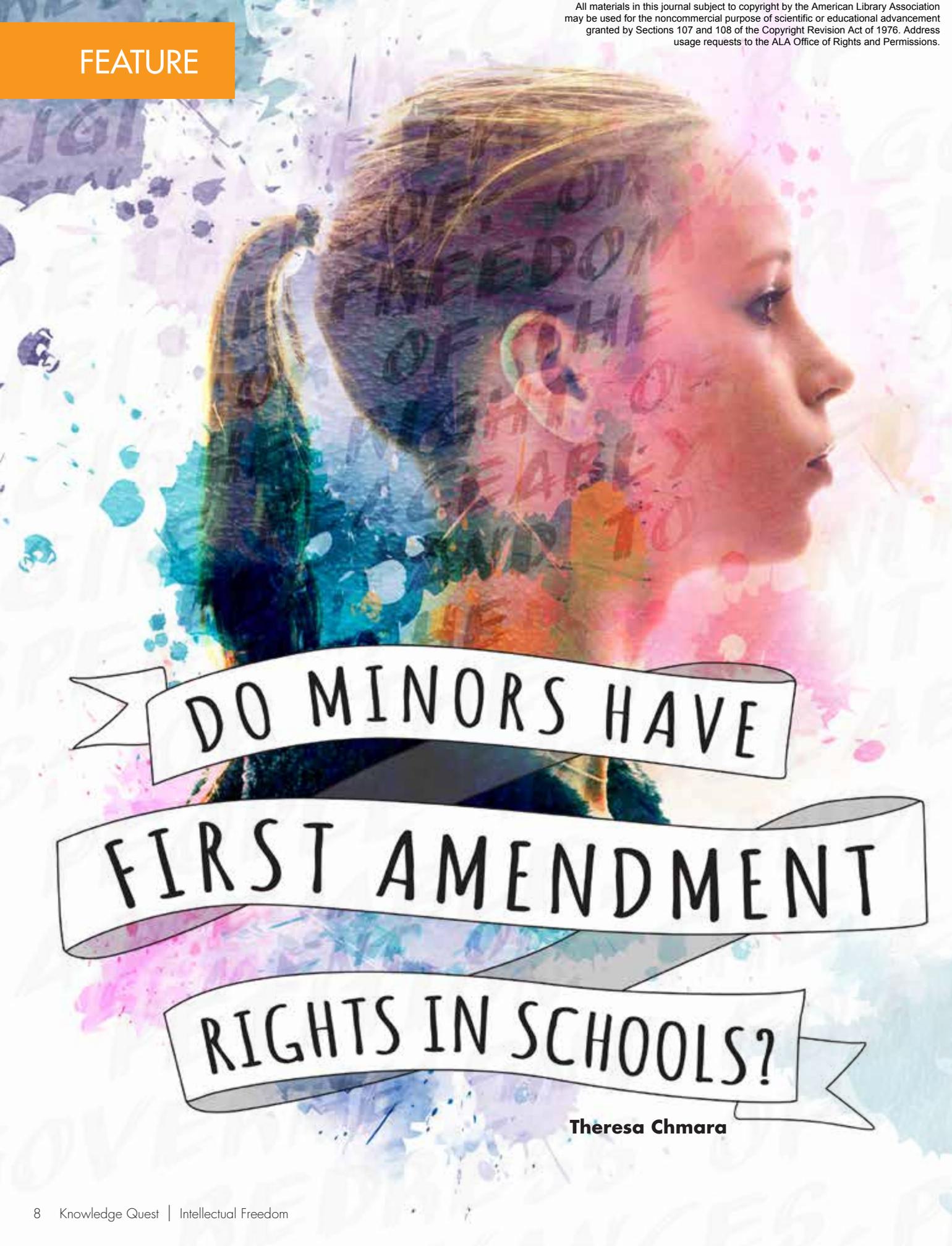


FEATURE



DO MINORS HAVE

FIRST AMENDMENT

RIGHTS IN SCHOOLS?

