

A SYMPOSIUM PRECÍS

Thomas E. Baker*

In commemoration of the bicentennial of the Constitution in 1987, Congress established a permanent endowment at Drake Law School¹ "to encourage graduate study of the American Constitution, its roots, its formation, its principles, and its development."² The Constitutional Law Center's programs and activities seek to broaden and deepen understanding of the Constitution by inviting prominent scholars, jurists, and national leaders to campus to share their vision of the Constitution in the larger culture.

Our Belin Lamson McCormick Zumbach Flynn Symposium is one of the highlights of the academic year. It is named to show our appreciation to the sponsoring law firm for its generous support of the symposium. This year's symposium is titled: *The Constitution Inside the Schoolhouse Gate—Student Rights Thirty Years After Tinker v. Des Moines School District*.

Sitting around the Eckhardt family living room on a cold, gray December Saturday in Des Moines, Iowa, Christopher Eckhardt and John and Mary Beth Tinker made the fateful decision to wear black armbands to school the next week to protest the involvement of the United States in the Vietnam conflagration and to mourn the dead on both sides.³ Their silent witness began a new chapter in rights of conscience. "It can hardly be argued," Justice Abe Fortas wrote, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴ Thirty years later, we gathered together a prominent array of constitutionalists, civil libertarians, policy analysts, lawyers, judges, school administrators, professors, students, and some of the principal actors in the case to reconsider the events leading up to the Supreme Court's decision and what that landmark ruling has meant for the First Amendment rights of all Americans.

The Keynote Address, *Keeping the Constitution Inside the Schoolhouse Gate*, was delivered with characteristic aplomb by Nadine Strossen, President of the American Civil Liberties Union and Professor at New York Law School. Her

* James Madison Chair in Constitutional Law & Director of the Constitutional Law Center at Drake University Law School; B.S. cum laude, Florida State University, 1974; J.D. with high honors, University of Florida, 1977.

1. 20 U.S.C. § 4516 (1994).

2. *Id.* § 4501.

3. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969).

4. *Id.* at 506.

rousing speech challenged the audience to be "ever vigilant" in the cause of protecting civil rights and civil liberties.

Dr. John W. Johnson, Head of the History Department at the University of Northern Iowa, presented the first paper, *Behind the Scenes in Iowa's Greatest Case: What Isn't in the Official Record of Tinker v. Des Moines Independent Community School District*. The "guy who wrote the book" told three fascinating stories about the overlooked litigant, the reluctant Justice, and the surprising dissenter, or, in turn, Christopher Eckhardt, Abe Fortas, and Hugo Black.⁵ We heard the comments and reminiscences of Ed Bittle, Gil Cranberg, and Dan Johnston. Back then, Ed was a young lawyer on the school district side; Gil was editor of the editorial page of the *Des Moines Register*, and Dan represented the plaintiff school children.

Professor Akhil Reed Amar, the Southmayd Professor at Yale Law School, presented a paper titled *A Tale of Three Wars: Tinker in Constitutional Context*. He wove together strands of history from the founding and from the Reconstruction era as background for the modern understanding of free speech for dissenters, provocatively reminding us that *Tinker* was after all a Fourteenth Amendment case.⁶ Keith Miller and Sue Seitz led a wide-ranging discussion that reflected on how we think of ourselves as a polity; themes included the centrality of public education, the importance of freedom of conscience, and the impact of transformative technology, especially the Internet, that portends our First Amendment future.

Dan L. Johnston, Esquire, who is proud to bear the title "the attorney for the kids," gave a reflective luncheon talk which tongue-in-cheek I titled *What the Pigeons Have Done to My Statue*. He was joined in the animated panel discussion that followed by Ed Bittle and by John Tinker, one of the three plaintiffs in the case. This is the place to thank John and his mother Dr. Lorena Jeanne Tinker who attended the symposium and contributed immeasurably to the day's discussions, along with other members of the Tinker family and friends.

Erwin Chemerinsky, the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California, recounted the case law developments over the past three decades in the Supreme Court and in the lower courts in a paper titled *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* He parsed the opposing opinions in *Tinker* to find two competing sets of assumptions, one

5. See generally JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960s* (1997) (discussing the behind-the-scene stories regarding the *Tinker* case).

6. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (weaving a complete discussion of the Bill of Rights and its effect on history).

set that emphasized students rights and the other that emphasized the authority of the school officials. He then reconciled later decisions with these polar sets of assumptions to synthesize the complexity of the case law. Bob Hunter opined that the 1969 decision simply has not held up over time because of a lack of judicial commitment to individual rights. Jeff Krausman challenged the entire enterprise of students rights in a spirited exchange with Erwin. The audience joined in, as well, in a discussion of the need for discipline in the schools and the importance of developing individual autonomy in the students.

