

# STUDENTS DO LEAVE THEIR FIRST AMENDMENT RIGHTS AT THE SCHOOLHOUSE GATES: WHAT'S LEFT OF *TINKER*?

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## I. INTRODUCTION

*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students.<sup>1</sup> The decision is perhaps best remembered for its ringing pronouncement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>2</sup> This sentence powerfully conveys schools are not institutions immune from constitutional scrutiny: students retain their constitutional freedoms even when they cross the threshold into the school.

*Tinker* was decided in 1969,<sup>3</sup> the last year of the Warren Court.<sup>4</sup> Chief Justice Earl Warren already had announced his resignation and was soon to be replaced by the much more conservative Warren Burger.<sup>5</sup> The author of the

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1. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
2. *Id.* at 506.
3. *Id.* at 503.
4. EDWARD L. BARRETT, JR. ET AL., *CONSTITUTIONAL LAW* 1692 (1989).
5. *Id.* at 1693.

majority opinion in *Tinker*, Justice Abe Fortas, already had been denied confirmation as Chief Justice when *Tinker* was released, and Fortas would shortly resign from the Court amidst a scandal.<sup>6</sup> Fortas's successor, Harry Blackmun,<sup>7</sup> would be a strong conservative voice and a consistent conservative vote in his first years on the Court.<sup>8</sup>

Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools. Indeed, there have been remarkably few rulings concerning students' speech, despite hundreds of lower court decisions on the topic. There have been only two Supreme Court cases concerning student speech in elementary, middle schools, and high schools,<sup>9</sup> excluding cases concerning religious expression:<sup>10</sup> *Bethel School District No. 403 v. Fraser*<sup>11</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>12</sup> In both, the Court rejected the students' First Amendment claims and sided with the schools.<sup>13</sup>

In fact, in the thirty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights.<sup>14</sup> For instance, in *Ingraham v. Wright*,<sup>15</sup> the Court rejected that students have a right to procedural due process before the imposition of corporal punishment.<sup>16</sup> In *New Jersey v. T.L.O.*<sup>17</sup> and

6. See generally LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990) (detailing the circumstances concerning Fortas's resignation).

7. BARRETT, *supra* note 4, at 1693.

8. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 763 (1971) (dissenting from the majority's decision allowing newspapers to publish the contents of a classified historical study on Vietnam) (Blackmun, J., dissenting); Erwin Chemerinsky, *Remembering a Justice Who Cared*, TRIAL, May 1999, at 92, 93 ("In his initial years [on the Court], he was a solid conservative vote . . .").

9. The Court considered student speech in the college context in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), and held that a student could not be expelled for a political cartoon in a newspaper. *Id.* at 670-71.

10. I choose to exclude religious speech because it also poses Establishment Clause issues. See *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 252-53 (1990) (upholding the constitutionality of the Equal Access Act which required schools not to discriminate against religious speech). The primary focus of the opinions in *Mergens* was whether allowing religious speech in public schools would violate the Establishment Clause of the First Amendment. See *id.* at 231.

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

12. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

13. *Id.* at 276; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 686-87.

14. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 276. *But see Goss v. Lopez*, 419 U.S. 565, 582-84 (1975) (holding the government must provide procedural due process when suspending students from public schools).

15. *Ingraham v. Wright*, 430 U.S. 651 (1977).

16. *Id.* at 670.

17. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

*Vernonia School District 47J v. Acton*,<sup>18</sup> the Court rejected Fourth Amendment claims by students and upheld the ability of schools to search students without probable cause and to subject them to random drug testing.<sup>19</sup>

In light of the later cases, it is hardly surprising that at least one federal court of appeals has concluded that subsequent Supreme Court cases cast doubt on whether *Tinker* remains viable and whether students retain free speech rights.<sup>20</sup> There simply are hardly any Supreme Court cases in the past thirty years protecting students' constitutional rights.

