast that it would create substantial disruption.</p>
U.S. Court of Appeals, Fifth Circuit	1972 <i>Dunn v. Tyler</i>	<p>Shortly after the formerly all-white John Tyler High School in Texas was desegregated with students from the formerly all-black Scott High School, racial tensions erupted over the election of cheerleaders. The school was 62% white, 38% black.</p> <p>To protect against only whites being elected to the cheer squad, the principal “directed that four whites be chosen from ten white candidates and two blacks from four black candidates.” Blacks and whites were listed separately. Black students protested the arrangement. After discussions with administration did not resolve the issue to their satisfaction, between 250 and 300 black students left campus in protest. The students who walked out were excluded from returning to campus until each student and a parent met with the administration, who suspended some offenders.</p> <p>The students sued for violation of the rights under <i>Tinker</i>. A district court ruled in favor of the students. The school appealed the case.</p> <p>The Fifth Circuit ruled against the students, saying that even though the school had no rule against walkouts, they did not need one. “No student needs a regulation to be told he is expected and required to attend classes” and that walkouts are “inherently disruptive of the school’s work” and so not protected expression under <i>Tinker</i>.</p>	<p>Schools could punish students involved in walkouts or other expressions that were “inherently disruptive of the school’s work.”</p>

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<p>U.S. Court of Appeals, Ninth Circuit</p>	<p>1973 <i>Karp v. Becken</i></p>	<p>When an English teacher's contract to teach at Canyon del Oro High School in Arizona was not renewed, students organized a protest to be staged at a sports banquet and called the media. Several athletes threatened violence if the protest occurred. The school canceled the banquet. Students then walked out of class and began displaying signs protesting the teacher's firing. Steven Karp retrieved a sign from his car and refused to give it to a vice principal, as the school had no rule against signs. He was suspended.</p> <p>He filed suit in federal court for violation of his First Amendment rights. He lost and appealed to the Ninth Circuit Court where he won. The judges ruled that displaying a sign was pure speech, not conduct, and so was protected.</p>	<p>Pure speech is protected by the First Amendment, but a reasonable forecast of substantial disruption can overcome that protection, as stated in <i>Tinker</i>.</p>
<p>U.S. Court of Appeals, Second Circuit</p>	<p>1977 <i>Trachtman v. Anker</i></p>	<p>Jeff Trachtman, editor-in-chief of the Voice, at Stuyvesant High School, New York, wanted to survey students' sexual attitudes and publish the results in the Voice in an article "Sexuality in Stuyvesant." The principal, a district administrator, the chancellor (Anker) and the school board each prohibited it. The 25-question survey was to be distributed randomly and returned anonymously. It included questions about students' sexual attitudes, preferences, knowledge and covered such topics as premarital sex, contraception, homosexuality, masturbation and the extent of students' "sexual experience."</p> <p>The federal district court agreed with the school district that 13- and 14-year-old students might experience psychological harm if asked to take the survey and "that the questionnaire would force emotionally immature individuals to confront difficult issues prematurely," but that for juniors and seniors "the psychological and educational benefits to be gained from distribution of the questionnaire to this group of students outweighed any potential harm."</p> <p>The student journalists appealed the ruling to the Second Circuit Court of Appeals, which ruled in favor of the district "not so much [as] a curtailment of any First Amendment rights" but because students are entrusted to the school's care, and are compelled by law to attend the school. The school is right to protect the students from peer contacts and pressures which may result in emotional disturbance to some of those students. "The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences."</p> <p>In addition, the court held "it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students."</p>	<p>Students do not have a First Amendment right to administer surveys in school if the school can reasonably forecast substantial psychological disruption of some students from the survey. School districts are better judges than the courts of how to protect student welfare.</p>

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U.S. Court of Appeals, Second Circuit	1979 <i>Thomas v. Granville Schools</i>	Several students in Granville, New York published a paper called <i>Hard Times</i> , which satirized their school and included articles the school considered “morally offensive, indecent, and obscene.” They produced and distributed the paper off campus with no help or support from the school. The school suspended them for five days. The students sued but the district court sided with the schools.  On appeal, the Second Court of Appeals held that the paper did not negatively affect discipline at the school and that “the student is free to speak his mind when the school day ends.”	Students’ off-campus expression may not be limited by the schools.
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## Retreat from the Tinker Standard—*Bethel v. Fraser* and *Hazelwood v. Kuhlmeier*

The Supreme Court next ruled on the First Amendment and public school students 17 years after *Tinker* in *Bethel School District v. Fraser* (1986). The decision limited student freedom of speech. The Supreme Court ruled against Matthew Fraser, calling his speech in a school assembly “lewd and indecent, but not obscene.” Obscenity would have been illegal under *Tinker*. Fraser’s speech was not obscene, the court ruled, but “lewd and indecent.” The ruling granted public schools the ability to punish such expressions that would arguably have been legal under *Tinker*. This opinion signaled a judicial retreat from *Tinker*.

