**Civics 101**

**1st Amendment in Schools Transcript**

**Nick Capodice:** [00:00:19] This is Civics 101, I'm Nick Capodice. If you've listened to a few episodes of our show you know that we don't have a lot of time. We try to keep these things down to about 15 minutes so they're digestible. And we can't really get into the moments of historical significance that are relevant to our episode topics like landmark Supreme Court cases actual presidential elections all that fun stuff. And that's what we're going to do today. We're calling it Civics 101 IRL. It's the real historical moments relative to our episode topics. So hope you have fun. Stick around. Last week I got this phone call from Dave Alcox

**David Alcox:** [00:00:54] Hey Nick this is Dave Alcox of Milford high school

**Nick Capodice:** [00:00:57] Mr. Alcox is a superstar social studies teacher here in New Hampshire, and a professional deejay.

**David Alcox:** [00:01:03] I've got a wicked great news for you. We're going to have John and Mary Beth Tinker from Tinker vs Des Moines, and Cathy Kuhlmeier from Hazelwood versus Kuhlmeier come visit us at Milford High on November 2nd...

**Nick Capodice:** [00:01:15] And I didn't want to sound like a complete fool when he called me. But the truth is I didn't know who these people were, and when I found out I had to tell someone. So I grabbed producer Hannah McCarthy. So let me ask you Hannah Do you know who John Tinker Mary Beth Tinker and Cathy Kuhlmeier are?

**Hannah McCarthy:** [00:01:34] I have no idea. Are these friends of yours or something?

**Nick Capodice:** [00:01:37] No I had no idea either and now I can say for certain I'm going to go to my grave remembering the names Tinker, Fraser, Kuhlmeier and Frederick.

**Hannah McCarthy:** [00:01:45] This is going to be good.

**Nick Capodice:** [00:01:46] Well what we're going to talk about today and the rabbit hole into which I fell is about four Supreme Court cases that are sort of the great quartet of Supreme Court cases about your right as a student in terms of the First Amendment and public schools. And that's actually a really important quick distinction. I'm talking about public schools here

**Hannah McCarthy:** [00:02:04] Right.

**Nick Capodice:** [00:02:04] Because as I've discovered private schools can do whatever the heck they want.

**Hannah McCarthy:** [00:02:07] That's right.

**Nick Capodice:** [00:02:08] Number one, Tinker versus Des Moines.

**Archival Audio:** [00:02:12] John F Tinker and Mary Beth Tinker, minors, etc. et al vs Des Moines independent community school district et al.

**Nick Capodice:** [00:02:21] The Tinkers name being first means that they are the petitioners. And Des Moines being second means they are the respondent.

**Hannah McCarthy:** [00:02:29] OK so that means that Des Moines is happy.

**Nick Capodice:** [00:02:32] Yes the original decision they don't want anything else to happen.

**Nick Capodice:** [00:02:35] Right. The Tinkers lost the previous case and Des Moines won the previous case. They're cool to stand. Mary Beth tinker, great story, Mary Beth Tinker was 13. Her brother John was about 16 I believe when this happened. Their father was a Methodist minister and he was very involved in the civil rights movement. And John and Mary Beth joined some students who were protesting the Vietnam War the Vietnam War and the United States. It's the first time that war is coming to American living rooms.

**Hannah McCarthy:** [00:03:05] Right through television.

**Nick Capodice:** [00:03:06] Yes absolutely. The horrors of war. And they were going to protest by joining some students who were wearing black armbands.

**Archival Audio:** [00:03:13] Specifically the views were that they mourn the dead on both sides, civilian and military in that war and they supported the proposal which would have been made by United States Senator Robert Kennedy. The truce which had been proposed for that war over the Christmas period made it open ended or an indefinite truce.

**Nick Capodice:** [00:03:33] Totally coincidentally two days before this big protest of wearing black armbands the principal of their school met with a bunch of other principals in Des Moines and passed a rule saying arm bands are forbidden in our school district.

**Hannah McCarthy:** [00:03:48] So were other kids wearing armbands?

**Nick Capodice:** [00:03:51] Yeah this was going to, when they heard that the principal heard that this was going to be a thing that happened. They're like look what are we going to do. Kids are going to be wearing armbands in school and it's going to be a disruption.