*Tinker* never has been overruled by the Court. Is it still good law? Do students leave their constitutional rights at the schoolhouse gate? This Article explores these questions. The focus of this Article is largely descriptive, assessing the law since *Tinker*. Part II reviews *Tinker* and suggests that it presents two very different views—one in the majority and one in the dissent—of the First Amendment rights of students. The majority's approach emphasizes the importance of student speech, the limits on school authority, and the need for judicial review.<sup>21</sup> The dissent by Justice Hugo Black conveys a very different view, stressing the need for judicial deference to the authority and expertise of school officials.<sup>22</sup>

Part III reviews the Supreme Court decisions since *Tinker* involving freedom of speech and other constitutional claims, and argues they embody the latter view. These decisions see schools as authoritarian institutions, much like prisons or the military, and they openly express judicial deference to the choices of school officials. Yet, I conclude in Part III these decisions do not completely overrule *Tinker* and they leave room for judicial protection of student speech in non-curricular areas where there is no evidence of disruption of school activities.

Part IV looks at lower court decisions since *Tinker*. Unlike the Supreme Court, lower federal courts have not followed a consistent pattern over the last thirty years. Some cases have been remarkably protective of student speech,<sup>23</sup> while others have been highly deferential to schools regulating expression.<sup>24</sup>

18. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

19. *Id.* at 665-66; *New Jersey v. T.L.O.*, 469 U.S. at 341.

20. *See Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994).

21. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506-08 (1969).

22. *Id.* at 524 (Black, J., dissenting).

23. *See generally Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (invalidating the school's policy conditioning the distribution of written material upon review by the school as an overbroad violation of the students' First Amendment rights).

24. *See generally Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149, 1150 (7th Cir. 1994) (upholding a school loitering rule); *Poling v. Murphy*, 872 F.2d 757, 764 (6th

Overall, the cases overwhelmingly have ruled against students' free speech claims.

Simply put, in the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate. The judiciary's unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students' constitutional rights. The decisions over the past thirty years are far closer to Justice Black's dissent in *Tinker* than they are to Justice Fortas's majority opinion.

## II. COMPETING VISIONS OF STUDENTS' RIGHTS AND SCHOOL AUTHORITY IN *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

In December 1965, John F. Tinker, a fifteen-year-old high school student; Christopher Eckhardt, a sixteen-year-old high school student; and Mary Beth Tinker, a thirteen-year-old junior high school student, chose to wear armbands to protest the Vietnam War.<sup>25</sup> "The principals of the Des Moines schools became aware of their plan to wear armbands . . . and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."<sup>26</sup> On December 16th, Mary Beth Tinker and Christopher Eckhardt wore armbands; on the next day, John Tinker did also.<sup>27</sup> Each student was suspended and told that he or she could come back to school only without the armbands.<sup>28</sup>

The Supreme Court, in a 7-2 decision, ruled in favor of the students' free speech rights and against the schools.<sup>29</sup> The majority and the dissenting opinions take markedly different approaches. The majority's might be termed the "speech protective model." The dissent's can be called the "judicial deference model."

Justice Fortas wrote the opinion for the majority and expressed three important themes in his opinion concerning students' rights that constitute the speech protective model. First, students retain constitutional rights within schools.<sup>30</sup> A close reading of the majority opinion reveals how emphatic the Court was in holding student speech in schools is constitutionally protected.<sup>31</sup> After his famous declaration that students do not "shed their constitutional rights

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Cir. 1989) (upholding the ability of the school to exclude a student from student council race because he made a rude comment about the assistant principal).

25. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 504.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 514.

30. *Id.* at 506.

31. *See id.*

to freedom of speech or expression at the schoolhouse gate,"<sup>32</sup> Fortas states: "This has been the unmistakable holding of this Court for almost 50 years."<sup>33</sup> After a long string of citations to many prior Supreme Court rulings, Justice Fortas quotes Justice Robert Jackson's eloquent opinion from *West Virginia State Board of Education v. Barnette*:<sup>34</sup>

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>35</sup>

Later in his majority opinion, Justice Fortas returns to this theme and powerfully proclaims the free speech rights of students.<sup>36</sup> Fortas declares:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>37</sup>

Indeed, like Justice Jackson in *Barnette*, Justice Fortas stressed freedom of speech is especially important in schools. He quoted an earlier opinion from Justice Brennan declaring: "The vigilant protection of constitutional freedoms is

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32. *Id.*

33. *Id.*

34. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding a state compulsory flag salute was unconstitutional).

35. *Id.* at 637.

36. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 511.