Two years later in *Hazelwood v. Kuhlmeier* (1988), the court further changed the balance between student First Amendment rights and the schools. The decision granted school officials greater power to restrain student newspapers if the newspaper was published under certain conditions. If the newspaper was produced as part of a class or using school resources, and was advised by faculty with the purpose of imparting skills to students, the court held that students did not automatically enjoy *Tinker* standard First Amendment protections. Which freedoms a publication enjoyed depended on its *forum status*. If it was a “forum for public expression,” it was protected under *Tinker*.

*Spectrum*, the Hazelwood High School newspaper, the court said, was not a “forum for public expression” by students but rather a school-sponsored publication. The school was not obliged to sponsor student speech that went against the school’s “legitimate pedagogical concerns.”

The Court indicated that if the student editors had been given final authority over the content of the paper, or if the school had explicitly designated *Spectrum* as a public forum for student expression, the result in the case would likely have been different, according to the Student Press Law Center. If it had been a public forum, the students would have been protected by the *Tinker* standard, which is still in force. *Hazelwood* creates exceptions to *Tinker*.

Thus a two-tiered system of student media was born. Some media enjoy the Constitutional protections of *Tinker*. Other media enjoy fewer protections under the more restrictive Hazelwood standard, which allows greater school district censorship.

*Hazelwood*, however, does not grant administrators unfettered powers of censorship. Because *Spectrum* was school sponsored and not a public forum, school officials could censor the paper if the censorship was “reasonably related to legitimate pedagogical concerns,” according to the judge. However, if the school officials cannot show the connection between “legitimate pedagogical concerns” and their censorship, their censorship remains unconstitutional and may be struck down by the courts. Parts of *Hazelwood* were clarified 15 and 16 years later in *Draudt v. City of Wooster* (2003) and in *Dean v. Utica Community Schools* (2004).

## What Are Legitimate Pedagogical Concerns?

When the Supreme Court looked for language to explain when school officials could censor student expression, they found their model in an odd source, a ruling about prisoners in Missouri who wished to marry and had exchanged love letters. Both activities were forbidden by prison regulations.

The Supreme Court ruled in *Turner v. Safley* (1987) that prisons, also called penal institutions, could prohibit one inmate from corresponding with another. This was deemed necessary to keep order in the prison. It struck down another regulation that prohibited inmates from marrying, finding that it was not “reasonably related to legitimate penological interests.”

When the Supreme Court ruled on *Hazelwood*, the court simply substituted “pedagogical concerns” for “penological interests,” according to Hudson in “Let the Students Speak.”

The “legitimate pedagogical concerns” the *Hazelwood* decision listed as grounds for censorship include

- material that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane or unsuitable for immature audiences”;
- potentially sensitive topics, such as “the existence of Santa Claus in an elementary school setting” or “the particulars of teenage sexual activity in a high school setting”;
- “speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the ‘shared values of a civilized social order’”; and
- material that would “associate the school with anything other than neutrality on matters of political controversy.”

## Carving Out Exceptions to *Hazelwood*

The *Hazelwood* decision does not apply in many schools, districts and states. Some states have reaffirmed their commitments to student freedom of expression while others have adopted laws and policies that free student media from *Hazelwood*.

The *Hazelwood* decision did not demand that school officials censor student expression. It only allowed them to do so under the limited conditions described above. States and school districts could still allow greater student freedom than *Hazelwood* allows.

This can best be understood by an analogy. If the Supreme Court had ruled that the Constitution allowed prisoners to be held in cells as small as 10 feet by 5 feet, cities and states could still create laws requiring that prisoners’ cells be at least 15 feet by 15 feet. So districts and states could create laws that give students more freedom—and the districts less power to censor—than the *Hazelwood* standard allows.