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Author's Disclaimer: This article does not constitute a legal opinion. Readers should consult their own legal counsel for legal advice regarding their particular situations.

Courts have held that minors have First Amendment rights and that those rights include the right to receive information. How does that apply in the school setting? Because the First Amendment guarantees that the *government* cannot infringe free speech rights, students cannot assert their First Amendment rights in a private school setting. The First Amendment prohibits governmental entities from unconstitutionally infringing rights of free speech. Students in public schools, therefore, do have rights under the First Amendment. Although public school officials retain substantial—though not absolute—discretion in designing school curricula, attempts to censor access to materials in the school library will not be permitted unless the restricted materials can be demonstrated to be educationally unsuitable.

The Supreme Court held in *Tinker v. Des Moines Independent Community School District* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹ Applying that principle, the court ordered a public school to allow students to wear black armbands in protest of the Vietnam War, explaining: “In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”²

Lower courts have echoed that sentiment. For example, in *American Amusement Machine Association v. Kendrick*, an appellate court held: “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”³ The courts also explicitly have held that minors’ First Amendment rights include the right to receive information.

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

2. *Id.* at 511.

3. *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

The Right to Receive Information

In *Board of Education v. Pico* a school board attempted to remove books from a school library.⁴ The school board's action did not restrict minors' own expression, but the Supreme Court rejected the removal because "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"⁵ and made clear that "students too are beneficiaries of this principle."⁶

There are two instances in which minors' rights are narrower than those of adults. First, school officials have significant latitude if the removal is based objectively on a finding that the material is "educationally unsuitable" rather than on an official's subjective disagreement with or disapproval of the content.⁷ The determination of whether material is "educationally unsuitable" is a fact-based inquiry that will generally require the testimony of educational experts.

Second, states can determine that certain materials are obscene for minors even if the materials are protected for adults. In *Ginsberg v. New York* the Supreme Court upheld the conviction of a magazine vendor for selling an adult magazine to a sixteen-year-old.⁸ The court explained that, although the magazine clearly was not obscene for adults, the state had acted within First Amendment bounds in adopting a broader definition of obscenity for minors. Most states have enacted "harmful to minors" obscenity statutes. Whether material is "harmful to minors" is a determination that must be made by a court.

Courts have, moreover, recognized limits on the *Ginsberg* principle. First, states may not simply ban minors' exposure to a full category of speech, such as nudity, when only a subset of that category can plausibly be deemed obscene for them.⁹ Second, the determination of whether material is "harmful to minors" must be made by reference to the entire population of minors—including the oldest minors. For

example, some lower courts have upheld restrictions on displays only if the restrictions did not prohibit the display of materials that would be appropriate for older minors.¹⁰

Student Speech Rights

Although minors do not shed their First Amendment rights at the schoolhouse gate, the Supreme Court has held that students' speech rights are not "automatically coextensive with the rights of adults in other settings"¹¹ and has generally applied those rights "in light of the special characteristics of the school environment."¹²

School officials also have greater discretion in the classroom and in the context of planned school events. In *Hazelwood School District v. Kuhlmeier*, for example, the Supreme Court permitted the removal of certain articles from a school newspaper.¹³ The student journalism class that wrote and edited the newspaper had planned to run several controversial stories about student pregnancy and the impact of divorce on students.¹⁴ The Supreme Court rejected the

4. *Board of Education v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

5. *Id.* at 867.

6. *Id.* at 868. Other cases in which the Supreme Court emphasized minors' right to receive information include *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975) (holding that "speech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them") and *Bolger v. Youngs Drug*

Products Corp., 463 U.S. 60, 75 n. 30 (1983) (criticizing a federal ban on mailing unsolicited contraceptive advertisements because it ignored adolescents' "pressing need for information about contraception").

7. *Pico*, 457 U.S. at 871.

8. *Ginsberg v. New York*, 390 U.S. 629 (1968).

9. *Erznoznik*, 422 U.S. at 212–14 (1975).

