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FREEDOM OF EXPRESSION WITHIN THE SCHOOLHOUSE GATE

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I. INTRODUCTION

In the late 1960s, the Supreme Court began contemplating how the First Amendment's commitment to "the freedom of speech" should protect the right of students to introduce their own ideas into the schoolhouse.[1] This constitutional question extended well beyond the matter addressed in *West Virginia State Board of Education v. Barnette*, because that opinion—momentous though it was—held simply that students could refuse to recite the Pledge of Allegiance.[2] But *Barnette* did not establish that students possessed an affirmative right to advance their own opinions, on topics of their own selection, much less in the face of school officials' objections. The right to sit out, in other words, did not necessarily confer the right to speak out.

This Article examines the history of student rights to affirmative speech, with a focus on threats facing those rights that appear on the horizon. First, as it must, this story begins with the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District.*[3] The Article analyzes the case's background, emphasizes the majority's broad conception of citizenship, and illuminates the opinion's deep doctrinal ambiguity. Turning to the dissent, the Article highlights Justice Black's narrow conception of citizenship, examines possible

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* Professor of Law, Yale Law School. I am grateful to Professor Mark Killenbeck and the University of Arkansas Law School for inviting me to deliver the Hartman Hotz Lecture in Fayetteville, Arkansas, on November 1, 2019. This Article is excerpted and adapted from my book-length examination of students' constitutional rights, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* (Pantheon Books, 2019). Kevin Kennedy provided invaluable assistance with condensing this book excerpt into a law review article.

1. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969).
2. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626, 628-29, 642 (1943).
3. *Tinker*, 393 U.S. 503.

motivations for his unusually strident opinion, and demonstrates that Justice Black's message resonated more with the American people than did the Court's opinion. By marshaling contemporaneous public opinion data, it becomes clear that *Tinker* should be understood as an opinion that successfully vindicated constitutional rights in the face of counter-majoritarian opposition.

Second, the Article assesses the strength of *Tinker* today, arguing that scholars have incorrectly dismissed its continuing significance. Admittedly, the Supreme Court has repeatedly rejected students' speech claims post-*Tinker*.[4] But those decisions should not be mistaken for indicating that *Tinker* is now a dead letter. After recovering *Tinker*'s contemporary vitality, the Article concludes by identifying two major areas that require renewed judicial attention in the fight to protect student speech rights. A brief conclusion follows.

II. *TINKER* AS A COUNTERMAJORITARIAN DECISION

In 1965, a small group of students in Des Moines, Iowa—including John Tinker (15 years old) and Mary Beth Tinker (13 years old)—formed a plan to protest the Vietnam War by wearing black armbands to their various schools.[5] They hoped that the armbands would spark conversations about their views and help in some modest way to mobilize antiwar sentiment.[6] When plans of the impending protest leaked, however, Des Moines school officials hastily arranged a meeting to create a policy announcing that pupils wearing armbands in school would be suspended until they agreed to remove the offending pieces of cloth.[7] This policy was necessary, the officials maintained, in order to avoid disruptions they believed would result from the protest.[8] In addition to learning that some students intended to wear nonblack armbands

4. *See, e.g.*, Morse v. Frederick, 551 U.S 393, 409-10 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685-86 (1986).

5. JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER V. DES MOINES* AND THE 1960S 1-5 (1997).

6. *Id.* at 4.

7. *Tinker*, 393 U.S. at 504.

8. JOHNSON, *supra* note 5, at 6.

as a sort of counter-protest, the officials noted that a former Des Moines student had been killed in Vietnam and expressed concern that his friends who remained in school would create a volatile, hot-tempered environment.[9] The antiwar students, undeterred, proceeded with their plans.[10] John Tinker managed to wear his armband at school through lunchtime, before a teacher finally instructed him to report to the principal's office for discipline.[11] During his half-day at school, several different groups of students alternately ridiculed him for wearing the armband and beseeched him to remove it.[12] Like her brother, Mary Beth Tinker wore her armband for much of the school day—until she attracted the notice of her mathematics teacher, who had dedicated the entire previous day of class to condemning student demonstrators and to announcing that he would eject anyone wearing an armband from his classroom.[13] Throughout the day, her classmates repeatedly encouraged her to discard the armband before she got into trouble—including at least twice during classes.[14] Despite the suspensions, all three students remained steadfast in their convictions, and did not return to school until January, when their scheduled period of protest had concluded.[15] The student protestors filed a lawsuit contending that their suspensions violated the First Amendment right of free expression, and thus set in motion what would eventually culminate in the Supreme Court's most consequential student rights opinion in its entire history.[16]

In *Tinker*, the Supreme Court, by a 7–2 margin, vindicated the right of students to express their views in school.[17] Justice Abe

9. *Tinker*, 393 U.S. at 509 n.3.

10. *Id*. at 504.

11. JOHNSON, *supra* note 5, at 23.

12. *Id*.

13. *Id*. at 19-20.

14. *Id*.

15. *Tinker*, 393 U.S. at 504.

16. For further background information on *Tinker*, see JOHNSON, *supra* note 5, at 1-15, 29-66; Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the* Tinker *Decision*, 58 AM. U. L. REV. 1193, 1193-1201 (2009); John W. Johnson, *Behind the Scenes in Iowa's Great Case: What Isn't in the Official Record of* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 473, 473-80 (2000).

17. *Tinker*, 393 U.S. at 504-06.

