



The First Amendment: Student Freedom of Speech Transcript

Narrator: This film is a project of the Leonore Annenberg Institute for Civics and the Annenberg Public Policy Center of the University of Pennsylvania in partnership with the Annenberg Foundation Trust at Sunnylands

Narrator: OK, let's do a little exercise about freedom of speech, specifically freedom of speech in schools. What would happen if one of you stood on your desk and started giving an impassioned speech about, let's say, why a hot dog is a sandwich, right in the middle of this film. Or what if one of you took out your phone and posted something on social media criticizing the school, maybe even using some colorful language. Could you be punished for that? Could you be sent to the principal's office? Suspended? Or is that speech protected by the First Amendment? That's a good question and it's not as easy to answer as you might think.

Geoffrey Stone: Freedom of speech sounds self-defining. The right to say anything anytime I want. But in fact that's not the way it turned out to be interpreted.

Narrator: We've all heard about freedom of speech but what does it really mean? What does it mean for students in public schools?

Catherine Ross: Freedom of speech is probably our most important right as citizens.

Kermit Roosevelt: Freedom of speech means the ability to express yourself, particularly on a controversial subject, without the fear that you will be punished for what you say.

Narrator: Look, it's right here in the First Amendment to the Constitution, it says "Congress shall make no law ... abridging the freedom of speech."

Mary Frances Berry: The amendment protects your freedom of expression from government intrusion.

Catherine Ross: But individuals or many other kinds of organizations remain perfectly free to punish you for what you said.

Narrator: So your parents telling you to zip it or even Instagram taking down one of your photos, none of that counts.

Mary Frances Berry: This is about what the government can do to keep the people from expressing themselves.

Narrator: So, how does this apply to schools? Although you may not realize it, public schools are technically part of the government. They're funded by taxpayers and run by state and local school boards. So the First Amendment should apply, right? Well, for a long time in our history, it was assumed that public schools, that is the government, could decide what students were allowed and were not allowed to say. And if students tried to say things the school didn't approve of, they were punished.

Geoffrey Stone: The assumption was that students were there to learn and not there to speak. That was the basic assumption.

Narrator: Until the Supreme Court weighed in. This is a story about students fighting for their free speech rights in public schools. What happens when First Amendment rights collide with school rules? How do you balance a school's need for order with a student's right to free expression?

OK, now before we go any further, let's go way back to understand why the framers cared so much about the freedom of speech.

Catherine Ross: Freedom of speech was very important to the founders because they needed freedom of speech to conduct the revolution. Speech enabled them to communicate, formulate their plans and decide when it was time to rise up against Great Britain.

Narrator: It also had to convince people to join their cause. It had to get the crowd behind them.

Kermit Roosevelt: They were trying to change their government, and it was essential for that purpose that they be allowed to say what was wrong with the government they had. But the British wouldn't let them do that.

Narrator: Under Britain's seditious libel laws in the colonies, it was a crime for people to criticize the government.

Mary Frances Barry: There were a lot of issues where someone criticized the king and they could be punished for it whether what they said was true or not.

Narrator: So after they won the revolution and created a new form of government, the founders made freedom of speech one of the key freedoms in the Bill of Rights. Because for democracy to work, people need to be able to speak freely.

Kermit Roosevelt: The people are going to control the government, and they have to be able to talk about it. They have to be able to say what it's doing right, what it's doing wrong, what needs to be changed. So the idea that citizens can criticize their government is really at the heart of democracy.

Narrator: But over the next few hundred years, the courts decided there are certain types of speech in certain places where the government can place restrictions on free speech, and one of those places is public schools.

Kermit Roosevelt: Student speech raises a whole bunch of difficult First Amendment issues.

Mary Frances Berry: Schools have to maintain order in order to have teaching go on.

Kermit Roosevelt: And part of that is they have to control student behavior.

Narrator: Imagine what would happen for a second if schools couldn't control any student speech. Go on. You know.

Kermit Roosevelt: You couldn't make them answer questions in class. You couldn't stop them when they weren't called on.

Geoffrey Stone: A student in a history class could start making a speech about mathematics.