37. *Id.*

nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'"<sup>38</sup>

Justice Fortas concluded his opinion by returning to this theme and again forcefully expressed the need for protection of student speech:

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.<sup>39</sup>

I quote at length from *Tinker* to show that its expression of support for student speech is much deeper than its single, most famous sentence. A core theme is student speech is protected by the First Amendment and safeguarding such expression advances the central purposes of the First Amendment.<sup>40</sup> Instead of seeing protecting student expression as in tension with the mission of schools, Justice Fortas regards safeguarding speech as a crucial part of educating students about the Constitution.<sup>41</sup>

The second theme expressed throughout the opinion is schools may punish student speech only upon proof that the speech would "substantially interfere with the work of the school or impinge upon the rights of other students."<sup>42</sup> Justice Fortas explained:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action [is] . . . something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in of the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.<sup>43</sup>

At the end of the majority opinion, Justice Fortas returned to this theme and stated government regulation of student speech is unconstitutional unless it can be "justified by a showing that the students' activities would materially and

38. *Id.* at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

39. *Id.* at 513.

40. *See id.* at 508.

41. *Id.* at 512.

42. *Id.* at 509.

43. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

substantially disrupt the work and discipline of the school.”<sup>44</sup> Mere fear of disruption is not enough. The burden is on the school to prove the need for restricting student speech and the standard is a stringent one: there must be proof that the speech would “materially and substantially” disrupt the school.<sup>45</sup>

The final theme expressed in *Tinker* is the need for careful judicial review to ensure the school has met this heavy burden.<sup>46</sup> Repeatedly throughout the opinion, Justice Fortas emphasized the lack of evidence to support punishing the speech.<sup>47</sup> Early in the opinion, he wrote: “As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.”<sup>48</sup> Later he wrote: “There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.”<sup>49</sup> He noted only a few of the students in a school system of 18,000 wore the armbands and “[t]here [was] no indication that the work of the schools or any class was disrupted.”<sup>50</sup>

In a crucial part of the opinion, Justice Fortas stated there must have been more than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>51</sup> He stated the district court made no finding that the speech would interfere with the schools’ activities “and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge the rights of other students.”<sup>52</sup>

Justice Fortas concluded the majority opinion by observing: “The record does not demonstrate any facts which might have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbance or disorders on the school premises in fact occurred.”<sup>53</sup> Thus, it is not for a court to accept the claims of school officials about the need to stop the speech; the court must independently review the facts and determine whether

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44. *Id.* at 513.

45. *See id.*

46. *See id.* at 509.

47. *See id.*

48. *Id.* at 505.

49. *Id.* at 508.

50. *Id.*

51. *Id.* at 509.

52. *Id.*

53. *Id.* at 514.

there is sufficient evidence of significant disruptive effect to justify punishing expression.

In sharp contrast, Justice Black, in dissent, advocated a vastly different approach to students' First Amendment rights.<sup>54</sup> Under this view, student speech in schools is only minimally protected by the Constitution.<sup>55</sup> Courts should defer to the expertise of school officials in deciding when expression needs to be prohibited and punished.<sup>56</sup> Judicial review should be used sparingly because it undermines the necessary authority of the school.<sup>57</sup>

Justice Black disputed the constitutional protection for students' speech. He wrote: "I deny, therefore, 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."<sup>58</sup> Justice Black was not alone in questioning the extent of the majority's protection for student speech. Justice Stewart wrote a separate concurring opinion to emphasize that he did not "share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."<sup>59</sup>

Justice Black repeatedly stated he believed that "reasonableness" was the appropriate constitutional test in evaluating the schools' regulation of student speech.<sup>60</sup> Reasonableness, of course, connotes the rational basis test and tremendous deference to the government.<sup>61</sup> Justice Black based this on the need for deferring to the authority of school officials. He stated:

And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high school, can deny 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.<sup>62</sup>

Later in his dissenting opinion, Justice Black explicitly declared his view that there should be almost complete deference to the schools: "Here the Court

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

55. *See id.* at 517 (Black, J., dissenting).

56. *Id.* at 524 (Black, J., dissenting).

57. *Id.* (Black, J., dissenting).

58. *Id.* at 521 (Black, J., dissenting) (quoting majority opinion).

59. *Id.* at 515 (Stewart, J., concurring).

60. *Id.* at 519-20 (Black, J., dissenting).

61. This is the test used in evaluating government regulation of prisoners' speech. *See Turner v. Safley*, 482 U.S. 78, 90 (1987). The Court has stated the government may punish prisoners' speech if its action is rationally related to a legitimate penological interest. *Id.* at 87, 89.

62. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 518 (Black, J., dissenting).

should accord Iowa educational institutions the . . . right to determine for themselves to what extent free expression should be allowed in its schools . . . .”<sup>63</sup> This statement would leave no room for judicial protection of free speech in schools.

Thus, contained within *Tinker* are two dramatically different models about students’ rights. The majority’s approach centers on the importance of safeguarding students’ freedom of expression, the need for proof of substantial disruption of school activities to justify punishment for speech, and the role of the judiciary in ensuring that such evidence exists before punishment. Justice Black’s alternative view is one of minimal protection of students’ speech in schools: courts must defer to the expertise and authority of school officials.

### III. THE SUPREME COURT AND STUDENTS’ RIGHTS SINCE *TINKER*

*Tinker* never has been expressly overruled or even openly questioned in later Supreme Court opinions. But its approach has also never been followed in cases involving elementary, middle school, and high school students. Indeed, the Supreme Court rulings subsequent to *Tinker* have almost all sided with school officials and appear to have followed an approach much closer to Justice Black’s than the majority. In other words, the judicial deference model very much has replaced the speech protective model in subsequent cases. Part III.A looks at the Supreme Court’s free speech cases since *Tinker*. Part III.B examines the Court’s decisions in other areas concerning students’ rights. Finally, Part III.C suggests what likely is left of *Tinker* after these decisions.

#### A. Supreme Court Free Speech Cases Since *Tinker*

There have been only two Supreme Court decisions in the past thirty years concerning student speech in public elementary, middle, and high schools.<sup>64</sup> In

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63. *Id.* at 524 (Black, J., dissenting).

64. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). One other case indirectly involved students’ First Amendment rights. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982). The Court considered the ability of a school library to remove books because they were deemed “objectionable” and said that the “First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.” *Id.* at 866. The Court explained the First Amendment protects a right to receive information and the “special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.” *Id.* at 868. The Court held that whether

*Bethel School District No. 403 v. Fraser*, the Court upheld the punishment of a student for a speech given at a school assembly nominating another student for a position in student government that was filled with sexual innuendo.<sup>65</sup> The student was suspended for a few days and kept from speaking at his graduation as scheduled.

The Court upheld the punishment and emphasized the need for judicial deference to educational institutions.<sup>66</sup> Chief Justice Burger, writing for the majority, emphasized not the need for protecting student speech, but the need for regulating it.<sup>67</sup> He began by stressing the importance of schools in "inculcating" the "habits and manners of civility,"<sup>68</sup> and then declared: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>69</sup>

The Court also distinguished *Tinker* on the ground that it had involved political speech, whereas the expression in *Bethel* was sexual in nature.<sup>70</sup> Chief Justice Burger stated: "[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."<sup>71</sup> He concluded: "A high school assembly or classroom is no place for a sexually explicit monologue . . . . [I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech is wholly inconsistent with the 'fundamental values' of public school education."<sup>72</sup>

removal of the books from their school libraries [violated the] First Amendment depends upon the motivation behind [the government's] actions. If [the government] *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution . . . . On the other hand, . . . an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar.

*Id.* at 871 (citation omitted). The Court remanded the case for a determination of this issue. *Id.* at 875. Thus, the case involved the First Amendment right of students to receive information, but not student speech, which was the focus in *Tinker*, *Bethel*, and *Hazelwood*.

65. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 677-78, 687.

66. *Id.* at 686-87.

67. *See id.* at 683.

68. *Id.* at 681.

69. *Id.*

70. *Id.* at 680.

71. *Id.* at 683.

72. *Id.* at 685-86.

Most significantly, Chief Justice Burger's majority opinion proclaimed the need for judicial deference to the authority and expertise of school officials.<sup>73</sup> He stated: "The determination of what manner of speech in the classroom or school assembly is inappropriate properly rests with the school board."<sup>74</sup> In fact, Chief Justice Burger concluded his majority opinion by quoting with approval Justice Black's dissenting opinion in *Tinker*: "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."<sup>75</sup>

The Court went even further in its deference to school authorities in *Hazelwood School District v. Kuhlmeier*.<sup>76</sup> A school newspaper produced as part of a journalism class was going to publish—with the approval of its faculty advisor—stories about three students' experience with pregnancy and the impact of divorce on students.<sup>77</sup> No students' names were included in the article on pregnancy and one name was mentioned in the article on divorce, although the name had been deleted after the paper had been forwarded to the principal for review.<sup>78</sup> The principal decided to publish the paper without these articles by deleting the two pages on which they appeared.<sup>79</sup> The principal expressed the view the articles on pregnancy discussed sexual activity and birth control in a manner inappropriate for some of the younger students at the school, the three students in the article on pregnancy might be identified from other aspects of the article, and the parents of the student identified in the article about divorce should have had the opportunity to respond.<sup>80</sup>