Two months after *Hazelwood*, the California Department of Education clarified student rights in that state. *Hazelwood* did not make any difference to California. The state remained under the *Tinker* standard, as described in Education Code 48907. In a news release clarifying California students’ freedom of the press, Superintendent of Public Instruction Bill Honig has this to say:

*Some people may not like the fact, but California’s law bends over backwards to protect the student journalist. School authorities can only prohibit publication of stories in school newspapers if they are obscene, libelous, slanderous or likely to incite others to commit illegal or disruptive acts.*

Massachusetts soon changed the language in its 1974 law, which previously had said local districts *may* adopt *Tinker*-standard policies, to read districts *must* adopt such language.

Arkansas, Colorado, Iowa, Kansas, North Dakota, Oregon, Pennsylvania and Washington have laws that protect student expression, while courts in New Jersey and Washington have specifically said their state constitutions may provide additional protections to student media.

In addition, dozens of school districts have adopted Tinker-standard language in their policies, providing significant freedom to their student media programs. In many cases, the districts have declared their student media to be public forums for student expression, language that frees their students from *Hazelwood*.

## Protecting Advisers

Journalism advisers may find themselves in difficult positions. Legally, they cannot censor lawful student expression any more than other school officials or government employees may do so. Public forums require that students control the content of the media.

However, school officials frequently hold the adviser responsible if students publish material that is legal but that the officials find objectionable. Advisers have been punished—transferred, suspended, fired or removed from their journalism assignment—for failing to prohibit legal student expression.

Two states have laws specifically protecting advisers. In 1992 Kansas passed the Kansas Student Publication Act, which states

*No ... adviser or employee shall be terminated from employment, transferred, or relieved of duties imposed under this subsection for refusal to abridge or infringe upon the right to freedom of expression conferred by this act.*

California passed an adviser-protection bill in 2008, adding language to the student free expression section of the education code stating that a teacher

*shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized [under the Tinker standard] or refusing to infringe upon conduct that is protected ...*

## Court Cases That Define the Limits of Hazelwood

Two notable cases have clarified which student publications are under the Hazelwood standard and which enjoy the greater freedom of the Tinker standard—even in states without Tinker-standard press laws. Neither case went to the Supreme Court, so technically each applies to the limited geographic district in Michigan and Ohio that the federal district courts serve. However, student media censorship cases are relatively rare, so future judges facing similar legal disputes are likely to look at these cases for guidance.

### ***Draudt v. Wooster***

*Draudt v. Wooster* (2003) ruled that the Blade, a Wooster, Ohio student paper, was a public forum and so enjoyed greater protection from censorship than the *Hazelwood* case allowed for nonpublic forum school newspapers. The judge identified nine factors that courts should use to decide whether the paper was a nonpublic forum and could be restrained under *Hazelwood*, or whether it was a public forum and enjoyed the broader First Amendment rights under the Tinker standard.

The Blade had attempted to publish an article about the district's alcohol policy. They quoted two student athletes by name who admitted drinking off-campus. One was the school board president's daughter, who reported both her drinking and that she was punished by the school

for drinking. School officials confiscated the entire press run because the story was “potentially defamatory.”

School officials later stated that the student had never admitted wrongdoing and that she was never punished. The student reporters maintain that the Blade reporter quoted the student accurately, though they acknowledge that the girl was not punished.

The judge ruled that the Blade was a public forum and so could only be censored if the content was illegal—obscene or libelous—or likely to create a serious, physical disruption to the school. The school district agreed out of court to avoid confiscating the student newspaper in the future without talking with the student editors. They also agreed to pay a total of \$35,000—\$30,000 to the students’ attorneys and \$5,000 to charities designated by the students. The students directed that the money be given to the Student Press Law Center in Washington, D.C. and the Cleveland chapter of the Society of Professional Journalists.

### ***Dean v. Utica***

*Dean v. Utica* (2004) clarified much that was vague in *Hazelwood*.

The Arrow, the student paper at Utica High School in Utica, Michigan, had attempted to publish an article by Katy Dean about a couple, Rey and Joanne Frances, who were suing the school district, claiming the idling diesel buses in the school garage next to their home had caused the husband’s cancer. The principal ordered the students to pull the story, an accompanying editorial and a cartoon. The students published a black box with the word *Censored* across it in white lettering, and an editorial on censorship. A local newspaper later published Dean’s censored article.

The judge ruled that the student paper was a public forum, using the nine criteria established in *Draudt v. Wooster*. Because it was a public forum and therefore under *Tinker*, not *Hazelwood*, the principal had violated the students’ rights.

