Supreme IRONY

The true story of two families' courage and the ACLU's unintended opening of religious freedom in the schools

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The Black Armband and the Peace Symbol

It is a great irony. In 1969, the Iowa chapter of the ACLU was fully committed to defending protestors against the Vietnam war. The chapter hired a young, local attorney and, with his help, secured the right of peaceful antiwar protesters to wear black armbands with peace symbols in public schools. The case was *Tinker v. Des Moines Independent Community School District*.[1]

What the ACLU did not foresee was that this First Amendment victory for free speech would become *the* major case that students now use to protect their right to express their faith. This is ironic because the ACLU is often reluctant to defend student religious expression when the speech conflicts with a favored constituency. (For example, in *Harper v. Poway Unified School District*[2] the ACLU delayed filing a supporting brief until after the Supreme Court secured a public school student's right to wear a shirt citing a Bible verse critical of same-sex conduct).

Yet the words of the Supreme Court's decision in *Tinker* are clear: students and teachers do not "shed their constitutional rights

1 393 U.S. 503 (1969).

2 *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007); *Harper v. Poway Unified Sch. Dist.*, 485 F.3d 1052 (9th Cir. 2007); *Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 318 F. App'x 540 (9th Cir. 2009).

. . . at the schoolhouse gate."[3] Those "constitutional rights" include freedom of religion.

But the ACLU did not foresee this.

It is well documented that Dan Johnston, the attorney who won this famous case—hired in part because he was young and did not charge much—certainly was not a conservative.[4] He opposed the Vietnam War and was committed to the antiwar movement and effort. Furthering that movement was his purpose and goal. He had no foreknowledge—and certainly no intention—of securing religious freedom for students, conservative or otherwise, in the schools.

Yet, that is the funny thing about freedom. Once you secure it for one group, you secure it for all. So while the organization Dan Johnston represented often hesitates to bring claims for students of faith today, the ACLU was nevertheless responsible for securing students' rights to express that faith.

What a supreme irony.

Freedom cannot be shackled. Freedom of speech opens the right not only of citizens to express a secular thought but the equal right to express a *religious* thought. And this famous case secured that right for students in our nation's public schools. Every time Liberty Institute files a case protecting the right of religious expression in the schools, *Tinker* is the main case upon which we rely. It is the landmark precedent.

In November of 2013, I had the privilege of lecturing on the *Tinker* case in the U.S. Supreme Court chamber—the very room where the case was argued in 1969—with the Tinkers in the

3 *Tinker*, 393 U.S. at 506.
4 John W. Johnson, The Struggle for Student Rights 62 (1997).

audience. It was a pleasure to research the case and meet some of the players. This book is adapted and expanded from that lecture.

I have also added the majority opinion of the Court for the reader's edification, as well as a second appendix showing in more detail the unintended consequences of *Tinker* faced by those who currently oppose proper, constitutional religious expression in the schools today. This second appendix contains Liberty Institute's evaluation of religious freedom in our public schools—a legal analysis of which *Tinker* is a mainstay.

Yes, the black armbands and peace symbols of the Tinkers, favored by those more liberal in their thinking, secured freedom of speech for both conservatives and liberals alike—and religious freedom for students of faith.

This supreme irony should not be lost as you read the true story of this historic case.

Kelly Shackelford
April 2014

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Preface

This book is an adapted and expanded version of the fourth and final lecture in the 2013 Leon Silverman Lecture Series on Litigants in Landmark Supreme Court Cases of the 20th Century, sponsored by the United States Supreme Court Historical Society.

The lecture from which this book was taken and expanded was given by Kelly J. Shackelford on the evening of November 6, 2013, in the United States Supreme Court chambers, to an audience that included John and Mary Beth Tinker, litigants of the famous case, *Tinker v. Des Moines Independent Community School District*. Samuel Alito, Associate Justice of the United States Supreme Court, introduced Mr. Shackelford.

This book adaptation of the lecture includes a deeper analysis of the irony in the legal stance taken by the ACLU, whose local Iowa chapter led the defense in the case and favored liberal antiwar free speech, but inadvertently secured conservative religious speech. This book should not be construed to be the view of the United States Supreme Court Historical Society or any other participants in the program.

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Chapter One

Freedom at the Schoolhouse Gate

One of the most famous phrases from the United States Supreme Court comes from *Tinker v. Des Moines Independent Community School District*. In its majority opinion, written by Justice Abe Fortas, the Court said:

> *It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.*[5]

In the 1960s, the schoolhouse gate was closed to certain freedoms when it should have been open. But *Tinker v. Des Moines Independent Community School District* changed all that. And still today, the case is opening schoolhouse gates to freedom.

Back when *Tinker* was decided, freedom to peacefully protest the Vietnam War was being banned. And a young lawyer from the Iowa Civil Liberties Union (ICLU), a chapter of the national American Civil Liberties Union (ACLU), led the legal fight to keep the schoolhouse gate open to freedom.

As the head of a legal organization that defends against

5 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

violations of First Amendment religious freedoms, today I use the *Tinker* case frequently and successfully to argue that teachers and students do not "shed their constitutional rights" to the free exercise of religion at the "schoolhouse gate."[6]

Yet ironically, when those of us who defend religious liberty look around, we usually do not see the ACLU, proponents of the *Tinker* verdict, standing alongside us. In fact, one ACLU board member conceded to me that the ACLU is for free speech but has a problem when the citizen's speech is religious. In a national debate I had with a national leader of the ACLU, he admitted to me, with embarrassment, that they could not stand with religious speech when the speech offends one of their political constituencies, such as the LGBT movement. Sad, and ironic.

It's actually very difficult to exercise your religious freedom if you can't speak.

Tinker is not only one of my favorite cases but, as I mentioned, a case I use every week in my work at Liberty Institute, which is the largest legal organization exclusively devoted to defending religious liberty in America.

Some people might ask, "Why does a group that defends religious liberty rely so heavily on a free speech case?" Well, it's actually very difficult to exercise your religious freedom if you can't speak. So as you might imagine, free speech is very important to me. And in the public schools, *Tinker* is the main case to cite because of that precious right to free speech.

I hope all constitutional lawyers will take a little time to

6 *Id.*

research the *Tinker* case. You can go to your computer and search for "Tinker oral argument." And you can *listen* to the oral argument that was in the Supreme Court on November 12, 1968; you can *hear* everything that was said. I'm grateful to the Supreme Court for keeping this historical record. And I'm very grateful for the U.S. Supreme Court Historical Society: this is living history, and one of the very reasons why that organization exists. Such preservation is a true national treasure.

I listened to that oral argument as I prepared this book. I also looked back at the briefs and all the documents of record. Though my main sources are cited and listed, I want to give credit where credit is due, because there is one book that provided more source material, including interviews with the Tinkers, than any other: *The Struggle for Student Rights* by Professor John W. Johnson.[7]

But in our analysis of the "supreme irony" of this case, let's first ask: How did the Tinkers arrive at the chamber of the United States Supreme Court? That is crucial to understand, so let's take a little time machine journey.

7 Johnson, *supra* note 4.

Chapter Two

The Families

In 1965, despite mild fare such as *Bonanza* and *Gomer Pyle* being the top television shows, it was a very tumultuous time. Dr. Martin Luther King, Jr. and 2,600 others were arrested in Selma, Alabama. Malcolm X was shot and killed. Riots were occurring in Watts, where 34 people were killed, a thousand people were injured, unrest lasted over six days, and 4,000 people were arrested. It's also the year when the United States involvement in Vietnam escalated. By the end of 1965, almost 190,000 American troops were in Vietnam. So in November of that year, it probably wouldn't surprise you to learn that a large number of people were gathering for a demonstration—a march to the White House—to get our troops home, to get out of the war.

And as his mother announced that she was going to the march, 15-year-old John Tinker said he really wanted to go too.[8] And that's where this whole case started.

Who was this family, the Tinkers?

They had a long history of involvement with civil rights and demonstrations. If you look at that history you discover that Leonard Tinker, their father, grew up in a conservative community

8 Stephanie Sammartino McPherson, Tinker v. Des Moines and Students' Right to Free Speech 7 (2006).

in Hudson, New York, and was a devoutly religious man. In fact, he met his wife, Lorena, at seminary. And this devout religious background led him to a very strong sort of Quaker-like antiwar pacifism and a commitment to racial equality. As a Methodist minister, that caused Leonard Tinker some problems.

When he was in Atlantic, Iowa, as a pastor, Leonard stood with the only black family in town and their right to use the community swimming pool. That stand cost Leonard his pastorate, and he was moved to Des Moines.

In Des Moines, when Leonard and Lorena invited African-American couples to their church, *that* caused trouble as well. And eventually Leonard Tinker took a leave of absence from the Methodist church and accepted a position that he really loved, the Secretary of Peace and Education of the American Friends Service Committee—a Quaker group that was committed to peace and antiwar activism. Leonard's new position led him to speak at churches all around the country. And when he traveled, he took his children; and they would hear what he was talking about. In these ways, the whole Tinker family had been standing up for peace and racial equality and what they believed for many years.