Fortas issued the majority's opinion in February 1969.[18] Fortas opened by asserting that the Supreme Court had held for nearly five decades that students retained First Amendment rights in school—a claim that he bolstered by citing *Meyer v. Nebraska*,[19] *Pierce v. Society of Sisters*,[20] and *Barnette*.[21] Fortas advanced this proposition in stirring language, using a turn of phrase that not only became a staple of judicial opinions, but even entered the larger national culture: "It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate."[22] If *Tinker* were memorable only for containing that sentence, the opinion would nevertheless rank high on the list of the Court's momentous defenses of students' constitutional rights, as that language established the fundamental terms of debate for subsequent cases. But *Tinker* also held great significance beyond that lone sentence.

Two additional, closely-related points in *Tinker*'s conceptualization of student rights demand attention. First, Fortas made clear that the state—through its public schools—could not prevent students from expressing particular ideas simply because their message may counter the state's own preferred message.[23] That the Des Moines school district sought to prohibit students from expressing an antiwar viewpoint—when it otherwise permitted students to express their viewpoints on a whole range of issues—rendered the policy constitutionally dubious, according to Fortas.[24] "In our system, state-operated schools may not be enclaves of totalitarianism," he wrote.[25] "School officials do not possess absolute authority over their students . . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[26] Second, linking the opinion to a broad notion of citizenship, Fortas emphasized

18. *Id*. at 504.

19. Meyer v. Nebraska, 262 U.S. 390, 400-03 (1923).

20. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925).

21. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 534-35 (1943).

22. *Tinker*, 393 U.S. at 506.

23. *See id*. at 509-11.

24. *See id*. at 510-11.

25. *Id*. at 511.

26. *Id*.

that it would be particularly unwise for a society that values uninhibited public debate to permit schools to suppress views, as today's students will soon assume responsibility for maintaining tomorrow's civic discourse.[27] Some of the most essential learning that occurs in schools happens not during teacher-led classroom instruction, but during "personal intercommunication among the students," interactions that Fortas affirmed as embodying "an inevitable . . . [and] an important part of the educational process."[28]

Tinker did not suggest, of course, that schools invariably violated the First Amendment if they placed limitations on student speech. Fortas's opinion pointedly observed that the speech at issue in *Tinker* did not involve "the length of skirts or the type of clothing, . . . hair style, or deportment"—matters that began to roil schools and courts during the 1960s.[29] While Fortas's opinion did not go so far as to hold that schools could sanction students with impunity in those areas, *Tinker* did make clear that it regarded those issues as distinct from the matter at hand.[30]

In what instances did the Supreme Court affirmatively authorize schools to prohibit student speech? Here, *Tinker* contained considerable ambiguity, as the opinion can be understood to contain three competing approaches for regulating student speech. While the Court left no doubt that it believed that the Des Moines school officials overstepped their bounds as measured by any of these three potential tests, *Tinker*'s ambiguity as to what measure actually governed student speech would beset educators and judges alike in subsequent years.

On *Tinker*'s most speech-restrictive reading, school officials may prohibit student expression if they can articulate reasonable grounds for predicting that the speech will meaningfully hinder school operations.[31] In Fortas's language, "[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material

27. *See Tinker*, 393 U.S. at 511-12.
28. *Id*. at 512.
29. *Id*. at 507-08.
30. *Id*.
31. *See id*. at 509.

interference with school activities."[32] This interpretation has clearly been the most influential in lower courts.[33]

On *Tinker*'s more demanding intermediate interpretation, however, school officials could not censor speech on merely the reasonable *prediction* of disruption; instead, the relevant inquiry would center on whether the controverted speech actually interfered with school activities.[34] "When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours," Fortas wrote, "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."[35] Fortas, assessing *Tinker*'s facts through this prism, conceded that some students directed unkind remarks toward the armband wearers outside of class.[36] But he noted that the school witnessed no threats of violence—let alone violent acts—and that schoolwork had not been compromised.[37] The virtually nonexistent record of actual disruption could hardly justify the schools' decision to silence student speech.

Finally, on *Tinker*'s least speech-restrictive reading, school officials could not justify prohibiting student expression based on their classmates' disruptive reactions to the speech, but instead must look to whether the speakers themselves disrupted school activities.[38] While students who espouse "unpopular viewpoint[s]" may create "discomfort and unpleasantness," *Tinker* maintained, educators may not censor expression out of a desire to avoid those sensations.[39] To the contrary, protecting dissident speech was, in Fortas's telling, intimately connected to the very core of American identity:

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32. *Tinker*, 393 U.S. at 514.

33. *See* Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1285, 1293 (2008).

34. *Tinker*, 393 U.S at 512-13.

35. *Id*. (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

36. *Id*. at 508.

37. *Id*.

38. *See id*. at 509.

39. *Tinker*, 393 U.S. at 509.

> 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, and our history says that it is this sort of hazardous freedom—this kind of openness—that is 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.[40]

Although Justice Hugo Black's vehement dissent did not distinguish among *Tinker*'s various tests, he left no doubt that he assigned the majority opinion a flunking mark. Only days shy of celebrating his eighty-third birthday, Black publicly excoriated his colleagues by reading aloud a version of his written dissent from the bench for some twenty minutes—a judicial performance seldom rivaled not only in its length, but also in its vitriol.[41] In the grand courtroom that invites solemnity, Justice Black used sarcastic tones to quote from a disfavored precedent, and concluded his jeremiad with the following declaration: "I want it thoroughly known that I disclaim any sentence, any word, any part of what the Court does today."[42] The published version of Black's dissent made little effort to conceal his deep displeasure. Justice Black ardently supported free speech rights in most contexts, but he asserted that the principle had no business in schools.[43] "It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach," he wrote.[44] For Justice Black, *Tinker* represented a profound mistake because it "usher[ed] in . . . an entirely new era in which the power to control pupils . . . in the United

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40. *Id*. at 508-09 (internal citations omitted). Justice Stewart and Justice White each authored brief concurring opinions. *See id*. at 514-15 (Stewart, J., concurring); *id*. at 515 (White, J., concurring).