The Supreme Court upheld the principal's decision and rejected the First Amendment challenge.<sup>81</sup> At the outset, Justice White, writing for the Court, quoted *Tinker*: "Students in public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"<sup>82</sup> But he then added, quoting *Bethel*, the "First Amendment rights of students in the public

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73. See *id.* at 683.

74. *Id.*

75. *Id.* at 686 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

76. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

77. *Id.* at 263.

78. *Id.*

79. *Id.* at 264.

80. *Id.* at 263.

81. *Id.* at 276.

82. *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

schools 'are not automatically coextensive with the rights of adults in other settings.'"<sup>83</sup> Most significantly, Justice White then quoted the declaration in *Bethel*: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>84</sup>

Justice White concluded the school newspaper was a nonpublic forum and as a result "school officials were entitled to regulate the content[ ] of [the school newspaper] in any reasonable manner."<sup>85</sup> In other words, only rational basis review was to be applied.

The Court emphasized the ability of schools to control curricular decisions, such as what appears in school newspapers published as part of journalism classes.<sup>86</sup> Justice White wrote:

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>87</sup>

The Court stated, in this context, schools have broad authority to regulate student speech. Justice White stated:

Educators are entitled to exercise greater control over . . . student expression to ensure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.<sup>88</sup>

Justice White concluded that the students' First Amendment claim was to be denied because the school's action was reasonable.<sup>89</sup> Justice White emphasized that the judiciary must defer to school officials: "This standard is consistent with our oft-expressed view that the education of the Nation's youth is

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83. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

84. *Id.* at 267 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 683).

85. *Id.* at 270.

86. *See id.* at 271.

87. *Id.* at 270-71.

88. *Id.* at 271.

89. *Id.* at 274.

primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>90</sup>

Thus, absent from *Bethel* and *Hazelwood* are the three themes of the *Tinker* majority: the importance of protecting students' free speech rights, the need for proof of significant disruption of school activities, and the role of the judiciary in monitoring schools' decisions to ensure compliance with the Constitution. Instead, *Bethel* and *Hazelwood* are far more similar to Justice Black's dissent in *Tinker* which stresses the minimal protection for student speech and the need for great judicial deference to the expertise and authority of school officials.<sup>91</sup>

#### B. Supreme Court Decisions Concerning Other Students' Rights Since Tinker

The Court's deference to school officials in the three decades since *Tinker* is also evident in cases involving other constitutional rights of students. For instance, in *Ingraham v. Wright*, the Court held that the imposition of corporal punishment involved a deprivation of liberty, but did not require that the school provide any type of due process prior to its imposition.<sup>92</sup> The Court recognized that liberty includes "freedom from bodily restraint and punishment" and therefore where school authorities "deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, . . . Fourteenth Amendment liberty interests are implicated."<sup>93</sup>

Yet, the Court refused to require that the school provide any procedures with regard to the imposition of corporal punishment.<sup>94</sup> The Court stated it was sufficient for due process that the state provided tort law remedies against abuses.<sup>95</sup> The Court emphasized: "Hearings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements."<sup>96</sup> The Court stressed the need for judicial deference to school authorities: "Assessment of the need

90. *Id.* at 273 (citations omitted).

91. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 516-24 (1969) (Black, J., dissenting).

92. *Ingraham v. Wright*, 430 U.S. 651, 672, 682 (1977). The Court also held the imposition of corporal punishment was not cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 683.

93. *Id.* at 674.

94. *See id.* at 680-82.

95. *Id.* at 682.

