READING 7
Freedom of Expression

Uncorrected and Edited
Page Proofs

Constitutional Law for a Changing America

Rights, Liberties, and Justice

Lee Epstein
University of Southern California

Kevin T. McGuire
University of North Carolina-Chapel Hill

Thomas G. Walker
Emory University

SAGE | CQPRESS

CHAPTER FIVE

FOUNDATIONS OF FREEDOM OF EXPRESSION

AT ONE TIME or another, everyone has criticized a political official or complained about a government policy. Sometimes we express such grievances privately, to friends or relatives. At other times we may join with like-minded people and communicate our opinions collectively. Speaking our minds is a privilege we enjoy in the United States, a privilege guaranteed by the First Amendment.

Indeed, the First Amendment's language is bold: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These words seem to provide an impregnable shield against government actions that would restrict any of the four components of freedom of expression: speech, press, assembly, and petition. But to what extent *does* the Constitution protect these rights? May mischievous patrons stand up in a crowded movie theater and shout "Fire!" when they know there is no fire? May a publisher knowingly print lies about a member of the community to destroy that person's reputation? May a political group attempt to spread its message by driving sound trucks through residential neighborhoods at all hours? May protesters storm onto the floor of the U.S. Senate to bring attention to their demands?

Despite the clear wording of the First Amendment, the answer to each of these questions is no. The Supreme Court never has adhered to a literal interpretation of the expression guarantees; rather, it has ruled that the government may restrict or regulate certain expressions, whether communicated verbally, in print, or by actions, because of their possible effects.

This chapter is the first of two dealing with the right of expression. Here we examine the foundations of free expression: the framers' understanding of the First Amendment, justifications for protecting expression, and the Supreme Court's initial foray into speech cases. In Chapter 6 we explore the contemporary application of First Amendment doctrine to various kinds of expression.

FREE EXPRESSION IN THE CONSTITUTION

In June 1789, the House of Representatives considered Madison's original version of the expression clauses of the First Amendment:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

After some tinkering with Madison's language, Congress eventually agreed on the version we know today:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Taken together, these four liberties—speech, press, assembly, and association—are the major sources of free expression in the Bill of Rights. But how did the framers understand these liberties? Because there was little debate in Congress, it is hard to know. As Benjamin Franklin said when asked about the meaning of free press, "Few of us, I believe, have distinct ideas about its

nature and extent."[1] Likewise, while the Bill of Rights was making its way through the state legislatures, the First Amendment's freedom of expression provisions were hardly debated.

Historians, though, suggest that the expression guarantees were a response to two repressive practices in England. The first was a licensing system under which nothing could be printed in England without prior approval from the government.[2] When these licensing laws expired in 1695, the right to publish materials free from censorship became recognized under common law, which led English jurist William Blackstone to write, "The liberty of the press consists in laying no previous restraint upon publications and not in freedom from censure for criminal matter when published."[3] Today, only rarely do previous or "prior restraints" on expression pass constitutional muster under the First Amendment—and for good reason.[4] Imagine if U.S. presidents had the power to review and then censor any speech their rivals planned to deliver or that senators could do the same with editorials critical of their performance? This may explain why Madison's original draft of the First Amendment called freedom of the press "one of the great bulwarks of liberty."

A second repressive English practice was the doctrine of seditious libel law, which outlawed criticism of the government and government officials, including and perhaps especially the king. Underlying this doctrine, as one English judge explained, was the belief that "[i]f people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[5]

Although it may be true that the First Amendment was designed to prevent punishment of "dissemination of material that is embarrassing to the powers-that-be"[6]—that is, seditious libel—U.S. history could be read to belie that interpretation. In the years immediately following adoption of the Constitution, the government was weak and vulnerable, the economy was in disarray, Europe continued to pose a threat, and the ruling Federalist Party was the target of much political criticism. In response, Congress passed one of the most restrictive laws in American history, the Sedition Act of 1798. This statute made it a crime to write, print, utter, or publish malicious material that would defame the federal government, the president, or the members of Congress; that would bring them into disrepute; or that could excite the hatred of the people against them. Violations of the act were punishable by imprisonment for up to two years. Prominent citizens were prosecuted; Vermont congressman Matthew Lyon, a combative and crude critic of the Federalist Party, was indicted for writing articles denouncing the Adams administration. Minor characters were also targeted, including Luther Baldwin, a patron at a tavern in Newark, New Jersey, who drunkenly expressed his hope that a cannon salute for President Adams "fired thro' his arse."[7]

Still, many were critical of the Sedition Act. James Madison and Thomas Jefferson, in particular, expressed their belief that the law violated the Constitution. The act expired in 1801, however, and the Supreme Court never had the opportunity to evaluate its validity.

Against this historical backdrop, it is hard to know whether, as it is sometimes presumed, the First Amendment was designed to eliminate seditious libel laws.[8] What is clear is that the framers had a deeper commitment to speech and press freedoms than in many other corners of the world, especially as those freedoms related to the public discussion of political and social issues. After all, vigorous public oratory had fueled the American Revolution and helped shape the contours of the new government.