41. Fred P. Graham, *High Court Upholds a Student Protest*, N.Y. TIMES, Feb. 25, 1969, at 25.

42. *Id*. (internal quotations omitted).

43. *Tinker*, 393 U.S. at 517, 521-22 (Black, J., dissenting).

44. *Id*. at 522.

States is in ultimate effect transferred to the Supreme Court," and—if that were not bad enough—also marked "the beginning of a new revolutionary era of permissiveness in this country."[45] Black further contended that those inclined to protest were the public schools' "loudest-mouthed, but maybe not their brightest, students."[46] In Black's estimation, *Tinker* thus did not merely permit the inmates to run the asylum, but it thrust the least equipped inmates among them into the warden's role.

Justice Black did implicitly locate one area of overlap with the Court's opinion in *Tinker*, as he agreed that the case implicated the importance of citizenship.[47] But where the majority entertained a broad conception of citizenship—commanding that schools in a disputatious society should not wantonly squelch dissenting viewpoints—Justice Black floated a comparatively thin conception of citizenship.[48] Instead of focusing on larger societal considerations, Justice Black's conception of citizenship resembled the subject found on some elementary students' report cards, which extols respect, deference, and obedience toward school officials. "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens," Black contended.[49] In the dissent's final paragraph, he ominously observed: "One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."[50] Black insisted that students should mind their *p*s and *q*s before they worried about expressing their own views.[51]

Tinker immediately garnered praise for reining in overzealous educators who had trampled upon students' First Amendment rights. The *New York Times* celebrated *Tinker*, viewing the opinion, with a clear debt to Fortas's framing, in almost patriotic

45. *Id*. at 515, 518.
46. *Id*. at 525.
47. *Id*. at 524.
48. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).
49. *Id*.
50. *Id*. at 525. Justice Harlan also wrote a short dissenting opinion, which would have accorded broader deference to school authorities than *Tinker* allowed. *See id*. at 526 (Harlan, J., dissenting).
51. *See id*. at 518.

terms.[52] "Freedom of expression—in an open manner by those holding minority or unpopular views—is part of the vigor and strength of our schools and society," the *Times* editorial argued.[53] "So long as it does not obstruct the right of others in the classroom or on campus, it must be allowed in this country. If dissent ever has to go underground, America will be in real trouble."[54] Law professors, even those leaning rightward, generally echoed that assessment.[55] Professor Charles Alan Wright, a lifelong Republican who would join President Richard Nixon's Watergate legal team, termed the *Tinker* decision "an easy one" to rebuff a "clearly invalid" school policy: "Constitution or no, it is hardly thinkable that we could deny to today's generation of students freedom of expression or procedural fairness."[56]

Much of the early *Tinker* commentary also conspicuously condemned Justice Black's dissent. The *Washington Post*, for example, deemed it "strange" that *Tinker* drew any dissent at all, let alone Black's "harsh" opinion, which it predicted "students of our judicial history [would find] puzzl[ing]."[57]

Justice Black's dissent was not, however, rejected in all quarters. In an editorial titled "Revolt Invited in the Romper Set," the *Chicago Tribune* endorsed Black's position, as it condemned the Supreme Court, "which is always ready to meddle in local affairs," and *Tinker* for rendering it more difficult to "[m]aintain[] discipline and order in the nation's schools."[58] While the *Tribune* was one of only a handful of major newspapers that criticized *Tinker*, the dissent found a welcoming audience among the many people who wrote Justice Black to commend him on the opinion.[59] It is hardly surprising that Black's opinion won the admiration of school officials, in positions ranging from

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52. *See Armbands Yes, Miniskirts No*, N.Y. TIMES, Feb. 26, 1969, at 46.

53. *Id*.

54. *Id*.

55. *See* Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1053, 1086 (1969); Theodore F. Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35, 61-62 (1969).

56. Wright, *supra* note 55, at 1053, 1086.

57. *Freedom of Expression in the Schools,* WASH. POST, Feb. 26, 1969, at A22. The *New York Times* called Black's dissent in *Tinker* "peppery." *Armbands Yes, Miniskirts No*, *supra* note 52, at 46.

58. *Revolt Invited in the Romper Set*, CHI. TRIB., Feb. 26, 1969, at 20.

59. Johnson, *supra* note 16, at 486-90.

superintendent to cafeteria manager.[60] But the appeal of Black's position reached beyond its natural constituency. A physician based in Springfield, Illinois, for example, congratulated Black for resisting "this [nation's] new sweeping plague of permissiveness," a term that quite easily could have appeared in the dissent itself.[61] "[Y]ou speak eloquently my feelings and those of so many of my countrymen," the physician noted. "I'm sick and intolerant of permissive parents, permissive teachers, permissive law enforcement agencies, permissive legislators, and permissive courts."[62]

Justice Black's vehement dissent in *Tinker* certainly made a deep impression on his colleagues, leading Chief Justice Earl Warren to remark: "Old Hugo really got hung up in his jock strap on that one."[63] What inspired Black's stridency in this case? According to one assessment, a searing episode from Black's familial life spurred him to adopt this hard line against student speech.[64] Proponents of this interpretation note that—after the oral argument in *Tinker*, but before the Court issued its decision—Black's grandson was suspended for his role in producing an underground newspaper that used intemperate language to criticize school administrators.[65] When Black learned of his grandson's suspension and that the family was contemplating a lawsuit against the school, the Justice penned a letter to his daughter-in-law condemning the idea in pointed terms. "[P]ersonally I think the school has done exactly right," he wrote.[66] "The time has come in this country when it must be known that children cannot run the school which they attend at government expense."[67] This anecdote contains irresistible appeal, as Black's frosty private

60. *Id*. at 487-88.

