IT MAY BE TIME TO TINKER WITH *TINKER* FOR FREE SPEECH IN HIGHER EDUCATION SETTINGS

James J. Hartnett, III, Staff Editor, Vol. 31[1]

In 1969, wearing armbands in school to protest the Vietnam War did not meet the definition of a "substantial disruption," which would restrict student speech at a public junior high school.[2] Yet, since 1969, the Supreme Court has failed to provide a clear and guiding definition of what constitutes a "substantial disruption," especially in cases involving higher education institutions.[3] This ambiguity leaves school administrators and potential protestors at public universities without clear guidance on when disruptive speech should be allowed to continue and when it should be stopped or regulated.[4] Considering recent protests of the war in Israel at public universities across the country,[5] it seems clear that the Supreme Court should revisit the "substantial disruption" standard from the landmark case *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, to provide direction, specifically to higher education campuses.[6] This post will show that, without clear guidance from the Supreme Court about when public universities can regulate disruptive on-campus speech, too much speech may be censored, or other students' rights to learn in peace on campus may be violated.[7]

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[2] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[3] *See* Jack Hodgson, *Why Colleges Don't Know What to Do About Campus Protests*, TIME (Apr. 29, 2024), https://time.com/6971920/campus-gaza-protests-free-speech-tension.

[4] *Id.* at ¶ 18 (discussing how the unclear standard provided by the courts up to this point has hindered public school administrators' effective response to First Amendment issues on campus).

[5] *See* New York Times Editors, *Where Protestors on U.S. Campuses Have Been Arrested or Detained*, N.Y. TIMES (June 6, 2024), https://www.nytimes.com/interactive/2024/us/pro-palestinian-college-protests-encampments.html.

[6] Hodgson, *supra* note 3, at ¶ 13.

[7] *See, e.g.*, Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1804–06.

In *Tinker*, The Supreme Court confronted balancing the rights of students to express speech against the Vietnam War under the First Amendment and a public school's ability to function effectively and maintain order.[8] Further, the Court was trying to balance the rights of other students to go to school in peace and without disruption.[9] Ultimately, to accomplish this balance, the Supreme Court held that speech that substantially interferes with "school activities" or speech that could be "forecast[ed]" by school administrators as a disruption to the school or other students may be regulated.[10]

In the cases that followed *Tinker*, the Court tried to narrow down, refine, and, in some cases, expand on what is considered a "substantial disruption . . . or material interference"[11] that would allow school administrators to regulate unprotected speech in schools. Additionally, another tenet that the Supreme Court established after *Tinker* is that speech could occur outside of a public classroom or even outside of the school building and yet still be restricted due to its disruption in school.[12] However, the problem that ostensibly arises is that these subsequent cases mainly concern and guide school administrators and students regarding disruptive speech in and out of K–12 public schools.[13]

In contrast, courts found that public higher-education universities are meant to promote free speech and encourage new ideas through students' speech and their association with diverse groups.[14] The courts' approaches vary from that of K-12 schools because the student population

[8] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[9] *Id.* at 514.
[10] *Id.*
[11] *E.g.* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007).
[12] *Mahanoy Area Sch. Dist*., 594 U.S. at 188–89.
[13] *See id.* at 195–200 (Alito, J., concurring) (providing context that the Supreme Court's rulings on First Amendment restrictions, as they apply to "juveniles," are that the limits on free speech are rooted in the theory "*in loco parentis.*").
[14] Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1128–29 (11th Cir. 2022).

and their primary purpose compared to universities are uniquely different.[15] For example, whether speech is protected in public schools from K-12 is analyzed, understanding that the students are "children."[16] Indeed, a determinative factor in placing restraints on free speech in schools is the concern that juveniles are forced to attend school, and the government must act *in loco parentis* of the juveniles.[17] However, the court must consider that public universities deal with "young adults"[18] and, therefore, the challenges to free speech analysis are dissimilar. This differing view of the student population at public education institutions creates uncertainty on whether the *Tinker* disruption standard can be applied to public higher education universities in the same way as K–12 public schools when conducting a free speech analysis.[19]