**Hannah McCarthy:** [00:04:00] OK so he tried to preempt the whole thing.

**Nick Capodice:** [00:04:02] Tried to preempt the whole thing but they wore them to school anyways and they were suspended. And immediately after they were suspended they started getting the threats. So yes. People called them a bunch of commies. Someone said they were going to firebomb their house. And one letter one letter that actually Marybeth still has to this day is like you're welcome to wear your armbands just do it on Saturday. You shouldn't be doing it in school. So they got in contact with the ACLU. They got a case together and through appeals it ends up in the Supreme Court and the vote is seven to two in favor of the Tinkers.

**Hannah McCarthy:** [00:04:40] That is a landslide. Go John and Mary Beth.

**Nick Capodice:** [00:04:44] John and Mary Beth. The seven justices wrote in the decision that yes their first amendment rights have been violated and they had a right to protest in school. The justice, the chief justice who wrote the decision is Abe Fortas. So when you have a Supreme Court case there's a decision where the majority writes the majority of it and then you can dissent. If you're someone who disagreed you can write in the dissent and Abe Fortas wrote the decision. He said "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Those words are used over and over in other Supreme Court cases further down the line. It's a magnificent decision and it creates this massive blanket precedent called the Tinker Standard which is where you ask was this speech disruptive. And if it's not disruptive then it's protected in schools. John and Mary Beth Tinker case 1969. And to this day John and Mary Beth do what's called the Tinker tour. They travel the country to tell students about their First Amendment rights.

**Hannah McCarthy:** [00:05:50] That is very cool.

**Nick Capodice:** [00:05:51] Mary Beth once said, one of my favorite quotes I found of hers, it's a good way of life to speak up. To use your rights. And she says that students are particularly in a position to speak up because students have virility, students are curious, students are the next generation who are is who is going to challenge the way the previous generation had everything all set up. So later on as the years go by the Supreme Court has to decide, are there things besides disruption quote unquote that makes something protected or not in school. So we're going to shift forward in time to 1986 were there.

**Hannah McCarthy:** [00:06:27] You should play some music.

**Nick Capodice:** [00:06:28] Oh I'm going to totally play 1986 music for this. It's going to be Cruel Summer.

**Hannah McCarthy:** [00:06:32] Yeah.

**Archival Audio:** [00:06:36] It does not say one should not swear in Latin class, the rule says that obscene or profane language is disruptive.

**Nick Capodice:** [00:06:46] 1986 Bethel v Fraizer.

**Archival Audio:** [00:06:50] The Facts of this case are that on April 26 1983 Matt Fraser, a 17 year old high school senior, gave a speech to the Associated Student Body.

**Nick Capodice:** [00:07:00] Gave speech nominating his friend Jeff for student body vice president. It was not full of cuss words.

**Archival Audio:** [00:07:06] He gave a crude and vulgar speech.

**Nick Capodice:** [00:07:08] It was very lewd and it was it was short but it was just goofy and it was all lewd and I think I'm not going, I'm not going to say it. So if you want to read it you can just go listen to it.

**Hannah McCarthy:** [00:07:21] We can't stop you.

**Nick Capodice:** [00:07:22] We can't stop you from googling it but it to be to be honest Hannah it's like no worse than a lousy Saturday Night Live monologue.

**Hannah McCarthy:** [00:07:29] Okay.

**Nick Capodice:** [00:07:30] Yeah except it's way too short. So it's yeah it's not long enough to be about SNL skit but it's just it's just full of sexual innuendo that's all it is. So then he was sent home for that. He went to court. He went to the 9th Circuit 9th Circuit Court of Appeals which ruled in his favor saying that double entendres were protected speech in schools and then the Bethel district brought it up and got up to the highest court in the land. The Supreme Court. Bethel comes first. Bethel v. Fraser because the Bethel school district is the petitioner in the case.

**Hannah McCarthy:** [00:08:05] I'm a little surprised. In the 80s. That this, that a school would even bother to say no it's our right to send you home when you exhibit lewd behavior.

**Nick Capodice:** [00:08:19] Because it's about 1960s when Tinker happened, this is a time the height of protest, it's the 60s you know America is learning how to protest in a new way. By the 1980s this is kind of been accepted. You know kids have freedom of speech in schools. Kids are expressing themselves but can it be lewd. It was another 7 - 2 vote. And the answer is no. You cannot say lewd speech in school and it is not protected in school.

**Archival Audio:** [00:08:46] The Ninth Circuit we believe has misconstrued the extent of the rights a student has under the First Amendment in a public school setting.

**Hannah McCarthy:** [00:08:55] I was wondering because I know in middle school at least while I was still in school in Massachusetts in a public school system if a kid wore a T-shirt with a lewd slogan or image on it they had to turn it inside out or go home.

