Foundations of Government Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
*Tinker v. Des Moines* Case Study   
Mr. Faulhaber Class Period\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**The First Amendment says:**  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 to peaceably assemble and to petition the government for a redress of grievances.

Directions: Read Highlighting or underlining all the information in this packet other than the questions posed.

**What is symbolic speech?**  
Sometimes speech is spoken or written. Sometimes speech is symbolic or an action. Symbolic speech is conduct that expresses an idea. Although speech is commonly thought of as verbal expression, we are all aware of nonverbal communication. Sit-ins, flag waving, demonstrations, and wearing . . . protest buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech. In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it. To convince a court that symbolic conduct should be punished and not protected as speech, the government must show it has an important reason. However, the reason cannot be that the government disapproves of the message conveyed by the symbolic conduct.  
  
So, just as there are limitations on the extent to which "free speech" applies to the spoken word, there are restrictions on the actions that people seek to have protected as symbolic speech.  
  
What are some other examples of symbolic speech cases other than those listed above?   
  
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 **Tinker v. Des Moines Case Background**   
  
John and Mary Beth Tinker and Christopher Eckhardt were public school students in Des Moines, Iowa, in December of 1965. As part of a group against American involvement in the Vietnam War, they decided to publicize their opposition by wearing black armbands to school. Having heard of the students’ plans, the principals of the public schools in Des Moines adopted a new policy concerning armbands. This policy stated that any student who wore an armband to school would be asked immediately to remove it. A student who refused to take off their armband would be suspended until agreeing to return to school without the band. They communicated the new rule to the students.

Two days later and aware of the school policy, John, Mary Beth, and Christopher wore armbands to school. Upon arriving at school, the students were asked to remove their armbands and they refused. They were subsequently suspended until they returned to school without their armbands.

The students returned to school without armbands after January 1, 1966, the date scheduled for the end of their protest. However, their fathers filed suit in U.S. District Court. This suit asked the court for a small amount of money for damages and an injunction to restrain school officials from enforcing their armband policy. Although the District Court recognized the children’s First Amendment right to free speech, the court refused to issue an injunction, claiming that the school officials’ actions were reasonable in light of potential disruptions from the students’ protest. The Tinkers and Eckhardts appealed their case to the U.S. Court of Appeals but a tie vote in that court allowed the District Court’s ruling stand. They then decided to appeal the case to the Supreme Court of the United States.

The case came down to this fundamental question: Does the First Amendment right of free speech extend to symbolic speech by students in public schools? And, if so, in what circumstances is that symbolic speech protected? The First Amendment states “Congress shall make no law . . . abridging the freedom of speech.” The 14th Amendment extends this rule to state governments as well, which includes school systems. The Supreme Court had decided that some types of speech are not protected. For example, it is not clear whether hate speech against an individual or group is protected. Neither does the First Amendment specify what types of expressive actions—such as wearing an arm band—should be considered speech.

The Supreme Court of the United States has made many attempts to determine what types of symbolic speech are protected under the First Amendment. In 1919, the Court decided in Schenck v. United States that an individual could be punished for distributing pamphlets urging non-compliance with the WWI draft because the pamphlets “create[ed] a clear and present danger that they will bring about [a] substantive evil[ . . .] Congress has a right to prevent”—(i.e., draft obstruction. The Court wrestled with the issue of the right to symbolic speech again in the case of Thornhill v. Alabama (1940) when it ruled that picketing was a form of symbolic speech protected by the First Amendment because no clear and present danger of destruction of life or property or of breach of the peace was inherent in the action. Three years later in a case about saluting the flag, West Virginia v. Barnette (1943), the Court extended the First Amendment protection of symbolic speech to students in public schools. In Barnette, the Court held “[i]f 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 . . . . ”

In 1968 the Supreme Court of the United States agreed to hear the Tinkers’ case and consider the constitutionality of the Des Moines principals’ anti-armband policy. The Court’s decision in Tinker v. Des Moines was handed down in 1969.