96. *Id.* at 680.

for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law."<sup>97</sup>

Similarly, in two important Fourth Amendment cases, the Court expressed great deference to schools and provided little protection for students' rights.<sup>98</sup> In *New Jersey v. T.L.O.*, the Court held schools could search students' purses without having probable cause, and only reasonable suspicion need be present to justify the search.<sup>99</sup> Although the Court held the Fourth Amendment applies in schools, the Court also stressed the need for deference to school authorities:

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.<sup>100</sup>

The Court stated insisting on warrants or probable cause for searches would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools."<sup>101</sup>

In *Vernonia School District 47J v. Acton*, the Court went even further in its deference to school officials in the Fourth Amendment context.<sup>102</sup> A school district in Oregon required that all student athletes submit to random drug tests.<sup>103</sup> The Court, in an opinion by Justice Scalia, rejected the students' claim that such testing violated their Fourth Amendment rights.<sup>104</sup> At the outset, Justice Scalia emphasized that "special needs exist in the public school context" and quoted *T.L.O.*'s language of the need for teachers and administrators to have authority to maintain order in the schools.<sup>105</sup> The Court quoted at length from *Ingraham*, *Fraser*, and *Hazelwood* as to the need for deference to school authorities.<sup>106</sup> The Court also wrote of the lessened privacy interests of students and of the government's important interest in deterring drug use.<sup>107</sup> Based on this balance,

97. *Id.* at 681-82.

98. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

99. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

100. *Id.* at 339.

101. *Id.* at 341.

102. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995).

103. *Id.* at 648.

104. *Id.* at 664-65.

105. *Id.* at 653 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 339).

106. *Id.* at 655-56.

107. *See id.* at 660-64.

the Court concluded random drug testing of student athletes did not violate the Fourth Amendment.<sup>108</sup>

### C. Does Tinker Survive?

In light of the subsequent cases, it is hardly surprising that lower courts have questioned whether *Tinker* remains good law.<sup>109</sup> As Professor Mark Yudof stated: "Although these [later decisions] have not specifically overruled *Tinker*, *Tinker*'s progeny have greatly altered the holding set forth by the Warren Court."<sup>110</sup> What, if anything, survives from *Tinker*?

First, *Tinker*'s narrow holding remains undisturbed—students have a First Amendment right to wear symbols—such as armbands—to communicate political messages, unless there is proof of likely serious disturbance to school activities.<sup>111</sup> Neither *Bethel* nor *Hazelwood* involved this issue and neither questioned the continued vitality of the specific ruling in *Tinker*.

Second, the *Tinker* majority's approach to student speech is no longer followed; the subsequent cases are much closer to Justice Black's dissent than to Justice Fortas's majority opinion.<sup>112</sup> The Court has made clear it views schools as authoritarian institutions and it therefore will greatly defer to school officials in student speech cases.<sup>113</sup> In *Bethel*, the Court clearly expressed this by declaring: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>114</sup> Similarly, in *Hazelwood*, the Court declared: "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>115</sup> This language is far more similar to Justice Black's angry dissent in *Tinker* than it is to the ringing pronouncements of the importance of student speech found in Justice Fortas's majority opinion.

108. *Id.* at 664-65.

109. *See Baxter v. Vigo County Sch. Corp.*, 26 F.3d 729, 737-38 (7th Cir. 1994).

110. Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995).

111. *But see Baxter v. Vigo County Sch. Corp.*, 26 F.3d at 737 (upholding a ban on T-shirts containing messages against drugs and protesting schools' grading policies).

112. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

113. I develop this theme and liken the Court's approach to schools to its treatment of prisons and the military in Erwin Chemerinsky, *The Constitution and Authoritarian Institutions*, 33 SUFFOLK U. L. REV. (forthcoming 2000).

114. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 683.

115. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 273.

Finally, despite this shift in approach, it is crucial to recognize that both *Bethel* and *Hazelwood* involved official school functions: a high school assembly and a student newspaper produced as part of a journalism class. Both decisions expressed the ability of the schools to control official educational programs and the messages communicated within them.<sup>116</sup> In both, the Court expressed concern that the school might be perceived as sponsoring or endorsing the speech.<sup>117</sup> *Tinker*, of course, did not concern this. It is appropriate to see *Bethel* and *Hazelwood*, in their specific holdings and their general approach, as being limited to public schools' ability to regulate speech in official programs and courses. Therefore, even in light of *Bethel* and *Hazelwood*, there remains First Amendment protection of student speech in non-curricular areas where there is no evidence of disruption of school activities.<sup>118</sup>

#### IV. STUDENT SPEECH IN THE LOWER COURTS AFTER *TINKER*

There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern; some are quite speech-protective and follow *Tinker*'s philosophy as well as its holding,<sup>119</sup> while others are very restrictive of student speech and treat *Tinker* as if it has been overruled.<sup>120</sup>

On the one hand, there are some lower court cases that are consistent with the conclusion of the prior section: student speech is protected by the First Amendment in non-curricular areas where there is no evidence of disruption of school activities.<sup>121</sup> For example, in *Burch v. Barker*,<sup>122</sup> the United States Court of Appeals for the Ninth Circuit declared unconstitutional the punishment of students for circulating an underground newspaper in violation of a school policy requiring prior approval of all material distributed at school events.<sup>123</sup> The court

116. *Id.* at 267; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 683.

117. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 266-67; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 685-86.

118. *See* Elliot M. Mincberg, *A Practical Approach to Tinker and Its Progeny*, 69 ST. JOHN'S L. REV. 519, 520-21 (1995) (arguing *Tinker* remains viable outside of official school programs).

119. *See, e.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1996) (protecting a student "threat" to a school counselor); *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (invalidating prior restraint on an underground student paper).

120. *See, e.g., Wiemerslage v. Maine Township High Sch. Dist.* 207, 29 F.3d 1149, 1153 (7th Cir. 1994) (upholding a school loitering rule); *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (upholding the ability of a school to exclude a student from a student council race because he made a rude comment about the assistant principal).

121. *See Burch v. Barker*, 861 F.2d at 1159.

122. *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988).

123. *Id.* at 1159.

quoted extensively from *Tinker* and saw *Hazelwood* as distinguishable because it involved a newspaper produced as a part of a journalism class.<sup>124</sup> The Ninth Circuit emphasized: "*Tinker* cautioned that before deciding that school interference [with speech] is warranted courts should look to concrete evidence of disturbance or disruption resulting . . . from specific expression."<sup>125</sup> The court also stressed that prior restraints are inconsistent with the First Amendment, except under the most extraordinary circumstances.<sup>126</sup>

Other cases have followed *Tinker* in protecting the right of students to wear symbols communicating messages in schools.<sup>127</sup> In *Chandler v. McMinnville School District*,<sup>128</sup> the United States Court of Appeals for the Ninth Circuit held that students could not be punished for wearing buttons containing the word "scab" in connection with a teachers' strike.<sup>129</sup> The court focused on the political message communicated, the fact that there was no appearance of school sponsorship of the speech, and the absence of any evidence of disruption.<sup>130</sup>

Yet, it should be noted that cases from other circuits involving almost identical facts have been decided the opposite way.<sup>131</sup> In *Bystrom v. Fridley High School, Independent School District No. 14*,<sup>132</sup> the United States Court of Appeals for the Eighth Circuit upheld a school district's policy of requiring prior approval of all materials distributed on school grounds.<sup>133</sup> Opposite the Ninth Circuit's holding in *Burch*, the Eighth Circuit approved prior restraint as applied to underground student newspapers.<sup>134</sup>

In *Baxter v. Vigo County School Corp.*,<sup>135</sup> the United States Court of Appeals for the Seventh Circuit upheld the suspension of students for wearing T-shirts protesting racism and the schools' grading policy.<sup>136</sup> Similarly, in *Gano v.*

124. See *id.* at 1152-57.

125. *Id.* at 1152.

126. *Id.* at 1154-55. But see *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 754 (8th Cir. 1987) (upholding prior restraint on circulation of materials in schools).

127. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530-31 (9th Cir. 1992).

128. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992).

129. *Id.* at 530-31.

130. *Id.* at 529-30.

131. See *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 754-55 (8th Cir. 1987).

132. *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747 (8th Cir. 1987).

133. *Id.* at 754-55.

134. *Id.*

135. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994).

136. *Id.* at 730, 738.

*School District No. 411*,<sup>137</sup> a federal district court upheld the suspension of a student for wearing a T-shirt depicting three school administrators inebriated.<sup>138</sup> Both cases involved the wearing of clothing communicating political messages.<sup>139</sup> In neither was there evidence of disruption of school activities.<sup>140</sup> Yet, unlike the results in *Tinker* and *Chandler*, the courts allowed the punishment of the students.<sup>141</sup>

Frankly, in reading the large body of case law since *Tinker*, it overwhelmingly seems much more in accord with Justice Black's dissent than Justice Fortas's majority opinion.<sup>142</sup> A typical case in this regard is *Poling v. Murphy*,<sup>143</sup> a decision of the Sixth Circuit. Dean Poling, an honor student and candidate for student council president, was disqualified from the election because he made a rude and discourteous statement about the assistant principal in his campaign speech.<sup>144</sup>