Don't miss that: the Tinkers included their children. When Dr. Martin Luther King, Jr. came through Des Moines, he asked Lorena whether she was concerned about the danger to her children because of her activism. Dr. King asked because he was a parent concerned about *his own* children and their safety. And Lorena answered, "Of course," but said she was trying to pass along her values to her children—and if the issue was serious enough, there

was no way to avoid it.[9]

You might reasonably think, because of the trouble that Leonard got into for his beliefs and his positions, that he was the outspoken one between him and his wife. But if you guessed that, you would be wrong! Lorena was quite a woman. Not only was she a member of numerous civil rights groups, she also had her master's degree in psychology, and by the time the *Tinker* decision was handed down, she had her doctorate. With a Ph.D. in psychology, Lorena actually taught at universities. This position was unusual for a woman at that time, so she ran into a lot of politics and generated a lot of trouble in her day. Consequently, Lorena tended to be a little outspoken.

When Dr. Martin Luther King, Jr. came through Des Moines, he asked Lorena whether she was concerned about the danger to her children because of her activism. Dr. King asked because he was a parent concerned about his own children and their safety.

So when she announced that she was going to the demonstration in Washington, D.C., to be held at the very place where, two years earlier, Dr. Martin Luther King, Jr. had given his "I Have a Dream" speech, Lorena's 15-year-old son, John Tinker, insisted on going. In fact, about 50 activists from the peace community in Iowa boarded buses and went to that demonstration in the nation's capital city.

There was no electricity for the 25,000 people who attended, but their time was electric. John remembered, "I was used to being in

9 Johnson, *supra* note 4, at 15.

the minority. Suddenly there was this whole crowd that agreed with me."[10] So it was an uplifting time for this young man. Another family that was there included a woman by the name of Margaret Eckhardt. Margaret was head of the local peace group in Des Moines, Iowa, and she took her son, Christopher. Christopher was 15, the same age as John. In fact, Christopher and John would end up being two of the three plaintiffs in the Tinker case with John's younger sister, Mary Beth, being the third. And this was the beginning.

"I was used to being in the minority. Suddenly there was this whole crowd that agreed with me."

Riding in the bus on the way back from the demonstration, the group from Iowa discussed how they could keep this going. How they could bring this antiwar message back home. And what they landed on, eventually, was the idea of wearing a black armband to express their thoughts on the war. So they decided to have a meeting when they got home.

The meeting was set for December 11, on a Saturday, and about 25 to 30 people gathered, including a large number from a group called The Liberal Religious Youth Group, which was connected with the Unitarian church. Those gathered decided to wear black armbands at school to convey two messages.

First, they wanted to mourn people who had lost their lives in the war from both sides, all the casualties.

Second, they wanted to support a Christmas truce that had been proposed by Senator Robert F. Kennedy. And so that's the decision they made. They would wear the armbands on Thursday,

10 McPherson, *supra* note 8, at 5.

December 16, and contacted students at high schools and colleges, encouraging them to wear the armbands on that day.

One of the students at this meeting was Ross Peterson. Ross actually submitted items to the Roosevelt Newspaper; Roosevelt is one of the five high schools that was a part of the school district in Des Moines. He was so excited about the armband protest that on Monday, when he got to school, he printed an article encouraging everyone to wear an armband on December 16.

Then things got interesting.

As soon as the journalism teacher saw Ross's article, alarm bells went off in his head, he went to the principal, and the principal went to the superintendent. Soon thereafter, the superintendent called an emergency meeting with *all five principals* of the local high schools, as well as the head of secondary education. At this meeting, the head of secondary education and the principals made the decision that they would ban, in all secondary schools, anyone from wearing an armband.

When the newspaper learned of the group's decision and asked the director of secondary education why they did this, he responded, "Schools are no place for demonstrations."[11]

The director of secondary education's statement was an interesting one because, just a year earlier, the school had advocated that the students wear all black armbands in order to express the loss of school spirit at the school! But evidently wearing a black armband *about the Vietnam War* was a bridge too far. So on December 15, the day before the big day when they were supposed to wear their armbands, an announcement came over the loudspeakers that the

11 *Id*. at 6.

schools had *banned* the wearing of armbands.

Mary Beth Tinker was in the eighth grade, and 13 years old. When the armband controversy arose, her math teacher spent half of his class talking about the evils of student protest, which didn't seem like it had much to do with math. He ended his speech by saying that any student who wore an armband in his class would be thrown out of the room. That night, the students met to decide what they were going to do. It was really a decision that each person had to make on his or her own.

As to what happened the next day, there is dispute about how many students wore armbands. The school says that there were seven—five of whom were suspended. The students claimed there were actually many more who wore armbands, but all we need to know is that there were three students who wore armbands and who ended up being a part of a lawsuit in this landmark decision: Mary Beth Tinker, John Tinker, and Christopher Eckhardt.

Prior to 1965, John Tinker had never been in trouble at school. Certainly, he'd never been suspended. The best description I saw was by his lawyer: John was "shy and Quaker-like."[12] And in fact, John said that if a student actually hit him, he wouldn't fight back—he really felt that maybe, if he wouldn't fight back, just maybe, they would be his friend.[13] This was the approach of John Tinker.

So when John heard that the school district had set out this new policy against wearing armbands, he felt it wasn't really fair for him to wear his armband until the school board itself had a chance to consider the policy. Like that bully on the playground, maybe

12 Johnson, *supra* note 4, at 18.
13 *Id.* at 19.

the school board would reverse its policy. Maybe there would be an explanation. He wanted to be fair. So he decided he wouldn't wear his armband on the next day, the sixteenth.

Christopher Eckhardt was a different story. Christopher was at Roosevelt High School, whereas John was at North High School. Christopher was a Boy Scout and very popular; he was even voted most likely to succeed. And Christopher went to school with his armband on.

Just a year earlier, the school had advocated that the students wear all black armbands in order to express the loss of school spirit at the school!

Christopher showed up with an overcoat—it was December in Iowa—but by the time he got into the school and he took the coat off, he had already decided that he was going to immediately go to the principal because he knew he was violating a school rule. As he began to walk to the principal's office, the captain of the football team saw him, grabbed and tried to rip his armband off, and had some unpleasant things to say to him. Christopher responded in kind, but continued on his way.

When he finally made it to the principal's office, he met the vice principal, Mr. Blackman, and the girls' advisor at Roosevelt High School, Thelma Cross. Blackman and Cross proceeded to tell Christopher that, if he were to wear the black armband in protest, it would ruin his plans for college.[14] They explained that "colleges didn't accept protesters."[15] In fact, they said, Roosevelt High

14 *Id.* at 17.
15 *Id.*

School would not even allow him back in if he insisted upon wearing his armband. And then Vice Principal Blackman said that Christopher would get "a busted nose."[16] At that point, Christopher felt intimidated and began to cry, but he still wouldn't take off his armband.[17]

Picture the scene.

He's crying, he's intimidated, he's scared. But he won't budge.

That takes courage.

I've seen it before: in 2011 a federal judge threatened one of my clients at Liberty Institute with "incarceration" if she prayed during her graduation speech.[18] Her name was Angela Hildenbrand, a model high school student and valedictorian. This seems impossible, but it actually happened. Who would have thought that the very courts charged with defending the Constitution would threaten a student's freedom of religion and freedom of speech? Angela was shaken up, but she stood tall in 2011, just as Christopher Eckhardt did in 1965.

I've seen it before: in 2011 a federal judge threatened one of my clients at Liberty Institute with "incarceration" if she prayed during her graduation speech.

Mr. Blackman picked up the phone to call Christopher's mother. He asked her to tell Christopher to take his armband off. They obviously didn't know his mother. She was the head of a peace organization in Des Moines! And she told the school officials she would *not* tell Christopher to remove it, saying, "I think he has every right to

16 *Id.*
17 *Id.*
18 Student Takes Bold Stand Against Government Religious Censorship, https://www.libertyinstitute.org/liberty_case/shultz-v-medina-valley-i-s-d (last visited May 1, 2014).

wear the armband..."[19] Evidently, she was prescient about how the Supreme Court would ultimately rule.

Nevertheless, Christopher *was* punished and told, in effect, "You're suspended until you come back without it on."[20]

Mary Beth Tinker, the eventual third student in the case, was a top student, was well liked, and decided on her own that she wanted to wear her armband that morning.[21] Her father, at first, was hesitant and didn't favor his children's defying authority.[22] But as Mary Beth expressed her heart to mourn the casualties and told him she really wanted to advocate for a truce in the war, just as Senator Kennedy had proposed, Leonard Tinker relented and agreed that she needed to speak her conscience in a respectful way.

So she headed to school and had a very different experience that day from Christopher Eckhardt's. At first, no one had much to say about her armband. A few people asked her why she was wearing it, and she explained her reasons.[23] One or two of them cautioned Mary Beth that she might get in trouble.[24] But there was no trouble—until after lunch when she went to math class.