To determine if the paper was a public forum, the judge looked at the *practice* of the publication. In its 25-year history, the officials at the school had never intervened in the editorial process of the publication. The students had no practice of submitting content to school officials for prior review, nor did the faculty adviser regulate the topics the newspaper covered. In practice the paper was a public forum.

School *policy* also supported the Arrow’s status as a public forum. The curriculum guide and the course descriptions provided evidence that it should enjoy the protections of *Tinker*.

Though the judge ruled the paper was under the *Tinker* standard, he also closely examined the censored article by Katy Dean using the *Hazelwood* standards of fairness, research and writing. He found that, even under *Hazelwood*, “the suppression of the article was unconstitutional.” The school officials had claimed the work was inaccurate because they disagreed with the opinions of people quoted in the story. What the district called inaccurate was simply an attempt to disguise “what is, in substance, a difference of opinion with its content,” the judge wrote. Even under the *Hazelwood* standard, the officials had violated the students’ rights.

This case articulated two avenues for student journalists to free themselves from *Hazelwood*. The first is to be a public forum in either policy or practice. The second is to produce high-quality journalism.

# Landmark Cases Affecting the First Amendment and the Schools

The Court	The Case	The Story and the Ruling	The Implication
Supreme Court	1833 <i>Barron v. Baltimore</i>	<p>John Barron sued Baltimore, claiming that city road construction had caused mounds of sand to accumulate near his wharf, making the water too shallow for ships and so ruining his business.</p> <p>Maryland state court found the city had violated his Fifth Amendment rights and awarded him \$4,500. An appeals court reversed this award. Barron appealed to the Supreme Court, but the Court said they had no jurisdiction—the Bill of Rights only restrains the federal government, not states or cities.</p>	<p>The Bill of Rights applied only to actions by the federal government. All other forms of government could violate the Bill of Rights.</p>
Supreme Court	1925 <i>Gitlow v. New York</i>	<p>Benjamin Gitlow appealed his conviction in state court for criminal anarchy. He had published “Left Wing Manifesto” in a newspaper, The Revolutionary Age. He served more than two years at Sing Sing Prison before his motion to appeal his conviction was granted.</p> <p>The Supreme Court held that First Amendment freedom of the press and freedom of speech restrains states as well as the federal government, but it upheld Gitlow’s conviction for advocating the violent overthrow of the government.</p>	<p>Parts of the Bill of Rights are now being applied to state actions.</p>
Supreme Court	1943 <i>West Virginia State Board of Education v. Barnette</i>	<p>Gathie and Marie Barnette followed their religious beliefs as Jehovah’s Witnesses and did not salute the flag in class. They were sent home from school for insubordination.</p> <p>The family sued the school board in federal court for excluding the children and won, but the school board brought the case to the Supreme Court. The Barnettes won there, also.</p> <p>Justice Jackson wrote, “If there is one fixed star in our constitutional constellation, it is that no official high or petty shall prescribe what shall be orthodox ... or force citizens to confess by word or acts their faith therein.”</p>	<p>Public school students do have First Amendment rights.</p>

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Supreme Court	1969 <i>Tinker v. Des Moines School</i>	<p>John and Mary Beth Tinker, 15 and 13, and Christopher Eckhardt, 16, wore black armbands to school December 16 and 17 to protest the Vietnam War and support the Christmas Truce called for by Senator Robert F. Kennedy. The principals of their Des Moines schools suspended the students until after January 1, 1966, when their protest had been scheduled to end.</p> <p>The students sued and won. The Supreme Court noted that “in wearing armbands, the petitioners were quiet and passive” and “did not impinge upon the rights of others.” Since there was no “substantial interference with school discipline or the rights of others,” the court ruled, “A prohibition against expression of opinion ... is not permissible under the First and Fourteenth Amendments.”</p> <p>Justice Abe Fortas wrote “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”</p>	<p>Students in school as well as out of school are “persons” under our Constitution and so enjoy the protection of the Bill of Rights.</p> <p>Schools, like other forms of government, are restrained by the Bill of Rights.</p>
Supreme Court	1986 <i>Bethel v. Fraser</i>	<p>Senior Matthew Fraser nominated a classmate for elective office in a required assembly attended by 600 students, “many of whom were 14-year-olds.” The speech was filled with sexual innuendoes, but no explicitly sexual language. He was suspended for three days and prohibited from speaking at graduation for “disruptive behavior.”</p> <p>Fraser and his parents sued, claiming the school had violated his right to free speech. He won in district court and the Ninth Court of Appeals, but lost when the school district took the case to the Supreme Court.</p> <p>Chief Justice Burger wrote that the Tinker standard did “not concern speech or action that intrudes upon the work of the schools or the rights of other students.”</p> <p>“[Public] education must prepare pupils for citizenship in the Republic. ... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”</p>	<p><i>Tinker</i> protections do not extend to styles of expression that are sexually vulgar though not obscene.</p> <p>Students’ rights while in school are more limited than adults’ rights. The courts defer to the schools’ judgment in such matters.</p>