Sigal Ben-Porath: You cannot speak German in Spanish class.

Narrator: It would be chaos, right?

Sigal Ben-Porath: In order to maintain a productive environment you really have to institute norms and teachers have to be allowed to enforce them.

Justin Driver: And so while students have significant free speech rights, those rights are not unlimited.

Narrator: So what free speech protections do students have? And how do we decide what speech is allowed and what is not. That story starts in 1906s Iowa with a case called *Tinker v. Des Moines Independent Community School District*. In 1965, Mary Beth Tinker was a 13-year-old junior high school student.

Mary Beth Tinker: I grew up in a working-class community in Des Moines, Iowa. In many ways we had a very ordinary childhood. I worried about my grades. I went roller-skating on the weekend, but at the same time, it was mighty times. There were many issues that were very controversial as far as what direction our country would go in.

Justin Driver: The 1960s were an enormous time of upheaval in American society.

Geoffrey Stone: There were civil rights protests, particularly in the South.

Catherine Ross: There was enormous cultural conflict over many things, over integration, voting rights, and perhaps most importantly over the war in Vietnam.

Narrator: In early 1965, the United States started sending combat troops to Vietnam. As the year went on, the violence escalated.

Mary Beth Tinker: And so by Christmas of 1965, we kids were seeing war, war, war on the news all the time.

Narrator: Mary Beth's father was a Methodist minister, and her mother was active in the peace movement.

Mary Beth Tinker: My parents raised us to put our values into action. And it wasn't enough just to talk about the values of love and understanding and getting along. We were actually supposed to make that happen.

Narrator: So in December of 1965, Mary Beth, her older brother, John, and a group of students made a plan to wear black armbands to school to protest the Vietnam War.

Justin Driver: School authorities get wind of this plan and they say, oh no, you are not able to wear these black armbands. This is too hot of a topic.

Catherine Ross: Iowa, in particular, had the highest per capita participation in the military service of any state in the union. So the issue of the war was particularly fraught.

Narrator: The school district issued a rule warning that anyone who wore a black armband to school would be suspended. Many students backed out, but a few decided to wear them anyway.

Mary Beth Tinker: I was really nervous because I was very shy, and so I decided I would try to be brave.

Kermit Roosevelt: So they wear their armbands to school. The students are relatively accepting. The school administrators, however, are not. I went to my math class, Mr. Moberly's class, and I loved math. He immediately saw the black armband and gave me a pink pass to go the office, and that's where the girls advisor, Mrs. Harmon, gave me a suspension, and I went home.

Narrator: Several other students were also suspended, including Mary Beth's older brother, John.

Geoffrey Stone: The school's reaction to it was quite clear. They regarded this as completely unpatriotic, inappropriate speech.

Justin Driver: One of the students was told, you're too young to have opinions on important questions.

Geoffrey Stone: And your job is not to have opinions; your job is to come here and learn.

Narrator: You've all heard that old expression that children should be seen and not heard. That's kind of what the school was saying.

Mary Beth Tinker: Well, my family didn't believe that. They believed that you should take part in democracy and you should be active in it.

Geoffrey Stone: To take a strong antiwar position in 1965 was an extremely courageous thing to do.

Narrator: America was only beginning its involvement in Vietnam and the war was supported by most Americans.

Justin Driver: Many people thought protesting the war was anti-American rather than antiwar.

Sigal Ben-Porath: People are supposed to support the troops and support the cause.

Mary Beth Tinker: A lot of people got really mad at us, which was very confusing as a child, because we were speaking up for peace at Christmastime. We got hate mail. We had a bomb threat to our house on Christmas Eve. But one group that didn't get mad was the American Civil Liberties Union, the ACLU. And so they offered to help us.

Narrator: With the help of the ACLU, the Tinkers sued the Des Moines school district.

Justin Driver: What the school authorities were doing by telling the Tinker children that they could not wear the black armbands was in effect silencing one side of the debate.

Narrator: Students who supported the war were allowed to express their views. But students like Mary Beth Tinker who opposed the war were not. And that's called viewpoint discrimination, something that is not allowed under the First Amendment. It means that the government can't restrict your speech simply because of your point of view. But did that apply to students?

