

I. Background and Introduction

“Congress shall make no law... abridging the freedom of speech”.¹ This constitutional amendment has generated many differing opinions, particularly in the context of public schools. In the case of *Shelby v. School*, rights to free speech came into play when a student, Shelby, submitted controversial artwork for a “life experience” assignment. Originally from the South, she depicted a white fist, “stars and bars,” a confederate battle flag, and raw cotton bolls, which brought forth the appropriateness of the work’s place in a school environment. Jesse, another student, submitted a painting portraying his experience as a black individual, which included rainbow stripes, a black fist, tear drops, and the line “I matter.” Shelby’s painting was considered disrespectful by some, juxtaposed with Jesse’s. Questions arose about how to proceed, citing the school board policy which states certain grounds on which a student may be suspended or expelled. Faced with this conflict, the superintendent must determine if Shelby’s artwork is cause for her suspension, expulsion, or other action. Despite the controversial content of Shelby’s artwork, the superintendent should note that there is no reason to take action against her, as a student is entitled to express oneself within the bounds of the constitution.

II. Analysis of School Board Policy

The school board policy is qualified by the Constitution, and as such, Shelby should not be punished, because her artwork fell within the guidelines of the policy. It clearly states that for suspension to be justified, the speech or action in question must cause “a substantial or material disruption of the school’s operation” or be “likely to incite a breach of peace.” The legitimacy of this policy can be seen in the Supreme Court ruling in *Tinker v. Des Moines*, wherein it was determined that only once a disruption of the school environment actually occurs may the administration take action against a student’s speech.² This ultimately disqualifies the “likely to incite” clause of the policy, but keeps intact the rest, saying that

¹ Jeremy Nelson, “The Bill of Rights (Amendments 1 - 10),” National Center for Constitutional Studies (National Center for Constitutional Studies, January 1, 2018), <https://nccs.net/blogs/americas-founding-documents/bill-of-rights-amendments-1-10>.

² “John F. TINKER and Mary Beth Tinker, Minors, Etc., Et Al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT Et Al.,” Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/393/503>.

students may only be punished upon a substantial disruption of the pedagogical concerns of the school. Furthermore, the decision in *Bethel v. Fraser* stated that the only exception to the aforesaid precedent is when a student speaks in an obscene or otherwise vulgar manner.³ Upon examining the soundness of the school board policy as it pertains to these landmark Supreme Court rulings, it becomes apparent that Shelby's work was a constitutional expression of her life. For her work to have been punishable, there would have had to have been some disruption of the learning environment. The key word that must be recognized in the school's execution of this policy is "substantial," meaning something that is "considerable in quantity".⁴ Instead of a considerably large disruption, what was seen in *Shelby v. School* was an individual, Jesse, who independently decided to make a change in his learning environment, and was the only one involved in any possibly precipitating events. Jesse's actions are merely tangentially related to Shelby's artwork. The absence of a disruption of the pedagogical interests of the school make Shelby's expression through painting entirely legal.

One classification for the expression presented in *Shelby v. School* is that of symbolic speech. In practicing symbolic speech, one must "convey a particular message" and be likely to "be understood by those viewing it".⁵ In this realm of free speech, one of the most influential cases was *Tinker v. Des Moines*.⁶ In the case, students who protested the Vietnam war by wearing black armbands after being told not to do so, were suspended from their school.⁷ Ultimately, the Court found that students were not

³ "BETHEL SCHOOL DISTRICT NO. 403, Et Al., Petitioners v. Matthew N. FRASER, a Minor and E.L. Fraser, Guardian Ad Litem.," Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/478/675>.

⁴ "Substantial," Merriam-Webster (Merriam-Webster), accessed February 20, 2021, <https://www.merriam-webster.com/dictionary/substantial>.

⁵ "Symbolic Speech Legal Definition," Merriam-Webster (Merriam-Webster), accessed February 20, 2021, <https://www.merriam-webster.com/legal/symbolic%20speech#:~:text=Legal%20Definition%20of%20symbolic%20speech%20%3A%20conduct%20that,259%20%281996%29%20%E2%80%94%20compare%20commercial%20speech%2C%20pure%20speech>.

⁶ "John F. TINKER and Mary Beth Tinker, Minors, Etc., Et Al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT Et Al.," Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/393/503>.

⁷ "John F. TINKER and Mary Beth Tinker, Minors, Etc., Et Al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT Et Al.," Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/393/503>.

subject to punishment regarding their symbolic expression, so long as order was maintained.⁸ This crucial element in *Shelby v. School* was maintained following her work's completion, and as such, it is necessary to protect this peaceful symbolic expression. In another First Amendment case, *Texas v. Johnson*, the Supreme Court determined that it is acceptable to burn a flag, even if it may be construed as offensive.^{9 10} Although this action, like Shelby's, could be considered offensive, the expression of her heritage is protected by the Supreme Court in this case. The right to use flags as symbolic expression is exactly what the Court meant to preserve in *Johnson*. It must be understood that the school's interference with this expression of her heritage would in fact be a violation of her rights, because she is entitled to her beliefs. The symbolic speech used in the case was legal, and thus should not be infringed.