Kay S. Hymowitz, Senior Fellow, Manhattan Institute, added a wider cultural perspective discussing *Tinker and the Lessons from the Slippery Slope*. She provoked the symposium to consider whether the children's rights movement has resulted in more harm than good, for society and for children themselves. She criticized "anticultural" thinking that undermines the appropriate development of children by mistakenly treating them as short adults.⁷ A lively discussion ensued. Indeed, after time was called, people stayed around well into the shank of the afternoon to continue the conversation she started.

Thus, thirty years later, the debate over students' rights continues unabated, each side equally convinced of being better informed by the events of the ensuing decades. The opinions of Abe Fortas and Hugo Black echoed once again through Des Moines, Iowa and the nation in the ongoing dialogue that is our Constitution.

Certainly, I want to single out each and every presenter and commentator for my deep felt professional and personal appreciation. What a remarkable collection of intellects and personalities they are, as the following pages reflect. The Articles published here benefited, to be sure, from being first presented to and critiqued by the expert and experienced commentators and then from being exposed to the audience's rich deliberations. My collective thanks to all the participants who attended the symposium and contributed to a memorable day of high-minded discussion.

There are many other thanks I owe. I am grateful for the financial support of the Iowa Civil Liberties Union and the Historical Society of the United States Courts for the Southern District of Iowa for hosting the reception following the Keynote Address. Special thanks also go to the Quill and Scroll Honorary Society for High School Journalists, and to individual past and current members of the board of directors of the Iowa Civil Liberties Union, who funded fellowships so that area students and teachers could attend the symposium. I also want to thank Nancy Dunham, Brian Fagan, Barbara Frueh, William Hennan,

7. See generally KAY S. HYMOWITZ, *READY OR NOT: HOW TREATING CHILDREN AS SMALL ADULTS ENDANGERS THEIR FUTURE—AND OURS* 76-101 (1999) (discussing the effect of anticultural education on educational results of children today).

Patrick McGraw, Norma Snodgrass, and Karla Westberg for their help with the logistics of planning the event. Finally, I want to thank the members of the Drake Law Review—especially Jennifer Brooks and Christopher Dyer—for their hard work toward publishing the Articles from the symposium.

BIOGRAPHICAL NOTES

PRESENTERS

Akhil Reed Amar received his B.A. *summa cum laude* in 1980 from Yale College, and his J.D. in 1984 from Yale Law School, where he served as editor for the Yale Law Journal. After clerking for then-Judge Stephen Breyer, he joined the Yale Law School faculty in 1985, where he has been Southmayd Professor of Law since 1993, teaching courses in constitutional law, criminal procedure, and federal jurisdiction. In 1994, he received the Paul Bator award from the Federalist Society for Law and Public Policy, and in 1997, he was awarded an honorary doctorate of law by Suffolk University. In 1995 the NATIONAL LAW JOURNAL named him as one of forty "*Rising Stars in the Law*," and in 1997, THE AMERICAN LAWYER placed him on their "*Public Sector 45*" list. He has delivered endowed lectures at over a dozen universities, and has written widely on constitutional issues for such publications as the NEW YORK TIMES, WASHINGTON POST, WASHINGTON MONTHLY, POLICY REVIEW, NEW REPUBLIC, AMERICAN LAWYER, and SLATE. His many law review articles have been widely cited by scholars, judges, and justices, and he is the author of three recent books: THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997), FOR THE PEOPLE (with Alan Hirsch) (1998), and THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (Yale Univ. Press, 1998). He is currently at work co-editing (with Paul Brest, Sanford Levinson, and Jack Balkin) the fourth edition of the landmark casebook, PROCESSES OF CONSTITUTIONAL DECISIONMAKING.

Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California Law School. He received a B.S. from Northwestern University and a J.D. from Harvard Law School. He practiced law as a trial attorney in the United States Department of Justice and worked as an attorney at Dobrovir, Oakes & Gebhardt in Washington, D.C. He joined the U.S.C. faculty in 1983. Previously he was a Law professor at DePaul College of Law, 1980-83. He is the author of three books: INTERPRETING THE CONSTITUTION (1987), FEDERAL JURISDICTION (3d ed. 1999) (a one volume treatise on federal courts), CONSTITUTIONAL LAW (1997) (a one volume treatise on constitutional law), and over seventy-five law review articles that have appeared in journals such as the HARVARD LAW REVIEW, MICHIGAN LAW REVIEW, NORTHWESTERN LAW REVIEW, TEXAS LAW REVIEW, STANFORD LAW REVIEW, and YALE LAW JOURNAL. He writes a regular column on the Supreme Court for the CALIFORNIA LAWYER, LOS ANGELES DAILY JOURNAL, and TRIAL MAGAZINE, and is a frequent contributor to newspapers and other magazines. He regularly lectures to judges in programs for the Federal Judicial Center, the National Judicial College, the American Bar Association, and various state and federal courts. He also regularly lectures to

attorneys in a wide variety of programs throughout the country. He served as a legal consultant and commentator for television and radio on the O.J. Simpson trial and other legal issues. His awards include the 1999 Eason Monroe Courageous Advocate Award from the American Civil Liberties Union of Southern California and the 1998 Judge John Brown Award for Contributions to Federal Judicial Education. He was named by the DAILY JOURNAL in October 1998 as one of the 100 most influential lawyers in California. He has testified many times before committees of the United States Congress, the California Legislature, and the Los Angeles City Council. He has served as co-counsel in the United States Supreme Court in cases such as *Sandin v. Conner*, *Alvarez v. Machain*, *Office of Personnel Management v. Richmond*, and on many *amicus curiae* briefs, most recently in *Blessing v. Freestone*. He also has briefed and argued several cases in United States Courts of Appeals. In 1997, he was elected by voters to serve a two-year term as a member of the Los Angeles City Charter Commission and he served as Chair of the Commission, which proposed a new Charter for Los Angeles in June 1999.

Nadine Strossen is a Professor of Law at New York Law School. She has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. In 1991, she was elected President of the American Civil Liberties Union, becoming the first woman to head the nation's largest and oldest civil liberties organization. (Because the ACLU Presidency is non-paid, she continues in her faculty position as well.) THE NATIONAL LAW JOURNAL has twice named her one of "The 100 Most Influential Lawyers in America." In 1996, WORKING WOMAN MAGAZINE listed her among the "350 Women Who Changed the World 1976-1996." In December 1997, UPSIDE MAGAZINE included her in the "Elite 100: 100 Executives Leading The Digital Revolution." In November 1998, VANITY FAIR MAGAZINE included her in a feature on "America's 200 Most Influential Women." Since becoming ACLU President, she has made more than 200 public presentations per year before diverse audiences, including on approximately 500 campuses and in many foreign countries. She comments frequently on legal issues in the national media, and writes monthly columns for the Web-zine, INTELLECTUALCAPITAL. Her writings have been published in many scholarly and general interest publications (approximately 200 published works). Her book, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995), was named by the NEW YORK TIMES a "notable book" of 1995. Her co-authored book, SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1995), was named an "outstanding book" by the Gustavus Myers Center for the Study of Human Rights in North America. In 1986, she became one of the first three women to receive the U.S. Jaycees' "Ten Outstanding Young Americans" Award; she was also the first American woman

to win the Jaycees International's "*The Outstanding Young Persons Of the World*" Award. She has received Honorary Doctor of Law Degrees from the University of Rhode Island, the University of Vermont, San Joaquin College of Law, and Rocky Mountain College. Other awards include: the "*Women of Distinction*" Award from the Women's League for Conservative Judaism; the Media Institute's Freedom of Speech Award; and the Free Speech Coalition's "*Freedom Isn't Free*" Award. She also is a member of the Council on Foreign Relations. She graduated *Phi Beta Kappa* from Harvard College (1972) and *magna cum laude* from Harvard Law School (1975), where she was an editor of the HARVARD LAW REVIEW. Before becoming a law professor, she practiced law for nine years in Minneapolis (her hometown) and New York City.

Kay S. Hymowitz earned her B.A. *summa cum laude* with honors in English and American Literature from Brandeis University in 1970. She also received degrees in English literature from both Tufts and Columbia University. She is an affiliate scholar at the Institute for American Values, a Senior Fellow at the Manhattan Institute, as well as a contributing editor at the Institute's CITY JOURNAL. Her articles on issues relating to children and education have appeared in, among others, the NEW YORK TIMES, WASHINGTON POST, WALL STREET JOURNAL, and NEW REPUBLIC, and she has appeared on radio and television numerous times. She recently published her book, READY OR NOT: HOW TREATING CHILDREN AS SMALL ADULTS ENDANGERS THEIR FUTURE—AND OURS (1999).