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Supreme Court	1988 <i>Hazelwood v. Kuhlmeier</i>	<p>Hazelwood East High School’s principal regularly reviewed the Spectrum, which was produced by the journalism class. In 1983 he objected to two stories, one about teen pregnancy, saying the anonymous source “might be identified” and that “the article’s references to sexual activity and birth control were inappropriate for some of the younger students.” The principal also objected to an article about divorce because a student complained of her father’s conduct but the paper had not given the father an opportunity to respond. Believing there was no time to revise the stories, the “principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages.”</p> <p>Catherine Kuhlmeier and two other students sued for violation of their First Amendment rights, lost in district court, won in federal appeals court and lost in the Supreme Court.</p> <p>The court held that public schools were not compelled to sponsor speech that conflicts with its “legitimate pedagogical concerns.” School-financed newspapers were not necessarily public forums, so the editors were entitled to a lower level of First Amendment protection than when they publish independent student newspapers or when they published school newspapers that have, by policy and practice, opened their page to student opinion.</p>	Public school-sponsored student newspapers that have not been established as forums for student expression are subject to a lower level of First Amendment protection than independent student expression or newspapers established (by policy or practice) as forums for student expression. Schools with these school-sponsored media may censor for “legitimate pedagogical concerns.” Courts are deferring more decisions about student speech to the discretion of the schools.
U.S. District Court for the Northern District of Ohio Eastern Division	2003 <i>Draudt v. Wooster</i>	<p>The Blade, the student newspaper at Wooster High School in Ohio, attempted to publish an article about the district’s alcohol policy. They quoted two student athletes by name who admitted off-campus drinking. One was the school board president’s daughter, who reported both her drinking and that she was punished by the school for drinking. School officials confiscated the entire press run because the story was “potentially defamatory.”</p> <p>Student journalist Darcie Draudt and three other students sued the school district. The judge identified nine factors that courts should use to decide whether the paper was a nonpublic forum and could be restrained under <i>Hazelwood</i>, or whether it was a public forum and enjoyed the broader First Amendment rights under the <i>Tinker</i> standard. He ruled that the Blade was a public forum and so could only be censored if the content was illegal—obscene or libelous—or likely to create a serious, physical disruption to the school.</p> <p>The school district agreed out of court to pay \$5,000 to charities designated by the students and \$30,000 to the students’ attorneys. They also agreed to avoid confiscating the student newspaper in the future without talking with the student editors.</p>	<p>Publications that are public forums in practice are under <i>Tinker</i>, not <i>Hazelwood</i>.</p> <p>Nine factors are identified that determine the forum status of a student publication, including practice and policies identifying the publication as public forum.</p>