Shelby's painting in *Shelby v. School* also falls into the category of political speech. Political speech is that in which someone may express oneself such that it may reasonably indicate their views on government policy and practices. The first landmark decision regarding students' abilities to convey political opinions was in the case *West Virginia Board of Education v. Barnette*.^{11 12} It was found in this case that students were not obligated to salute the American Flag during the Pledge of Allegiance in the school environment.¹³ Moreover, the Supreme Court ruled in *Board of Education v. Pico* that school administrations may not remove books from school libraries solely on the grounds that the political views do not align with those of the administration.¹⁴ Shelby's views were presented in the form of a white fist

⁸ "John F. TINKER and Mary Beth Tinker, Minors, Etc., Et Al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT Et Al.," Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/393/503>.

⁹ "TEXAS, Petitioner v. Gregory Lee JOHNSON.," Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/491/397>.

¹⁰ Ronald Kahn, "Symbolic Speech," The First Amendment Encyclopedia (Middle Tennessee State University), accessed February 21, 2021, <https://mtsu.edu/first-amendment/article/1022/symbolic-speech>.

¹¹ Kristine Bowman, "West Virginia State Board of Education v. Barnette," The First Amendment Encyclopedia (Middle Tennessee State University), accessed February 20, 2021, <https://mtsu.edu/first-amendment/article/227/west-virginia-state-board-of-education-v-barnette>.

¹² "WEST VIRGINIA STATE BOARD OF EDUCATION Et Al. v. BARNETTE Et Al.," Legal Information Institute (Cornell Law School), accessed February 21, 2021, <https://www.law.cornell.edu/supremecourt/text/319/624>.

¹³ "WEST VIRGINIA STATE BOARD OF EDUCATION Et Al. v. BARNETTE Et Al.," Legal Information Institute (Cornell Law School), accessed February 21, 2021, <https://www.law.cornell.edu/supremecourt/text/319/624>.

¹⁴ "WEST VIRGINIA STATE BOARD OF EDUCATION Et Al. v. BARNETTE Et Al.," Legal Information Institute (Cornell Law School), accessed February 21, 2021, <https://www.law.cornell.edu/supremecourt/text/319/624>.

and Confederate flag, and are perceived as political, much like those of the authors in *Pico*. The school should not blind the student body from real, American opinions in this context of creative expressions. Although the school may not condone such opinions or actions, the precedent set in *Guiles v. Marineau* should be followed.¹⁵ ¹⁶ The school is not to restrict her right to free speech on the basis of other students' protection, as long as the content of the expression is not "plainly offensive".¹⁷ Both a shirt relating to drugs, as seen *Marineau*, and a painting of one's Southern heritage cannot be construed as inherently or deliberately offensive, as they both convey a meaning which were not so. Political speech, a crucial element to the educational environment, cannot be suppressed, as the right has been thoroughly protected by the Supreme Court.

III. Recommendations

Any interference by the school or district administration with Shelby's painting would be a violation of her constitutional right to freedom of expression. In accordance with the school board's policy and the Supreme Court of the United States, a suspension or expulsion would be unjustified. Additionally, the school should take this as an opportunity for students to learn and engage in the real-world conversations of 2021, as encouraged in *Pico*. In an effort to promote student engagement, the school should showcase both Jesse and Shelby's works, identifying them as the intended reflection of one's life experience. Also crucial to the resolution of this case is a comprehensive review of the school board policy which should make clearer its areas of ambiguity, such as the absence of a clause regarding the acceptability of symbolic and political speech, and should identify the line at which an outcome of speech crosses into the territory of "substantial disruption," such that innocent students such as Shelby will not be at risk of future unfair disciplinary action. As Justice Abe Fortas famously wrote in his

¹⁵ "Guiles V. Marineau - The Decision of The Court," Liquisearch.com, accessed February 20, 2021, https://www.liquisearch.com/guiles_v_marineau/the_decision_of_the_court.

¹⁶ "Guiles Ex Rel. Lucas v. Marineau, 349 F. Supp. 2d 871 (D. Vt. 2004)," Justia Law, accessed February 20, 2021, <https://law.justia.com/cases/federal/district-courts/FSupp2/349/871/2477785/>.

¹⁷ "Guiles V. Marineau - The Decision of The Court," Liquisearch.com, accessed February 20, 2021, https://www.liquisearch.com/guiles_v_marineau/the_decision_of_the_court.

majority opinion for *Tinker v. Des Moines*, students do not “shed their constitutional right to freedom of speech or expression at the schoolhouse gate.”¹⁸

¹⁸ “John F. TINKER and Mary Beth Tinker, Minors, Etc., Et Al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT Et Al.,” Legal Information Institute (Cornell Law School), accessed February 20, 2021, <https://www.law.cornell.edu/supremecourt/text/393/503>.

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