61. *Id*. at 488.

62. *Id*. (internal quotations omitted).

63. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 592 (2d ed. 1997) (internal quotations omitted).

64. *See, e.g*., CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 32 (2015) ("Personal considerations may have played a part.").

65. *See* NEWMAN, *supra* note 63, at 592.

66. *Id*.

67. *Id*.

letter about his grandson seems to foreshadow the public posture he would adopt in *Tinker*.

Upon deeper reflection, however, it seems mistaken to invest too much stock in this episode's explanatory power for Justice Black's position on student speech. Some of the reason for caution on this front surrounds the sequence of events. Years before *Tinker* arrived at the Court, for instance, Black demonstrated a willingness to retreat from his traditionally staunch defense of free speech rights when he confronted cases involving the civil rights movement's direct action phase, which can be seen as a forerunner of the antiwar movement.[68] Similarly, at oral argument in *Tinker,* Black appeared deeply skeptical of First Amendment rights for students, something noted in contemporaneous media accounts.[69] With a tinge of irritation piercing his Alabama drawl, Black asked the protesting students' attorney the following question: "Which do you think has the most control in the school . . . the pupils or the authorities that are running the school?"[70]

More importantly, though, it is misguided to construe Justice Black's dissent in *Tinker* primarily as a cranky grandfather's fit of pique because that interpretation obscures the prevalence of such views among Americans during the late-1960s. Instead of viewing Black's dissent as the ranting of an elderly codger whose mischievous grandson caused him to become unhinged, it seems far more accurate to view him as tapping into a deep wellspring of cultural anxiety that engulfed the Court's efforts to extend constitutional rights to students. Moreover, although some readers may intuit that Black's sentiments from *Tinker* have disappeared in the nearly five decades since the decision, that intuition misses the mark; Black's views continue to claim admirers within society, the legal academy, and even on the Supreme Court.

While some observers perceived *Tinker*'s outcome as inevitable, when assessed from the viewpoint of the 1960s, it seemed quite plausible that the Supreme Court could have reached

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68. *See id*. at 540-47.

69. *See* Lyle Denniston, *High Court Studies Classroom Protests*, EVENING STAR, Nov. 13, 1968, at D-16 (noting Justice Black's cutting questions at oral argument); Transcript of Oral Argument at 44-45, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (No. 21) [hereinafter Tinker Transcript]; JOHNSON, *supra* note 5, at 161.

70. Tinker Transcript, *supra* note 69, at 44-45.

precisely the opposite outcome. To appreciate how *Tinker* could have resulted in a defeat for students' First Amendment rights, contemplate that no less a personage than the author of the Court's opinion himself viewed the matter as thorny. When *Tinker* initially arrived at the Court, Justice Fortas wrote, "this is a tough case" on a law clerk memorandum outlining the students' petition for certiorari.[71] Fortas eventually voted to deny the students' petition,[72] a stance that (if not overcome by his colleagues) would have permitted the school officials' suppression of student speech to remain intact from their victory at the circuit court level. Even at oral argument, Fortas's comments to the students' lawyer revealed at least some unease at the prospect of finding that the Des Moines educators' actions violated the Constitution: "This gets the Supreme Court of the United States pretty deep in the trenches of ordinary day to day [school] discipline."[73]

The notion that *Tinker* was far from an assured triumph for student rights finds further support when one contemplates the events swirling outside of the Court in the late 1960s. The Court heard oral arguments in *Tinker* on November 12, 1968—only ten weeks after the Democratic National Convention in Chicago was overshadowed by demonstrations and violence, and exactly one week after Richard Nixon defeated Hubert Humphrey for the presidency.[74] Prior to the election, Nixon's campaign condemned the Supreme Court for its supposedly indulgent treatment of the criminal element, and promised to restore "law and order," a protean term that encompassed criminal defendants and antiwar protestors alike.[75] Against these groups, President Nixon would purport to speak on behalf of the "silent majority," an assemblage that was chiefly defined by its not assembling—in order to protest the Vietnam War, or anything else for that matter.[76] In a nod toward Nixon's "silent majority," *Time* designated "The Middle Americans" its "Man and Woman of the Year" for 1969, and

71. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 287 (1990).

72. *Id*.

73. *Id*. (internal quotations omitted).

74. *See* Allen Rostron, *Intellectual Seriousness and the First Amendment's Protection of Free Speech for Students*, 81 UMKC L. REV. 635, 637-38 (2013).

75. *See generally* KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 24-35 (2011).

76. *Id*. at 2 (internal quotations omitted).

placed an image of a school on its cover to represent a chief concern for these ordinary folks.[77] In the accompanying article, the Middle Americans were depicted as flaunting an obsessive, flag-bearing patriotism, and as "fear[ing] they were beginning to lose their grip on the country," as "[o]thers seemed to be taking over—the liberals, the radicals, the defiant young . . . ."[78] *Time* quoted a resident of Pittsfield, Massachusetts, who groused: "Dissent is disgusting. If you have a complaint, write your Congressman or the President. School is to get an education."[79] This statement bears an uncanny resemblance to the view offered by the Des Moines school officials in *Tinker* who contended that "schools are no place for demonstrations," and asserted if 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."[80]

During the late 1960s, polling data suggests that more Americans would have embraced Justice Black's dissent than Justice Fortas's majority opinion. In a Harris Poll taken only one month after *Tinker*, fifty-two percent of respondents opposed granting rights to student protesters, and only thirty-eight percent of respondents supported granting such rights.[81] When Gallup conducted its first comprehensive poll gauging attitudes toward education in February 1969, moreover, respondents identified a lack of student discipline as the single leading problem confronting the

77. *Man and Woman of the Year: The Middle Americans*, TIME, Jan. 5, 1970.

