PART 3
Young People and the CONSTITUTION

The Supreme Court's decision in *In re Gault* declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." But a series of decisions involving young people and the Constitution has proven that although young people are entitled to constitutional protections, those protections do not always extend as far as they do to adults. This section of the Dialogue looks at youth rights and the Constitution beyond the juvenile justice system, paying particular attention to youth rights in a school context.

STUDENT SPEECH AND THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."

The rights described in the First Amendment are not absolute, even for adults. Speech can be subject to reasonable time, place, and manner restrictions. For example, a community could pass an ordinance prohibiting sound trucks from driving through a residential neighborhood between the hours of 10 p.m. and 6 a.m. The Supreme Court has also differentiated between political and artistic speech, which is given a high level of protection; commercial speech (such as advertisements), which is given less protection; and obscene speech, which is given little or no protection.

The First Amendment also protects only against restrictions on speech made by "state actors"—individuals acting with government authority. Thus, a city government could not prohibit you from passing out political brochures in a community, but a private employer could prohibit you from distributing political brochures at a workplace.

Public schools occupy a unique position. Although public school officials are clearly "state actors" with government authority, public schools also are assigned the special role of educating and protecting students while the students are in the school's care.

The tension between the free speech rights of students and the special role of the schools has produced differing results in the Supreme Court. Two cases, *Tinker v. Des Moines Independent School District* and *Hazelwood School District v. Kuhlmeier*, illustrate this tension.

Student Protest and the Tinker *Decision*

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), arose during the United States' involvement in the Vietnam War. A group of students decided to wear black armbands to school to protest the war. The school heard of their plans and adopted a policy prohibiting students from wearing armbands to school. Students who violated the policy would be suspended until they returned to school without the armbands.

A majority of the Supreme Court held that a school ban on armbands protesting U.S. participation in a war is not constitutional. Writing for the majority, Justice Fortas asserted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." He classified the wearing of protest armbands as "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." The students' expression of opinion was silent and passive and did not intrude upon the work of the school or the rights of other students. Moreover, the school had singled out one form of symbolic expression—the wearing of armbands—while other students were allowed to wear buttons for political campaigns and other symbolic items. A prohibition on expression of one particular opinion is constitutionally impermissible without a showing that the expression of that opinion would cause "material and substantial interference with schoolwork or discipline."

Justices Black and Harlan dissented in *Tinker*. Justice Black declared that "if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy or flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." While the government cannot regulate or censor the content of speech, Justice Black argued, regulations on when and where certain forms of speech can occur are permissible.

BONG HITS 4 JESUS

In 2007, the Supreme Court will be deciding a new student free speech case, *Morse v. Frederick*. This case involves a student who was suspended for displaying a banner reading "Bong Hits 4 Jesus" during an Olympic Torch Relay outside the student's school in Juneau, Alaska. The *Tinker* and *Kuhlmeier* cases will almost certainly be revisited, and possibly revised, by the Court's decision in the case.

Censorship of Students and the Kuhlmeier *Decision*

The Supreme Court's view of student free speech rights was more restrictive in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The student editor of a school-based newspaper decided to run two controversial stories. One discussed students' experiences with teen pregnancy and a second looked at the impact of divorce on students at the school. The school principal reviewed page proofs of the newspaper before it is published. He decided to remove the pages on which these two articles appeared, citing concerns that students described in the teen-pregnancy article might be identified, that discussions of sexual activity and birth control might be inappropriate for some students, and that a father who was criticized in the article on divorce was not given a chance to respond.

In this case, the Supreme Court decided that the principal's censorship of the articles in the school newspaper was constitutional. In an opinion written by Justice White, the Court stated that the rights of students in a public school "are not automatically coextensive with the rights of adults in other settings." The school newspaper was part of the educational curriculum of the school's journalism course and remained under the oversight of teachers and school administrators. It could not, therefore, be described as a public forum for speech. School officials were entitled to regulate the newspaper's contents in "any reasonable manner." Moreover, the First Amendment does not require a school to affirmatively promote particular student speech in publications or activities that "the public might reasonably perceive to bear the imprimatur of the school." The school is not required to disseminate student speech that does not meet the standards established by the school or that might appear to advocate behavior or positions inconsistent with shared social values.

Justices Brennan, Marshall, and Blackmun disagreed. These justices argued that "the mere fact of school sponsorship does not . . . license such thought control in the high school." They acknowledged that a school had the right to limit the scope of a school-sponsored publication to specific, objectively defined topics such as literary criticism or school sports. But they argued that limiting a publication on the basis of "potential topic sensitivity" is "a vaporous non-standard that . . . chills student speech to which school officials might not object." They also argued that, even if the majority of the Court was correct in its analysis, the means of censorship used—simply excising the pages of the newspaper on which the offending articles appeared—was much too broad. By ignoring "obvious alternatives" (delaying publication, requiring precise deletions or changes), the principal demonstrated "unthinking contempt for individual rights."