JUSTIFICATIONS FOR PROTECTING EXPRESSION

Why did the founding generation so value freedom of expression? And why do today's Americans continue to

[1]Michael I. Meyerson, "The Neglected History of the Prior Restraint Doctrine," *Indiana Law Review* 34 (2001): 320.

[2]See Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1970), 504.

[3]Blackstone's *Commentaries on the Laws of England*, vol. 4 (London, 1765–1769), 151–152.

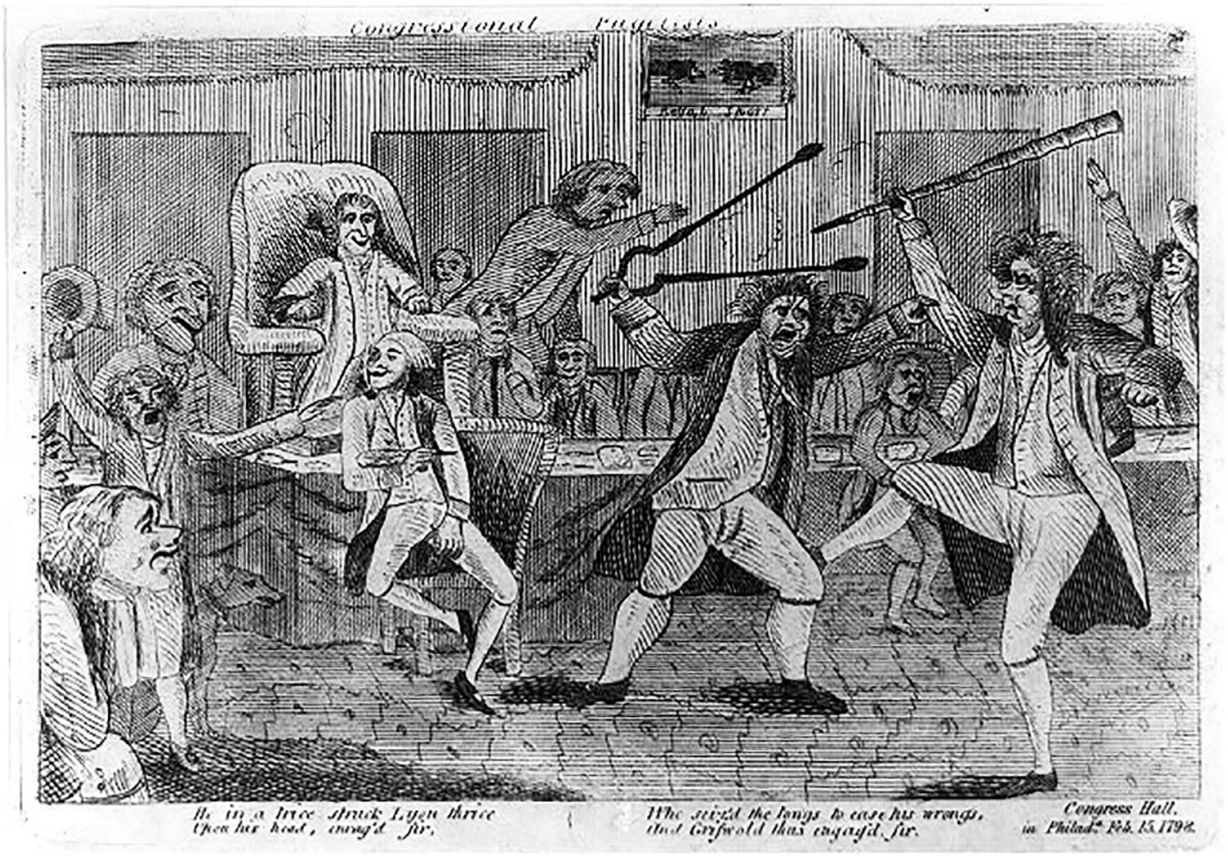
[4]See Chapters 6 and 7 for more detailed discussions of prior restraint.

[5]Chief Justice Holt, in *Rex v. Tutchin* (1704).

[6]Justice William O. Douglas, concurring in *New York Times v. United States* (1971).

[7]James Morton Smith, *Freedom's Fetters: The Alien and Sedition Law and American Civil Liberties* (Ithaca: Cornell University Press, 1956); and Charles Slack, *Liberty's First Crisis: Adams, Jefferson, and the Misfits Who Saved Free Speech* (New York: Atlantic Monthly Press, 2015), 111–113, 295.

[8]See Zechariah Chafee Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1941); and Leonard W. Levy, *Legacy of Suppression* (Cambridge, MA: Harvard University Press, 1960). See also Levy's revised and enlarged edition, *Emergence of a Free Press* (New York: Oxford University Press, 1985).