Directions: The following is a list of arguments in the *Tinker v. Des Moines*(1969) case. Read through each argument and decide whether it supports the **Tinkers' position (T**) or the position of the **Des Moines School District (DM)**.

\_\_\_\_1. The First Amendment to the United States Constitution states: *"Congress shall make no law . . . abridging the freedom of speech. . . ."*  The administration of a public school is an agent of the government. At a minimum, therefore, it must uphold the basic rights protected by the U.S. Constitution.

\_\_\_\_2. In the case of *Stromberg v. California*(1931), the Supreme Court ruled that the First Amendment protects symbolic speech by declaring unconstitutional a California law prohibiting a display of a red flag as a symbol of opposition to established government.

\_\_\_\_3. Wearing the armbands was a form of speech. It was a silent, passive expression of opinion.  
  
\_\_\_\_4. Free speech is not an absolute right. The government, at all levels, must balance the rights of individuals to free speech with other values the society holds dear. These other values may include public safety and protecting the rights of other individuals.  
  
\_\_\_\_5. The Vietnam War is a controversial issue. Wearing the armbands could be an explosive situation that disrupts learning. It is the school district’s duty to prevent substantial and serious disruption to the learning environment.

\_\_\_\_6. In order for a school to function, there must be rules prohibiting behavior that could be disruptive to the school's educational mission. Schools contribute to making us a more law-abiding people, and school discipline is an important part of children's development as good citizens.

\_\_\_\_7. Schools are meant to be a forum for learning, which includes the possibility for debate of controversial issues. Communication among students is an inevitable and important part of the educational process.

\_\_\_\_8. The Des Moines School District did not ban all expressions of political or controversial subjects. In the past the school had allowed the wearing of political campaign buttons, for instance.

\_\_\_\_9. Allowing students to flout a school rule regarding the wearing of armbands will lead us down a slippery slope. It is not difficult to imagine that if the Tinkers are supported, that students will see this as license to break other school rules as well.

\_\_\_\_10. In the late 1960s many student groups in universities around the country were conducting sit-ins, lie-ins, and other forms of protest against the Vietnam War that interrupted the normal functioning of schools.

\_\_\_\_11. The wearing of the armbands was a silent and passive expression of a position on the Vietnam War. There was no evidence of substantial disruption to the school resulting from the armbands; however, the school officials reasonably feared disruption and therefore took preemptive action to protect the learning environment of the students.  
  
\_\_\_\_12. If the Supreme Court rules in favor of the students, it would be overstepping its bounds and interfering with state and local government powers that govern day-today school operations.

**If I was describing this case to a friend or family member I would tell them…**  
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**If I was a Supreme Court Justice, I would decide the case for… because…**  
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The Supreme Court ruled 7 to 2. The following is from the majority opinion delivered by Justice Fortas:

. . . 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. . . .

. . . The 14th Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

. . . 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 involves direct, primary First Amendment rights akin to "pure speech."

. . . 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 . . .

. . . the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students . . . [and] 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. . . .

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance . . . 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. 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. . . .

**In the majority opinion, the Court recognized the need to balance the specific rights in conflict in this case. What rights are in conflict here?**  
  
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According to the decision, a school must prove the speech materially and substantially interfered with schoolwork or discipline in order to justify prohibiting a student's rights to free speech. Read each example below and determine whether you think the student expression described is disruptive enough to be punished or stopped by the school administration.

a. In order to protest the new cafeteria food offered at Valley High School, the student government organizes a protest. During both lunch periods, SGA officials plan to lead a walk-out from the cafeteria and a group march to the local McDonalds.

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b. Local gang members wear colored plastic bracelets on their wrists to declare their affiliation.

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c. During a pep rally, a student leader uses very obscene language in a speech.

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d. Atheists decide they want to publicize and educate others about their beliefs. To make their point, they begin wearing t-shirts that portray Jesus as a monster with three heads.  
  
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