QUESTIONS FOR REVIEW

1. What is the importance of "state actors" under the First Amendment?
2. Name two reasons why the Supreme Court was willing to uphold a student right to wear protest armbands in *Tinker*.
3. Name two reasons why the Supreme Court upheld censorship of the school newspaper in *Kuhlmeier*.

DOWNLOAD THE DIALOGUE

The Dialogue on Youth and Justice is available in PDF format on the ABA Division for Public Education website at

HTTP://WWW.ABANET.ORG/PUBLICED/FEATURES/DIALOGUES.HTML

STUDENT PRIVACY AND THE FOURTH AMENDMENT

The Fourth Amendment protects against "unreasonable" searches and seizures. It was designed to protect against random searches and seizures of persons, homes, and other personal property by government officials looking for evidence of crimes. The "unreasonable" language of the amendment indicates that it does not prohibit all searches and seizures; the key question is the reasonableness of a particular search. To determine the reasonableness of a search, courts have considered whether a person would have a reasonable expectation of privacy in a particular situation. Most people, for example, reasonably expect privacy within their homes. They have a lesser expectation of privacy on a public street.

As with the First Amendment, the Fourth Amendment applies to "state actors": government officials who are acting in their official capacities. Thus in a school setting, teachers and school administrators may be governed by the Fourth Amendment while the students' parents (or classmates) would not be. The Supreme Court has concluded that although students do have limited Fourth Amendment rights, within a school setting they have a lesser expectation. Schools have a duty to maintain the discipline, health, and safety of students. In fulfilling this duty, the Court has agreed, schools may need to exert greater control over students than would be acceptable outside the school setting.

Mandatory Drug-Testing Schemes

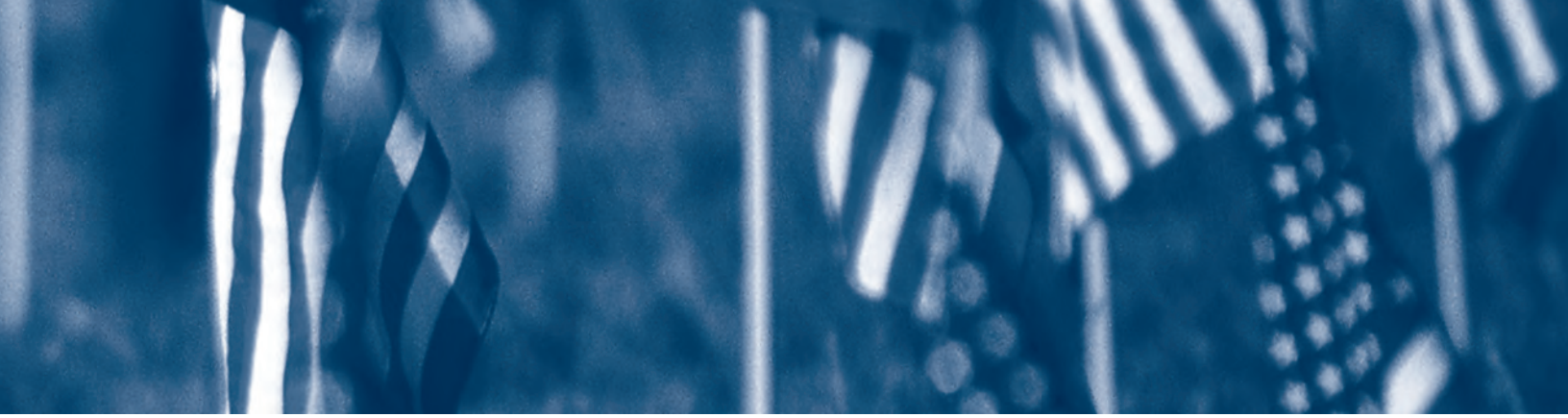
Some of the most controversial "search and seizure" cases in school settings have involved testing students for use of illegal drugs. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), a school passed a new policy that required any student who participated in extracurricular activities to (1) take a drug test before participating, (2) submit to random drug testing while participating in the activity, and (3) agree to be tested for drugs at any time upon reasonable suspicion.