Courtesy of Library of Congress Prints and Photographs Division

Congressman Matthew Lyon, Democratic-Republican of Vermont, fighting with Congressman Roger Griswold, Federalist of Connecticut, on the floor of Congress Hall in Philadelphia. Lyon (pictured with fireplace tongs) was an outspoken critic of the Federalists and was the first person indicted under the Sedition Act.

cherish the right to communicate freely? Answers to these questions abound, though three justifications for protecting expression have moved to the fore. First, following from the writings of John Stuart Mill,[9] and later Supreme Court justice Oliver Wendell Holmes Jr., is the idea that free expression aids in the discovery of "truth." Holmes famously put it this way:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — *that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out*. That at any rate is the theory of our Constitution.[10]

In other words, the point of the First Amendment is "to preserve an uninhibited marketplace of ideas"—a competition of ideas—in which truth will ultimately prevail.[11]

However powerful and even accepted Holmes's "marketplace of ideas" justification for protecting speech, it is not without critics. One problem is that it assumes "truth" must emerge from a competition among different ideas. But, as the law scholar Frederick Schauer points out, some "ideas" or "beliefs" are simply facts. People may believe that "President Obama was born

[9] *On Liberty* (1859).

[10] Holmes, dissenting in *Abrams v. United States* (1919).

[11] *FCC* v. *League of Women Voters* (1984).

in Kenya or that the Holocaust is . . . a myth fabricated by Zionists and their supporters,"[12] but these beliefs are "false—plainly, demonstrably, and factually false," as Schauer writes. So why do they need to be tested in the marketplace?

Another problem is that even for ideas tested and ultimately adjudged false, a long marketplace competition can produce "irreversible harm." As law professor Harry Wellington noted,

> [M]ost of us [believe] that the book is closed on some issues [such as] genocide. Truth [won out], and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. Moreover, before those murders occurred, many individuals must have come "to have false beliefs."[13]

Last but not least, some scholars assert that the very idea that the marketplace always and ultimately produces truth is doubtful. Not all people who want to "peddle their ideas to the public" have the same access to "channels of mass communication;" and various cultural and psychological differences among people "distort the way ideas are bought and sold, as does the fact that some ideas are more easily packaged than others."[14] In short, the competition among ideas is rarely, if ever, fought on a level playing field.

Despite these criticisms, the "search for truth" rationale remains an important justification for protecting free expression, as the cases to come attest. But it is not alone. Yet a second justification that has gained prominence centers on the importance of expression for the maintenance of a democratic system of government. This justification is sometimes called "self-governance" because it emphasizes "those activities of thought and communication by which we 'govern',"[15] including the acquisition and expression of knowledge necessary to engage in political deliberation, cast votes, and make other political decisions. Put another way, the self-governance rationale privileges political speech on the theory that democracy thrives when there is open, unfettered discussion, including criticism of government officials.

To be sure, many commentators agree that political (and ideological) speech deserves special protection under the First Amendment. But they also bristle at the idea that political speech is the only expression deserving of protection under the amendment in part because the boundary between political-public and private speech is not always clear:

> Birth control is the most personal of matters, and yet any discussion of it raises questions of the desirable size of our population, the intelligent rearing of children, dependency, immorality, and clerical control of votes. The truth is that there are public aspects to practically every subject. The satisfactory operation of self-government requires the individual to develop fairness, sympathy, and understanding of other [people], a comprehension of economic forces, and some basic purpose in life. [They] can get help from poems and plays and novels.[16]

A third rationale for free speech, sometimes called "self-fulfillment," is almost the polar opposite of the self-governance justification. It offers protection to a wide range of expression, both private and public-political, on the ground that

> [e]very [person]—in the development of their own personality—has the right to form [their] own beliefs and opinions. And, it also follows, that [they have] the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize [their] potentiality as a human being begins at this point.[17]

On this account, most any attempt to suppress expression does not merely violate the First Amendment; it amounts to an "affront to the dignity of [people],

[12]Frederick Schauer, "Facts and the First Amendment," *UCLA Law Review* 57 (2010): 898.

[13]Harry H. Wellington, "On Freedom of Expression," *Yale Law Journal* 88 (1979): 1132.

[14]Vincent Blasi, "Holmes and the Marketplace of Ideas," *Supreme Court Review* (2004): 7.

[15]Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review* (1961): 255. See also Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948).

[16]Zechariah Chafee Jr., "Book Review of 'Free Speech: And Its Relation to Self-Government'," *Harvard Law Review* 62 (1949): 900.

[17]Thomas I. Emerson, "Toward a General Theory of the First Amendment," *Yale Law Journal* 72 (1962–1963): 879.

a negation of [their] essential nature."[18] But therein, some commentators argue, lies the problem with self-fulfillment as a justification for speech: Why should the liberty to communicate freely receive more protection than any other human activity from which people derive benefit or satisfaction? Law scholar Robert H. Bork vividly makes this point:

> An individual may derive pleasure from trading on the stock market . . . working as a barmaid, engaging in sexual activity, playing tennis . . . or in any of thousands of other endeavors. Speech . . . can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore[,] . . . indistinguishable from the functions or benefits of all other human activity. [Why] choose to protect speech . . . more than . . . any other claimed freedom[?][19]

Keep reading-->

[18]Ibid.

