

# Speaking Up for Themselves

Teens are upping the battle over their right to free speech in school. But should they go to court to protect their rights?

By REYNOLDS HOLDING

**T**HE FIRST MORNING OF THE 2005 SCHOOL year held more than the typical jitters for Toni Kay Scott. One moment, the seventh-grader, known as T.K., was stepping from her mom's Ford pickup to join friends in front of Redwood Middle School in Napa, California. Minutes later, the police officer assigned to watch arriving students was steering her toward the principal's office.

Scott had violated Redwood's dress code. The code aimed to squelch gangs by requiring students to wear only certain clothes and solid colors. Scott could change her outfit and stay at school, or she could spend the day at home. "I said, 'There's nothing wrong with what I'm wearing. I'm going home,'" recalls Scott, a near straight-A student. "I thought it was kind of ridiculous."

Her parents thought the dress code more than just ridiculous: they considered it unconstitutional. In March they and a dozen other Redwood parents and students sued the school and the Napa Valley Unified School District in state court. They claim that students have a fundamental right to express themselves through their attire—to speak, in effect, through the kind of clothes that Scott insisted on wearing that first day of school: a denim skirt and socks depicting Tigger, a character from *Winnie-the-Pooh*.

We have come a long way in the four decades since three students in Des Moines, Iowa, wore black armbands to protest the Vietnam War—and won a landmark U.S. Supreme Court decision establishing the right to speak freely in school. Back then lawsuits over school speech were almost unheard of, and they usually involved weighty issues such as racial equality and the right to political protest. But since 1998, students have sued schools in astounding numbers, with as many as 94 disciplinary cases reaching appellate

courts in one year. And while lots of these suits claim First Amendment violations, the speech involved can feel trivial: inappropriate clothes, online insults or, as in a recent Supreme Court case, *BONG HITS 4 JESUS* written on a banner.

That the bong-hits case, known officially as *Morse v. Frederick*, has come before the court is a sign of the times. An unprecedented wave of similar suits has clogged the lower courts in recent years, propelled, say legal experts, by several developments: stricter rules in the aftermath of gang violence and school shootings, a crackdown on alarming Internet comments and a perceived hostility toward religion in public schools.

While the lawsuits may strengthen student rights, they come at a high cost for schools—in diminished authority as well as dollars. "We used to defer to the professional discretion of teachers and administrators," says Richard Arum, a professor of sociology and education at New York University and the author of *Judging School Discipline*. "Now our schools are run increasingly by lawyers and judges."

The notion that whatever the teacher says goes began to fade in the 1960s. Outrage over racism, poverty and the Vietnam War made questioning authority a righteous cause in schools as well as on the streets. But students also attracted attention from



public-interest lawyers who believed that stronger rights of expression would allow children to get a better education. Their first big victory came in 1969 with the black-armband case, called *Tinker v. Des Moines Independent Community School District*. In a 7-to-2 decision, the Supreme Court ruled that students don't "shed their constitutional rights to freedom of speech ... at the schoolhouse gate" as long as they don't cause "substantial disruption" at school. Courts gave students even more rights over the next decade, but the rise of drugs and alcohol on campus made judges increasingly sympathetic to schools. In the 1980s, the Supreme Court cut back the rights granted in *Tinker*, telling schools they could limit student speech that was "vulgar and offensive" or "sponsored" by the school in, for example, a student newspaper.

Student lawsuits started to dry up after the backlash. From 1969 to 1975, an annual average of 76 school-discipline cases made their way to appeals courts, according to Arum, but from 1976 to 1989, the annual average dropped to 29.

In 2002 the Juneau-Douglas High School in Alaska let students cross the street to watch the Olympic torch pass on its way to Salt Lake City. As TV cameras rolled, senior Joseph Frederick and several friends unfurled a banner that said BONG HITS 4 JESUS. Frederick testified that the banner was supposed to be "meaningless and funny, in order to get on television." But the school principal suspended Frederick for 10 days.

Frederick sued the school for violation of his free-speech rights and won in the lower federal courts. But the Supreme Court accepted the school's appeal, making this the most significant high-court case since *Tinker* to test a school's authority to suppress student dissent. In a 5-4 ruling, the court declared schools may punish "student speech celebrating drug use" without violating the Constitution. Writing for the court, Chief Justice John Roberts stressed that "drug abuse can cause severe and permanent damage to the health and well-being of young people" and so "deterring drug use by school children" is justification enough for silencing a student.

The problem, says Justice John Paul Stevens, joined by Justices David Souter and Ruth Bader Ginsburg in dissent, is that the Roberts opinion invents "out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions

**Landmark Cases** These cases were milestones in the ongoing battle over freedom of expression in public schools.

### 1943 WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE

The U.S. Supreme Court acknowledges free-speech rights for students, striking down a West Virginia law requiring public-school children to salute the flag

### 1969 TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

The Supreme Court strengthens speech rights for students when it rules that they may protest the Vietnam War by wearing black armbands to school

### 1986 BETHEL SCHOOL DISTRICT NO. 403 V. FRASER

With this case, the court determines that schools may bar student speech that is vulgar, lewd or offensive

### 1988 HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER

Limits on school-sponsored speech like stories in student newspapers are permissible under the First Amendment, says the high court

### 2007 MORSE V. FREDERICK

The Supreme Court rules that a high school principal may punish students for displaying a banner that reads "Bong Hits 4 Jesus" across the street from school

drugs." Stevens is fine with a rule that prohibits students from promoting illegal drugs. But no matter what the principal argued in this case, Frederick's banner—in Stevens' view—conveyed "nonsense," speech "that was never meant to persuade anyone to do anything."

Stevens explains that most students knew the banner had no meaning, because most of them "do not shed their brains at the schoolhouse gate." And so to allow schools to ban speech that merely alludes to drugs might, he says, squelch "a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana," a topic at the heart of political debate.

In the end, says Arum, "Tinker was all about explicitly political topics, and the courts were sympathetic about protecting students' fundamental political rights. It's quite different when you're talking about bong hits." Or, for that matter, Tigger socks. ■

#### Questions

1. What did the Supreme Court rule in the *Tinker* case?
2. What is your view of the *Morse* ruling? Explain.