THE TINKER CASE: REFLECTIONS THIRTY YEARS LATER

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I. INTRODUCTION

From 1960 to the end of 1963, the number of United States military personnel assigned to Vietnam to support the Saigon regime increased from 700 to 17,000.[1] In August of 1964, Lyndon Johnson ordered torpedo boat bases and storage facilities bombed in reprisal for alleged attacks by North Vietnamese torpedo boats on United States destroyers on August 2 and 4, 1964.[2] This incident prompted the Gulf of Tonkin resolution.[3] In February 1965, President Johnson ordered the bombing of North Vietnam.[4] On March 7, 1965, 3500 United States Marines landed in Da Nang, and by July 1965 the number of United States combat troops in Vietnam was 75,000.[5] By January 1968, the number of troops in Vietnam was 510,000.[6]

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1. 27 THE NEW ENCYCLOPEDIA BRITANNICA 864 (15th ed. 1987).
2. 12 *id.* at 362.
3. 12 *id.*
4. 27 *id.* at 864.
5. 27 *id.*
6. 12 *id.* at 130.

Meanwhile, back at the homefront, the Twenty-Fourth Amendment was adopted in 1964 barring poll taxes in federal elections.[7] Prior to that, in 1963 President Kennedy had proposed a civil rights law that would end segregation in public places.[8] However, following Kennedy's assassination, the bill was stalled in Congress.[9] Upon assuming his duties, President Johnson made Kennedy's civil rights bill a priority.[10] The Civil Rights Act of 1964, enacted in July 1964,[11] required restaurants, hotels, and other businesses that served the general public to serve all people without regard to race, color, religion, or national origin.[12] The Act barred discrimination by employers and unions, and established the Equal Employment Opportunity Commission to enforce fair employment practices.[13] In addition, "the Act provided for a cut-off of federal funds from any program or activity that allowed racial discrimination."[14]

In January 1965 Martin Luther King began a voting rights campaign, concentrating on Selma, Alabama.[15] When several hundred African-American marchers tried to set out for Montgomery on March 7, 1965, police used tear gas and night sticks to stop them.[16] Malcolm X was assassinated in February 1965.[17] On August 20, 1965, Congress passed the Voting Rights Act of 1965.[18] In that period there was much student militancy.[19] There were militant student demands of public schools and violent demonstrations on college campuses in support of expanded civil rights and civil liberties and in protest to the Vietnam policy.[20] Many African-Americans and whites cooperated in protest against the Vietnam War.[21] Among the groups that were active were the Students for a Democratic

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7. 4 THE WORLD BOOK ENCYCLOPEDIA 609 (1995).
8. 4 *id.* at 611.
9. *See* 4 *id.* at 612.
10. 4 *id.*
11. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, 78 Stat. 244 (current version at 42 U.S.C. 2000 (1994)).
12. *See* 42 U.S.C. § 2000a.
13. *See id.* § 2000e-4 to -5.
14. 4 THE WORLD BOOK ENCYCLOPEDIA, *supra* note 7, at 609.
15. 2 *id.* at 398.
16. 11 *id.* at 322.
17. 2 *id.* at 399.
18. Voting Rights Act of 1965, Pub. L. No. 89-110, § 15, 79 Stat. 445 (current version at 42 U.S.C. § 1971).
19. *See generally* MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 365-81 (1964) (discussing the student unrest among black and white students in the mid-1960s).
20. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 258 F. Supp. 971, 972-73 (S.D. Iowa 1966) (discussing the social climate of the mid-1960s), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).
21. *See* NANCY ZAROULIS & GERALD SULLIVAN, WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM 1953-1975 108 (1984).

Society,[22] the Weathermen,[23] the Black Panthers,[24] and the Black Muslims.[25] By 1965 many of the goals of the Civil Rights Movement had been obtained through court rulings and legislation, and the peace movement was in some instances picking up where the Civil Rights Movement had left off.[26]

II. REVIEW OF FACTS

In November 1965 Chris Eckhardt and his mother participated with a group of college students, Dr. Spock, and others, including Students for a Democratic Society in a march and demonstration in Washington, D.C. for an end to the Vietnam War.[27] There was a march from the White House to the Washington monument.[28]

On Saturday, December 11, 1965, following this march, a group including college students connected with Students for a Democratic Society and some adults met at the Eckhardt home.[29] There was a suggestion for wearing black armbands to mourn the dead in Vietnam—civilian and military—and to support an extension of a moratorium proposed by Robert Kennedy.[30] None of the plaintiff students were at the meeting which consisted of college students and adults.[31] A second meeting was held of high school youths including Chris Eckhardt and John Tinker at the Eckhardt home on Sunday, December 12th.[32]