[19]Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 25.

[20]Zechariah Chafee Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1941), 266.

CHAPTER SIX

MODERN-DAY APPROACHES TO FREE EXPRESSION

IN JUST THIRTY-TWO WORDS the framers of the Bill of Rights summarized the First Amendment's free expression guarantees:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

But it has taken the Supreme Court hundreds upon hundreds of decisions to interpret the meaning of those thirty-two words. Chapter 5 considered but a handful of those decisions—foundational cases relating to the vexing problem of when the government can prevent speech that incites lawlessness. Here we turn to the many other areas of free speech law that the Court has fleshed out over time and, yes, continues to flesh out. During the Roberts Court era alone, the justices resolved more than forty disputes relating to free expression, or nearly three per term.

AN OVERVIEW OF MODERN-DAY FREE SPEECH DOCTRINE

When deciding whether the government can regulate or even prohibit speech, the contemporary Court considers the dispute from many different angles, including the nature of the speech, the place in which the expression occurs, the interests the government is pursuing by its restrictions, and the kind of regulation the government imposes. Figure 6-1 outlines the key questions the justices ask; and the sections to follow fill in the details on some of the more difficult ones. For now, it is worth familiarizing yourself with the concepts in each box so that you can more fully appreciate the material that follows.

Triggering the cases in this chapter is, naturally enough, an allegation that the government has abridged someone's right to free expression. In the 1800 and early 1900s, determining whether a case involved expression was easy enough: most words were clearly spoken or written. But that task became harder as human communication took other forms, including emails, video games, and computer code, as well expression that combined speech and conduct—for example, burning an American flag to protest government policies or making a contribution to a political candidate. Different and new forms of expression, in turn, required the justices to determine the reach of the First Amendment's guarantee of "free speech," and we shall consider their answers momentarily. But do keep in mind, as you read the cases to come, that simply because the Court has declared certain expression protected by the First Amendment does not mean that the government is disallowed from regulating the expression in various ways.

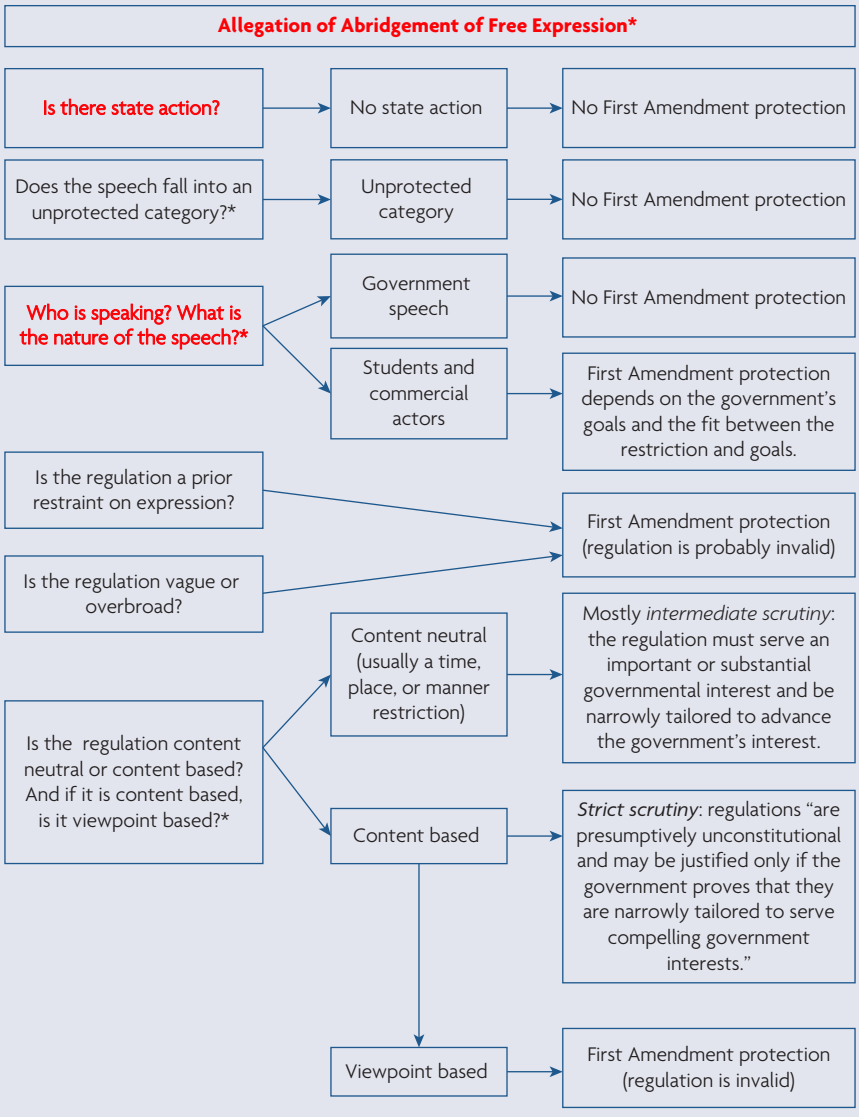
Once people claim a depravation of their expression rights, the question becomes: Is the government doing the depriving? In other words, is there "state action," a shorthand term to refer to government action, as shown in Figure 6-1? Because the words of the First Amendment start with "Congress," it is clear that Congress cannot abridge free speech. But neither can states and localities; the First Amendment applies to them too.

