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# FLASHPOINTS: DISCUSSION GUIDE

## Free Speech & Schools

Between 2021 and 2023, PEN America and the American Historical Association (AHA) cohosted [Flashpoints: Free Speech in American History, Culture and Society](#). This series presented the fascinating and complex history of free speech in American democracy to public audiences in cities across the country. The historical flashpoints highlight pivotal moments in which artists, activists, writers, filmmakers, and intellectuals tested the limits of free speech, challenged the public to redefine “freedom” and realized it anew for populations and causes that were at risk of having their liberties denied.

## How to Use This Guide

This guide was designed to supplement the [video recording](#) (accessible at [pen.org/flashpoints/](https://pen.org/flashpoints/)) of a live event for use in the classroom. The questions and prompts included here offer ideas for fostering student engagement in both secondary and postsecondary educational environments, foregrounding issues of general public interest that align with topics often covered in history, government, civics, and political science. Choose the prompts that seem best suited to the concerns and interests of your community, using them as a springboard for discussion, writing exercises, and debate or as a model for civic engagement.

## Incorporating Flashpoints into the Secondary Classroom

The video recording of **Flashpoints: Free Speech and Schools** can help structure lessons on the First Amendment, free speech, the Supreme Court, and the Vietnam War. It will be most obviously relevant in civics and government classes, where curricula may already include *Tinker v. Des Moines*.

Teachers may wish to share excerpts of this video to support conversations about any of the themes outlined above. Alternately, this material might help students prepare to hold their own panel discussion about research related to a contemporary issue.

## Learning Outcomes and Standards Alignment

The question of free speech in schools can orient an inquiry that aligns with the C3 Framework, especially as it applies to civics education. A lesson built around this video and subsequent discussion—such as the sample activity, applying the Tinker Test, outlined below—can address D2.Civ.2 on the role of citizens; D2.Civ.4 on the US Constitution; outcomes associated with participation and deliberation (D2.Civ.7-10); D2.Civ.12 on using and challenging laws; and D2.Civ.14 on changing societies and protecting rights.

A classroom activity asking students to organize a panel discussion will move firmly into dimensions 3 and 4, requiring students to gather and evaluate sources; develop claims and use evidence; communicate and critique conclusions; and, potentially, take informed action.

Many states will have standards in civics, social studies, or history that address free speech, Supreme Court rulings, and/or youth protests against the Vietnam War.



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## Flashpoints: Free Speech & Schools

On January 7, 2023, Justin Driver and Natalia Mehlman Petrzela joined moderator Brendan Gillis for a conversation about Free Speech & Schools at the 2023 American Historical Association annual meeting in Philadelphia, Pennsylvania. Schools are spaces of learning and discipline where students acquire the knowledge to thrive, but is it fair to presume that knowledge is apolitical? What rights should students have to express political views that may spark division and stir controversy in classrooms? The event explored the range of methods students have found for expressing dissent, from antiwar armbands to the decision to remain seated during the Pledge of Allegiance.

### What Is a Panel Discussion?

The format of a panel discussion, in which multiple experts gather to talk about an issue of compelling public interest, provides a model for the kind of informed, civil dialogue that teachers hope to facilitate in the classroom and that is vital to the functioning of a democratic society. Many students may be unfamiliar with this style of intellectual exchange because people argue, rather than just deliver definitive facts. Teachers or discussion leaders may wish to call attention to the fact that each panelist has devoted years to the careful and thorough study of the topic they are addressing. Note, too, how each speaker anchors their interpretation in specific examples that provide evidence to support their perspective.

Informed debate can look quite different from the kinds of sparring matches students see on the news. The panelists may agree about some ideas but not about others. Grappling productively with reasonable differences in interpretation is essential to developing a full understanding of an issue. This kind of conversation—in which experts gather to discuss their findings—is an important component in the creation of new knowledge about our society and the world.

- Is this panel discussion different from debates we see on cable news? If so, how and why?
- Can we, as a class or discussion group, engage in a civil debate in our own class discussions?

### Free Speech & Hollywood **Video** Timeline

0:00 – Introductions of PEN America and moderator

3:24 – Nikolai McKenzie reads excerpts from the ruling in *Tinker v. Des Moines Independent Community School District* (1969)



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13:27 – Justin Driver discusses the significance of *Tinker v. Des Moines*

24:39 – Natalia Mehlman Petrzela discusses opposition to sex education curricula in Southern California school districts

36:45 – Justin Driver discusses *West Virginia State Board of Education v. Barnette* (1943)

42:43 – Natalia Mehlman Petrzela discusses changing attitudes about sex education since the 1960s

46:45 – Moderated Q&A

1:05:20 – Audience Q&A

### **The Flashpoint: *Tinker v. Des Moines***

In late 1965, a group of students in Des Moines, Iowa—including Christopher Eckhardt (aged 16), John Tinker (15), and Mary Beth Tinker (13)—decided to wear black armbands in protest against escalating US involvement in the Vietnam War, a conflict that would eventually result in the deaths of more than one million people. Upon learning of these plans, the Des Moines Independent Community School District adopted a new policy that any students wearing armbands would be suspended, setting the stage for a conflict over students' rights that would eventually work its way to the Supreme Court of the United States.

In the late 1960s, protests over the Vietnam War focused attention on what seemed to many Americans to be a gaping divide between youthful counterculture (with slogans like “make love, not war”) and the political mainstream, what Richard Nixon described as the “silent majority” who refused to join antiwar protests.

Before watching Nikolai McKenzie read excerpts from the 1969 ruling in *Tinker v. Des Moines Independent Community School District* (3:24) and Justin Driver's discussion of the case (13:27), it may be helpful to discuss why this issue was so controversial in the context of the 1960s.