A student at Roosevelt High School wanted to publish an article relating to Vietnam.[33] Unable to find the principal, he talked to an assistant superintendent, who called a meeting of senior high school principals on December 14th to discuss handling the wearing of black armbands, which was understood to be planned for December 16th.[34] The high school principals agreed to announce

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22. *See* CHARLES DE BENEDETTI, AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA 44 (1990).
23. *See id.* at 250.
24. *See id.*
25. *See* MALCOLM X & HALEY, *supra* note 19, at 365-81 (detailing the involvement of the Black Muslims in the antiwar effort).
26. *See* MELVIN SMALL & WILLIAM D. HOOVER, GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT 25 (1992).
27. Record at 30, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (No. 1034).
28. *Id.*
29. *Id.* at 52-53.
30. *Id.* at 7-8, 15.
31. *See id.* at 30.
32. *Id.* at 36.
33. *Id.* at 68.
34. *See id.* at 68-69.

that armbands would not be permitted.[35] If a student wore an armband, the student would be called to the office and asked to remove it, if he did not, the parents would be called, and if the armband was not removed, then the student would be suspended to home.[36] This was standard procedure for handling discipline problems in the school.[37] The policy was not in writing and had not been adopted by the Board.[38] It was announced, and the students were fully aware of the policy.[39] It was not aimed at any particular students and was not aimed at any particular incident, although it was anticipated that black armbands might be worn on December 16th.[40]

On December 16, 1965, Mary Beth Tinker and Christopher Eckhardt wore black armbands to school.[41] When Christopher Eckhardt reached Roosevelt High School he went directly to the principal's office and visited with the vice-principal who asked him to remove the armband.[42] He refused and was sent home.[43]

Mary Beth Tinker wore her armband to Harding Junior High School throughout the morning and during the lunch hour.[44] During her first class after lunch her teacher asked her to go to the principal's office.[45] At the principal's office she removed her armband and returned to class.[46] She was subsequently called back to the office and suspended from school.[47]

The following day John Tinker wore his black armband to North High School.[48] He had not worn it the previous day because of the prohibition that had been announced by the principals, and he had wanted to talk with them first.[49] Some students made unfriendly remarks to him about the armband, but there was no evidence in the record of disorder or disruption.[50] Following lunch,

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35. *Id.* at 45, 69.
36. *Id.* at 45.
37. *See id.* at 43.
38. *But see id.* at 31. Although not formally in writing, the morning paper on the day of December 15th stated the principals' decision to ban the armband. *Id.* at 31, 65-66.
39. *Id.* at 8.
40. *See id.* at 46.
41. *Id.* at 25, 30.
42. *Id.* at 31.
43. *Id.* at 33.
44. *See id.* at 25-28.
45. *Id.* at 27.
46. *Id.*
47. *Id.* at 27-28.
48. *Id.* at 16.
49. *Id.*
50. *Id.* at 17-18.

he was called to the office and told by the principal that he would be dismissed from school if he did not take off the armband.[51]

On December 16th, after school, several students gathered at the home of Christopher Eckhardt and telephoned the Board president to request a special meeting of the Board.[52] The request was denied, and they were told that the Board might take the matter up at its regular meeting on December 21st.[53] On December 21st, the Board deferred action pending consultation with legal counsel and further investigation.[54] When the Board met on the first Monday in January, 1966, the majority of the Board voted to uphold the actions taken under the principal's policy prohibiting the wearing of armbands.[55] Thereafter, the students returned to school without their armbands.[56]

On March 14, 1966, a complaint was filed in United States District Court under § 1983 of Title 42 of the United States Code seeking a permanent injunction restraining the defendants from suspending plaintiffs or otherwise disciplining them in such a manner as to deprive them of their rights to free speech under the United States Constitution, restraining the defendants from interfering with their exercise of free speech, and seeking nominal damages.[57] The school district was represented by Des Moines attorney, Allan Herrick.[58] The case was tried in the summer of 1966 and the district court ruled September 1, 1966, upholding the policy and actions of the school district.[59]

Although the decision is styled "Tinker," the organizational work for wearing black armbands came from the adult meeting at the Eckhardt home on December 11th.[60] Mrs. Eckhardt was the president of the Des Moines Chapter of the Women's International League for Peace and Freedom.[61] In the Eckhardt home, Students for a Democratic Society met to discuss the armband activities.[62]

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51. *Id.* at 19.
52. *Id.* at 16, 48.
53. *Id.* at 47-48.
54. *Id.* at 48.
55. *Id.*
56. *Id.* at 28, 34.
57. Tinker v. Des Moines Indep. Community Sch. Dist., 258 F. Supp. 971, 972-73 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).
58. *See id.* at 971. I had the opportunity to sit at counsel table when the *Tinker* case was heard. I had just finished my second year at Michigan Law School and was a summer clerk for Allan Herrick. Herrick was preparing for the *Tinker* trial and asked me to research issues connected with the case.
59. *Id.* at 973.
60. Record at 19, 30, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (No. 1034).
61. *Id.*
62. *See id.* at 57.