In short, to challenge a restriction on free expres-sion grounds, there almost always must be some action taken by federal, state, or local actors, including public universities, judges, executives, and legislators.[1]

[1]Very few exceptions exist to the state action requirement. For one of the very few, see *Marsh v. Alabama* (1946), holding that a privately owned company town, which exercises "traditional state functions," is a government for purposes of the First Amendment and so cannot punish a person for distributing literature on its streets.

Note to Law 200 Students. Feel free to read this entire section (pp. 7-10) but please note: we'll cover only the boxes labeled in red in Figure 6-1.

Figure 6-1 Major Questions in Free Expression Cases



*Indicates questions that are more fully fleshed out in the sections to follow. A version of intermediate scrutiny is also used in commercial speech cases, as we shall see.

The opposite holds too: If government action is not at issue in the case, a speech claim is highly unlikely to prevail. For example, a First Amendment challenge to a social media company's decision to remove a post is almost surely doomed to fail because those companies are private, not government, actors (though there is some debate over whether they should be treated as such for purposes of the First Amendment[2]).

[2]In *Packingham v. North Carolina* (2017), Justice Kennedy referred to social media sites as the "modern public square," seemingly equating "the entirety of the internet with public streets and parks," as Justice Alito noted. If so, the question arises as to whether social media should be treated as a government for purposes of the First Amendment.

The "Unprotected Category" box in Figure 6-1 covers a lot of ground. That is because the Court has held that some categories of expression are not protected by the First Amendment. You already know one such category from Chapter 5: speech meant to and likely to produce "imminent lawless action." Other categories of unprotected speech include obscenity and defamation, which we cover in Chapter 7, along with "true threats" and certain speech that provokes listeners into lawlessness, which we cover in this chapter. True threats, to preview, are when a speaker communicates "a serious expression of an intent to commit an act of unlawful violence" against particular individuals. In terms of listeners' reaction to speech, on the one hand the Court has been quite reluctant to allow a hostile audience to shut down speech. On the other hand, through a doctrine called "fighting words," the Court has ruled that the government may prohibit expression that causes a breach of peace by provoking listeners to retaliate.

If the expression does not fall into an unprotected category, the justices will take a closer look at both the speech and the regulation. With regard to the speech, who is delivering it is a crucial matter because the Court has said that certain speakers and types of speech merit more protection under the First Amendment than others. By way of example, the Court will generally reject First Amendment challenges to government speech, even if that speech favors some views over others—for example, when a city posts signs telling people to recycle. (Problems can arise, though, in determining when the government is speaking and when it is not, as we shall see.) In contrast, attempts to regulate student and commercial speech may or may not succeed depending on the government's goals and the fit between its goals and the regulation.

This leaves features of the regulation itself. One question is whether the regulation constitutes a prior restraint: an attempt by the government to prevent expression before it occurs. As you learned in Chapter 5, the First Amendment was designed, in part, to eliminate the licensing systems that had existed in England, under which nothing could be printed without prior approval from the government. As a result, the government may prosecute individuals who violate legitimate restrictions on expression but, absent extraordinary circumstances, may not intervene before the fact. Because questions of prior restraint arise most commonly in press cases, we cover this issue in some detail in Chapter 7.

In addition to prior restraint, the Court considers whether the government's regulation is overbroad or vague. Problems of overbreadth emerge when a regulation restricts constitutionally protected expression along with unprotected speech. To provide two examples:

- Cincinnati, Ohio, passed an ordinance making it illegal for "three or more persons to assemble on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." Although the city pointed out that the ordinance covers conduct within its power to prohibit (for example, committing assaults), the challengers argued that the ordinance also covered protected expression, including the right to assemble for, say, political purposes (*Coates v. Cincinnati*, 1971).

- Congress enacted a law criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty. Although the government argued that the law was designed to prevent extreme portrayals of harmful acts—such as videos depicting dog fighting—the law's challengers claimed that the law was overbroad: It may cover depictions that the government has a legitimate concern in regulating, but it also covers presumptively protected expression, such as hunting magazines and videos (*United States v. Stevens*, 2010).

In both cases, the Court invalidated the government's action. Because of the uncertain boundaries of the regulations, the justices worried about chilling protected speech.