The same teacher who had given the lecture against armbands for 30 minutes the day before immediately sent her to the principal's office.[25] Mary Beth talked to the vice principal, and the vice principal told Mary Beth that if she took off her armband, she could go back to class.[26] So Mary Beth took her armband off and she went back to class.[27]

It wasn't that Mary Beth was caving on her principles or

19 Johnson, *supra* note 4, at 18.
20 *Id.* at 18.
21 *Id.* at 19.
22 *Id.* at 83.
23 Johnson, *supra* note 4, at 19.
24 *Id.* at 20.
25 *Id.*
26 *Id.*
27 *Id.*

making some big decision. She was only 13, and he had told her, "Mary, you know we're going to have to suspend you from school unless you take off that armband."[28] And that's what she did. But five minutes after she got back to class, the girls' advisor, Ms. Tarman, showed up and told Mary Beth she needed to come back to the office.[29] When she brought Mary Beth back, Ms. Tarman expressed her sympathy.[30] She said she understood Mary Beth's position, having been raised a Quaker herself, but that rules were rules, and the rule was that wearing an armband got you suspended—no exceptions.[31]

That night a number of students got together because of the suspensions. The students tried to contact the president of the school board, Ora Niffenegger, and an attorney.[32] They succeeded in contacting Niffenegger after three or four different calls and asked him to hold an emergency meeting.[33] They recalled that his comment was that it was "not that important" to hold any special meeting.[34]

John Tinker, if you remember, was trying to be fair. He was waiting for the school board to have their chance. When he heard that the school board considered the issue trivial and something they wouldn't even hold an emergency meeting to address, he made his decision right then to wear his armband the next day. So the next day, in North High School, John wore the black armband. The problem was that John was wearing a dark suit, and his armband wasn't noticed by anyone at the beginning!

28 Peter Irons, The Courage of Their Convictions 247 (1990).
29 Johnson, *supra* note 4, at 20.
30 *Id*.
31 *Id*.
32 *Id*. at 21.
33 Johnson, *supra* note 4, at 21.
34 McPherson, *supra* note 8, at 18–19 (citing Lorena Tinker's handwritten notes of the meeting).

After gym class, he put on a white shirt and immediately got some, as he described them, "not . . . very friendly" comments.[35] At lunch, he endured some more remarks, but a football player came to his defense and told the other students, "Just leave him alone. Everyone has a right to his own opinion."[36] (So, one of the messages here is that not all of the football players are bad!)

At that point, John went to the principal's office and was told by the principal, "John, I'll ask you to take the armband off, but I don't suppose you will."[37] John replied, "No, I won't."[38]

When he heard that the school board considered the issue trivial and something they wouldn't even hold an emergency meeting to address, he made his decision right then to wear his armband the next day.

The school called his father, who came and was told that John couldn't come back to school until his armband was off.[39]

As an aside, the Tinkers also had two other children: Hope, who was 11 years old, and Paul, who was eight years old. One morning, bounding down to breakfast with an armband on her arm, came 11-year-old Hope Tinker. Leonard said, "Oh Hope, not you, too."[40] She said, "Well Dad, I grieve for those children in Vietnam. Is it wrong for me to show that I'm grieving?"[41] At that point, Leonard knew that he was had.

35 Johnson, *supra* note 4, at 23.
36 *Id*. at 24.
37 McPherson, *supra* note 8, at 20.
38 Id. at 20.
39 Johnson, *supra* note 4, at 25.
40 *Id*. at 26.
41 *Id.*

That day 11-year-old Hope and eight-year-old Paul went off to school with their armbands on. The school district had hastily passed the new armband policy, but the policy only applied to secondary schools.[42] The school district never even thought of the idea of trying to apply this policy to elementary schools! So the younger Tinkers had violated no rule. One of the fascinating—and instructive—lessons of this case is how it was handled by the teachers and the officials at the school.

Unlike at the high school, the elementary school officials considered the protest a wonderful learning experience. And they actually taught the kids.

Unlike at the high school, the elementary school officials considered the protest a wonderful learning experience. And they actually taught the kids. What a concept! In Hope's class, somebody called her unpatriotic.[43] And Linda Ordway, her teacher, said, "Hope is very patriotic. She has a cause to believe in, and that's why she's wearing an armband."[44] In one of Paul's classes, the teacher spent a long time—30 minutes—talking about the First Amendment and what the right to free expression means—and why it's important in our country.[45]

I believe if we would just do things like they did in the elementary school, our country would be a lot better, and I think this is one of the lessons of *Tinker*.

But the authorities didn't, and that had immense consequences.

42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*

Chapter Three

A Lawyer Spots Hypocrisy

The school board meeting was set for December 21. Instead of the usual 20 attendees, there were over 200 at the meeting, and there were a lot of opinions flying through the air.

One of the opinions was by a lawyer named Craig Sawyer, an associate professor at Drake University Law School, who was actually representing the students at this point. During Sawyer's discussion, one of the school board members asked him, "Would it be okay if the kids wanted to wear Nazi swastikas on their arm if they came to school?"[46] His answer was, "Yes, and a Jewish Star of David and the Cross of the Catholic Church and an armband saying 'Down with the School Board.'"[47] Evidently Mr. Sawyer wasn't looking to make friends on that school board!

The board voted to postpone the vote in order to get legal advice. About two weeks later, they voted 5–2 to uphold the ban. The controversy had started December 16. By January 22, just a month later, there had been 22 articles in the Des Moines newspaper and their afternoon newspaper. *The New York Times* had carried a very full story on this case, and it was even on CBS Evening News.

46 *Id*. at 32.
47 *Id.*

Their story had gone national.

One of the fascinating and surprising facts to emerge from the publicity is this: a simple count of the letters to the editor in these papers found the majority who wrote them supported the students in their right to wear the armband, despite peoples' views on the war.[48] Most Americans innately understand—almost built into their DNA—that people should be able to express their opinions, even if they emotionally disagree.

That said, one of the unpleasant truths about many landmark court cases—and unfortunately true in this case—is that people who stand up for what they believe typically have to pay a price for what they're doing. The Tinkers had red paint thrown at their house. They received hate mail. They endured nasty phone calls. A local radio talk show host even promised to defend anyone who would physically attack the father, Leonard Tinker, who was a devoted pacifist.

The persecution didn't stop there. John, despite being an excellent musician, was given a D in band. He wasn't allowed to march in the Memorial Day Parade, which really hurt him. Mary Beth—and remember, Mary Beth was 13 years old—received a call from a woman who asked, "Is this Mary Beth?" Mary Beth said, "Yes." The woman on the phone then said, in these exact words, "I'm going to kill you."[49] This should never happen to any 13-year-old anywhere. But this is the type of sacrifice that people pay when they stand up in what turns out to be a landmark First Amendment case.

The families persisted, however, and as they realized they were

48 *Id.* at 52.
49 Irons, *supra* note 33, at 248.

going to file a lawsuit, one of their first decisions was: who would their lawyer be?

Both the Iowa Civil Liberties Union, who was helping the families with the case, and the families themselves concluded that Professor Sawyer was too "volatile and abrasive" to be effective.[50] So they turned to a young attorney by the name of Dan Johnston. The families and the ICLU thought Dan Johnston had better organizational and negotiating skills; and, 28 years old and fresh out of law school, Johnston didn't charge very much. And the ICLU was actually helping, mainly through one donor, to fund the case.[51]

So young Dan Johnston became the lead attorney on what was to become one of the most consequential cases in Supreme Court history.

So young Dan Johnston became the lead attorney on what was to become one of the most consequential cases in Supreme Court history.

On the other side, the school district's attorney was the polar opposite, and if the lawsuit had been a TV show, the casting couldn't have been any better. His name was Allan Herrick, and he worked for one of the biggest law firms in town. Herrick was an almost 70-year-old World War II veteran who arrived at work every day at 6 a.m. In researching the *Tinker* case, I didn't see any notes on when Dan Johnston arrived at work, but I gathered it wasn't at 6 a.m. Allan Herrick was known, even at age 70, to play a pretty mean

50 Johnson, *supra* note 4, at 61.
51 *Id.* at 62.

game of racquetball. He was in very good shape, was very agile, and was very emotional about these issues. He was a remarkable and honorable man and would serve as a more-than-able opponent for the young Mr. Johnston.

Dan Johnston filed his eight-page complaint in federal court asking for an injunction on the grounds that the students had a right to free speech and for nominal damages of one dollar. The answer filed by the school was three pages long. And thus started the case. In fact, from the filing of the complaint to the final decision of the Supreme Court took three years, much faster than things go these days.

The major argument made by the students' lawyer was that the school district's policy was censorship under the First Amendment. He argued that the students' armband protest was peaceful, it caused no disturbances, and it was protected under the First Amendment's protection of free speech. The main argument by the school district was that schools have a duty to maintain order and discipline in the schools and that the discretion should be left with them and not the courts. The trial, which commenced on July 25, 1966, lasted two days. The main people who testified were the three plaintiffs, Christopher Eckhardt, John Tinker, and Mary Beth Tinker, and a few of the school officials. There were no additional facts from what I have already recounted except one striking thing that was unearthed: the school's admission that they allowed political buttons at school,

From the filing of the complaint to the final decision of the Supreme Court took three years, much faster than things go these days.

they allowed religious symbols to be worn at school, and they even allowed students to wear Iron Crosses that were associated with Hitler's Third Reich at school.