Reverend Tinker was the secretary for peace and education affiliated with the Friends Church.[63] He was characterized in Allan Herrick's brief, and in Justice Black's dissent, as "a Methodist minister without a church, . . . paid a salary by the American Friends Service Committee."[64] Two contemporary cases similar to *Tinker v. Des Moines Independent Community School District*[65] involved freedom buttons in Mississippi.[66] In *Burnside v. Byars*,[67] the school district had denied students the "right to wear 'freedom buttons' while attending school."[68] The other case, *Blackwell v. Issaquena County Board of Education*,[69] became particularly important as the case was briefed on the way to the Supreme Court. By the time the case was heard on appeal, the Fifth Circuit (which at that time had become immersed in all kinds of civil rights litigation in the south), had ruled for the students in the *Burnside* case[70] and against the students and for the school district in the *Blackwell* case.[71] In support of the Petition for Writ of Certiorari, Dan Johnston, attorney for the Tinkers and Eckhardts, argued a conflict among circuits because of the *Burnside* decision.[72] Herrick agreed there was no real conflict between *Tinker* and *Burnside*; that in each case the Court recognized the right of school authorities to enforce reasonable regulations.[73]

One or more of the administrators recalled specific threats, and in particular, specific concerns in the North High community because a former student had been killed in Vietnam.[74] The African-American community had been involved in media reporting about the death, and there was serious concern at North High School that if a white student wore a black armband the black students might retaliate.[75] However, none of the students who had been reported as present when threats were made would come forward to testify. As a result,

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63. *Id.* at 15, 37, 51-52.

64. *See id.* at 52; Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 516 (Black, J., dissenting).

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

66. *See* Burnside v. Byars, 363 F.2d 744, 746 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ. 363 F.2d 749, 753 (5th Cir. 1966).

67. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

68. *Id.* at 746.

69. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

70. *See* Burnside v. Byars, 363 F.2d at 749.

71. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d at 753.

72. Respondents' Brief at 8-9, Tinker v. Des Moines Indep. Community Sch. Dist., 383 F.2d 988 (8th Cir. 1967) (No. 1034).

73. *Id.*

74. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 n.3 (1969).

75. *See generally id.* at 508 (discussing the school's fear that classroom disruption would ensue).

the administrators had to state their recollections, which were not supported by corroborating testimony from students or others.

In the context of what was happening across the country with respect to civil disobedience, protest marches, civil rights marches, peace marches, and other demonstrations, the wearing of black armbands in Des Moines, in retrospect, was mild by comparison. However, the challenge to the authority of school administrators was taken very seriously, and concern was often expressed that if this were permitted, it would undermine discipline in the schools.

Herrick was particularly incensed at the challenge to the school authorities. A veteran of World War I, a former district court judge, a disciplined athlete still playing handball into his seventies, and a political conservative, Herrick had little patience with Leonard Tinker (a Methodist minister without a church). This may have been influenced somewhat by Herrick's status as a leader of the First Methodist Church in downtown Des Moines.

Superintendent Dwight Davis had not been involved in calling the meeting of principals. That had been done by his assistant superintendent for secondary instruction and Dwight was not involved until after the fact. If Davis had been involved from the beginning, the incident may not have even taken place. Davis was a conciliator, avoided conflict, and worked hard to achieve administrative decisions on a no-lose basis without confrontation. The black armband incident was one instance where he could not avoid the conflict.

III. DISTRICT COURT DECISION

On September 1, 1966, Judge Roy Stephenson upheld the action of the school district.[76] He noted that the school officials:

> Have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are unreasonable, the Courts should not interfere.[77]

Judge Stephenson also took note of the social climate.[78] Herrick quoted this portion of the district court opinion in his argument before the United States Supreme Court:

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76. Tinker v. Des Moines Indep. Community Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

77. *Id.* at 972.

78. *Id.* at 972-73.