**Nick Capodice:** [00:09:09] Yep same happened to my school particularly in the 1980s something called the coed naked T-shirts which were really hot in 1989 1990. And because they were lewd the school could tell you to turn them inside out or if they had swear words. So they didn't have to just say swear words. But even if they were lewd it couldn't happen in school. One of the quotes from the decision was "the first amendment does not protect speech in school that is vulgar or inconsistent with the fundamental values of public school education." And it kind of makes sense to me even though I'm you know I'm not a crotchety old man but you know you're you can't just go around saying lewd stuff in school.

**Hannah McCarthy:** [00:09:49] Right. Yeah yeah yeah. The Queen Mab speech is very filthy.

**Nick Capodice:** [00:09:53] So in the case the dissent and as I've said before the dissent is always kind of my favorite part of Supreme Court cases because it's like the minority coming out being like I still stand for bippity bop. Justice Stevens John Paul Stevens wrote the dissent and he said he just quoted he said "Frankly my dear I don't give a damn. When I was a high school student the use of those words in a public forum shocked the nation. And today Clark Gable's four letter expletive is less offensive than it was then." So he says that what is considered dirty or unprotected as it were in school can change over the years. Yes so let's let it be so let it be kind of like let it be kind of alive.

**Hannah McCarthy:** [00:10:39] For those of you listening who don't know what that's referencing that's Rhett Butler.

**Nick Capodice:** [00:10:43] Oh yeah.

**Hannah McCarthy:** [00:10:43] From uh, um, God,

**Nick Capodice:** [00:10:45] Gone with the Wind.

**Hannah McCarthy:** [00:10:47] Yeah.

**Nick Capodice:** [00:10:48] Two more and they're going to be fast. So that was in 1986 we're going to go forward in time to another case and this is Hazelwood v Kuhlmeier. now so the Tinker case was cited in the Fraser case and tinker and Fraser are cited and Hazel would be Kuhlmeier. And that's what I love is like Supreme Court decisions are living. They build a top each other. Hazelwood v Kuhlmeier decided in 1988. Kathy Kuhlmeier, she worked at a school newspaper called the Spectrum.

**Hannah McCarthy:** [00:11:20] Alright.

**Nick Capodice:** [00:11:20] What a fun name this was! What a ROYGBIV name! The Spectrum. And what they did when they wrote the Spectrum newspaper is they gave the proofs of what the paper is gonna be to the principal. He looked it over and said great job kids and printed it. Principal Reynolds got the proofs. It was a May issue. And there were two stories that the principal didn't really care for. One was about teen pregnancy and the other was about divorce. So what he did was he didn't tell anybody he just removed those articles and published the newspaper. Cathy Kuhlmeier and company got their paper the Spectrum opened it up and saw these two big articles were missing and they said what what's up with that. And the principal said that's you know and he gave his reasons for it goes up to the U.S. Supreme Court.

**Archival Audio:** [00:12:11] Mr. Chief Justice and may it please the court. This case comes before the court to resolve the issue of whether a school sponsored high school newspaper produced and published by a journalism class is a part of the school adopted curriculum under a teacher's supervision and subject to a principal's review. It is a public forum for the purpose of the First Amendment.

**Nick Capodice:** [00:12:33] Can schools decide what you can and can't put in a school newspaper? So Hazelwood School District v. Kathy Kuhlmeyer. Kuhlmeier got the help of the American Civil Liberties Union. She sued. She won. Then the Hazelwood district appealed it to and went up to the Supreme Court. This vote was 5 3. It's closer than the others and the victor the Hazelwood school district. Schools do have the right to alter to say what you can and can't put in a school newspaper and this was Justice White who delivered the majority decision and he said "the question we addressed and Tinker is different from the question whether the First Amendment requires a school to promote particular student's speech. The former question addresses educators ability to silence a student's personal expression. That happens to occur on school grounds but the latter question concerns educators' authority over school sponsored publications." So this case goes on to say if it's in a newspaper if it's in a school play if it's in a thing the school does, the school has the right to decide what can and can't be done. So you could do a rude play and the school could say we're not going to put that play up and your first amendment rights are not violated. What do you think of that one?

**Hannah McCarthy:** [00:14:00] I remember being very upset when my school...well in retrospect I get it. We were going to do the King and I and I prepared my audition song and everything from the King and I and and they decided no it's racist we're not doing it. It is racist. They shouldn't have been doing it. But at the moment I just thought like bunch of soft-handed ninnies, like is not is not a good reaction but I don't understand it. I understand that there is an implicit like as though the school is agreeing with whatever is being put in this material because the school's name is on it.