In the closing arguments, Dan Johnston stood and said it was hypocritical to allow political buttons, even Iron Crosses, but to ban armbands; and that the school district showed no evidence of any disruption at the schools from what these students had done. The school district argued that schools have a right to set rules for order and are no place for demonstrations.

Dan Johnston was right, the school district's policy *was* hypocritical. But would the court see it this way? This would be an especially hard decision during a time of war.

What happened next was, I think, amazing. It was one of those twists that seemingly has to happen in every case for it to become what is considered "landmark." You have to have a little divine providence go your way.

At the same time this trial was going on, unbeknownst to anybody in the case, another case was being decided by the United States Court of Appeals for the Fifth Circuit: a case called *Burnside v. Byars*.[52] In this case, out of Mississippi, more than 30 students had worn freedom buttons in the civil rights movement.[53] The principal told these students that freedom buttons were banned because they "would cause commotion, and would be disturbing [to] the school program."[54] The U.S. Court of Appeals for the Fifth Circuit ruled that students have a right to free speech in the schools and that for a school to interfere with that right, there had to be

52 363 F.2d 744 (5th Cir. 1966).
53 Johnson, *supra* note 4 at 101.
54 *Burnside*, 363 F.2d at 746.

evidence of a material and substantial interference with the order and discipline of the school.

Remember that ruling, because it was on a collision course with *Tinker*.

The judge in the *Tinker* case was a man by the name of Judge Roy Stephenson. Judge Stephenson had been a high-ranking officer in World War II. He received the Silver Star and the Bronze Star. He was probably not who Dan Johnston was hoping would decide the case with his clients, who were speaking out against a war. Five weeks after the trial, Judge Stephenson issued his ruling in favor of the school district. But in his ruling, Judge Stephenson now had to deal with the *Burnside* decision. So in his *Tinker* opinion, Judge Stephenson said that a disciplined atmosphere in the classroom wins out over any sort of student rights, that schools shouldn't be limited to restricting speech when it might cause a material and substantial disruption, and that schools should have wide discretion. And as if to leave no doubt as to what he thought of the Fifth Circuit's opinion, Judge Stephenson went on to say that *Burnside* is "not binding upon this Court."[55]

Dan Johnston lost the case at the trial court, but he was really pretty cheery. He felt like the case was set up well for appeal. And on appeal, Johnston aimed straight at the hypocrisy issue: the school district banned armbands while permitting political buttons and the Iron Crosses. Johnston also pointed out that there was no disruption to the schools from the armband protest. The school district filed its response, arguing that schools should have discretion and that it was reasonable to assume armbands might lead to disturbances of some

55 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 258 F. Supp. 971, 973 (S.D. Iowa 1966) (mem. op.).

sort. The oral argument was set for April of 1967 at the United States Court of Appeals for the Eighth Circuit in St. Louis.

Unlike today, no transcripts were made of the oral argument, and no media covered the case. The only remark from the oral argument that anyone remembers is that one of the judges asked Dan Johnston if he was really going to insist upon getting his dollar.[56] That's all anybody remembers. But at least after many hundreds of hours of work and briefing and depositions and trial and everything else, the students and the school district were going to get an answer.

Or so they thought. The argument was before a three-judge panel of the Eighth U.S. Court of Appeals, but the court issued no decision and instead reset the case for an *en banc* rehearing,[57] because the court believed the decision was too important for only a limited panel of the appellate court to decide.

The court issued no decision and instead reset the case for an *en banc* rehearing, because the court believed the decision was too important for only a limited panel of the appellate court to decide.

And so *Tinker* went to all eight of the Eighth Circuit U.S. Court of Appeals judges, and reargument was set for five months later. Again, there was no transcript, so we have no official record of the argument, but the *Des Moines Register* covered the proceedings and noted a significant exchange. It focused on a question asked by one of the judges parroting an argument of the school district: even if the

56 Johnson, *supra* note 4, at 117.

57 *An en banc* hearing means that all of the judges heard the case—the entire court—rather than the typical three-judge panel.

students couldn't wear the armbands, classes did discuss the war and the students had their opportunity to express themselves at certain times, so why wasn't that sufficient under the First Amendment? Dan Johnston's response was, "I submit this is not free speech at all. There is too much interference. What if President Johnson said you can argue against his policies only on Fridays?"[58] I think he had made his point pretty well.

The decision came down a month later by the full Eighth Circuit, all eight judges. And, you would think, after all this time and all this effort, there would be some analysis. Instead, here is the full decision: "The judgment below is affirmed by an equally divided court."[59] That's it. No analysis, no discussion, 4–4, Johnston tied and like the phrase kissing your sister, it meant he lost. Because the decision from the lower court was a loss, that earlier loss still stood.

The Supreme Court does this because we don't want the Constitution to mean *two different things* in *two different jurisdictions.*

What this really meant, however, was that the lower court decision, which said *Burnside* is not binding on the Eighth Circuit and now stood unreversed, had set up a beautiful circuit split. And for those of you who are not attorneys, if you want to get into the Supreme Court, the most likely way for the Supreme Court to take your case is when one Federal Court of Appeals says one thing while another Federal Court of Appeals says something else. The Supreme Court does this because we don't want the Constitution to mean *two*

58 Johnson, *supra* note 4, at 118.
59 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 383 F.2d 988 (8th Cir. 1967).

different things in *two different jurisdictions.*

As the case was submitted for consideration by the U.S. Supreme Court, Dan Johnston received some help. The national ACLU had attorneys in New York City, David Ellenhorn and Melvin Wulf, who offered to help write much of his briefing, which they did. Johnston was glad to receive such help because he was, by this time, running for Attorney General of Iowa. And Ellenhorn and Wulf did a couple of very bright things for the case.

First, they brought out the students' backgrounds as Quakers and Unitarians, pulling in a religious background that would make them more mainstream and not seem as outliers or protesters. As I've stated, it's sad that the ACLU will rarely defend religious speech cases in the schools today, such as those litigated by my Liberty Institute colleagues, others and myself. But by fighting for antiwar speech in the 1960s, they were about to open the door for protection of respectful student speech, a protection that now covers students of faith.

Second, Ellenhorn and Wulf pointed out the circuit split.

And so, in March of 1968, the Supreme Court granted *certiorari.* The students' case was going to the highest court in the land.

Chapter Four

Supreme Consistency

The Supreme Court's vote to accept the case was a 5–4 split. We know this because the justices' private papers, released many years later, recount this fact.[60] Two of those four justices who opposed hearing *Tinker* would later change their opinion and ultimately support the students' free speech rights.

The students' lawyer, Dan Johnston, argued similarly as he had before, but with a little more refinement that the student expression here was "dignified, orderly, and peaceful"—there were no disruptions.[61] And so, he argued, under the First Amendment, the students should win.

The school district said that chaos was breaking out all over the country. And in fact, that was true; chaos *was* breaking out all over the country due to antiwar protests, some of which were violent and unpatriotic. Therefore, the school district argued, their prompt action might have avoided chaos at the schools.

Another event that was interesting was that one organization filing an *amicus* brief in support of the students was the National Student Association. This was a group of college and university

60 Johnson, *supra* note 4, at 128, 165–67.
61 *Id*. at 135.

student governments with which Dan Johnston had connections. It was, in my opinion, a strategic mistake and shows his newness before the Supreme Court. Probably the last thing you want to do if your clients are peaceful and orderly—and even silent with an armband—is to connect yourself with college protests and pictures on television of water hoses and bullhorns and arrests. But Johnston was thrilled that the National Student Association, with which he had been involved in college, filed its brief saying that the *Tinker* decision would affect protests and demonstrations in college campuses all over the country. But mistakes can be overcome if facts, law, circumstances, and divine providence are with you.

The all-important oral argument itself was on November 12, one week after the new President, Richard Nixon, was elected. And that week, every leading story in every newspaper was Vietnam. So the war was front and center. The Tinkers were all there for the oral argument except for John, who, unfortunately, missed his flight because of weather and didn't get there in time. But one of the decisions the Tinker team had to make beforehand was who was going to do the argument.

The ACLU attorneys from New York had much more experience, but the Tinkers and the Eckhardts felt that Dan Johnston had been with them for three years, had done good work, wanted to argue it, and—they felt—he had earned that right. And so Dan Johnston stepped into the batter's box to give the argument.

I've stood where he stood, which is very close to the faces of the Supreme Court justices. In fact, when arguing, you are so close that you can only see four or so justices at a time and must turn your head to see others. It's a thrilling and honoring, but

humbling, experience.

As Johnston stood on that spot, he was immediately peppered with 19 questions in three minutes from Justice Byron White.[62] By the end of that peppering, Johnston was essentially admitting that it *was* a disruption to other students' mental state when they saw an armband in the classroom. He was in dangerous water indeed.

Seeing that he was in trouble, Chief Justice Earl Warren and Justice Thurgood Marshall came to his rescue. Justice Marshall's "question" wasn't even as much of a question as it was a statement: the armband policy—the ban—wasn't limited to the classroom, was it? He was right, and Johnston got the point: the policy says you can't wear an armband *anywhere*—not in the classroom, not on the school grounds, not on the playgrounds, not anywhere. It helped Johnston get his footing, and he did an excellent job in the balance of the argument.