- Why would an Iowa school district adopt a policy banning armbands?
- What kinds of restrictions do schools place on how students dress and act?



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- Why do you think many lowans rushed to defend the students when they chose to violate this policy?
- The antiwar students chose a nonverbal form of protest. The students did not do any speaking. Does the First Amendment protection of free speech extend to actions and symbols? How and why?

### The Tinker Test

After watching Justin Driver's discussion of *Tinker v. Des Moines*, students and other viewers may find it useful to parse the significance of the decision, in which Justice Abe Fortas famously ruled that "students" do not "shed their constitutional rights to freedom of speech or expression at the school-house gate." In recognizing the rights of students, however, the Supreme Court acknowledged—in what has come to be known as the **Tinker test**—that student speech should be protected only when it does not result in "substantial disruption of or material interference with school activities."

The Tinker test means, for example, that a student may be punished for sharing an opinion in a way that prevents other students from learning. Imagine someone yelling at the top of their lungs in the middle of class. Otherwise, schools may not discipline a student just because they disagree with the ideas that person is trying to express. When applying the Tinker test and other interpretations of the First Amendment, lawyers and courts divide words and actions into two categories. **Protected speech** describes forms of expression that do not disrupt or interfere with the fundamental educational mission of a school. **Unprotected speech** refers to statements or actions that cause or will likely bring about some kind of disruption, meaning that schools may lawfully punish those responsible. Sound confusing? This standard leaves considerable room for interpretation.

- What is the Tinker test? What kinds of words and actions qualify as protected speech? Can you think of any examples of unprotected speech?



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- Prior to the *Tinker* decision, *West Virginia v. Barnette* (1943) held that two sisters could not be disciplined for remaining seated during the Pledge of Allegiance in their classroom. How did the *Tinker* decision change what freedom of speech meant in public schools?
- How is the First Amendment right to free speech defined differently in public schools (which are operated by government) than in other venues?
- In his remarks, Justin Driver refers to students having “junior varsity” constitutional rights. What does he mean?
- What does free speech mean for students? What about for teachers or for parents?



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### Activity: Applying the Tinker Test

The issue of free expression in schools remains deeply controversial. Once students have learned about the Tinker Test, direct them, either individually or in small groups, to apply this legal standard (“substantial disruption”) to examples of student speech taken from real court cases. Each of the following scenarios is based on one or more actual disputes about the limits of student speech:

- A group of students wears T-shirts displaying a Confederate flag to school (*Hardwick v. Heyward*, 2013)
- A student wears a T-shirt advertising the “Trump Border Wall Construction Company” to a class during which students would be discussing issues surrounding immigration (*Barnes v. Liberty High School*, 2018)
- A student wears a T-shirt including the passage from scripture that some Christians interpret as forbidding same-sex love on the same day as a student-led demonstration to protest the bullying and harassment of LGBTQ+ peers (*Harper v. Poway Unified School District*, 2006)
- Outside of school hours, a student creates a parody social media profile pretending to be their school’s principal, where they publish sexually explicit statements (*Layshock v. Hermitage School District*, 2011; *J.S. v. Blue Mountain School District*, 2011)
- School officials refuse to allow a group of students form a Gay-Straight Alliance to combat discrimination, citing a state law mandating abstinence-only sex education (*Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 2009)

Each scenario is complex, illustrating the difficulty of resolving legal issues surrounding free speech in schools. Ask students to identify reasons that each example might both pass and fail the Tinker Test, depending on one’s interpretation of the evidence. What arguments might convince a judge that the student(s) described here are engaging in protected speech? What arguments might be raised to suggest that these words, symbols, or actions are likely to cause “substantial disruption of . . . school activities?”

Once students have weighed arguments both for and against allowing students to express themselves in these ways, ask them to predict whether a court would have agreed that school administrators should be allowed to prevent students from expressing themselves in this way. It may also be productive to design an assignment asking students to do additional research into the case or cases touching on the issues addressed in these scenarios.

### The Legacies of *Tinker v. Des Moines*

- Natalia Mehlman Petrzela addresses controversies surrounding sex education in South California, in which some students and parents demanded protections against being exposed to topics, ideas, and language to which they objected (24:39). Does the First Amendment guarantee parents or students a right to freedom *from* speech?



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- Do the free speech protections laid out in the *Tinker* case apply to decisions about what schools teach students? Why or why not?
- If a student or their parents disapproves of a book that used for teaching, should the school grant them an exemption from reading it and provide an alternative text?
- If a student or their parents disapprove of the school's sex education curriculum, should they be allowed to "opt out" of the class?
- Does the outcome of *Tinker v. Des Moines* affect your rights today? How and why?



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- Do you recite the Pledge of Allegiance in school? Did you know that the Supreme Court has ruled that the First Amendment protects your right to choose whether to do so?
- What did you learn about your own rights after watching this video? How will you exercise your First Amendment right to freedom of speech?

### Suggestions for Further Reading

Excerpts from the majority decision and dissent in *Tinker v. Des Moines Independent School District* (1969) can be found on the Constitution Center website:

<https://constitutioncenter.org/the-constitution/supreme-court-case-library/tinker-v-des-moines-independent-community-school-district>

Driver, Justin. *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*. New York: Vintage Books, 2018.

Petrzela, Natalia Mehlman. *Classroom Wars: Language, Sex, and the Making of Modern Political Culture*. New York: Oxford University Press, 2015.

Zimmerman, Jonathan. *Whose America? Culture Wars in the Public Schools*, 2nd ed. Chicago: University of Chicago Press, 2022.

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