John W. Johnson is in his twelfth year as Head of the Department of History at the University of Northern Iowa (Cedar Falls, Iowa). Prior to coming to UNI, he was a member of the History Department at Clemson University (1976-88) and the American Studies Department at Skidmore College (1973-76). He holds a B.A. in History and Political Science from St. Olaf College (1968) and a M.A. (1970) and Ph.D. (1974) in American Studies from the University of Minnesota. At UNI he regularly teaches courses on American Constitutional History, Recent U.S. History, and on Introductory Historical Methods. He is the author of THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960s (1997). He is also the editor of HISTORIC U.S. COURT CASES, 1690-1990: AN ENCYCLOPEDIA (1992), the author of INSURING AGAINST DISASTER: THE NUCLEAR INDUSTRY ON TRIAL (1986), and AMERICAN LEGAL CULTURE, 1908-1940 (1981). Currently, he is revising his HISTORIC U.S. COURT CASES for a second edition (publication scheduled for 2001) and working on a book of the 1960s right to privacy case, *Griswold v. Connecticut*, that will be part of the same University of Kansas Press series as THE STRUGGLE FOR STUDENT RIGHTS.

Dan L. Johnston is in the private practice of law in New York City and a member of the Advisory Panel to the New York City Public Advocate on Police Misconduct. Formerly he was: Chief Counsel to the Subcommittee on Criminal Justice of the U.S. Congress; Member, Civilian Complaint Review Board of the New York City Police Department; Board of Directors, Gay Men's Health Crisis, New York City; Executive Director and Founder, Prosecuting Attorneys Research Council; County Attorney, Polk County, Iowa; Member, Iowa General Assembly; and Assistant Iowa Attorney General. He represented the Plaintiffs, Christopher Eckhardt and John and Mary Beth Tinker, in the *Tinker* case.

COMMENTATORS

Thomas E. Baker holds the James Madison Chair in Constitutional Law and serves as Director of the Constitutional Law Center at Drake University Law School. Between 1985 and 1987, he worked at the Supreme Court, first as the Tom C. Clark Judicial Fellow and then as Acting Administrative Assistant to Chief Justice William H. Rehnquist. He was awarded the Bicentennial of the Constitution Award in Legal Education and has served on the editorial boards of HUMAN RIGHTS, THE JOURNAL OF SUPREME COURT HISTORY and PREVIEW OF U.S. SUPREME COURT CASES. He was the Distinguished Fulbright Professor of American Constitutional Law at the University of Athens. He is the author of five books and more than 80 articles about the Constitution and the courts that have appeared in leading journals, including, AMERICAN BAR ASSOCIATION JOURNAL, CONSTITUTIONAL COMMENTARY, HARVARD JOURNAL ON LEGISLATION, HARVARD LAW REVIEW, HASTINGS CONSTITUTIONAL LAW QUARTERLY, JOURNAL OF LEGAL EDUCATION, MICHIGAN LAW REVIEW, TULANE LAW REVIEW, UCLA LAW REVIEW, WASHINGTON & LEE LAW REVIEW, WILLIAM & MARY BILL OF RIGHTS JOURNAL, and WILLIAM & MARY LAW REVIEW. He writes regularly for LEGAL TIMES, NATIONAL LAW JOURNAL, and other national newspapers, and he is frequently quoted as an expert in constitutional law and the courts.

Edgar Bittle was born in Des Moines, Iowa, on February 26, 1942 and is a shareholder in Ahlers, Dorweiler, Cooney, Haynie, Smith & Allbee, P.C. Back in the summer of 1966 he was a law clerk for Alan Herrick and researched, investigated, and sat through the trial of the *Tinker* case. He then researched and assisted with the briefs on appeal. He was admitted to the Iowa Bar in 1967 after graduating from Cornell University with a Bachelor of Arts with a major in government and from the University of Michigan Law School. He joined the Herrick Firm upon graduation. In 1979, he became a member of the Ahlers Firm. He is a member of the firm's Public Law and finance Department and is active in the Education and Employment Law Department. He is General