The Supreme Court decided that a mandatory drug-testing scheme for students participating in extracurricular activities is constitutional. Writing for the majority, Justice Thomas considered the traditional Fourth Amendment question of the "reasonableness" of the search. When looking at the reasonableness of searches in a criminal context, the Court asks whether the government had established "probable cause" for the search. But in the context of safety and health regulations, a search unsupported by probable cause may be reasonable when "special needs" are involved. Public schools are one area where such special needs have been recognized. Schools act as guardians of the students in their care, and students have a diminished expectation of privacy in a school environment. Participation in extracurricular activities requires voluntary submission to additional rules, which further diminishes the expectation of privacy. The worst penalty that could result from the tests was limiting a student's privilege to participate in extracurricular activities. Finally, drug abuse among students remains a real and immediate concern for schools. Balancing all these factors, the Court found the drug-testing scheme permissible under the Fourth Amendment.

Justices Ginsburg, O'Connor, Souter, and Stevens disagreed. In an earlier case involving the drug testing of student athletes, the Court had upheld the testing because the athletes were distinguished by "their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use." The four dissenting justices argued that none of those factors applied to the students involved in *Pottawatomie County*, who were involved in choir, band, and academic teams. Such students have a higher privacy expectation than student athletes, whose sports require communal undress and subject them to physical risks that schools must try to keep to a minimum. Moreover, studies have established that students who participate in extracurricular activities "are significantly less likely to develop substance abuse problems than are their less-involved peers." The policy in question thus had a double failing if it sought to deter drug use: "It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems."

QUESTIONS FOR REVIEW

1. Why is the reasonableness of a search important when interpreting the Fourth Amendment?
2. Name three factors in the Court's decision to random drug testing of students involved in extracurricular activities.
3. How did the dissenting justices in *Pottawatomie* distinguish between drug testing of student athletes and drug testing of students in nonathletic extracurricular activities?



DUE PROCESS AND THE FOURTEENTH AMENDMENT

The Supreme Court has held that juveniles are entitled to many due process guarantees in a juvenile court setting. But what about in the schools? Schools are able to punish students, and these punishments—including suspension or expulsion—can have real consequences for the students. Should students be given due process rights—including the right to a hearing or the right to tell their side of the story—in school disciplinary hearings?

Goss v. Lopez, 419 U.S. 565 (1975), involved a state law that allowed a school principal to suspend a student for misconduct for up to 10 days or to expel the student. The principal was required to notify the suspended or expelled student's parents within 24 hours and explain the reasons for the suspension or expulsion. Expelled students could appeal the decision and have a hearing before the board of education. Suspended students were not given the right to a hearing.

The Supreme Court held that suspension of a student without some form of hearing is not constitutional. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In an opinion written by Justice White, the Court declared that by providing the benefit of a public education to its citizens, the state of Ohio had created an entitlement to public education. This entitlement is a property interest protected by the due process clause of the Fourteenth Amendment. That interest cannot be taken away, even if only temporarily, without giving the student at least some opportunity to hear the reasons for the suspension and, if the student denies them, the chance to tell his or her own side of the story.

Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist dissented. The dissenting justices saw the majority opinion's requirement for a hearing as an "unprecedented intrusion into the process of elementary and secondary education." They argued that the hearing requirement improperly gave federal courts, rather than educational officials and state legislatures, authority over routine classroom discipline of students. The dissenters also felt that a suspension of no more than 10 days—less than 5 percent of the normal school year—should not assume constitutional dimensions.

QUESTIONS FOR REVIEW

1. What is the difference between suspension and expulsion?
2. How does the phrase "life, liberty, or property" relate to school suspensions?

DISCUSSION QUESTIONS FOR PART III

The following questions present hypothetical scenarios that potentially infringe upon students' constitutional rights. For each of these scenarios, consider dividing the group into "for" and "against" teams and give them ten or fifteen minutes to identify arguments for or against the actions described in the scenarios. Have the teams present their arguments and then discuss as a group the relative merits of the two positions.

1. A group of students has decided to protest a school policy requiring random drug testing of students involved in extracurricular activities. Based on the Supreme Court's decisions in *Tinker* and *Kuhlmeier*, do you think the Court would allow limits on students' First Amendment free speech rights in any of the following circumstances:
   - The students come to school wearing T-shirts with the words "Drug Free? None of Your Business" printed on them.
   - The students loudly chant "Don't test me!" during a school-sponsored public pep rally for the football team.
   - The students publish a political cartoon showing members of the school board trampling on the U.S. Constitution in the school newspaper.
2. A school district decides that it will begin random drug testing of all students in grades six through twelve, citing evidence of increased drug use in the community. Do you think this should be permitted under the Fourth Amendment? Why or why not?
3. A student is caught talking on his cell phone in the middle of an exam in violation of a policy that the teacher distributed to the class. The teacher immediately assigns the student after-school detention for one week. The student has an after-school job and will lose at least five hours of pay because of his detention. Should the student have the right to a hearing at which he can explain why he was on his phone and what the impact of detention will be on his earnings? Why or why not?