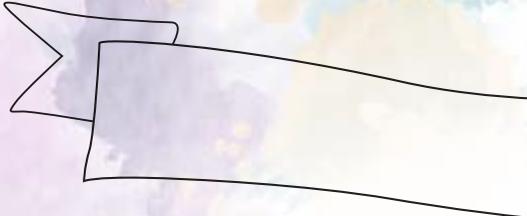
10. *American Booksellers Association v. Webb*, 919 F.2d 1493, 1504–05 (11th Cir. 1990); *American Booksellers Association v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989).

11. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

12. *Pico*, 457 U.S. at 868 (quoting *Tinker*, 393 U.S. at 506).

13. *Hazelwood School District v. Kuhlmeier* 484 U.S. 267 (1988).

14. *Id.* at 274.



STUDENTS' FIRST AMENDMENT RIGHTS IN THE SCHOOL LIBRARY CONTEXT, THEREFORE, ARE BROADER THAN THOSE IN A CLASS, A SCHOOL-SPONSORED ASSEMBLY, OR OTHER CURRICULUM-BASED ACTIVITIES.

students' First Amendment claims, finding that school officials have greater discretion when there is a danger that student expression will be perceived as "bear[ing] the imprimatur of the school."¹⁵

Similarly, in *Bethel School District No. 403 v. Fraser* the Supreme Court held that a student could be disciplined for having delivered a speech that was sexually explicit, but not legally obscene, at an official school assembly.¹⁶ The court found it "perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."¹⁷

In a more recent school discipline case, *Morse v. Frederick*, the Supreme

Court reiterated the important right that students have to participate in political speech, while at the same time providing school officials with authority to discipline students who advocate illegal drug use.¹⁸ A student was suspended from school for displaying a sign reading "Bong Hits 4 Jesus" across the street from the school when students had been dismissed from school to watch the Olympic torch relay travel through town. The court upheld the suspension on the ground that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" and that "the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it."¹⁹

Student Rights, the Curriculum, and the School Library

In applying *Hazelwood* to other situations, lower courts have applied greater deference to school officials attempting to control curricular speech restrictions. For example, in *Virgil v. School Board of Columbia County* the Court of Appeals affirmed a school board's decision to remove selected portions of *The Miller's Tale* and *Lysistrata* from a humanities course curriculum, stating: "In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity."²⁰ In upholding the removal, the court emphasized that the disputed materials remained in the school library,²¹ which, unlike a course

15. *Id.* at 271, 273 (holding that curriculum decisions are permissible if they are "reasonably related to legitimate pedagogical concerns").

16. *Bethel School District*, 478 U.S. at 685–86.

17. *Id.*

18. *Morse v. Frederick*, 551 U.S. 393 (2007).

19. *Id.*

20. *Virgil v. School Board of Columbia County*, 862 F.2d 1517, 1520 (11th Cir. 1989).

21. *Id.* at 1523, n. 8.



PUBLIC SCHOOL OFFICIALS MUST BE COGNIZANT OF THE **FIRST AMENDMENT** RIGHTS OF MINORS WHEN THESE OFFICIALS MAKE DECISIONS ABOUT LIBRARY RESOURCES, THE CURRICULUM, AND POLICIES RELATED TO EXTRA-CURRICULAR ACTIVITIES

curriculum, was a “repository for ‘voluntary inquiry.’”²²

Students’ First Amendment rights in the school library context, therefore, are broader than those in a class, a school-sponsored assembly, or other curriculum-based activities. For example, in *Campbell v. St. Tammany Parish School Board* the Court of Appeals confirmed that “the key inquiry in a book removal case is the school officials’ substantial motivation in arriving at the removal decision.”²³

The court observed that “in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the school board’s non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to ‘strangle the free mind at its source’.”²⁴ Similarly, the district court in *Case v. Unified School District No. 233* found a school

board’s removal of *Annie on My Mind* unconstitutional where a “substantial motivation” behind the library removal was the officials’ disagreement with the views expressed in the book.²⁵