> "The Viet Nam War and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate of the Viet Nam War had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views. This was demonstrated during the school board's hearing on the arm band regulation. At this hearing, the school board voted in support of the rule prohibiting the wearing of arm bands on school premises. It is against this background that the Court must review the reasonableness of the regulation."[79]

Judge Stephenson noted that a subject should not be excluded from the classroom just because it is controversial.[80] He noted that the purpose of the plaintiffs was to express their views on a controversial subject.[81] While the armbands themselves might not be disruptive, reactions and comments from other students would likely disturb the disciplined atmosphere required for any classroom.[82] Judge Stephenson found that it was not unreasonable for school officials to anticipate that the wearing of armbands would create some type of classroom disturbance, and that they had a reasonable basis for adopting the armband regulation.[83]

Judge Stephenson concluded:

> After due consideration, it is the view of the Court that actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. . . . [T]he regulation . . . was, under the circumstances, reasonable and did not deprive the plaintiffs of their constitutional right to freedom of speech.[84]

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79. Brief for Respondents at 19-20, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (No. 1034) (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 258 F. Supp. at 972-73).

80. Tinker v. Des Moines Indep. Community Sch. Dist., 258 F. Supp. at 973.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

This decision was affirmed without an opinion by an equally divided Eighth Circuit Court of Appeals.[85]

IV. SUPREME COURT DECISION

The United States Supreme Court reversed the decision of the district court.[86] Justice Fortas stated:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[87]

In support of that proposition, Justice Fortas cited two cases involving state statutes forbidding the teaching of a foreign language, which the Court had held unconstitutionally interfered "with the liberty of a teacher, student, and parent."[88]

During oral argument before the United States Supreme Court, Justice Marshall, who had just been named to the Court, sharply questioned Allan Herrick about the few number of students—seven out of 18,000 secondary students—who were involved and the lack of a disturbance.[89] Herrick had cited a recent United States Supreme Court decision involving a civil rights demonstration in Florida in which Justice Marshall had served as counsel for the demonstrators.[90] In that case, the Court had upheld criminal trespass convictions of demonstrators at a jail.[91]

Justice Marshall's questions during the oral argument are clearly reflected in Justice Fortas's opinion where Fortas states:

> [T]he action of the school authorities appears to have been based upon the urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the

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85. Tinker v. Des Moines Indep. Community Sch. Dist., 383 F.2d 988, 988 (8th Cir. 1967) (en banc), *rev'd*, 393 U.S. 503 (1969).

86. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 514.

87. *Id.* at 506.

88. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923); Bartels v. Iowa, 262 U.S. 404, 411 (1923)).

89. PETER IRONS & STEPHANIE GUITTON, MAY IT PLEASE THE COURT 128-29 (1993).

90. Adderley v. Florida, 385 U.S. 39, 40 (1966); *see* IRONS & GUITTON, *supra* note 89, at 127-28.

91. Adderley v. Florida, 385 U.S. at 48.

> contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded).[92]

The Supreme Court also noted that students had been allowed to wear political buttons for political campaigns, and iron crosses—traditionally a symbol of Nazism. The order prohibiting armbands did not extend to these.[93]

Justice Fortas said:

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[94]

Justice Black wrote a strong dissent in *Tinker*.[95] Black, an ardent supporter of First Amendment freedoms, disagreed vehemently with the opinion of the majority. He began by stating: "The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court."[96] He noted:

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92. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. at 510.

93. *Id.*

94. *Id.* at 512-13 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (citations omitted)).

95. *See id.* at 515 (Black, J., dissenting).

96. *Id.* (Black, J., dissenting) (quoting from the petition for certiorari's question presented to the Court).

> Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. . . . I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.[97]

Justice Black also stated:

> I deny . . . that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* [the Nebraska foreign language case] did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade.[98]

On the subject of the "reasonableness" of the regulation, Justice Black criticized the holding as a throwback to many of the holdings of the Supreme Court which struck down 1930s New Deal legislation.[99] In his concluding paragraph, Justice Black stated:

> Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa

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97. *Id.* at 518 (Black, J., dissenting).
98. *Id.* at 521 (Black, J., dissenting) (quoting majority opinion).
99. *Id.* (Black, J., dissenting).

> schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and the caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels that teachers, parents, and elected school officials to surrender control of the American public school system to public school students.[100]

V. OTHER RELEVANT CASES

In 1961, the United States Court of Appeals for the Fifth Circuit rendered a decision in *Dixon v. Alabama State Board of Education*.[101] In that case, the court considered the expulsion of students at Alabama State College following a lunchroom sit-in at the basement of the Montgomery County Courthouse, and other demonstrations.[102] The notice of expulsion contained no specific grounds for the expulsion, but referred instead in general terms to "this problem of Alabama State College."[103] The court considered whether the students had a right to any notice or hearing whatever before being expelled.[104] The Fifth Circuit concluded that the students were entitled to notice and opportunity to be heard, and set forth standards on the nature of the notice and the hearing required by due process prior to expulsion from a state college or university.[105] Subsequent to the *Tinker* decision, education lawyers reviewed carefully the standards set forth in *Dixon* in drafting discipline policies and disciplinary procedures.