Catherine Ross: So the question of what rights do students carry into school and how should we think about those rights came squarely before the Supreme Court.

Narrator: In 1969, the Supreme Court ruled 7 to 2 in favor of the Tinkers, saying that First Amendment protections do in fact apply to students in public schools. Justice Abe Fortas wrote the majority opinion.

Unknown speaker: Justice Abe Fortas writes, It can hardly be argued that students shed their constitutional rights at the schoolhouse gate.

Catherine Ross: It means that students do have the right to speak up.

Mary Frances Berry: And just because they go to school and are inside the school doesn't mean they have no rights and we can just regard them as people you can control however you wish.

Justin Driver: But while Justice Fortas says it can hardly be argued, it was in fact a major argument about whether that was the correct interpretation of the freedom of speech.

Justice Hugo Black issued a scathing dissent in Tinker, and this was surprising for a number of reasons.

Kermit Roosevelt: Generally speaking, Black was a strong protector of First Amendment rights. But for him, the school situation was very different. He thought children are there to learn, not to teach.

Mary Frances Berry: And you need to keep order, above all else, so don't let anybody do anything or say anything that seems out of the way and is not on the lesson plan for today:

Narrator: In other words, Justice Black didn't think students should have any First Amendment rights in schools, and he felt very strongly about it.

Justin Driver: Justice Black took the unusual step of reading his dissent from the bench for many minutes.

Kermit Roosevelt: Black was very clearly influenced by what he saw going on on college campuses, which was quite different from Mary Beth Tinker's silent symbolic protest. Students were taking over administration offices. Black thought that youth culture was getting out of control.

Catherine Ross: If people could wear black armbands, next thing you know they could be occupying the principal's office and no learning would go on at all and he went on about basically the inmates would be running the asylum.

Narrator: But Justice Fortas and the majority of the court saw it differently. He didn't think it was dangerous to let students express their views. He thought it was a key part of preparing students to become citizens.

Mary Beth Tinker: The Supreme Court ruling in Tinker versus Des Moines is one of the most beautiful rulings about what education should be in a democracy.

Justin Driver: Justice Fortas says when students exchange ideas on the issue of the day, that is not a distraction but instead is a vital part of the educational process itself.

Kermit Roosevelt: We want people to develop into citizens, but we don't do that by trying to standardize them and tell them what to think. We do that by letting experience the ability to dissent. It's a vision of the government that teaches by example.

Narrator: But the Court also ruled that there should be some limits to student speech. Remember, we can't have students jumping up in history class and giving a speech about math.

Sigal Ben-Porath: So the Court set a test for the kind of opinions and views that are protected in schools and the kinds that are actually not protected.

Narrator: So when lawyers say test, what they mean is a set of rules the Court creates to give guidance to other cases that come up in the future. In this case the test the Court created became known as the Tinker test. And what it said was, well, I'll let the person who the test was named after explain it.

Mary Beth Tinker: The Supreme Court said that students should have free speech rights in school, except they cannot substantially disrupt school and they cannot impinge on the rights of others.

Narrator: Interfering with the rights of others seems pretty straightforward, but what exactly qualifies as substantial disruption? Well, that's where it gets a little tricky.

Kermit Roosevelt: We understand substantial disruption now as something that meaningfully interferes with the school's ability to teach. So, discomfort, a few negative comments, harsh looks, none of that would count.

Mary Frances Berry: If what happens disrupts the whole teaching process, makes it hard to engage in, then the courts might be likely to say that's not something you should do.

Narrator: So while the ruling gives schools some leeway to decide what constitutes substantial disruption, it still gives students significant protections.

Kermit Roosevelt: Tinker is considered a landmark case because it really broadens the free speech rights of students. It's the first case in which the Court looked at this context of students in school and really took seriously the idea that there is a First Amendment right there.

Narrator: But in the four decades after Tinker, the Court heard three major student speech cases and, spoiler alert, in each case, the student lost. The first case, *Bethel School District v. Fraser*, arrived at the Court in 1986. High school senior Brendan Fraser made a speech at a school assembly nominating a friend for student government using, uh, some choice language.