78. *Id*. at 10. For a useful overview of *Tinker*'s historical backdrop, see Rostron, *supra* note 74, at 638. For insightful examinations of President Nixon's 1968 campaign and its legal implications, see generally MCMAHON, *supra* note 75, at 17-36; MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA (2008). For penetrating analysis of this Time issue and its implications for schooling debates, see JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 63-64 (2010).

79. *Man and Woman of the Year: The Middle Americans*, *supra* note 77, at 13.

80. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 n. 3 (1969) (internal quotation marks omitted).

81. Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OPINION Q. 483, 493 (1970) (The precise question asked: "Do you feel that students have the right to make their protests or not?").

nation's schools.[82] Many respondents doubtless would have identified the behavior at issue in Des Moines, with students disobeying direct orders from their principals, as a cardinal example of the breakdown in student discipline that must be corrected.

In short, *Tinker* represented a momentous innovation in the recognition of students' constitutional rights. For the first time, the Supreme Court recognized: students retain the essential power to communicate their ideas to one another; such communication is not extraneous to the educational process, but instead forms an integral part of that process; and public schools have an acute responsibility to tolerate dissident speech, so both the marketplace of ideas functions properly and citizens will be prepared to participate in the freewheeling debate that characterizes the United States. *Tinker*'s constitutional contributions to our society would deserve to be saluted if they arrived at any time. But that *Tinker* resisted, rather than ratified, the era's prevailing attitudes on student dissent makes those contributions all the more remarkable.

III. *TINKER*'S CONTINUING VITALITY

Following *Tinker*'s defense of student speech in 1969, the Supreme Court has handed students a series of high-profile defeats in this area. In 1986, the Supreme Court in *Bethel School District v. Fraser* held that students could be sanctioned for lewd speech.[83] Two years later, the Court in *Hazelwood School District v. Kuhlmeier* authorized educators to control the content of school newspapers, even over the objections of student reporters.[84] In 2007, the Court in *Morse v. Frederick* permitted educators to punish students for speech that could be reasonably construed as promoting illicit drug usage.[85] Such decisions have provoked many observers over time to express grave doubts about whether the First Amendment retains vitality in schools. As early as 2000, Professor Erwin Chemerinsky queried: "What's Left of

82. A DECADE OF GALLUP POLLS OF ATTITUDES TOWARD EDUCATION 1969-1978 20 (Stanley M. Elam ed. 1978).

83. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

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

85. Morse v. Frederick, 551 U.S. 393, 409 (2007).

Tinker?"[86] His assessment registered somewhere between *not much* and *nothing at all*.[87] Chemerinsky contended that the Supreme Court "views schools as authoritarian institutions," to which it all-too-readily deferred: "[T]he *Tinker* majority's approach to student speech is no longer followed; the subsequent cases are much closer to Justice Black's dissent than to Justice Fortas's majority opinion."[88] *Frederick*, of course, did nothing to tamp down such dire evaluations. In 2009, Professor Perry Zirkel asserted that *Fraser* and *Frederick* had "deflected the import of the *Tinker* opinion to the point of practically reversing or, at least, effectively compartmentalizing it[,]"[89] and a law review article likewise contended that the Court's decisions have "render[ed] *Tinker* negligible to a large extent."[90]

Reports of *Tinker*'s demise have, however, been greatly exaggerated. While the Court's post-*Tinker* opinions should not be dismissed as inconsequential, neither should they be viewed as draining student speech of all vitality. The Supreme Court in *Fraser* and *Frederick* did not purport to undercut *Tinker*'s core contribution: students, typically, continue to possess the right to express themselves in schools, even if educators dislike their messages. The Court's subsequent opinions can plausibly be viewed as retreating in particular areas—involving speech that is lewd, school-sponsored, or pro-drug.[91] But it is implausible to contend that those decisions indicate that *Tinker* has been hollowed out entirely, so that only its edifice remains. To the contrary, today's students enjoy far greater First Amendment protections than did their counterparts in the pre-*Tinker* era.[92]

Lower courts often issue decisions permitting students to express themselves, even over the objections of school

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86. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000).

87. *See id*. at 529.

88. *Id*. at 541.

89. Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of* Tinker, 38 J.L. & EDUC. 593, 597 (2009).

90. Piotr Banasiak, Morse v. Frederick: *Why Content-Based Exceptions, Deference, and Confusion Are Swallowing* Tinker, 39 SETON HALL L. REV. 1059, 1099 (2009).

91. *See* Banasiak, *supra* note 89, at 1060-61.

92. *See generally* Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse: *How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407 (2011).

administrators. In recent years, for example, the federal judiciary has issued opinions vindicating students' speech rights to: oppose President George W. Bush by wearing a T-shirt that refers to him as an "International Terrorist";[93] advance gay equality by wearing items that read "Gay? Fine by Me," "I Support Gays," and "Pro-Gay Marriage";[94] and support a national breast cancer awareness campaign by wearing a bracelet that reads "I ♥ boobies!"[95]

After *Tinker*, moreover, some lower courts have even held that student hecklers must not be permitted to veto student speech.[96] In 2004, for example, a federal appellate court upheld a student's right to thrust his fist in the air as his classmates recited the Pledge of Allegiance, even though the school contended that other students would react with hostility to his silent protest.[97] In doing so, the Eleventh Circuit expressly rejected the notion that *Tinker* must permit hecklers to veto student speech:

> If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alt[a]r of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob . . . . The fact that other students might take such a hairstyle as an incitement to violence is an indictment of those other students, not long hair . . . . While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason.[98]

One particularly notable anti-heckler's veto decision occurred in 1980 when a high school senior in Rhode Island named Aaron Fricke wished to bring another young man to prom as his

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93. Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849 (E.D. Mich. 2003).