Similar to a court's analysis of the maturity level of the student population, the public forum for free speech at each institution is analyzed differently for public K-12 students than public universities.[20] In particular, there are locations on college campuses that are more analogous to a limited public forum; however, the Court emphasized that the First Amendment protections afforded on public sidewalks, streets, or public parks would not apply to a college campus.[21] Further, the Court clarified that Tinker applied to college campuses; however, the decisions mainly emphasized that public institutions cannot regulate speech simply because they do not like it.[22]

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[15] *See* Hosty v. Carter, 412 F.3d 731, 740-42 (7th Cir. 2005) (Evans, J., dissenting) (explaining that the two critical reasons high school settings are treated differently from universities under a First Amendment analysis are that "high school students are less mature and the missions of the respective institutions are different.").
[16] *See Mahoney Area Sch. Dist.*, 594 U.S. at 198 (Alito, J., concurring).
[17] *Id.* at 195-200.
[18] Widmar v. Vincent, 454 U.S. 263, 274 n.14.
[19] Hodgson, *supra* note 2, at ¶ 16–18.
[20] *But see* Healy v. James, 408 U.S. 169, 180 (1972) (stating that "college classrooms" and university grounds are representative of the "marketplace of ideas" proposition which seeks to promote free speech).
[21] ACLU v. Mote, 423 F.3d 438, 443-45; *see also Widmar*, 454 U.S. at 267 n.5.
[22] *See* Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667, 669-70 (1973) (citing *Healy*, 408 U.S. at 192–93 (1972)).

Still, the decisions did not say whether the speech would have been disruptive under *Tinker*, only reinforcing that college administrators may restrict speech based on "time, place, or manner."[23]

Nevertheless, time, place, or manner restrictions mainly cover limitations such as noise, number of protesters, and the hours protestors can protest on campus.[24] While the list of limitations on the time, place, or manner of speech could be expansive, more is needed to prevent disruptive speech that could affect other students attending universities.[25] Indeed, it is not just speech that disturbs the overall efficacy of the school setting that is unprotected.[26] Part of the decision in *Tinker* discussed that speech that "impinge[s] upon the rights of other students" trying to learn is not protected speech.[27] This part of the *Tinker* balance is where the difficulty arises because students not involved in the protests may be exposed to hateful or offensive speech, which is considered protected speech.[28] Yet, the students being exposed to the speech, hateful or not, may nevertheless still have their right to learn "impinged" upon[29] if the speech is disruptive.

While the *Tinker* disruptive standard still applies to student speech today, the case involved students from the K–12 population[30] and did not guide a public university. Indeed, the same distinction influences private universities, which usually mirror the First Amendment protections afforded to public universities.[31] So, while speech that is harassing, truly threatening, or about to

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[23] *Papish*, 410 U.S. at 670.
[24] *See* Kevin Francis O'Neill, *Time, Place, and Manner Restrictions*, FREE SPEECH CTR. (July 30, 2023), https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions.
[25] Hodgson, *supra* note 2, at ¶ 2, 19.
[26] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[27] *Id*.
[28] *See* Eleanor Stratton, *Free Speech on College Campuses*, U.S. CONST. NET. (July 7, 2024), https://www.usconstitution.net/free-speech-on-college-campuses.
[29] *See* Glen Altshuler & David Wippman, *What the History of Campus Hate Speech Codes Teaches Us About Fighting Antisemitism*, THE HILL (Nov. 19, 2023), https://thehill.com/opinion/education/4317052-what-the-vexed-history-of-campus-hate-speech-codes-teaches-us-about-fighting-antisemitism/.
[30] *See Tinker*, 393 U.S. at 504.
[31] *See Public Universities*, FIRE, https://www.thefire.org/research-learn/private-universities (last visited July 20, 2024).