Catherine Ross: It was a prolonged sexual innuendo, and the school concluded that it was lewd and graphic.

Justin Driver: And the question was, was that speech protected, and the Supreme Court said no, and in effect carved out an exception to Tinker for lewd speech.

Narrator: The second case was in 1988, a case called *Hazelwood School District v. Kuhlmeier* involving two controversial articles in the school newspaper.

Catherine Ross: One was on teenage pregnancy and the other was on parental divorce.

Narrator: The principal thought the articles were inappropriate and without telling the students, he pulled them from the paper.

Geoffrey Stone: And the students challenged it and claimed it violated their First Amendment rights.

Narrator: But the Court sided with the school, ruling that a student newspaper is school-sponsored speech.

Geoffrey Stone: The school newspaper, even though run by students, was in some ways the voice of the school.

Catherine Ross: The Court really drove a truck through Tinker by creating a new category of speech called school-sponsored speech and it gave schools enormous discretion to prevent speech and to punish speech.

Justin Driver: The third major case was in 2007 from a high school in Alaska. The formal name for the case is Morse v. Frederick, but just about everybody calls it "Bong Hits 4 Jesus."

Narrator. Ho boy, take a minute and laugh, and yes, that really is what everybody calls it, but there's a serious issue underneath. High school senior Joseph Frederick attended an off-campus, school-sponsored event with his classmates, holding a banner that read "Bong Hits 4 Jesus."

Catherine Ross: The school principal decided that this was a school reference to drugs. She snatched it from him and Frederick said, What about the Bill of Rights? She marched him into her office and she suspended him.

Justin Driver: The question was: Did the suspension violate the student's free speech rights?

Narrator: The Court ruled against Frederick saying schools could punish student speech if it promotes illegal drug use. So with these cases the Court carved out three major categories of speech that became exceptions to Tinker: lewd speech, school-sponsored speech, and pro-drug speech.

Sigal Ben-Porath: And so we have decades in which the Court is continuously citing with the school, meaning that teachers and principals are allowed to restrict and punish more and more types of speech.

Justin Driver: That streak lasted until Brandi Levy's case arrived at the Supreme Court.

Narrator: In 2017, Brandi Levy was a 14-year-old high school student in Mahanoy, Pennsylvania. She tried out for the varsity cheerleading squad but she didn't make the cut. Coaches told her she needed to spend another year on junior varsity.

Catherine Ross: She was very frustrated, she was very angry. And on a Saturday, she went with a girlfriend to a convenience store, and she put a snap on her Snapchat story.

Justin Driver: She took a photo of herself with her middle finger extended to the camera and she said, among other things, F- cheer.

Kermit Roosevelt: So Brandi does not intend for this to spread widely. It's Snapchat, it's going to disappear, she's got a limited circle of friends who are going to see it.

Narrator: But we all know how that goes.

Catherine Ross: Unfortunately, one of her classmates took a screenshot, which she showed to her mother. And even more unfortunately, her mother was a coach for this cheerleading squad.

Narrator: The school punished Brandi by suspending her from cheerleading altogether. They claimed that her Snapchat message was disruptive and that its vulgar language violated the team's code of conduct.

Kermit Roosevelt: And just like many other Americans who have ended up at the Supreme Court, Brandi Levi thinks this is wrong and she thinks she's going to stand up for her rights.

Narrator: With the help of the ACLU, Brandi and her parents sued the Mahanoy Area School District. She believed the school district didn't have the right to punish her for something she said off-campus on the weekend.

Justin Driver: It was an important question because the Supreme Court had never weighed in on student speech rights when they are off campus rather than on campus.

Mary Frances Barry: Could she be punished for expressing her feelings on Snapchat, especially could she be punished since she didn't do it at school.

Narrator: In the 50 years after Tinker, social media had drastically changed the way students communicated.

Justin Driver: Justice Fortas in Tinker said it can hardly be argued that students shed their constitutional rights at the schoolhouse gate. In the age of social media, where does the schoolhouse gate begin and end?