Counsel to the Iowa Association of School Business Officials. During 1988 and 1989, he was co-chair of the Iowa Legislative Post Secondary Education Task Force which developed a twenty-year plan for higher education. He served as Visiting Assistant Professor for the spring semester of 1993 in the Department of Education, University of Iowa and is department chair of legal faculty and adjunct faculty member of the Iowa School Business Officials Academy, Iowa State University, College of Education. He is a member of the American Bar Association and was Chair of the American Bar Association Urban, State and Local Government Section's Public Education Committee from 1985 to 1989. He is past Chair of the National School Board Association National Council of School Attorneys. He has served as Chair of the Labor Law and Administrative Law Committees of the Iowa State Bar Association, and he was the first Chair of Iowa Law PAC. He was elected to the Iowa House of Representatives in the 65th and 66th General Assemblies. He was the ranking member of the State Government Committee at that time, and also was Chair of the Interim Committee that drafted and introduced the Iowa Administrative Procedure Act which was adopted in 1974. He is a member of the American Management Association, and the American Bar Association Sections of Banking, Business and Corporation Law, Labor and Employment Law, Administrative Law, and Urban, State, and Local Government Law. He was General Counsel to the Iowa Association of School Boards from 1973-1997. He has served as General Counsel to the Des Moines Independent Community School District and the Des Moines Area Community College, the Iowa Dental Association, and the Iowa Association of Independent Insurance Agents.

Gilbert Cranberg is the George H. Gallup Professor at the University of Iowa School of Journalism and Mass Communication, where he has taught since 1982. Prior to being named to the Gallup Chair, he was associated for thirty-three years with the DES MOINES REGISTER AND TRIBUNE, where he was editor of the editorial pages. He founded the University of Iowa's Libel Research Project to study the feasibility of resolving libel disputes by non-litigation methods. He was born in 1925 in New York City. He graduated *magna cum laude* and *Phi Beta Kappa* from Syracuse University and has a master's degree in social science from Drake University. Through his editorials he was instrumental in establishing in Des Moines one of the nation's first bail reform programs. He was for six years a member of the National Board of Directors of the American Civil Liberties Union. He served as chairman of the Professional Standards Committee of the National Conference of Editorial Writers and as a director of that organization. He is a member of the Ethics and Values Committee of the American Society of Newspaper Editors and of the Ethics Committee of the National Conference of Editorial Writers, of which he is a life member for having "achieved exceptional distinction in the profession." He has written for

numerous publications, including the NEW YORK TIMES, WASHINGTON POST, LOS ANGELES TIMES, JOURNALISM QUARTERLY, COLUMBIA JOURNALISM REVIEW, AMERICAN JOURNALISM REVIEW, AMERICAN BAR ASSOCIATION JOURNAL, IOWA LAW REVIEW, and NORTH CAROLINA LAW REVIEW. He is co-author of a book, LIBEL LAW AND THE PRESS: MYTH AND REALITY, published by the Free Press division of Macmillan, whose authors won the 1987 Distinguished Service Award of the Society of Professional Journalists for research in journalism.

Robert C. Hunter has been a member of the Drake Law School faculty for twenty-five years, teaching primarily in the areas of Constitutional Law and Civil Procedure. He also teaches Education Law and Federal Jurisdiction. He received his B.A. degree from the University of Pittsburgh and his law degree from Duke University. He practiced law and taught in Ohio before coming to Drake and has been a visiting professor at the University of Arkansas and the Vermont Law School. He served as Interim Dean for the 1996-97 academic year. He has won numerous teaching awards.

Jeffrey A. Krausman is a member of Belin Lamson McCormick Zumbach Flynn, P.C. He has a B.A. in 1971 and a J.D. in 1975 from Drake University. He chaired the Labor and Employment Law Section of the Iowa State Bar Association. He is a member of the National Council of School Board Attorneys. He has served as on the Executive Committee and as President of the Iowa Council of School Board Attorneys.

Keith C. Miller is the Ellis and Nelle Levitt Professor of Law at Drake University. He received his J.D. from the University of Missouri-Kansas City where he was the Editor-in-Chief of the UMKC LAW REVIEW. After practicing law in Kansas City and receiving his L.L.M. from the University of Michigan, Professor Miller joined the faculty at Drake Law School in 1979. His teaching interests range from torts and products liability, to constitutional law and legal history. He is the Editor-in-Chief of the four volume treatise, AUTOMOBILE ACCIDENT LAW published by Matthew Bender. His law journal scholarship has focused primarily on products liability issues. Since 1996, he has served as Drake's Faculty Athletics Representative to the NCAA.

Sue Luetjohann Seitz graduated from the University of Iowa College of Law in 1976 with highest distinction. Since 1976, she has practiced law with the firm now known as Belin Lamson McCormick Zumbach Flynn, devoting her time to representing Iowa school districts and area education agencies in a variety of matters, including special education, and student and employee rights. She recently argued the *Cedar Rapids Community School District v. Garret F.* case

before the United States Supreme Court. She is a former chair of the Iowa Bar Association Administrative Law section and chair of the Iowa Council of School Board Attorneys, where she is currently on the executive committee.