94. Gillman v. Sch. Bd. for Holmes Cty., 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008).

95. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 297-98 (3d Cir. 2013).

96. For the foundational work coining "the heckler's veto," see HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140 (1965).

97. Holloman v. Harland, 370 F.3d 1252, 1275-76 (11th Cir. 2004).

98. *Id*. Lower courts have frequently vindicated the desire of students to sit during the Pledge of Allegiance. *See* Banks v. Bd. of Pub. Instruction of Dade Cty., 314 F. Supp. 285, 294-95 (S.D. Fla. 1970); Lipp v. Morris, 579 F.2d 834, 835 (3d Cir. 1978).

date.[99] School administrators responded that Fricke could not do so because they could not guarantee his safety against attacks from his classmates—an assertion that had at least some factual basis because the school recently witnessed physical altercations over sexual orientation.[100] Nevertheless, the district court invalidated the school's response as impermissibly infringing upon Fricke's First Amendment expressive rights.[101] To rule otherwise, the court explained, would endorse "mob rule," and "completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through—prohibited and violent methods—what speech will be heard."[102] In 2000, a Massachusetts Superior Court relied upon that decision to invalidate a school's effort to prohibit a transgendered student from wearing clothing to school that corresponded to her gender identity.[103]

Perhaps even more revealing of *Tinker*'s legacy than these judicial opinions, though, are the many instances in recent years where educators have initially sought to suppress student speech only to realize that their stance cannot be squared with the Constitution. Following this pattern, school districts have retreated from efforts to prohibit students from: displaying a pin featuring the Palestinian flag;[104] expressing pro-life views by wearing a T-shirt that reads "Abortion Kills Kids";[105] and voicing solidarity with the Black Lives Matter movement by wearing "I Can't Breathe" T-shirts in honor of the dying words that Eric Garner wheezed as a police officer choked him.[106] If *Tinker* were truly as feeble as some observers maintain, educators in these examples—and many others besides—would have squelched these instances of student expression with impunity.

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99. Fricke v. Lynch, 491 F. Supp. 381, 382 (D.R.I. 1980).

100. *Id*. at 383-84.

101. *Id*. at 388.

102. *Id*. at 387.

103. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *5 (Mass. Super. Ct. Oct. 11, 2000).

104. Tamar Lewin, *High School Tells Student to Remove Antiwar Shirt*, N.Y. TIMES, Feb 26, 2003, at A12.

105. John Carlson, *Anti-Abortion Message Meets Zero Tolerance*, DES MOINES REGISTER, May 4, 2005, at 11A.

106. Veronica Rocha, *Players Allowed to Wear Protest Shirts*, L.A. TIMES, Jan. 1, 2015, at AA4.

While *Tinker* is best construed as retaining vitality, that position should be not mistaken for complacency, contending that all is well with the First Amendment in schools. Today, two primary areas stand out as demanding significant interventions. First, although some judges have wisely rejected hecklers' efforts to veto speech, such opinions are sporadic rather than universal. Lower courts still too frequently indulge that practice and rely upon related techniques in order to uphold schools' efforts to silence student speech on contentious issues. Second, lower courts have permitted school officials to exert excessive authority over student speech that is articulated off-campus.

Lower courts' mistreatment of heckler's veto cases poses a grave threat to student expression. Federal courts too often permit schools to stifle student expression of views on divisive topics—including on questions of national significance. Consider a few examples. In 2007, a federal district court in southern Texas upheld a school's decision to prohibit students from wearing T-shirts that read "Border Patrol" and "We Are Not Criminals" as methods of expressing competing positions on unauthorized immigration.[107] In 2014, the Ninth Circuit upheld a northern California school's decision to prohibit students from wearing clothes featuring images of the American flag on the day celebrating Cinco de Mayo.[108] The courts in those two cases found that the schools' actions were justified because the contested speech had generated angry reactions and even threats from classmates—classic instances of the heckler's veto at work.[109] Even when schools cannot persuasively claim that student speech caused any tempers to flare or disruption of school activities, however, courts have nonetheless sometimes upheld bans on expression about divisive topics. In 2006, for example, the Ninth Circuit upheld a southern California school's decision to prohibit a student from wearing a T-shirt, in protest of a school-sanctioned Day of Silence, that read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"[110] In 2010, moreover, the Sixth

107. Madrid v. Anthony, 510 F. Supp. 2d. 425, 427-28 (S.D. Tex. 2007).
108. Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 767, 781 (9th Cir. 2014).
109. *Madrid*, 510 F. Supp. 2d at 435-36; *Dariano*, 767 F.3d at 777-78.
110. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171-72 (9th Cir. 2006).

Circuit upheld a Tennessee school's ban of clothes featuring the Confederate flag when a student wore a T-shirt with the controversial emblem, and text reading: "If you have a problem with this flag you need a history lesson."[111]

The desire of schools to curtail speech on these acrimonious topics is certainly understandable. Few topics have demonstrated the ability to stir passions more intensely in recent years than unauthorized immigration, cultural assimilation among Mexican Americans, the quest for gay equality, and the Confederate flag's relationship to racial subordination. Nevertheless, the courts, in my view, erred by permitting these speech prohibitions in all four of these instances. Students in the above cases who disagreed with the messages they believed their classmates were conveying should have either informed them of their disagreement, or—if they could not manage to do so in a composed fashion—simply ignored them. In the marketplace of ideas, boycotts too can sometimes be an effective instrument for change.