Vagueness also relates to how laws are written. The requirement is that governments must draft laws restricting free expression with sufficient precision to give fair notice as to what is being regulated. If reasonable people have to guess what a statute means and are likely to come to different conclusions about what is prohibited by it, the statute is unconstitutionally vague.

The requirement that laws be sufficiently precise—not vague—reflects two considerations. One is obvious: people cannot be expected to follow the law unless they understand it. To return to the Cincinnati ordinance, would reasonable people understand whether their behavior is "annoying"? The Court thought not, writing that people of "common intelligence must necessarily guess at its meaning." The second consideration centers on the enforcement of vague laws. Because, as the Court

wrote in the Cincinnati case, "conduct that annoys some people does not annoy others," the term "annoying" leaves the door open to police and other officials exercising too much discretion. Enforcement of the ordinance, in other words, may "entirely depend upon whether or not a policeman is annoyed," even by, say, protected expression, such as wearing a political button.

Finally, the Court considers whether a regulation is content neutral or content based; and, if it is content based, whether it discriminates based on viewpoint. Content-neutral regulations do not take into account the subject matter of the expression or the viewpoint expressed. A public university's policy, for example, that prohibits all demonstrations on campus from 9:00 A.M. to 5:00 P.M., when classes are in session, is content neutral. The ban applies to all subjects and all viewpoints: political organizations, the theater club, religious groups, and on and on.

Content-based regulations, in contrast, are those that discriminate based on subject matter of the message conveyed. Suppose the university's policy allowed anyone to hold demonstrations at any time on any subject *except* demonstrations about the university's police force. That would be an ordinance restricting speech on the basis of its subject matter. An especially egregious form of content discrimination occurs when a regulation is based on the viewpoint expressed, that is, when the government "singles out a subset of messages for disfavor based on the views expressed."[3] It would be one thing for a university to allow demonstrations on all issues except those dealing with its police (content discrimination), but a much different matter if the university allowed public demonstrations on all issues, including policing, *except* those in opposition to the university's police (viewpoint discrimination).

The distinction between content-neutral and content- and viewpoint-based regulations is extremely important. As Figure 6-1 shows, when a government regulation is found to discriminate on the basis of content, it is subject to *strict scrutiny*, the highest and most exacting standard of judicial oversight. Under strict scrutiny, regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[4] By "narrowly tailored," the Court demands that the regulation be the "least speech-restrictive means" of advancing the government's interest. Almost never do restrictions on speech survive this standard; and our example of a public university allowing all demonstrations except on policing shows why. Can you think of a compelling reason the university could offer for its content-based policy? Perhaps it could say that it is worried about violence, but then why does it allow all other demonstrations, even those where the possibility for violence also exists? One might also question whether the university could achieve its stated goal of preventing violence through narrower rules that perhaps would apply to all demonstrations (that is, content-neutral rules).

Faring an even worse fate than content-based regulations are those that discriminate based on viewpoint. As a matter of course, they are invalid per se, for as Justice Robert H. Jackson once wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Giving government the authority to censor ideas, pushing only those it favors, is a hallmark of authoritarian regimes and just the sort of regulation of speech the First Amendment is designed to protect against.

When it comes to content-neutral regulations, most of which implicate the "time, place, and manner" of the expression, the Court is generally more deferential to the government. To evaluate these regulations, the Court applies *intermediate scrutiny*, asking whether the regulation furthers an important or substantial governmental interest (rather than a compelling interest).[5] Intermediate scrutiny, like strict scrutiny, requires that the regulation be narrowly tailored to advance the government's interest. But unlike strict scrutiny, the regulation need not be the least speech-restrictive means of advancing the government's interests. Rather, the Court has said:

> the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Narrow tailoring in [the intermediate scrutiny] context requires, in other words, that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests.[6]

[3]Justice Kennedy concurring in *Matal v. Tam* (2017) *(excerpted later in the chapter)*.

[4]***Reed v. Town of Gilbert*** (2015).

[5]As we explain later in the chapter, the Court is far more deferential to content-neutral regulations on speech that takes place in certain government-owned property (such as jails and defense plants).

[6]***Turner Broadcasting System, Inc. v. FCC*** (1994).

To return to our example of a university policy disallowing all campus demonstrations from 9:00 A.M. to 5:00 P.M., when classes are in session: Do you think it meets the intermediate scrutiny test? Is the university's interest substantial, and is the policy narrowly tailored to meet it?

With the material we just covered in mind, let us now turn to some of the specific questions raised in expression cases. As you read the cases and narrative below, note that, on the one hand, not all cases raise *all* the questions in Figure 6-1. For example, if a regulation on speech falls into an unprotected category, it is unlikely that the Court will consider whether the regulation is content based or content neutral.[7] In fact, many categories of unprotected expression are subject matter based (such as obscenity). On the other hand, many cases raise multiple questions. For example, a state might defend a regulation on speech on the ground that the restricted speech falls into an unprotected category (such as fighting words), but the challenger might claim that the regulation is overbroad, vague, or both.