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<p>U.S. District Court Eastern District of Michigan Southern Division</p>	<p>2004 <i>Dean v. Utica</i></p>	<p>The Arrow, the student paper at Utica High School in Michigan, had attempted to publish an article about a couple who were suing the school district, claiming the idling diesel buses in the school garage next to their home had caused the husband's cancer. The principal ordered the students to pull the story, an accompanying editorial and a cartoon. The students published a black box with the word <i>Censored</i> across it in white lettering, and an editorial on censorship.</p> <p>The judge ruled in favor of Katy Dean, the sports editor who wrote the article, saying the student paper was a public forum, using the nine criteria established in <i>Draudt v. Wooster</i>. Because it was a public forum and under <i>Tinker</i>, not <i>Hazelwood</i>, the principal had violated the students' rights.</p> <p>To determine if the paper was an open forum, the judge looked at the <i>practice</i> of the publication. In its 25-year history, the officials at the school had never intervened in the editorial process of the publication. The students had no practice of submitting content to school officials for prior review, nor did the faculty adviser regulate the topics the newspaper covered. In practice the paper was a public forum.</p> <p>The court noted that even under <i>Hazelwood</i>, the censorship was illegal. The school officials had claimed that the story was inaccurate because they disagreed with the opinions of people quoted in the story.</p>	<p>Publications that are public forums in policy and in practice are under <i>Tinker</i>, not <i>Hazelwood</i>. <i>Hazelwood</i> does not give administration unchecked powers of censorship. Any restriction on content needs to be content neutral.</p>
<p>Supreme Court</p>	<p>2007 <i>Morse v. Frederick</i></p>	<p>Principal Deborah Morse suspended Joseph Frederick, 18, for displaying a 14-foot banner which read BONG HiTS 4 JESUS during the school's viewing of the 2002 Olympic Torch Relay. Frederick was across the street from the school and had not gone to school that day.</p> <p>Frederick sued for violation of his state and federal rights to free speech. He lost in district court, won in the Ninth Circuit Court and lost in the Supreme Court. The court ruled that watching the torch relay was "a school sponsored event," that the banner could be "reasonably viewed as promoting illegal drug use," and that the school had an "important—indeed, perhaps compelling interest" in deterring drug use.</p>	<p>The courts are deferring decisions about student speech that can be construed as promoting drug use to the discretion of the schools.</p> <p>However student political speech, such as speech that advocates for changes to existing laws concerning drugs, is protected speech.</p>

## Four Cases in Which Districts Were Sued for the Content of Student Media

In each of the four cases in which school districts were sued for the content of student publications, the suits were unsuccessful and the districts won. No school district has ever been successfully sued for something the student media has published, according to Frank LoMonte, executive director of the Student Press Law Center.

In each case the lawyers for the school district argued that the students, not the schools, controlled the content of the media. In three of the four cases, the courts agreed. In the fourth case, the court did not rule on the forum status (whether or not the publication was a public forum). In each case, the school district was cleared of wrongdoing by the courts and did not have to pay any damages. In two of the cases, *Sisley v. Seattle School District* (2011) and *M.R.B. v. Puyallup* (2012), The JagWire case, the quality of the students' journalism protected the school.

These court cases show the protection school districts enjoy when students control the content of the student media and are trained to make ethical and journalistically sound decisions.

None of the cases went to the Supreme Court. One case was decided by a federal appeals court, one in a federal district court and two others in state courts.

### *Yeo v. Lexington, 1997*

The yearbook staff at Lexington High School in Massachusetts decided against running an ad from Douglas Yeo that advocated *ABSTINENCE: The Healthy Choice*. Yeo was part of LEXNET, a pro-abstinence parent group that had been involved in heated debate with the school district over condom distribution. The yearbook had an unwritten policy against running political ads and so refunded his money and returned his ad.

Yeo sued the superintendent, the principal, the advisers of the yearbook and newspaper and the Lexington school committee claiming that they were denying his First Amendment right to free speech and his Fourteenth Amendment right to due process.

The U.S. Court of Appeals for the First Circuit ruled that student journalists do have the right to refuse ads. They are not government agents. Since only the government is in a position to violate the First Amendment or the Fourteenth, there was no suppression of Yeo's rights.

Furthermore, the court ruled that the school district was not responsible for the students' decisions. "As a matter of law, we see no legal duty here on the part of school administrators to control the content of the editorial judgments of student editors of publications."

Under Massachusetts law, the students control the content of the student publications. At Lexington High School, the policy and practice had been for the students to make editorial decisions. School officials were not responsible for those decisions, and so there were no First or Fourteenth Amendment violations.

The district was protected from judgment in the suit because the students controlled the student media.

### *Douglass v. Londonderry School District, 2005*

The yearbook staff at Londonderry High School in New Hampshire voted against running the photograph Blake Douglass submitted as his senior picture, though they did offer to include it in the community sports section. The photograph showed him kneeling, a broken (open) shotgun across his shoulder, dressed in trap shooting clothing. Shotgun shells appeared to be in his pocket.

Douglass and his father sued the school district, claiming his First Amendment rights were being violated. He also claimed the school was using "unconstitutional viewpoint discrimination" by refusing to run a picture of him with his shotgun. Douglass claimed the school could not "lawfully

refuse to publish [the photograph] because they disapproved of the ‘message’ they think the readers will take from it.”