Contemplate each of the four cases in turn. While there can be no doubt that the topic of immigration reform generates strong feelings and that some students on both sides of the debate may well feel affronted by those T-shirts, schools should not take it upon themselves to ban this sort of communication on this vital topic. If students either threaten their classmates or if an outbreak of violence occurs, the students who are responsible for actually causing those disruptions should be disciplined, not the speaker. That same analysis pertains to the students who threatened violence against classmates who displayed the American flag on Cinco de Mayo. I maintain that view even though I well understand that some celebrants may genuinely feel aggrieved by classmates who display Old Glory on the lone day during the entire school year set aside to honor Mexican heritage. In both instances, however, rewarding angry hecklers by silencing speakers incentivizes students in precisely the wrong manner.

The remaining two cases present closer calls. The student who opposed the Day of Silence sought to express his religious-based opposition to the school's embrace of gay equality; he

111. Defoe v. Spiva, 625 F.3d 324, 329, 342 (6th Cir. 2010); Complaint at 3, Defoe v. Spiva, 625 F.3d 324 (E.D. Tenn. 2006) (No. 06CV00450).

expressed that position without resorting to epithets, and it is difficult to know how he could have expressed his particular view (which is distinct from expressing pride in heterosexuality) in a way that educators would have deemed permissible. Although I vehemently disagree with the T-shirt's stance and regard it as animated by antigay sentiment, I also believe that a school should not make it virtually impossible to express a particular viewpoint—especially when that opinion opposes the school's own position. Finally, the Confederate flag case presents, in my estimation, the most vexing case of all. I associate that flag primarily with an expression of racial hostility, and for that reason detest it. Nevertheless, I do not believe that it usually connotes a threat of violence, as is true with burning crosses. Ultimately, my assessment that this school's ban on the Confederate flag should not have been permitted to stand is due in no small part to the accompanying action it took to make that ban viable. To comply with the requirement for viewpoint neutrality, the school also barred paraphernalia promoting Malcolm X.[112] While it is far from clear that the opposite view of the Confederate flag is actually communicated by a Malcolm X hat—rather than, say, the American flag—it does seem clear that public schools are spectacularly ill-suited to making that determination.

Consider a few more broadly applicable reasons why upholding these bans on student speech may have been unwise in these cases. First, validating these bans sends the message that particular groups of students may be more psychologically fragile and lacking in self-control than actually seems warranted. Second, because the bans apply only within school, it seems important to remember that these groups of students may well encounter versions of this speech outside of school—and that they may be less adept at navigating those situations because the experience is unfamiliar. Third, the bans seem unlikely to rid the school of the disfavored message because clever students can locate alternate phrasing or symbols to serve as a substitute for the prohibited speech. (Contemplate, for example, how the Confederate flag could be swapped for iconic images of Robert E. Lee.) Fourth, the bans themselves may even prove counterproductive

112. *Defoe*, 625 F.3d at 337.

because they render particular expression taboo, which will for some subset of students elevate its status and make it more attractive, precisely because it is forbidden in school.

An additional area of concern involves the ability of educators to sanction students for comments made off-campus but online, whose effects may eventually be felt within the school—an issue of ever-increasing significance during the internet era. To date, the Supreme Court has studiously evaded this question, despite being presented with numerous viable opportunities to consider it.[113] The Court's reticence on this front seems regrettable because ample evidence suggests that lower courts have generally taken an unduly deferential approach to articulating legal standards for school regulations regarding off-campus speech.[114]

The downside of the judiciary's lax approach to protecting students' off-campus speech is seldom more apparent than when students use harsh language to criticize school officials. In one particularly egregious example, the Second Circuit in 2011 found that a Connecticut high school did not violate Avery Doninger's clearly established First Amendment rights when it punished the eleventh grader in her capacity as Junior Class Secretary for calling school administrators "douchebags" in a blog post written from her home during non-school hours.[115] The dispute arose when an administrator informed students that "Jamfest," an annual battle-of-the-bands concert, could not be held in the school's new auditorium on the upcoming weekend as previously planned.[116] That evening, Doninger took to her personal blog—unaffiliated with the high school's website—and encouraged readers to contact school administrators (whom she termed "the douchebags in central office") to register their displeasure with the changed plans for Jamfest.[117] Doninger's post, along with an email campaign that she coordinated, succeeded in motivating many people to call the school; the unusually high volume of phone calls, in turn, caused some tumult within the central

113. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 380, 383 (5th Cir. 2015).
114. *Id.* at 396.
115. Doninger v. Niehoff, 642 F.3d 334, 340, 357 (2d Cir. 2011).
116. *Id.* at 339.
117. *Id.* at 340-41.

office.[118] After the school learned of the blog, it punished Doninger by prohibiting her from running for election as Senior Class Secretary as she had intended.[119] Nevertheless, the federal appellate court refused to find that the school's sanctioning of Doninger violated her First Amendment rights, reasoning that "it was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was not free to engage in such behavior while serving as a class representative."[120]

Fortunately, federal appellate courts have not universally rubberstamped schools' efforts to sanction students for off-campus speech that criticizes educators. In 2011, the Third Circuit found a free speech violation when a Pennsylvania school suspended an eighth-grade student—identified by the courts as J.S.—for creating a vulgar, absurd MySpace[121] The online profile for the Alabama principal J.S. dubbed "M-Hoe"—which she created from her home computer, and made accessible only to approved users—contained the following greeting:

> HELLO CHILDREN. yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL. I have come to myspace so i can pervert the minds of other principals to be just like me. I know, I know, you're all thrilled. Another reason I came to myspace is because—I am keeping an eye on you students (whom I care for so much). For those who want to be my friend, and aren't in my school, I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man.[122]

In the section listing M-Hoe's general interests, J.S. included the following: "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their

118. *Id*. at 341.
119. *Id*. at 342.
120. *Doninger*, 642 F.3d at 351.
121. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011).
122. *Id*. at 921 (original modifications incorporated).

parents."[123] Despite the precautions J.S. took limiting access to the profile, and the absence of evidence that it significantly disturbed school proceedings, her principal nevertheless suspended J.S. for ten days after he learned of its existence.[124] The Third Circuit, however, invalidated the suspension, reasoning: "The profile was so outrageous that no one could have taken it seriously, and no one did. Thus, it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school."[125] As the Third Circuit further explained in a companion case released the same day: "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[126]

The finding of a First Amendment violation here seems plainly appropriate with respect to J.S.'s suspension. As the Third Circuit suggests, schools should not rely upon the existence of the internet to render actionable students' off-campus disparagement of educators—particularly when the critiques are clearly satirical. At the same time, though, if forced to select only Doninger's post or J.S.'s profile as meriting First Amendment protection, it seems difficult to escape the conclusion that the First Amendment should be understood as more readily protecting Doninger than J.S. On first impression, Doninger's protest over "Jamfest" may seem to involve a frivolous issue; the Constitution does not recognize a fundamental right to rock out. But Doninger's protest should not be dismissed because it can also be viewed as raising important questions of democratic representation and the importance of government accountability. Recall that Doninger's speech involved an issue that directly criticized the governance of her school, and encouraged her classmates and fellow citizens in effect to petition the government about a grievance, a right that receives independent protection under the First Amendment. Moreover, although the Second Circuit appeared to regard Doninger's punishment of being banned from serving in the student

123. *Id*. at 920.
124. *Id*. at 921-23.
125. *Id*. at 930.
126. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).

government as lighter than a suspension, it seems plausible that this particular sanction may actually be graver in this context. The school is in effect sanctioning Doninger for daring to speak out against the local government by stripping her of the ability to occupy a formal leadership position and also prohibiting her classmates from voting for her. Finally, regarding the language itself, Doninger's usage of "douchebag," while pejorative, commonly appeared on network television shows, and by the time that she used the term it had largely been severed from a connection to anything literal. In contrast to Doninger's speech, J.S.'s mock profile was by her own testimony designed to amuse because it was "outrageous," not to communicate any serious idea, and used shocking language to achieve its intended effect. It seems downright bizarre to think that Avery Doninger would have had better luck prevailing on her First Amendment claim if, in addition to calling school officials "douchebags," she remarked upon their genitalia, suggested they were pedophiles, and insulted their relatives' physical appearances.[127]

IV. CONCLUSION

Given the sometimes-ugly content of student speech today, some readers may now have greater sympathy for the notion that Justice Black voiced long ago in *Tinker*, contending students do not know enough to express views that enjoy First Amendment protection in schools. Judge Richard Posner offered a somewhat softened version of this claim in 2008, when he wrote an opinion for the Seventh Circuit that voiced deep hesitation about the wisdom of having the federal judiciary review free speech determinations made by educators, even as he sided with the student in the immediate case.[128] "A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense," Judge Posner posited, because "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest."[129]

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127. *See Snyder*, 650 F.3d at 921; *see also* Edward Wyatt, *It Turns Out You Can Say That on Television, Over and Over*, N.Y. TIMES, Nov. 14, 2009, at A1.

128. Nuxoll *ex rel*. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671-72 (7th Cir. 2008).

129. *Id*. at 671.

This effort to diminish the importance of conferring First Amendment rights on students, however, elicited a powerful, rousing response from Judge Ilana Rovner:

> Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the [2008] presidential primaries where the youth voice and the youth vote are having a substantial impact . . . . The young adults to whom the majority refers as "kids" and "children" are either already eligible, or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy . . . is contrary to the values of the First Amendment.[130]

Students, as Judge Rovner attests, have made valuable contributions to the nation's marketplace of ideas, and the school itself has often been an important site for exchanging ideas on the topic of the day. As the preceding material establishes, moreover, the judiciary played a critical role in ensuring that students retain the ability to speak out on these issues—even if educators themselves have initially dismissed their statements as incoherent, incorrect, or irrelevant. When schools have sought to prevent students from wearing black armbands to protest the Vietnam War—when educators have tried to stop students from revealing their sexual orientation through their prom dates or their gender identity through their clothing choices—it seems clear that majoritarian sentiment within those communities would have supported the schools. While many observers now view those student messages as presenting valued input to our schools and our polity, they were not always so considered at the outset. Yet courts nevertheless prohibited educators from banning those contested student messages. The First Amendment provides space to disfavored ideas today in the event that they may, over time, flourish and perhaps eventually become the dominant view. Make no mistake, though: students will not *invariably* avail themselves of the space created by the First Amendment to articulate ideas that ultimately become

130. *Id*. at 677-78 (Rovner, J., concurring) (internal citations omitted).

the wave of the future. Instead, much of what students say will no doubt seem puerile, spiteful, ill-conceived, and wrong-headed—initial impressions that the passage of time will only cement. On this score, though, it is essential to appreciate that speech from students has no small amount in common with speech from adults.