Keep reading-->

[7]See ***United States v. Alvarez*** (2012). R.A.V. v. City of St. Paul (1992), discussed later in the chapter, is an exception to this general rule and has proved to be an anomaly.

[8]*Roberts v. United States Jaycees* (1984).

WHO IS SPEAKING?

As Figure 6-1 shows, the application of First Amendment speech guarantees may vary depending on the identity of the speakers and the nature of their speech. Let's turn our attention to the rights of students,

Student Speech

Considerable controversy has arisen over freedom of speech in the public schools. Do the schools constitute a special setting that permits an elevated degree of speech regulation? Do pre-college students have the same expression rights as adult speakers? The debate over these questions began with *Tinker v. Des Moines Independent Community School District* in 1969.

Tinker v. Des Moines Independent Community School District

393 U.S. 503 (1969)
http://caselaw.findlaw.com/us-supreme-court/393/503.html
Oral arguments are available at https://www.oyez.org/cases/1968/21.
Vote: 7 (Brennan, Douglas, Fortas, Marshall, Stewart, Warren, White)
2 (Black, Harlan)

OPINION OF THE COURT: *Fortas*
CONCURRING OPINIONS: *Stewart, White*
DISSENTING OPINIONS: *Black, Harlan*

FACTS:

In December 1965 a group of adults and secondary school students in Des Moines, Iowa, devised two strategies to demonstrate their opposition to the Vietnam War: they would fast on December 16 and New Year's Day and would wear black armbands every day in between. Principals of the students' schools learned of the plan and feared the demonstration would be disruptive. As a consequence, they announced that students wearing the armbands to school would be suspended. Of the eighteen thousand children in the school district, all but five complied with the policy. Among those five were John Tinker, Mary Beth Tinker, and Christopher Eckhardt, whose parents allowed them to wear black armbands to school. The three students had a history of participating in other civil rights and antiwar protests. All three were suspended. ACLU attorneys represented the students in their appeal to the Supreme Court.

ARGUMENTS:

For the petitioners, John and Mary Beth Tinker and Christopher Eckhardt:

- The First Amendment protects the right of public school students to free speech in their schools and classrooms.

- The prohibition against wearing the armbands was an unconstitutional prior restraint on freedom of speech.
- Wearing the armbands caused no disturbance or disruption of the school day.

For the respondent, Des Moines Independent Community School District:

- School officials should be given wide discretion to carry out their responsibility to maintain a scholarly, disciplined atmosphere in the classroom. The school policy at issue here was reasonably calculated to promote that goal.
- Des Moines school officials properly allowed full classroom discussion of public issues, such as the Vietnam War, but demonstrations are inappropriate inside the school.
- Disturbances at school cannot be measured by the same standards used for adults in other environments.

MR. JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska* (1923), this Court held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent

In *West Virginia State Board of Education v. Barnette*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. . . .

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not

Bettmann/Getty Images

Mary Beth Tinker, pictured here with her mother, Lorena Tinker, and younger brother Paul, took part in a Vietnam War protest by wearing a black armband in school—an action that got Mary Beth and her older brother, John, suspended in 1965. In *Tinker v. Des Moines* (1969), the Supreme Court ruled that the suspensions violated the students' First Amendment rights.

concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises. . . .

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . .

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

Reversed and remanded.

MR. JUSTICE BLACK, DISSENTING.

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. . . .

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." . . .

I deny . . . that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." . . . The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. . . .

. . . Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. . . . Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. . . . This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Justice Abe Fortas's majority opinion is a strong endorsement of constitutional protection for expression that takes place in the classroom. Teachers and students, he declared, do not shed their constitutional rights at the schoolhouse gate. As long as the speech does not disrupt the educational process, government has no authority to proscribe it.

In the years since *Tinker*, though, the Court has pulled back from its strong protection of student expression. In *Bethel School District No. 403 v. Fraser* (1986), for example, the justices upheld the action of Washington state education officials who disciplined high school senior Matthew Fraser for delivering a student assembly speech that violated a policy against "the use of obscene, profane language or gestures." Although this decision may appear to be in direct conflict with *Tinker*, it is important to note that Fraser, unlike the *Tinker* protesters, was not being punished for the political content of his expression. Instead, the school was simply ensuring a proper educational environment by upholding a policy that forbade the use inappropriate language—on *any* topic.

Two decades later, the Court returned to student expression in *Morse v. Frederick* (2007). As you read the *Morse* decision, notice the wide array of views expressed by the justices. Justice Stevens's dissenting opinion strongly supports the *Tinker* precedent; he would protect almost all student expression. At the other extreme, Justice Thomas believes that students have no constitutionally protected expression rights. He thinks *Tinker* should be overruled. The majority of the justices, however, take positions between those two extremes.