But one of the decisions the Tinker team had to make beforehand was who was going to do the argument.

Then it was Allan Herrick's turn.

Herrick got up on behalf of the school district, and Justice Marshall was fairly aggressive—which should not have been too surprising. This was Thurgood Marshall, the man who argued *Brown v. Board of Education,* famous as a civil rights attorney before he came onto the Court; and if anything was important in the civil rights movement, it was the right to peaceful protest and demonstration. So, it's not surprising that he asked a question aiming at that point.

62 *Id*. at 153.

When the school district's attorney was trying to argue that this could be a disruption, Justice Marshall asked, "How many will wear an armband?"[63] Herrick responded that five were suspended and two others wore armbands, admitting there were no others known to wear them. Marshall's statement was "Seven out of *18,000*, and the school board was afraid that *seven students* wearing an armband would disrupt *18,000."* When Herrick tried to sidestep, Marshall cut in, "Am I correct?"[64]

"Seven out of *18,000,* and the school board was afraid that *seven students* wearing an armband would disrupt *18,000."*

That was the favorite moment of the day for the Tinker family. Next came Dan Johnston's rebuttal. The rebuttal was fairly rough, and one of the surprises to Johnston was that Justice Hugo Black, normally seen as a liberal on the Court, was very hostile to his side.

On Friday of that week, three days after the argument, the Court met in secret and voted.

We know what happened in that conference because, again, we have the justices' private notes that have been released since that time. In this vote, the justices voted 7–2 in favor of the Tinkers. Two votes had switched from before.[65]

When the discussion started, Chief Justice Warren believed that they should decide the case based upon the equal protection grounds that the school district allowed political buttons but they wouldn't allow armbands. Justice Douglas argued for a much broader

63 *Tinker v. Des Moines Independent Community School District,* Oyez (last visited May 1, 2014), http://www.oyez.org/cases/1960-1969/1968/1968_21 (oral argument).
64 *Id*.
65 Johnson, *supra* note 4, at 128, 165–67.

protection. Justice Hugo Black said, "[C]hildren [are] being allowed to run riot."[66] Justice White, who had been so tough on Johnston during the oral argument, then suggested a narrower ruling for the case: that schools had the right to control, discipline, and order in the school, but in this case there was no real proof of any disruption and therefore the school had lost the case.[67]

That argument won the day.

The writing of the decision was given to Justice Abe Fortas. Justice Fortas had recently written a very significant decision on the rights of minors in *In re Gault*[68] that, some commentators believe, had a big impact on the decision he wrote here. *In re Gault* involved a 15-year-old boy who, while his parents were at work, was pulled out of his home and taken into custody for allegedly making an obscene phone call that he said he didn't make.[69] Gault was given no right to an attorney.[70] He and his family were given no identification of the charges against them, there was no right to a transcript or an appeal, and he was given no right to confront his accuser.[71] When this case made it to the Supreme Court, the Supreme Court ruled almost unanimously that this conduct was unconstitutional.[72] In the opinion, Justice Fortas wrote, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[73] Thus, in this decision, Justice Fortas gave minors their first rights of protections under the Fourteenth Amendment and due process.[74] Now Justice

66 *Id*. at 166.
67 Johnson, *supra* note 4, at 167.
68 387 U.S. 1, 3–4 (1967).
69 McPherson, *supra* note 8, at 38.
70 *Id*.
71 *Id*.
72 *In re Gault*, 387 U.S. 1, 33–34, 41, 57, 59 (1967).
73 *Id*. at 58.
74 *In re Gault*, 387 U.S. at 33–34, 41.

Fortas was about to deliver a decision giving minors their first protections in the schools. He was well prepared.

The famous quote that almost any law student knows from *Tinker* is, **"It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."**[75]

Justice Fortas went on to say:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.[76]

The key part of this opinion in making it narrow, and dealing with the idea of disruption, was when Fortas wrote, "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the rights to freedom of expression."[77]

Think about the alternative.

The alternative is that "fear" of disruption, or of other unpleasant things, could be used by the government to shut down all speech and replace it with what, as Justice Fortas said, would be "totalitarianism."[78]

What if that alternative was the country in which we live? There are efforts today to move to that very approach. That is why eternal vigilance is the price of freedom. And that's why the *Tinker* case is so treasured by First Amendment lawyers like me.

The Supreme Court's ruling was *consistent.* It was consistent with the facts of the case. But most importantly, it was consistent with the plain words and meaning of the First Amendment to the

75 *Tinker,* 393 U.S. at 506.
76 *Id.* at 511.
77 *Tinker,* 393 U.S. at 508.
78 *Id.* at 511.

United States Constitution:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*.[79]

In 1969, those applauding the *Tinker* decision, including the ACLU whose attorneys helped argue it, saw the crystal clear consistency of that decision. Today, many of them are strangely and, I would argue, *inconsistently,* silent when a student wants to exercise his or her protected private speech in a public school—if the speaker happens to be a student of faith expressing content of faith. These cases include:

"In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the rights to freedom of expression."

- When one of my clients wanted to simply hand out candy canes with a religious message to friends at a school winter celebration.[80]
- Or when another of my clients wanted to mention his faith as a graduation speaker and had his microphone shut off and his college career threatened by the high school principal.[81]
- Or when the valedictorian we represented, whom I mentioned

79 U.S. const. amend. I.
80 Supreme Court Denies "Candy Cane" Case, but the Fight for Students' Religious Rights Intensifies, https://www.libertyinstitute.org/liberty_case/morgan-v-swanson (last visited May 1, 2014).
81 Brave Student Stands Up to Religious Censorship, http://www.libertyinstitute.org/pages/issues/in-the-school/remington-reimer.(last visited May 1, 2014).

> in an earlier chapter, was actually threatened with "incarceration" if she mentioned God in her valedictory address. And a group that says it is for civil liberties was the one who filed that lawsuit! Yet they were trying to suppress the civil liberties of another citizen.[82]

But, thankfully, all these students I just mentioned had their rights restored because the authorities eventually saw the consistency between their freedom and the Constitution. The protection of freedom is an ongoing legacy of the *Tinker* decision, even if some are now uncomfortable with that freedom.

John Tinker heard about the Supreme Court's decision when a reporter contacted him at school, and John was thrilled. Mary Beth Tinker was a high school student in St. Louis when she heard about the decision. She was actually embarrassed because she became a celebrity at her new school, which was discomforting to her. Leonard Tinker was in a peace conference in Paris, France, when the decision came down. Two weeks later, when the Tinkers all were together again, they celebrated by eating ice cream and drinking ginger ale.

The opinions from the culture on the *Tinker* decision were strong and diverse. I'll give you one example of each. Professor Theodore Denno wrote, "A society which is too proud to listen to its children, too afraid that they might 'disturb' it, is probably a society too afraid to look itself in the eye. During the course of events in history, there was probably precious little difference between Mary Beth Tinker's message on the black armband and the twelve year old boy who spoke to the elders in the temple," referring to Jesus. "This time, the men in

82 Student Takes Bold Stand Against Government Religious Censorship, https://www.libertyinstitute.org/liberty_case/shultz-v-medina-valley-i-s-d (last visited May 1, 2014).

black robes got wise."[83]

Not so complimentary were some of the letters that came to the Supreme Court. One of my favorites, and I think emblematic of what was sent, was this one: "If my kids ever try to take advantage of your recent decisions when in high school or college, they'll find out just who the real supreme court is."[84]

Over the years, *Tinker* has gone through many attacks. In fact, there are attempts to reduce the strength of *Tinker* in courts all over the country. But *Tinker* is still the law to this day. After the decision, Mary Beth Tinker continued to be active in many peace, antiwar, and civil rights efforts. Because of her parents' experience as professionals and educated people, they suffered harassment for what they did. Mary Beth therefore decided to stay away from higher education, and she actually became a piano technician, a position she enjoyed. But after a number of years, she decided to go back to school and earned her nursing degree. As this book is being written, Mary Beth has just recently retired from hospital nursing. But she is still very, very involved in many activities. I asked her to send me an email, and the list is so long, my first thought was, "She reminds me of her mom."

The protection of freedom is an ongoing legacy of the *Tinker* decision, even if some are now uncomfortable with that freedom.

Her brother, John, continued his antiwar activities in college, and he actually referred to himself as "majoring in protests."[85] Afterwards, John held numerous varied and fascinating jobs. He's

83 Johnson, *supra* note 4, at 190.
84 *Id*. at 191.
85 *Id*., at 183.

married now and has two children, ages 13 and nine. In fact, one of the things I've found is that there are incidents where a child is taking a stand all by himself or herself facing the school district, and they'll get a call out of nowhere from John Tinker. Just calling to support them. So he's still standing up beside students around the country.

Chapter Five

Will Freedom Survive Today's Irony?

"I think it's great that conservative students can make use of our case, and that religious students use our case."
John Tinker, 2005[86]

So what are my takeaways from this story? I have three—but they all come down to one question: will freedom, true freedom, survive today's gates? Will *Tinker* continue to set the course of an America where we tolerate each other's First Amendment freedoms without punishing those with whom we disagree? Or will *Tinker* become less relevant in an America where "freedom" is redefined and politicized?