The federal judge disagreed. It was not the school district that rejected the photo. It was the student yearbook editors. “The state has not, it seems, suppressed Blake’s speech his fellow students have done so,” the judge wrote. “The First Amendment does not restrict the conduct of private citizens, nor is it violated when one private actor ‘suppresses’ the speech of another.”

## ***Sisley v. Seattle School District, 2011***

The March 2009 edition of *The Roosevelt News*, the student paper for Roosevelt High School in Seattle, included an article on a potential project that would tear down rental homes near the school and replace them with a tall building. “*Sisley Slums Cause Controversy*” included this sentence: “In fifteen years these [Sisley] brothers have acquired 48 housing and building maintenance code violations, and have also been accused of racist renting policies.”

Hugh Sisley sued the Seattle School District Number One for defamation, that is, making false, derogatory claims. He objected to one clause in the article, the clause that read “and have also been accused of racist renting policies.”

The Washington state superior court judge ruled against Sisley and in favor of the school district, writing “a public school student is not an agent or employee of the school district.” In addition, “the public school district is a governmental entity constitutionally prohibited from censoring or otherwise curtailing a student’s First Amendment right to free speech unless there is evidence censorship is necessary to prevent disruption of the school environment. No such evidence exists.”

The Sisleys appealed and the appeals court ruled against the Sisleys—and for the school district—simply because the Sisleys had not proved the statement in *The Roosevelt News* was untrue.

## ***M.R.B. v. Puyallup, 2012—The JagWire Case***

Four students and their parents sued three reporters from the Emerald Ridge High School’s student newspaper the *JagWire*, as well as two faculty members and the Puyallup (Washington) School District for invasion of privacy, negligence and the intentional infliction of emotional distress. They each sought up to \$1.5 million in damages in the Washington state courts.

The four students claimed they had not given permission to the *JagWire* to publish their statements about their sexual activity in a 2008 article on teen sexual practices, including oral sex.

The student journalists made a convincing case that they had acted both ethically and legally and had secured the students’ permission to publish their accounts. They reported that they had checked the students’ quotes with the students, ensuring that they were each quoted accurately. They had reverified with each of the students that they had given permission to be quoted. They had respected another student’s request to retract her comments. (The *JagWire* did not at that time use signed consent forms and has since instituted a policy of requiring written consent if students are interviewed on sensitive topics. The interview tapes had been reused.)

Courts generally hold that a person can legally give consent to be interviewed if the person has the legal capacity to give consent, regardless of age. A minor who is capable of understanding the consequences of an interview may give consent, even if the parents do not consent.

The jury ruled in favor of the student journalists, the teachers and the school district. It determined that the article possessed a level of newsworthiness, a legal defense in invasion of privacy cases. The *JagWire* had reported that 37% of the students at the school had engaged in oral sex, but that the district sex education curriculum did not address the topic. The significant quality of the students’ article seems to have contributed to the verdict. High-quality journalism was a sound legal defense.

The plaintiffs, the four students and their parents who sued the district, also claimed that the school district was negligent when it allowed the article. During the trial, the judge ruled that the JagWire was not public forum and so could have been restrained by district officials under the Hazelwood standard. However, the school district argued that the paper operated under the “educational practice” of a public forum where students had the ultimate control over content.

The jury did not rule on the issue of the school district’s responsibility. Rather they decided that there had been no invasion of privacy. If there was no invasion of privacy, there was no need to assign responsibility and so no need to decide the forum-status of the JagWire.

The four plaintiffs and their parents filed an appeal, requesting a new trial. In their appeal, they challenged the paper’s status as a public forum. The Washington Court of Appeals denied their request for a new trial.

The Case	The Court	The Ruling Implication
1997 <i>Yeo v. Lexington</i>	The U.S. Court of Appeals for the First Circuit	If students decide which ad to take, the district is protected from successful suit for First Amendment violations.
2005 <i>Douglass v. Londonderry School District</i>	United States District Court, District of New Hampshire	If students decide which senior portraits to allow, the district is protected from successful suit for First Amendment violation.
2011 <i>Sisley v. Seattle School District</i>	Court of Appeals of Washington, Division One	If what the students write is true, it is not libel. A lower court also ruled in the school district’s favor saying that where the students make the content decisions, the school district is protected from successful suits for slander.
2012 <i>M.R.B. v. Puyallup</i>	Court of Appeals of Washington, Division Two.	If students employ sound journalistic practices, they protect their schools.