

VIRGINIA LAW REVIEW ONLINE

VOLUME 105

DECEMBER 2019

155–158

FOREWORD

TINKER AT 50

*Leslie Kendrick**

Fifty years ago, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court intoned, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ Nevertheless, speech protections for students in public primary and secondary schools have never been as robust as *Tinker*’s rhetoric suggests, not at the time of *Tinker* and certainly not now after decades of erosion. *Tinker* itself said that student speech was not protected if it was materially disruptive of the educational mission or involved “invasion of the rights of others,” two limitations on speech in public schools at once sensible and manipulatable.² Schools and courts have both made use of the disruptiveness exception to regulate a wide variety of speech, while the exception for speech that invades the rights of others has mostly withered on the vine, when it arguably has important work to do.

Since *Tinker*, students have lost every student speech case to come before the Supreme Court. In each one, the Supreme Court has identified

* Vice Dean and David H. Ibbeken '71 Research Professor of Law. The author would like to thank Laura Toulme and Mika Carlin of the *Virginia Law Review* and the authors of the four wonderful symposium essays, Manal Cheema, Mary Anne Franks, Mary-Rose Papandrea, and Anna Cecile Pepper. It is an honor to be involved in a project with these women.

¹ 393 U.S. 503, 506 (1969).

² *Id.* at 513.

another type of student speech as categorically unprotected by the First Amendment: profane and sexually suggestive speech,³ school-sponsored speech,⁴ and speech advocating illegal drug use.⁵ These days, to reach the uncertain protections of *Tinker*, students must run a gauntlet of categorical exceptions into which their speech might fall.

Despite this retrenchment, *Tinker* still has real power. It governs the most salient student speech issues of our time, including the scope of school disciplinary authority over social media and other off-campus speech and the ability to regulate students' wearing of white supremacist symbols in public schools. *Tinker* put forth a deceptively simple maxim: speech may be regulated when it disrupts the educational environment or invades the interests of others. What these words mean is at the heart of most K-12 student speech conflicts today.

This Symposium considers *Tinker*'s history and its legacy. The four pieces in this collection go all the way from the Supreme Court's pre-*Tinker* cases, through the opinion itself, to its influence on current speech issues finding their way into schools and courts across the country. Professor Mary-Rose Papandrea's piece points out that school speech cases are complicated by the fact that, both before *Tinker* and since, the Supreme Court has been none too clear about minors' free speech rights *outside* the school context.⁶ Professor Papandrea also argues that courts' non-intrusive, deferential approach to schools and school officials leaves student protest and heterodoxy more vulnerable than *Tinker* appears to suggest.⁷

Professor Mary Anne Franks moves from the schools directly governed by *Tinker*'s holding, primary and secondary schools, to the realm of higher education, where she considers *Tinker*'s significance—and its distortion—in the university context.⁸ Professor Franks suggests that contemporary claims of a free-speech “crisis” on college campuses are overblown and indeed manufactured. She argues that these claims of crisis misconstrue a foundational free speech principle affirmed in *Tinker*:

³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁵ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

⁶ Mary-Rose Papandrea, *The Great Unfulfilled Promise of Tinker*, 105 Va. L. Rev. Online 159, 161 (2019).

⁷ *Id.* at 168.

⁸ Mary Anne Franks, *The Miseducation of Free Speech*, 105 Va. L. Rev. Online 218, 218–19 (2019).

that peaceful protest is an essential part of freedom of speech.⁹ In criticizing college students for protesting controversial speakers, Professor Franks argues, the campus speech crisis narrative has “targeted a long-recognized, well-established form of protected free speech—student protest—and recast it as censorship.”¹⁰

Meanwhile, the student contributions to this Symposium address contemporary speech issues in public schools. Manal Cheema’s essay considers *Tinker* and subsequent cases and the questions they leave open about schools’ ability to require student participation for pedagogical purposes.¹¹ Cheema examines a recent Fourth Circuit case in which a student unsuccessfully claimed that a school lesson on world religions violated her First Amendment speech rights because she had to fill out a worksheet stating basic tenets of Islam.¹² Cheema argues that, although the court reached the correct outcome in this case, the Supreme Court has not provided enough guidance on the scope of speech that can be required for pedagogical purposes.¹³ She examines the relevant precedent to develop a roadmap for courts faced with similar claims.

Finally, Anna Cecile Pepper’s essay applies *Tinker* and its progeny to student walkouts protesting gun violence and climate change.¹⁴ Pepper points out that here, too, existing precedent provides insufficient guidance, at least in situations where schools expressly permit participation in a walkout.¹⁵ In such cases, the status of student speech during the walkout becomes unclear, and schools could argue that it is completely unprotected school-sponsored speech.¹⁶ Pepper suggests that *Tinker* provides the better paradigm and that all student walkouts, both permitted and unpermitted, should be governed by *Tinker*.¹⁷

All of these contributions highlight *Tinker*’s continued importance. Even as it left many questions unanswered, even as its scope was reduced by subsequent cases, even as its central premise remains under-

⁹ Id. at 233.

¹⁰ Id.

¹¹ Manal Cheema, Fill in the Blank: Compelling Student Speech on Religion, 105 Va. L. Rev. Online 175, 178–79 (2019).

¹² Id. at 175–78 (discussing *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019), cert. denied, 2019 WL 5150487 (U.S. Oct. 15, 2019) (No. 18-1438)).

¹³ Id. at 178–79.

¹⁴ Anna Cecile Pepper, Walking out the Schoolhouse Gates, 105 Va. L. Rev. Online 198, 201 (2019).

¹⁵ Id. at 204–07.

¹⁶ Id. at 206.

¹⁷ Id. at 214–16.

developed, *Tinker* endures as the touchstone for school speech. Fifty years later, a Vietnam protest case sets the terms for walkouts and worksheets, for gun violence and climate change, for cyberbullying and white supremacist symbols—for all the dangers and opportunities that come with recognizing student speech rights while educating young people in a pluralistic and complex society. In the following essays, four scholars whom I am lucky to count as my students, colleagues, and friends, explain all of this and more.