**Nick Capodice:** [00:14:33] Yeah it's an interesting case and I think because it extends to all sorts of things musical performances, plays I think of all of the possibilities this decision could change and it still stands. I mean Hazelwood v Kuhlmeier stands.

**Hannah McCarthy:** [00:14:46] Yeah. Especially, well not especially. There's always there's always some tumult in the country. But right now I think you've got a lot of young people who feel very passionately about certain political and racial tensions. And if they want to write a piece about it and you know perhaps cite use of a racial slur or something and they want to print that and talk about that word for example and why that word is wrong and they're going to print it because it's important that you read it as it is something like this you know and the school says we're not publishing that because that's a racial slur.

**Hannah McCarthy:** [00:15:24] Or maybe not even quite that we're just not even going to really give you a reason beyond use of racial slur. And we're just not printing your piece. I think it couldn't leave room for let's say a hyper conservative principle to just push back on anything that offended his or her ideals.

**Nick Capodice:** [00:15:41] Yeah. Well I think you might be in the same bailiwick as, this is one of my favorite dissents ever written, Justice William Brennan, "the young men and women of Hazelwood east high expected a civics lesson, but not the one the court teaches them today such unthinking contempt for individual rights is intolerable from any state official. It's particularly insidious from a school principal to whom the public can trust the task of inoculating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees." You, listener. Go read the whole case. It's a fascinating dissent. It's a lot of fun full of passion.

**Nick Capodice:** [00:16:23] One extra point that I want to make that Cathy Kuhlmeier made about defending her article staying in the newspaper was that there was so much teen pregnancy at her school that they had their own daycare.

**Hannah McCarthy:** [00:16:34] Wow. I have never heard of that.

**Nick Capodice:** [00:16:36] Yes. You're not allowed to write about teen pregnancy but enough students are having sex and having underage children that you have a daycare at your high school.

**Hannah McCarthy:** [00:16:45] That takes it to a completely different level.

**Nick Capodice:** [00:16:48] And now we're up to our last one.

**Hannah McCarthy:** [00:16:49] All right.

**Nick Capodice:** [00:16:50] And it's never the last one because gosh there's going to be is probably one being argued right now and it's it's 2007 Morse v.. Frederick.

**Nick Capodice:** [00:17:00] We're going to go all the way up. Juneau what I'm talking about we're going to Juneau Alaska.

**Archival Audio:** [00:17:04] ...everyone has been waiting for. And here are the first two torchbearers to enter the stadium Dorothy Hamill.

**Nick Capodice:** [00:17:11] This is during the torch relay for the 2002 Winter Olympics in Salt Lake City Utah. It's so fun. A schoolhouse Supreme Court case that involves the Olympics and our neighbor to the north.

**Archival Audio:** [00:17:24] Respondent Joseph Frederick Sr. was late to school that day when he arrived. He joined his friends across the street from the school to watch the event as the torchbearers and camera crews passed by. Frederick and his friends unfurled a 14 foot banner bearing the phrase quote "bong hits for Jesus" endquote.

**Nick Capodice:** [00:17:44] Bong Hits for Jesus. And the four was the number four and it was all capital letters except for the 'i" in hits. BONG HiTS 4 JESUS. So Frederick hung up the bong hits banner and principal Morse, Deborah Morse she took the banner down and Frederick was suspended. How would you rule on this one?

**Hannah McCarthy:** [00:18:12] It may fall under the lewd category because it will not lewd but generally inappropriate because it's saying drugs.

**Nick Capodice:** [00:18:23] You have these nine old Supreme Court justices men and women talking about bong hits for Jesus. And one of them kept being like, "it was a cryptic message. Such cryptic. What did he mean in Bong Hits for Jesus?"

**Archival Audio:** [00:18:38] I mean that's what I actually seriously don't understand suppose the school has the following rule. By the way on our field trips you can carry around 15 foot banners they can say anything except they can't talk about drugs and they can't talk about sex and they can't talk about. I don't know. Or I'd say three things. Would that be constitutional. Well I mean I think I think a school could certainly prohibit the display of banners on a school trip or in a school or some...suppose that this particular person had whispered to his next door neighbor bong hits for Jesus. Suppose that's what had happened.

**Nick Capodice:** [00:19:16] How are they going to vote?

**Hannah McCarthy:** [00:19:20] I feel a little nervous.

**Nick Capodice:** [00:19:20] Is the boy and the banner protected, or is the principal in her in her rights thinking of what you know about Hazelwood v Kuhlmeier, thinking of what you know of the Tinker standard and thinking of what you know about Fraser?