incite imminent unlawful action[32] is not protected at any school, the question then becomes, how should college administrators respond to disruptive speech that affects the rights of other students at the college level?[33]

Sadly, university administrators have not responded to the protests the same way across the country.[34] With protests occurring at over 300 college campuses over the war in Gaza, the response by college administrators has ranged from extreme responses of allowing disruptive weeks-long encampments to requesting police assistance to forcefully remove protestors.[35] In either extreme of college administrators' responses, students not participating in the protests are potentially disturbed from their right to learn in peace[36] and are afraid to go to class.[37] This uneven reaction to the protests may be due to college administrators' uncertainty about how to respond to satisfy all parties.[38]

Without a uniform response by public school administrators, colleges risk censoring or chilling speech with extreme crackdowns and censorship of protests.[39] Conversely, school administrators allow disruptions to both the school and other students when forced to close scheduled classes or

[32] *See* Altshuler & Wippman, *supra*, note 29 at ¶ 4.
[33] Papandrea, *supra* note 7, at 1804.
[34] *See* Jennifer Smith, *Response to Gaza Campus Protests Demonstrates Lack of Preparation*, COMMONWEALTH BEACON (May 6, 2024), https://commonwealthbeacon.org/education/response-to-gaza-campus-protests-demonstrates-lack-of-preparation/.
[35] *See* Tiffany Xiao, *Administrative Responses to Pro-Palestine Efforts Vary Across University Campuses*, DAILY BRUIN (July 27, 2024), https://dailybruin.com/2024/05/05/administrative-responses-to-pro-palestine-efforts-vary-across-university-campuses.
[36] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[37] *See* Marc Siegal, *Stop the Volatile Campus Protests That are Scaring Students Out of Classrooms*, THE HILL (Apr. 28, 2024), https://thehill.com/opinion/education/4624186-stop-the-volatile-campus-protests-that-are-scaring-students-out-of-classrooms/.
[38] *See* Hodgens, *supra* note 2, at ¶ 18.
[39] *See* Vimal Patel & Anna Betts, *Campus Crackdowns Have Chilling Effect on Pro-Palestinian Speech*, N.Y. TIMES (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/us/campus-crackdowns-have-chilling-effect-on-pro-palestinian-speech.html.

cancel graduations due to the unregulated encampments permeating the campuses.[40] Public school administrators need a tempered response that balances both the needs of the school and students with the need to respect the First Amendment's right to free speech of other students.[41]

Uniformity should not require that protests be banned from college campuses, but it may require that the Supreme Court guide college administrators at public universities on how to respond while still observing the First Amendment for students not involved in the protests.[42] Indeed, the Court has said that if speech causes a substantial disruption at a public university, it can be regulated.[43] However, what is not as clear is whether speech that disrupts an adult college student's peaceful ability to learn should be regulated or simply tolerated.[44] Perhaps it is time for the Supreme Court to tinker with *Tinker* and provide some guidance on how disruptive speech affects other students at college campuses and whether the speech should be regulated by public university administrators.[45]

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[40] *See* Steve Leblanc & Nick Perry, *USC Cancels Graduation Ceremony and Dozens are Arrested on Other Campuses as Anti-War Protests Grow*, ASSOCIATED PRESS (Apr. 25, 2024), https://apnews.com/article/israel-palestine-war-campus-protests-fbd7dd06431f32d24d0f8abcc8a56b8b.

[41] *See* Parker Elder, *How Colleges Should Handle Campus Protests*, WALL ST. J. (May 7, 2024), https://www.wsj.com/articles/how-colleges-should-handle-campus-protests-free-speech-disorder-9072d717.

[42] Hodgson, supra note 2, at ¶ 17–18.

[43] *See* Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667, 669-70 (1973) (citing Healy v. James, 408 U.S. 169, 180 (1972).

[44] Hodgson, *supra* note 2, at ¶ 20–21.

[45] *Id.*