My first takeaway concerns children and their families.

One of the arguments often made against the *Tinker* decision is that kids should be seen and not heard. And that's really a misnomer and misapplication in such First Amendment cases, especially involving students. These cases don't involve children by themselves; there are families. A child can't bring a lawsuit. They have to have a next friend, and it's their parents.

Freedom cases are frequently about families who have a

86 McPherson, *supra* note 8, at 97 (citing interview with John Tinker, October 12, 2005).

different belief system than the majority, who are not being allowed to express their beliefs—and indeed *punished* for holding or living out those beliefs. And this is very important to our future. Why?

Because our children are not children of the state, they're children of their parents. American society is comprised of millions of little governments called families, and they're each producing these unique products, young adults, with their own philosophical, moral, religious and political belief systems. And then they compete in the marketplace of ideas, and we think that that's the best way to provide diversity of opinion and ideas: to allow free individuals to search for truth, express what they believe, and not be punished for their opinions.

As a religious liberties attorney, I see this every week.

A college student is ordered to remove her necklace with a traditional religious symbol—a necklace and a faith handed down from her grandmother and parents.[87] Members of a group of small-town high school cheerleaders are banned from displaying uplifting Bible verses on "run-through banners" at football games.[88] An elementary school child is disciplined for praying at his meal in the lunchroom, just as his family prays at their dinner table.[89] I could go on. Fortunately we win virtually all such cases, yet the battle is fierce and alarming.

So let's remember Abe Fortas's words in the *Tinker* decision:

> *It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of*

87 Told to Remove Her Necklace, http://www.libertyinstitute.org/pages/issues/in-the-school/audrey-jarvis (last visited May 1, 2014).
88 Small Town Cheerleaders Inspire the Nation, http://www.libertyinstitute.org/pages/issues/in-the-school/kountze-cheerleaders (last visited May 1, 2014).
89 Outrage! School Stops 5-Year-Old's Lunchtime Prayer, http://blog.libertyinstitute.org/2014/04/outrage-school-stops-5-year-olds_4798.html (last visited May 1, 2014).

speech or expression at the schoolhouse gate.[90]

His words put *Tinker* on a collision course with what is commonly known as "political correctness," a philosophy of intolerance that is in danger of being enshrined in our culture, allowing government to pick and choose the ideological "winners and losers." There's another term for this, and Fortas used that term in his opinion as well: "totalitarianism."[91]

Tinker upholds the American principle that parents have the right to infuse their values into their children because they are *their* children, not the state's; and those children have the right to live out those values, including values that openly express their religious beliefs—free exercise of religion being the first freedom found in the First Amendment.

It can hardly be argued, that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

So this case to me is ultimately about the very heart, the very core of our free society—families, including children, exercising liberty in accordance with their faith and family beliefs.

My second takeaway concerns social and cultural maturity.

There's a great story about something that happened after the sound and fury of the *Tinker* decision that I believe says so much about our country; at least the way our country should be. And that is that Dan Johnston, two years after the decision, was invited by Roosevelt High School—the same Roosevelt High School against

90 *Tinker*, 393 U.S. at 506.
91 *Id*. at 511.

which he led the lawsuit—to be its commencement speaker!

Now I think that says a lot about maturity, about unity, and about coming together; and it shows a grown-up America that sometimes we don't always see in a media that seems to delight in dividing us to generate ratings.

I'm not asking for a "Kumbaya" America where differences aren't strongly argued. I've been open about hypocrisy by those who do not consistently support freedom of religious expression, and I believe for good reason: they too often argue against the very freedoms they argued *for* in the *Tinker* case. But despite our disagreements, I am urging us not to take the bait of hating our opponents and manipulating the government into stealing our opponents' liberty to disagree with us, including their religious liberty. I'm fighting for an America where different views—including different religious views—are tolerated and not trampled; where people of faith are not recklessly labeled as "haters"; where their First Amendment rights are not attacked by the very people who hold up *Tinker* as a model of allowing the views of everyone to be heard, even if they are unpopular; where differences are peacefully acknowledged rather than powerfully suppressed.

I'm fighting for an America where different views—including different religious views—are tolerated and not trampled.

My clients enter many of our nation's gates: the gate of the schoolhouse, the gate of city hall, the gate of the house of worship or ministry, the gate of the military base. Often they are being asked to

"shed their constitutional rights"—to use Abe Fortas's phrase—when they enter those gates.

But in an America where someone like Dan Johnston is invited to speak at Roosevelt High School in Des Moines—a grown-up America—the gates are open: open to First Amendment freedoms, open because we have committed to a system where we can agree to disagree and interact with each other without hating and ostracizing and suppressing each other.

My final takeaway is related to the first two.

As Thomas Jefferson and John Dickinson wrote in 1775, we must be, "… [w]ith one mind, resolved to die freemen, rather than to live as slaves."[92]

Freedom takes commitment.

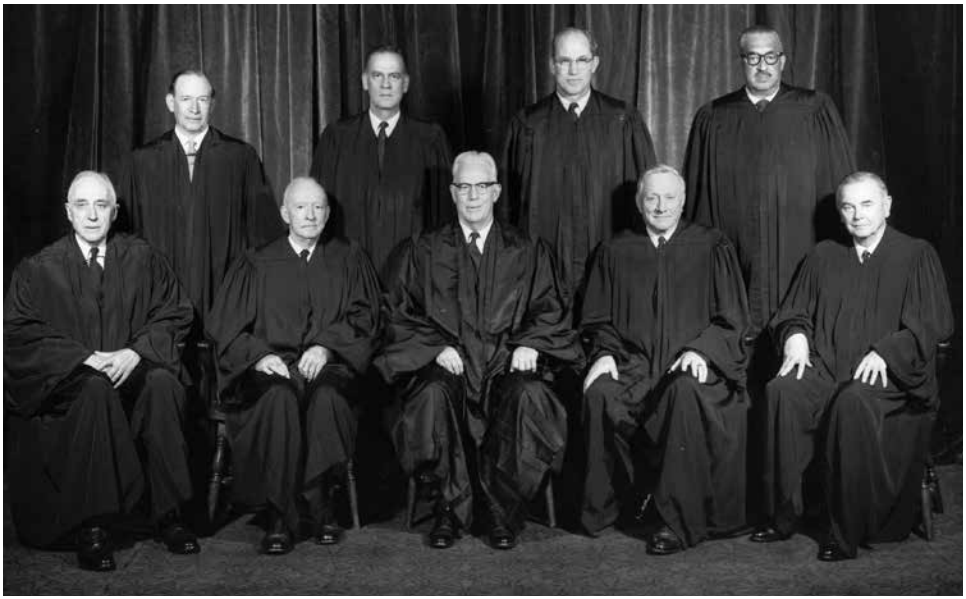
And that's why I use the *Tinker* decision to defend religious liberty—and in a supreme irony, usually without the aid of the ACLU—because I believe *Tinker* is a lighthouse to guide us to an America where true tolerance, diversity, and pluralism overcome the impulses to suppress another citizen just because we don't like his or her viewpoint on God, meaning, purpose, or anything else. In fact, without such liberty, we won't have civilized order for long; we'll have the "totalitarianism" of which Abe Fortas warned.

After researching the *Tinker* case and rubbing elbows, even if only by email, with its participants, I would not be surprised that, if you compared my political beliefs with John's and Mary Beth's

92 Declaration of the Causes and Necessity for Taking Up Arms.," http://avalon.law.yale.edu/18th_century/arms.as. Authorship documentation: Editorial Note: Declaration of the Causes and Necessity for Taking Up Arms," Founders Online, National Archives (http://founders.archives.gov/documents/Jefferson/01-01-02-0113-0001, ver. 2014-02-12). Source: *The Papers of Thomas Jefferson*, vol. 1, 1760–1776, ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp. 187–192.

political beliefs, we might not have any in common. But we treasure something else we do have in common, and that's our commitment to freedom. And we'll lock arms and fight for that. And isn't that what makes this country great?

I hope someday that the "supreme irony" comes to an end: that the fans of First Amendment free speech become equally fervent fans of First Amendment free exercise of religion. But until that day, we will need attorneys who will truly fight for the First Amendment and our "First Freedom"—religious freedom.



Collection of the Supreme Court of the United States.

The Supreme Court of the United States as it was when it decided the Tinker case.

Mary Beth Tinker and Christopher Eckhardt with their armbands.

A federal judge threatened to incarcerate Angela Hildenbrand if she mentioned her faith in her valedictorian address. Liberty Institute stepped in, she gave the address her way, and freedom prevailed. The ACLU, which defended the Tinkers, does not consistently help defend students like Angela who hold traditional views of faith.

A twenty-first century advocate for faith: Liberty Institute client Audrey Jarvis was ordered to remove or hide her cross necklace at a public university. The school eventually admitted it was wrong.

Erin Shead was told she could not draw or name God as her "idol" in a class project because it would violate the First Amendment. Actually, the opposite was true, and Erin got to turn in her assignment on God.