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100. *Id.* at 524-26 (Black, J., dissenting) (citations omitted).
101. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961).
102. *Id.* at 152 n.3.
103. *Id.* at 152.
104. *Id.* at 159.
105. *Id.*

In 1967, the United States Supreme Court also decided *Keyishian v. Board of Regents of the University of the State of New York.*[106] That case involved a requirement by the State University of New York that continued employment was conditioned upon compliance with a New York statute and regulation that required a professor's certificate that the professor was not a communist, that if he had ever been a communist, he had communicated that fact to the President of the State University of New York.[107] Professors were notified that failure to sign the certificate would require dismissal.[108] This provision in the law was ruled unconstitutional.[109] The Supreme Court of the United States noted:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is particularly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.[110]

In 1968, the United States Supreme Court decided *Pickering v. Board of Education.*[111] In that case, Marvin L. Pickering was dismissed from his teaching position in Will County, Illinois for sending a letter to a local newspaper that was critical of the board of directors and the superintendent with respect to a proposed tax increase.[112] The board, after a full hearing, concluded the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district," and it was in the best interest of the school to dismiss him.[113] The Supreme Court ruled that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[114]

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106. Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967).
107. *Id.* at 591-92.
108. *Id.*
109. *Id.* at 603.
110. *Id.* (citations and quotations omitted).
111. Pickering v. Board of Educ., 391 U.S. 563 (1968).
112. *Id.* at 564.
113. *Id.* at 564-65.
114. *Id.* at 574.

These cases, set the stage for a decade of litigation over the rights of teachers and students with respect to the exercise of constitutionally protected rights within the schoolhouse gates. In April 1975 the United States Senate Committee on the Judiciary, subcommittee to investigate juvenile delinquency, reported on school violence and vandalism.[115] The report began:

> It is alarmingly apparent that student misbehavior and conflict within our school system is no longer limited to a fist fight between individual students or an occasional general disruption resulting from a specific incident. Instead our schools are experiencing serious crimes of a felonious nature including brutal assaults on teachers and students, as well as rapes, extortions, burglaries, thefts and an unprecedented wave of wanton destruction and vandalism. Moreover our preliminary study of the situation has produced compelling evidence that this level of violence and vandalism is reaching crisis proportions which severely threaten the ability of our educational system to carry out its primary function.[116]

By 1986, when the United States Supreme Court decided *Bethel School District No. 403 v. Fraser*,[117] the federal and state courts of this country had considered numerous cases regarding the speech of students and the protections of the First Amendment accorded to students.[118] Chief Justice Burger delivered the opinion of the Court and noted that:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[119]

Justice Burger stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political

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115. *Our Nation's Schools—A Report Card: "A" in School Violence and Vandalism Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 94th Cong. (1975), *reprinted in* ARVAL A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 495-503 (2d ed. 1980).

116. *Id.* at 495.

117. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

118. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (discussing school's legitimate interest in curtailing stories published in a curricular newspaper).

119. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. at 681 (alteration in original) (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

> and religions views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against a society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.
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> . . . .
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.[120]

The Court held that the school district was within its authority to discipline Fraser for offensively lewd and indecent speech in a student assembly.[121] Justice Burger quoted Justice Black's dissent in support of that conclusion.[122]

In 1988, in *Hazelwood School District v. Kuhlmeier*,[123] the United States Supreme Court considered the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.[124] In that case, the principal excised one of the stories which described three student's experiences with pregnancy and a story which discussed the impact of divorce on students.[125] The Court concluded:

> [T]he standard articulated in *Tinker* for determining when a school may punish school expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style

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120. *Id.* at 681-83 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969)).
121. *Id.* at 686.
122. *Id.*
123. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
124. *Id.* at 272-73.
125. *Id.* at 274.

and content of student speech and school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[126]

VI. CONCLUSION

Today, school attorneys continue to harmonize conflicting statutes and cases which impact student discipline. Recent incidents of violence in schools and the development of hostile environment harassment cases have tilted the balance of the scales of justice toward more deference to disciplinary actions by school authority. In the realm of student expression, *Bethel* and *Hazelwood* have in effect made Justice Black's dissent the majority view.

126. *Id.* at 272-73.