**Hannah McCarthy:** [00:19:33] I think given what I've learned so far from this lesson. Yeah. The principal is protected.

**Nick Capodice:** [00:19:39] Really.

**Hannah McCarthy:** [00:19:41] Yeah. Because we've seen two cases where if there is objectionable material the school is in the right to say no.

**Nick Capodice:** [00:19:50] The court votes five to four, close one, in favor of principal Morse. You got it on the head. And who wrote the decision was the newest chief justice. Justice Roberts.

**Hannah McCarthy:** [00:20:02] OK.

**Nick Capodice:** [00:20:02] It was an early decision of the new of the Roberts, uh, of the Roberts court. He said in his decision he said "Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it's going to disrupt the work of the school. Fraser demonstrates that the constitutional rights of students in public school are not automatically coexisting with the rights of adults in other settings like Fraser. If he had said those rude words outside a school th at would've been fine. But he can't say them in school and then Kuhlmeier acknowledged that schools may regulate some speech even though the government couldn't censor it outside of the school. And finally the concern here is not that Frederick speech was offensive but that it is reasonably viewed as promoting illegal drug use.

**Hannah McCarthy:** [00:20:54] So my biggest issue with all of this is that all of these Supreme Court judges are saying you know you've got adult rights and then you've got what happens to kids in the school in the public school system.

**Hannah McCarthy:** [00:21:08] And so it's it's basically saying that they aren't, children do not have the same rights as adults. In this certain.

**Nick Capodice:** [00:21:16] in this public school setting.

**Hannah McCarthy:** [00:21:18] Right. So why is it that the public school is this hallowed ground where students are stripped of something.

**Nick Capodice:** [00:21:25] Well do you think that students should have the right to say whatever they want whenever they want in school?

**Hannah McCarthy:** [00:21:32] No.

**Nick Capodice:** [00:21:33] Well let's talk about disruption first of all OK. Can somebody stand up and start screaming in class and disrupt your lessons.

**Hannah McCarthy:** [00:21:39] People do it.

**Nick Capodice:** [00:21:40] They do it but should they be allowed to do it?

**Hannah McCarthy:** [00:21:42] Well they're punished right.

**Nick Capodice:** [00:21:43] So should they not be punished.

**Hannah McCarthy:** [00:21:45] No I think they should be punished. I guess the idea is that the learning environment we're trying to teach our youth how to be responsible how to earn those rights as adults. I can yeah I can see that. I can understand that. I was also always a good kid. So it's easy for me to just imagine not to say that these are bad kids who are dissenting. Yeah but I only ever saw that it's entertaining and I never came up against sitting in the principal's office for having started an expletive.

**Nick Capodice:** [00:22:18] I mean I don't think it's, I'm a dyed in the wool champion of freedom of speech. I always have been. You know but all these cases like both sides make sense to me. You know something in them makes sense to me. So I can understand the court's difficulty in making these decisions. And in the dissent for Morse v Frederick it's Justice John Paul Stevens again, and his dissent by the end of it gets around to the point of basically this whole thing we've been talking about. He starts with this he says "although this case began with his silly nonsensical banner it ends up with the court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs." And then he says "the Vietnam war is remembered today as an unpopular war. But during the Tinker era during its early stages the dominant opinion that Justice Harlan mentioned in his Tinker dissent regarded opposition to that war as unpatriotic if not treason." So look where we are now. Who knows if feelings about drugs cannot change.

**Hannah McCarthy:** [00:23:26] We know that they can change we're seeing the marijuana laws change across the country.

**Nick Capodice:** [00:23:30] Absolutely. So I really like that in his dissent for for this case as he references Tinker and he says guys don't forget you know the Vietnam War. You would be just screamed at for opposing the Vietnam War. You'd get in trouble. People would get into fights with you at bars. I really like that he comes back to Tinker and he comes back in a way that's supportive of this. The Constitution is interpreted and those interpretations change over the years. These four students Tinker Fraser Kuhlmeier, Frederick. Four kids changed the ways our First Amendment rights are interpreted in schools.

**Nick Capodice:** [00:24:07] Well Mr. Alcox, if you're listening I'm ready now. Send me your Tinkers and your Kuhlmeiers. This episode was produced by me Nick Capodice and Hannah McCarthy. Music is by the inimitable Peetie Wheetstraw, 1937. And Matt Oakley. The dulcet tones of Supreme Court justices past and present come from oyez.org, it's a free Law Project from Cornell's Legal Information Institute. Civics 101 is a production of NHPR, New Hampshire Public Radio.