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Appendix I

Majority Opinion

Tinker v.
Des Moines
Independent Community School District

No. 21
SUPREME COURT OF THE UNITED STATES
393 U.S. 503
Argued November 12, 1968
Decided February 24, 1969

Syllabus

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting *en banc,* affirmed by an equally divided court. Held:

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Pp. 505-506.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. Pp. 506-507.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Pp. 507-514.

DISPOSITION: 383 F.2d 988, reversed and remanded. [504]

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met 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. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired--that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld [505] the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F.Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars,* 363 F.2d 744, 749 (1966). [93]

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the

93 In Burnside, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that, in Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them, and created much disturbance.

District Court's decision was accordingly affirmed, without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia v. Barnette,* 319 U.S. 624 (1943); *Stromberg v. California,* 283 U.S. 359 (1931). Cf. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Brown v. Louisiana,* 383 U.S. 131 (1966). 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. It was closely akin to "pure speech" [506] which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. *Cox v. Louisiana,* 379 U.S. 536, 555 (1965); *Adderley v. Florida,* 385 U.S. 39 (1966).

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. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Bartels v. Iowa,* 262 U.S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere

with the liberty of teacher, student, and parent. See also [94]*Pierce v. Society of Sisters,* 268 U.S. 510 [507] (1925); *West Virginia v. Barnette,* 319 U.S. 624 (1943); *McCollum v. Board of Education,* 333 U.S. 203 (1948); *Wieman v. Updegraff,* 344 U.S. 183, 195 (1952) (concurring opinion); *Sweezy v. New Hampshire,* 354 U.S. 234 (1957); *Shelton v. Tucker,* 364 U.S. 479, 487 (1960); *Engel v. Vitale,* 370 U.S. 421 (1962); *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *Epperson v. Arkansas, ante,* p. 97 (1968).

In *West Virginia v. Barnette, supra,* this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> "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." 319 U.S., at 637.

94 Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g., West Virginia v. Barnette, 319 U.S. 624 (1943); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A. 5th Cir.1961); Knight v. State Board of Education, 200 F.Supp. 174 (D.C. M.D. Tenn.1961); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (D.C. M.D. Ala.1967). See also Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595 (1960); Note, Academic Freedom, 81 Harv.L.Rev. 1045 (1968).

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson v. Arkansas, supra,* at 104; *Meyer v. Nebraska, supra,* at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, [508] to hair style, or deportment. Cf. *Ferrell v. Dallas Independent School District,* 392 F.2d 697 (1968); *Pugsley v. Sellmeyer,* 158 Ark. 247, 250 S. W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. 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. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class

was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago,* 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is [509] the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

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 was caused by 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 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. *Burnside v. Byars, supra,* at 749.

In the present case, the District Court made no such finding,

and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. [510][95]

On the contrary, the action of the school authorities appears to have been based upon an 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 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.)[96, 97]

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools

95 The only suggestions of fear of disorder in the report are these:

A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school, and it was felt that, if any kind of a demonstration existed, it might evolve into something which would be difficult to control.

Students at one of the high schools were heard to say they would wear armbands of other colors if the black bands prevailed.

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students didn't like the way our elected officials were handling things, it should be handled with the ballot box, and not in the halls of our public schools.

96 The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the armband regulation involved herein was promulgated, debate over 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." 258 F.Supp. at 92-973.

97 After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one.

wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement [511] in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

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. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." *Burnside v. Byars, supra,* at 749.

In *Meyer v. Nebraska, supra,* at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

"In order to submerge the individual and develop ideal

> citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a [512] State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents,* 385 U.S. 589, 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

> "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker,* [364 U.S. 479,] at 487. The classroom is peculiarly 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.'"

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal 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 [513] 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. [98]*Burnside v. Byars, supra,* at 749. 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. Cf. *Blackwell v. Issaquena County Board of Education,* 363 F.2d 749 (C. A. 5th Cir. 1966).

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. We properly read it to permit

98 In Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C. S.C.1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. Edwards v. South Carolina, 372 U.S. 229 (1963); Brown v. Louisiana, 383 U.S. 131 (1966).

reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. *Hammond* [514] v. *South Carolina State College,* 272 F.Supp. 947 (D. C. S. C. 1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board of Education,* 273 F.Supp. 613 (D. C. M. D. Ala. 1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and

their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Appendix II

Summary of Religious Rights at the Schoolhouse Gate Today

The U.S. Supreme Court's Majority opinion in *Tinker v. Des Moines Independent Community School District* stated that neither teachers nor students "*shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."* And thus, the right to peacefully protest in government-operated schools was upheld.

Yet the story doesn't end there. What about other constitutional rights, such as "free exercise" of religion, which often is intertwined with "freedom of speech or expression"? How have the courts interpreted and applied the Constitution in that regard?

This is a critical question because religion today, like the Vietnam War in the 1960s, is often a flashpoint of controversy in schools, and a good test of the spirit of freedom at the "schoolhouse gate"—balanced by the need for order—championed by *Tinker*.

The following is a summary of the legal situation today regarding religious rights at the schoolhouse gate.

General Principles

It is well established that students have First Amendment

rights in public schools. Because public schools are dedicated places for learning, however, courts apply students'[99] rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech. Although there are some limits that apply to government speech, the Constitution fully protects a student's[100] private religious expression.[101]

The First Amendment prohibits a school district and its employees from being hostile toward religious beliefs and expression. The proper role of a school district is to remain neutral and accommodating toward private religious beliefs. Unlike the government, students may promote specific religious beliefs or practices.[102, 103]

As one U.S. Court of Appeals observed, the Constitution "does *not* permit [a public school] to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all."[104]

99 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Morgan v. Swanson,* 659 F.3d 359 (5th Cir. 2011) (en banc).

100 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotations omitted).

101 *See Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

102 *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

103 *See Pinette*, 515 U.S. at 760.

104 *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (emphasis added).

Prayer, Scripture Reading, and Discussion of Religion During Noninstructional Time

Public schools must treat religious expression such as prayer, reading the Bible, and religious discussion the same way they treat similar nonreligious expression.[105]

Can students pray during lunch, recess, or other designated free time?

Yes, the First Amendment grants students the right to pray during noninstructional time, such as lunch, recess, or other designated free time, to the same extent that the school allows students to engage in nonreligious activities. In other words, the school must treat religious expression, such as prayer, in the same way that it treats similar nonreligious expression.

The U.S. Supreme Court stated that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."[106]

Additionally, the U.S. Department of Education guidelines provide:

> Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the education program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say

105 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; ***see also Rosenberger v. Rector & Visitors of the Univ. of Va.***, 515 U.S. 819, 845-46 (1995).

106 *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (holding that although it is unconstitutional for the *government* to "affirmatively sponsor[] the particular religious practice of prayer" that the Constitution protects the right of ***students*** to engage in voluntary prayer). *See also Chandler,* 230 F.3d at 1317.

> grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities.[107]

As long as the prayer is student-initiated and not substantially disruptive to the school environment, schools may not restrict or punish students from praying or expressing their faith, even in front of non-believers. This means that if a school district allows students to converse with each other about any topic during lunch, recess, or free time, it has to allow students to pray, either individually or in a group, as long as the prayers are not disruptive.[108, 109]

Can students silently pray during a school's moment of silence?

Yes, if the school has a moment of silence, students are allowed to silently pray, just as they may engage in any other silent activity. Teachers are prohibited from discouraging students from praying during this time.[110]

Can students read religious materials at school?

Yes, during noninstructional time, students can read the Bible or other religious materials to the extent that the school allows students to read similar nonreligious materials. The First Amendment prohibits schools from treating religious materials differently from

107 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).
108 *Tinker,* 393 U.S. at 511.
109 *Chandler,* 230 F.3d at 1317.
110 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

nonreligious[111] materials, as long as the materials do not create a substantial disruption.

For example, if schools allow students to bring books from home to read during free time, then the school cannot prevent students from bringing religious material such as a Bible or scriptures of other faiths and reading these during free time. In the same way, if a school allows students to bring car magazines to class to read, then students can also bring religious magazines.

Can students verbally share their faith with fellow students?

Yes, if a school allows students to freely converse with each other about various topics during noninstructional time, then students can also share their faith verbally with fellow students.[112]

In other words, if a school allows students to talk to each other in between classes, at recess, during lunch, or other nonclass times, the school cannot specifically prohibit students from speaking to each other about religion and faith.

For example, if a school allows students to speak about sports, movies, or friendships during noninstructional time, the school cannot restrict students from also talking about their faith with others, as long as it is not substantially disruptive.

Student Religious Expression in Class Assignments

Students can express their faith in school assignments such as homework, projects, or artwork. The U.S. Department of Education's

111 *Id*.
112 *Id.; see also Morgan*, 659 F.3d at 412 ("[W]hat one child says to another child is within the protection of the First Amendment").

guidelines state:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.[113]

To further illustrate, if a teacher instructed students to draw pictures about the "winter season," a student could draw a picture of the birth of Jesus as part of the Christmas tradition in the same way that a student could draw a picture of a snowman. The First Amendment forbids a teacher from giving a student who incorporates religion into her assignment a lower grade based on the religious viewpoint expressed.