Absent from the Sixth Circuit's opinion were any of the themes mentioned in Justice Fortas's majority opinion.<sup>145</sup> The court did not speak of the importance of protecting student speech, the need for evidence of disruption, or the role of the judiciary in safeguarding First Amendment rights in schools. Rather, the Sixth Circuit began by noting teachers, parents, and elected school officials are not required "to surrender control of the American public school system to public school students" and "[l]imitations on speech that would be unconstitutional outside the schoolhouse are not necessarily unconstitutional within it."<sup>146</sup> The court then applied a rational basis test stating the sole issue before it was "whether the actions of the school officials were reasonably related to legitimate 'pedagogical concerns.'"<sup>147</sup> The court found this test was satisfied.<sup>148</sup>

137. *Gano v. School Dist. No. 411*, 674 F. Supp. 796 (D. Idaho 1987).

138. *Id.* at 798-99.

139. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d at 730; *Gano v. School Dist. No. 411*, 674 F. Supp. at 798.

140. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d at 737; *Gano v. Sch. Dist. No. 411*, 674 F. Supp. at 798.

141. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d at 738; *Gano v. School Dist. No. 411*, 674 F. Supp. at 799.

142. *See, e.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1995) (upholding punishment of a student for angry statements made to a guidance counselor); *Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149, 1152-53 (7th Cir. 1994) (upholding a school loitering policy); *Crosby v. Holsinger*, 852 F.2d 801, 802-03 (4th Cir. 1988) (upholding a prohibition of a school symbol).

143. *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989).

144. *Id.* at 764.

145. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506-14 (1969).

146. *Poling v. Murphy*, 872 F.2d at 762.

147. *Id.*

The court's approach in *Poling*—rational basis review for student speech and emphasis on judicial deference to school authorities—is Justice Black's dissenting view in *Tinker*, not the majority's position. Yet, *Poling* seems representative of the majority of lower court cases dealing with student speech over the last three decades. Students really do leave their First Amendment rights at the schoolhouse gate.

## V. CONCLUSION

*Tinker* is based on three fundamental principles concerning the First Amendment and schools: student speech is important and constitutionally protected; schools may punish expression only if there is proof of substantial disruption of school activities; and the judiciary has a crucial role in ensuring students are punished only if this standard is met. These themes have been totally absent from subsequent Supreme Court decisions and most lower court cases involving student speech.

The dissent in *Tinker* took a radically different view. Justice Black would provide minimal protection for student speech and instead would have courts defer to the authority and expertise of school officials. The latter Supreme Court cases and most lower court decisions have taken this approach in the years since *Tinker*.

I was asked in this Article to be descriptive, not normative, in discussing the decisions over the last three decades. Yet, I am sure that my normative bias has been clear throughout the paper. I strongly agree with Justice Fortas that students retain First Amendment rights even within the schoolhouse gates. As Justice Brennan expressed it: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.'"<sup>149</sup> I decry the use of rational basis review in evaluating student speech, with courts such as the Sixth Circuit using the identical standard for evaluating students' speech rights as is employed for considering prisoners' First Amendment rights.<sup>150</sup> Schools cannot teach the importance of the First Amendment and simultaneously not follow it.

Justice Fortas's approach does not eliminate the ability of schools to maintain order and discipline. His majority opinion in *Tinker* hardly gave students absolute free speech rights in schools. However, he did emphasize

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148. *Id.* at 763.

149. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 624 U.S. 479, 487 (1960)).

150. *See Chemerinsky, supra* note 113.

student speech can be punished only if there is proof of substantial disruption or interference with school activities. This standard balances the schools' needs with those of the students.

Finally, and most importantly, there is a key role for the judiciary to play in protecting student speech. School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech. Yet, subsequent cases rarely follow this approach. Instead, they proclaim the need for deference to the authority and expertise of school officials. Few cases, though, involve instances where school authority must be deferred to for the sake of authority and even fewer concern expert decisions by school officials.

Justice Black's dissent in *Tinker* is an angry polemic against according students First Amendment rights. Unfortunately, his position and not that of the seven Justices in the majority seems to have triumphed. Simply put, thirty years after *Tinker*, students do leave most of their First Amendment rights at the schoolhouse gate.