

# Chapter 4

## Erecting a Virtual Schoolhouse Gate

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### ABSTRACT

*The very first amendment to the United States Constitution protects the freedom of speech. While the Supreme Court held in 1969 that students “do not shed their constitutional rights at the schoolhouse gate,” since then the Court has limited students’ freedom of speech, stopping short of considering the boundaries of off-campus, online speech. Lower court holdings vary, meaning that a student engaging in certain online speech may not be punished at all in one state but would face harsh criminal punishments in another. The lack of a uniform standard leads to dangerously inconsistent punishments and poses the ultimate threat to constitutional knowledge and citizenship exercise: chilling of speech. Recent interest in technology-related cases and the presence of a new justice may reverse the Court’s prior unwillingness to address this issue. In the meantime, this chapter argues that school districts should erect a virtual schoolhouse gate by implementing a uniform standard.*

### INTRODUCTION

*Congress shall make no law ... abridging the freedom of speech. - Amendment I*

This chapter address the extent to which the First Amendment to the U.S. Constitution extends protections to public K-12 students’ speech online.

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The Framers of the United States Constitution – the oldest and shortest written constitution in the world – felt so strongly about the importance of free speech that they included it in the very first amendment to the main document. In fact, a number of the Framers wanted to include free speech and other individual rights in the main document and only agreed to sign once it was promised to them that there would be immediate additions (Emerson 1977). In 1791, just four years after ratification of the U.S. Constitution, the Bill of Rights – the first ten amendments – were adopted.

As the final arbiter of the Constitution and its amendments, the U.S. Supreme Court's role in ensuring protection of civil rights cannot be overstated. While the other two branches of government – the legislative and executive – can have an influence on rights, the Supreme Court has an independent and critical role in reviewing the work of the other branches (Rotunda & Nowak 2017). In the past eighty or so years, the U.S. Supreme Court has repeatedly interpreted the provision to include the rights of public school students to freely speak, and decline to speak, in the school context.

In 1969, the Court declared that students – and teachers – do not “shed their constitutional rights at the schoolhouse gate.” In *Tinker v. Des Moines Independent School District* (1969), the Court recognized the important role that public schools play in preparing youth for citizenship. They declared that student speech on campus may not be censored unless the school officials show a reasonable apprehension that the student speech will lead to material disruption or collide with the rights of others. In *Tinker*, Justice Fortas famously wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

In the almost fifty years since *Tinker* was decided, the Supreme Court has decided exactly three cases concerning the extent of students' freedom of speech. Those cases include *Bethel v. Fraser* (1986), *Hazelwood v. Kuhlmeier* (1988), and *Morse v. Frederick* (2007). The reluctance to consider more cases and create more useful guidelines highlights the Court's deference to school officials. Further, the Court's refusal to grant certiorari in *Bell v. Itawamba County* (2015), indicates another concern of the justices – how to handle the impact of technology on rights.

This chapter argues that the schoolhouse gate now extends to off-campus, online speech. The advent and widespread use of the internet by young people has exponentially increased the opportunities for students to speak such that there is now a virtual schoolhouse gate. The Supreme Court simply has not caught up. In fact, according to Connor Mitchell and Carolyn Schurr Levin of the Student Press Law Center (2017), the leading non-profit in this space, the Court has declined a number of opportunities to review the extent to which students' freedom of speech both in K-12 and higher education extends to online speech. Lower courts have explored this question and have reached different conclusions and drawn different lines.

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