Although schools cannot discriminate against religious expression, they can require that the religious expression is related to the topic assigned, that the assignment reflects the student's[114] own work, and that the student has followed the specific directions of the assignment. For example, if the class assignment is to write about the

113 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

114 See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29, 845-46 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 393-94 (1993); *Morgan,* 695 F.3d at 401-02.

Constitution and a student writes about the Bible instead, the student can be penalized for not following the directions of the assignment.

It is important to note that student expression in class assignments is different from school-sponsored publications (such as school newspapers), theatrical productions, or other school-sponsored activities that the school district promotes and that appear to be the speech of the school district itself.[115]

Student Religious Speech at Athletic Competitions, Student Assemblies, and Other Extracurricular Events

Can students privately pray, either individually or as a group, at a school athletic competition (such as a football game), student assembly, or other extracurricular activity when school officials (teachers or administrators) are not involved?

Yes, if the students are voluntarily praying without any involvement by a school official (teacher, administrator, etc.), then the First Amendment protects the students' prayer to the extent that the school allows other speech to occur. Indeed, the U.S. Supreme Court stated that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."[116]

For example, if members of a football team are allowed to talk to one another about any subject prior to a game, then the school is prohibited from discriminating against students who wish to engage in religious speech or pray together during this time. The school cannot treat conversations about religion differently than

115 *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 270-271 (1988).

116 *Santa Fe Indep. Sch. Dist*., 530 U.S. at 313 (holding that although it is unconstitutional for the government to "affirmatively sponsor[] the particular religious practice of prayer" that the Constitution protects the right of *students* to engage in voluntary prayer). See also *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000).

conversations about movies, friendships, or any other similar nonreligious[117] speech.

Can a school district allow student-led prayer before an athletic competition (such as a football game), a student assembly, or other extracurricular event as part of the school program?

Yes, students can pray or speak about religion when a school has policies in place that allow students to speak, the policies are neutral towards religion (by neither encouraging nor discouraging religious speech or prayer), the school does not control the content of the student speech, and it is clear that the speech is the students' and not the school's.

> According to the U.S. Department of Education's guidelines: Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or antireligious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or antireligious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral

117 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see also *Morgan*, 659 F.3d at 412 ("[W]hat one child says to another child is within the protection of the First Amendment").

> disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.[118]

For example, if a school allows a student speaker to deliver "opening remarks" before each athletic competition, and the student speaker is chosen by neutral criteria (such as a position in student council, a position on the athletic team, or is selected randomly), and the school does not control the speech of the student, then the student speaker can discuss religion, pray, or engage in any other speech during this time because his or her speech is constitutionally protected, private speech. Additionally, under these policies, the First Amendment prohibits the school from disallowing a student from engaging in religious expression since the speech is private religious speech.

It is important to note that "the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. Without more, however, such review does not make student speech attributable to the state."[119] This means that a school official can review a student's speech for vulgarity, lewdness, or sexually explicit language and the speech can still remain private, constitutionally protected expression.

Student Religious Speech at Graduation Ceremonies

Students can include religious content, including prayer, in their graduation speeches so long as the students were selected by neutral criteria (e.g., valedictorian and salutatorian are selected by grade point average, class officers are selected by a student body vote) and

118 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).
119 *Id*.

the control over the content of each address is left to the students, and not the school.

> According to the U.S. Department of Education's guidelines:
> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or antireligious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.[120]

For example, if the school district allows the valedictorian, salutatorian, class president, and class vice president to each speak for a certain amount of time, and the students have control over the content of their speeches, then the school cannot discriminate against students who wish to incorporate religious speech, including prayer, in their addresses.

Please note, however, that a few courts have deviated from this generally accepted rule regarding the permissibility of religious content in graduation speeches. In one case, the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) determined that when school officials

120 U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,* available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).

exercise *complete* control over a graduation ceremony, including student speech, that the school officials may remove proselytizing and sectarian language from a student's graduation speech. The court determined that an objective observer would perceive the speech to be approved and endorsed by the school, and, therefore, the school could remove the proselytizing comments to avoid an Establishment Clause violation.[121]

The Ninth Circuit, however, in a different case did not require school officials to eliminate all references to God in a student's graduation speech. After removing the proselytizing comments, the student was allowed to make[122] "references to God as they related to [the student's] own beliefs."[123] The student also distributed unedited copies of his graduation speech just outside of the graduation site, and at graduation, the student announced the time and place where he would deliver the unedited version of his speech.[124]

The Eleventh Circuit (Alabama, Georgia, and Florida) upheld a school district's policy that permitted "graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies."[125] The policy did not refer to any religious speech. If the students voted to have a classmate deliver a speech, the classmate's speech would not be reviewed or edited by school officials; therefore, the speech was private student speech, and the

121 *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1103–05 (9th Cir. 2000).
122 *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981–82 (9th Cir. 2003).
123 *Id*. at 981.
124 *Id.* at 981–82, 985.
125 *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1334, 1342 (11th Cir. 2001).

message was allowed regardless of the religious content.[126]

Christmas in the Public Schools

Can a school refer to "Christmas" and have a "Christmas party," or must the school have only "holidays" and "holiday parties"?

Christmas is perfectly fine, so long as the school is not celebrating Christmas for the purpose of furthering Christianity. A federal court held that a public school is allowed to celebrate Christmas (and other holidays with both religious and secular aspects) because doing so serves the educational goal of advancing students' knowledge and appreciation of the role that America's religious heritage has played in the social, cultural, and historical development of civilization. While public schools may celebrate Christmas, they do not have to;[127] "holiday parties" are legally acceptable as well.[128]

Can a public school display Christmas decorations?

Yes, a school district may include the temporary use of decorations and symbols to demonstrate the cultural and religious heritage of the Christmas holiday. In this way, the decorations and symbols are a teaching aid and resource, and not part of a religious exercise.[129]

In a different context, the Supreme Court allowed the display of a Nativity scene, which depicts the historical origins of the

126 *Id*. at 1332, 1342.
127 *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1314 (8th Cir. 1980).
128 *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 610 (3rd Cir. 2009).
129 *Florey*, 619 F.2d at 1314.

Christmas holiday, when the religious display was next to many secular symbols, including Santa Claus, a reindeer, lights, candy-striped poles, carolers, and a teddy bear.[130]

Can a school include religious Christmas music, art, or drama in a school play or performance?

Yes, so long as the religious music, art, or drama is presented in an objective manner as a traditional part of the cultural and religious heritage of Christmas. In fact, a federal court has held that to allow students only to study, and not to participate in religious art, literature, and music when such works have developed an independent secular and artistic significance would give students a truncated view of our culture.[131]

Federal courts have also affirmed that choirs can sing both religious and secular songs, as long as the religious songs are not part of a religious exercise. One court stated that if the music curriculum is designed to cover the full array of vocal music, the inclusion of religious songs is to be expected. Another court, recognizing that most choral music is religious, stated that preventing public schools from including religious songs would demonstrate an unlawful animosity towards religion.[132, 133, 134]

Can students give out Christmas gifts with religious messages at school parties?

If students are allowed to distribute gifts at a school party, then

130 *Lynch*, 465 U.S. at 671-72.
131 *Florey*, 619 F.2d at 1316.
132 *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402 (5th Cir. 1995).
133 *Bauchman*, 132 F.3d. at 554.
134 *Duncanville Indep. Sch. Dist.*, 70 F.3d at 407-08.

the students may not be prohibited from giving out their gifts just because the gift includes a religious message.[135]

Please note, however, that a few courts have deviated from this generally accepted rule in cases involving student religious expression in class assignments when younger students, such as kindergarten and first grade students, are involved. Some federal appeals courts in the Third Circuit, which consists of Delaware, New Jersey, and Pennsylvania, and in the Sixth Circuit, which consists of Kentucky, Michigan, Ohio, and Tennessee, have granted more discretion to schools in these situations depending on the particular facts. If this situation arises, please contact Liberty Institute for further analysis and guidance.

Can students express their faith in classroom and homework assignments?

Yes. The First Amendment protects a student's private work and the school may not prevent students from expressing their faith in their assignments. See "Student Religious Expression in Class Assignments" above for the U.S. Department of Education policy.

Applying this policy to the holiday season, if a teacher instructs the students to write a story about the winter season, students may write about Christmas or Hanukkah as much as they may write about sledding or ice skating.

Can teachers and other school employees discuss religion?

During instructional time, teachers and other school employees

135 *Morgan*, 659 F.3d at 410, 412.

are acting in their official capacities and must remain neutral towards religion. As stated above, school district employees can discuss the historical and cultural role of religion as part of a secular program of education.

Teachers and other school employees can only promote religion when not acting in their official capacities. According to the U.S. Department of Education, teachers may "take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities."[136]

Similarly, outside of the school day, school officials are allowed to participate in private religious events, such as Christmas parties, in their personal capacities. This is even true when the private religious event takes place on school grounds before or after school hours. For example, if a church group rents out a classroom after school hours for a Christmas party, the teacher may attend, just like any other private citizen.[137, 138]

136 *Id.*
137 *Id.*
138 *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (holding that a teacher may participate in a religious, after-school program on school grounds in her capacity as a private citizen).

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