Morse v. Frederick

551 U. S. 393 (2007)
http://caselaw.findlaw.com/us-supreme-court/551/393.html
Oral arguments are available at https://www.oyez.org/cases/2006/06-278.
Vote: 5 (Alito, Kennedy, Roberts, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stephens)

OPINION OF THE COURT: *Roberts*
CONCURRING OPINION: *Alito, Thomas*
OPINION CONCURRING IN JUDGMENT IN PART AND DISSENTING IN PART: *Breyer*
DISSENTING OPINION: *Stevens*

FACTS:

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the Winter Games in Salt Lake City. The event was scheduled to pass along a street in front of Juneau-Douglas High School (JDHS). Principal Deborah Morse decided to have the school's staff and students observe the event as part of an approved school activity. Students were allowed to leave class and watch the relay from either side of the street. The school's cheerleaders and band performed during the event.

Joseph Frederick, a senior at the high school, joined some friends across the street from the school. As the torchbearers and television camera crews passed by, Frederick and his friends unfurled a fourteen-foot banner bearing the words "BONG HiTS 4 JESUS" in large letters. Morse immediately crossed the street and ordered the students to lower the banner. All complied except Frederick. Morse suspended Frederick for ten days on the grounds that he violated school policy pertaining to the advocacy of illegal drugs.

The school superintendent upheld the suspension, holding that it was an appropriate enforcement of school policy at a school-sponsored event. The message portrayed on the banner was not political expression and could be reasonably interpreted

Mischafer at en.wikipedia, Public domain, via Wikimedia Commons

In *Morse v. Frederick* (2007), the Supreme Court upheld the Juneau School District's suspension of Joseph Frederick for displaying a banner perceived as supportive of illegal drug use. Here Frederick's attorney stands alongside the banner that ignited the dispute.

as supportive of illegal drug use. Frederick sued in federal district court for unspecified monetary damages, claiming that his First Amendment rights had been violated. The district judge held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity." The Court of Appeals for the Ninth Circuit, however, reversed on the grounds that student speech cannot be restricted without a showing that it poses a substantial risk of disruption. The school system requested Supreme Court review.

ARGUMENTS:

For the petitioners, Deborah Morse and the Juneau School Board:

- *Tinker v. Des Moines* and *Bethel School District No. 403 v. Fraser* allow regulation of student speech that disrupts or undermines the school's educational mission.
- Discouraging use of illegal substances is part of the school's mission.
- Frederick's pro-drug banner interfered with decorum by radically changing the focus of the school activity.
- Principal Morse properly disassociated the school from Frederick's pro-drug banner.

For the respondent, Joseph Frederick:

- Frederick's banner was displayed off school property. The Olympic Torch event was not school sponsored.
- Schools cannot punish nondisruptive student speech just because they disagree with the ideas expressed.
- The record does not show that Frederick's banner caused substantial disruption of the educational mission as required in *Tinker,* nor was the banner offensive within the meaning of *Fraser*.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. . . . [W]e agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." . . .

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one. . . .

We agree with Morse. . . .

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." . . . Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." But that is a description of Frederick's motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

. . . [T]his is plainly not a case about political debate over the criminalization of drug use or possession.

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may. . . .

Tinker [*v. Des Moines Independent Community School District* (1969)] held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in

political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black* (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

This Court's next student speech case was [*Bethel School District No. 403 v.*] *Fraser* [1986]. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." . . . This Court [held] that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." . . .

. . . For present purposes, it is enough to distill from Fraser two basic principles. First, Fraser's holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*. . . .

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." *Vernonia School Dist. 47J v. Acton* (1995). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey v. T. L. O.* (1985). . . .

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. . . .

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs. . . .

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment" and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. . . .

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser.* We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use. . . .

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, CONCURRING.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* (1969), is without basis in the Constitution. . . .

. . . In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. . . .

. . . [W]hen States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled "a core of common values" in students and taught them self-control.

Teachers instilled these values not only by presenting ideas but also through strict discipline. Schools punished students for behavior the school considered disrespectful or wrong. Rules of etiquette were enforced, and courteous behavior was demanded. To meet their educational objectives, schools required absolute obedience.

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order. . . .

Tinker effected a sea change in students' speech rights, extending them well beyond traditional bounds: [unless] a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. . .

I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. . . .

Justice Black['s] dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools . . . . We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish" or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students."

I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

JUSTICE ALITO, WITH WHOM JUSTICE KENNEDY JOINS, CONCURRING.

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER AND JUSTICE GINSBURG JOIN, DISSENTING.

I would hold . . . that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use" cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more. . . .

Two cardinal First Amendment principles animate . . . the Court's opinion in *Tinker* [*v. Des Moines Independent Community School Dist.* (1969)]. . . . First, censorship based on the content of speech, particularly censorship that depends on the view point of the speaker, is subject to the most rigorous burden of justification. . . .

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. . . .

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner. . . . [T]he Court's holding in this case strikes at "the heart of the First Amendment" because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson* (1989). . . .

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs. . . . Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana. . . .

I respectfully dissent.