In a more recent case, *American Civil Liberties Union of Florida v. Miami-Dade School Board*, the Eleventh Circuit upheld the school board’s removal of a picture book on the ground that the book was factually inaccurate.²⁶ School board members defended their removal decision by arguing that the books were educationally unsuitable because they are viewpoint-neutral and omit detailed facts about Cuba’s totalitarian dictatorship. The ACLU expert noted, however, that the “alleged omissions are appropriate omissions given the age level and purpose for which the book is intended.”²⁷ The district court had concluded that the removal decision was politically motivated, but the appellate court disagreed.²⁸ The determination of whether a decision to censor materials is based on educational suitability or political motivation will be a fact-based inquiry in every instance. The conclusion that the Miami-Dade School Board did not engage in politically motivated censorship, therefore,

22. *Id.* at 1525 (quoting *Pico*, 457 U.S. at 869); but see *Pratt v. Independent School District No. 831*, 670 F.2d 771, 779 (8th Cir. 1982) (refusing to allow a school board to strike a short story, “The Lottery,” from the school curriculum merely because the story remained available in the school library).

23. *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 190 (5th Cir. 1995).

24. *Id.*

25. *Case v. Unified School District No. 233*, 908 F. Supp. 864 (D. Kan. 1995)

26. *American Civil Liberties Union of Florida v. Miami-Dade School Board*, 557 F.3d 1177 (11th Cir. 2009), *cert. denied*, 130 S.Ct. 659 (2009).

27. *American Civil Liberties Union of Florida v. Miami-Dade School Board*, 439 F. Supp. 2d 1242 (S.D. Fla. 2006).

28. *Id.*

would not preclude another court from finding in a different situation that removal of the same books in another library was unconstitutional discrimination based on viewpoint.

The removal of books from open shelves, rather than an outright removal from the library, also raises First Amendment concerns. In *Counts v. Cedarville School District* a federal court in Arkansas addressed a dispute over whether books from the *Harry Potter* series could be removed from the open shelves of a school library and available only with parental permission.²⁹ The court held that the minor's rights were violated by the removal of the books from the open shelves because the books were "stigmatized."³⁰

Internet Access and Filtering

How do these principles apply in the context of Internet access? Plainly there are materials on the Internet that would fit the definition of "harmful to minors" and that are "educationally unsuitable." However, the Internet also provides educators and students with a powerful tool for expanding their knowledge beyond what can be covered in the curriculum. From a technological standpoint filters simply cannot block only material that is obscene, child pornography, or harmful to minors or determine the educational suitability of material. Filters will block materials of educational value.

The Children's Internet Protection Act (CIPA) statute requires schools and libraries that receive federal E-Rate discounts or Library Services and Technology Act (LSTA) grants for Internet access to use filters that will block *visual* images that are obscene, child pornography, or harmful to minors. That statute was upheld by the Supreme Court in one challenge because the justices concluded that filtering for adults at public libraries would be disabled by request and without the need for adults to justify their request for access to particular sites.³¹ That case did not address the issue of filtering in schools.

A school Internet filtering system recently was challenged in Camdenton, Missouri. In that case, the district court held that the school district was acting in an unconstitutional manner when it used a filtering system that blocked websites supporting or advocating on behalf of lesbian, gay, bisexual, and transgender (LGBT) people but permitted access to websites that condemn homosexuality or oppose legal protections for LGBT people.³² After the court's finding, the school district agreed to stop blocking LGBT websites, submit to monitoring for eighteen months, and pay \$125,000 in attorneys' fees.

Conclusion

Public school officials must be cognizant of the First Amendment rights of minors when these officials make decisions about library resources, the curriculum, and policies related to extra-curricular activities. Decisions to restrict access to materials that are based on the officials' disagreement with the views expressed in the material, rather than on their educational suitability, could subject the school district to litigation and substantial costs.



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29. *Counts v. Cedarville School District*, 295 F. Supp. 2d 996, 1000–01 (W.D. Ark. 2003).

30. *Id.* at 999. 31. *United States v. American Library Association*, 539 U.S. 194, 209 (2003).

32. *PFLAG v. Camdenton R-III School District*, Case No. 2:11-cv-04212 (W.D. Missouri, 2/15/12).

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