Kermit Roosevelt: Social media really blurs the lines between on-campus and off-campus speech because students may create the social media off campus, as Brandi Levy did here, but it can be accessed on campus, and so something that is created outside of school can be seen, heard, read, spread around inside school. And it can be having direct effects on students during the school day.

Narrator: Remember the Tinker test? It said students have a right to free spee

ch in school but not if it creates substantial disruption. The school argued that if a social media post substantially disrupts what's going on at school, they should have the right to punish that speech even if it was written off campus.

Catherine Ross: And the lawyer for the ACLU, which was representing Brandi Levy, she said that if schools were allowed to do this, the students would be carrying the schoolhouse on their back all the time. And it's a great image that you can't shake free of the authority of the school.

Narrator: In other words, anytime a student posts something online they would have to think about whether or not the school could punish them for it. So you might be thinking, wait a minute, Brandi wasn't talking about war or politics. She was just venting about cheerleading in a way thatsome people found offensive. Why should we care about protecting this kind of speech?

Kermit Roosevelt: No, Brandi Levy wasn't talking about the Vietnam War, but she was talking about the operations of the government entity that was exerting control over her life. And she was saying that I've been treated unfairly.

Geoffrey Stone: Even though this was not political speech, it's important for individuals to convey their feelings in a powerful, emotional way. I mean that's a part of what the First Amendment is designed to protect.

Narrator: In 2021, after hearing oral arguments remotely, the Supreme Court ruled 8-1 for Brandi Levy. The Court said Brandi's post did not cause substantial disruption in school and because of that, her off-campus speech was protected by the First Amendment.

Catherine Ross: The Court ruled for Brandi, but it did not rule for Brandi in a way that creates clear guidance.

Narrator: The Court said the First Amendment limits the school's ability to limit off-campus speech but doesn't completely prohibit it. In certain situations, like cases of online bullying or harassment, schools might be able to punish off-campus speech, but the Court didn't provide clear guidance.

Kermit Roosevelt: The Court seemed very aware of the difficulties that different kinds of situations might present, and they didn't want to write a broad rule that would tie their hands for future cases.

Justin Driver: Schools are in a very difficult position these days with respect to social media.

Narrator: For example, if a student posts something online targeting other students that is racist, or vulgar or sexually harassing, what happens if the school can't punish them? How can they provide a safe learning environment for all students?

Sigal Ben-Porath: School, you know, coaches, teachers, principals, need to have some tools to address proper norms of behavior.

Mary Frances Berry: These are all issues that schools have to grapple with, and it's not easy.

Narrator: The ruling didn't make a bold statement for future cases, but it was still a very important one. It was the first time in 50 years that a student won a free speech case at the Supreme Court. Justice Breyer, who wrote the majority opinion, echoed ideas from the Tinker decision, saying America's public schools are the nursery of democracy.

Sigal Ben-Porath: What Justice Breyer is expressing really is the schools, broadly, as institutions, are meant to train citizens. And the way to do it is to allow young people to exchange their views, even when they are inappropriate sometimes, even when they are mistaken.

Narrator: And when students are talking about war or cheerleading, or some other topic, the First Amendment protects them.

Kermit Roosevelt: We shouldn't forget the courage that it takes to offer this dissenting voice, to be the lone critic, to be swimming against the tide of the majority opinion.

Justin Driver: We would not have the Constitution that we have today if it weren't for Mary Beth and John Tinker standing up against the Des Moines School District or for Brandi Levy standing up against the school district in Pennsylvania. Ordinary Americans can shape our constitutional rights in really profound ways.

Narrator: When you look around the country today you can see the legacy of the Tinker case.

Geoffrey Stone: Students today can make arguments on both sides of issues and schools can no longer say to them, you can't argue that, you can't say that. And that's important. It prepares them to become engaged citizens.

Mary Beth Tinker: But it's not always so easy. Students are still having to really struggle to express their views and stand up for their rights.

Sigal Ben-Porath: Really your voice is your power. And so the way that you use it, the way that you wield it, is the way that you act as a citizen. And this is really the core part of your civic power that you can start practicing now and continue using for the rest of your life.