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Cover Page Footnote

My thanks to the panelists at the University of Dayton Law Review Symposium celebrating 50 years since the *Tinker* decision: Charles Russo, William Thro, and Jyllian Rradshaw. A special thanks to my research assistant, Emily Mothmiller, and to my colleagues, Erika Goldberg and Jeff Schmitt for their comments on earlier drafts of this Article.

WHAT WAS WRONG WITH *TINKER*: MIND THE GAP

Christopher Roederer[*]

I. INTRODUCTION

The Supreme Court decision in *Tinker v. Des Moines Independent Community School District* is often celebrated as a landmark decision that set the high-water mark of free speech protections for students in school.[1] While some high-water marks are created by daily high tides, others are the result of turbulent weather and flood surges.[2] *Tinker* is an example of the latter—a

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[1] 393 U.S. 503, 514–15 (1969). According to Chemerinsky, it was "the high watermark of the Supreme Court protecting the constitutional rights of students." Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004).

[2] While the phrase "high-water mark" is often used as a positive way of depicting legal protections, the term implies an ebb and flow of protection from high tide to low tide. We do not need the same protections when calmer waters prevail as we do in times of flooding.

product of the tsunami, known as the 1960s. *Tinker* was decided in 1969, at the end of a decade known for upheaval, protest, and change, as well as unprecedented advancements in the protection of civil rights; it is in many ways a product of that decade. The 1960s were not only marked by protest and change, but also state-sanctioned violence and resistance to change.[3] As the social and political conditions of the decade reached a fever pitch, the Supreme Court responded. In addition to a number of major civil rights advancements at the federal legislative level, the 1960s witnessed an unprecedented number of advances in the protection for constitutional rights by the Supreme Court.[4] No other decade, before or since, has witnessed as many landmark rights cases by the Court. In case after case, the Court stepped in to protect people from the intrusive and controlling authority of the State, be it through the development of a right to privacy, to protections from unreasonable searches and seizures, the protection of voting rights, religious rights, or the free speech rights of protestors and those critical of government.[5] There is a clear theme of protecting the proverbial "little guy" from big government. *Tinker* is a natural outgrowth of this disposition. The social and legal developments of the decade seem to naturally and inexorably call for the Court to protect the vulnerable students in *Tinker* from the authoritarian and overbearing principals in that case.[6]

The wave of social changes and legal developments catapulted the Court beyond the mark in *Tinker*. The wall of protection erected by the Court to protect student speech was too tall, and its foundation too weak, to be sustained. Contrary to the majority opinion in the case, *Tinker* was not grounded in well-settled law.[7] The Court's lofty statement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," implied more student freedom of expression than could be reasonably delivered in the school environment.[8] The majority opinion's most cited rule, that school officials cannot prohibit the expression of opinion when there is "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,'" is too strong to work as a general rule governing student speech in school.[9] Further, like the reaction of a mother bear protecting her cubs, it was stronger than necessary to accomplish the goal. The Court could have articulated a rule more narrowly tailored to

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[3] *See* discussion *infra* Part II.A.

[4] *See* discussion *infra* Part II.B.

[5] *Id.*

[6] The majority opinion in *Tinker* draws out this gap between the role model students and the out-of-touch and unreasonable reactionary principals in the case. *See* discussion *infra* Part III.B.

[7] *See* discussion *infra* Part III.D.

[8] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Before the *Tinker* decision, children did not have constitutional free speech rights within the schoolhouse gates, and they had few free speech rights outside the schoolhouse gate. *See* discussion *infra* Parts III.D.–E.

[9] *Tinker*, 393 U.S. at 509.

the facts of the case that would have been more in line with subsequent Supreme Court doctrine in schools and in other limited public forums.[10]

There is also a weaker reading of *Tinker* that calls attention to much more circumspect language from the case, and this is often invoked to distinguish or limit *Tinker*.[11] *Tinker* lives on, in part, because of this ability to read the case either broadly or narrowly, and as either establishing a very strong, speech-protective test, or a rather weak test that can be interpreted as deferential to school authorities. In practice, the strong rule from *Tinker* is not the general rule governing student speech in schools; rather, it is the exception. In general, school authorities are free to impose reasonable limits on student speech as long as they have legitimate pedagogical purposes for doing so.[12] This is because schools are not public forums for the unfettered discussion of ideas but are institutions with the specific purpose and mission to educate students.[13]

This points to another respect in which *Tinker* missed the mark. It is unclear if the Supreme Court did students a great favor by giving them free speech rights in schools. While it sounds profound to say that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it is not clear what this "right" entails in this context. [14] The slogan promises too much and distracts us from what is important in

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[10] The facts of *Tinker* are set out in Part III.A. below, and an alternative narrower rule is discussed in Part III.C. The narrower rule is consistent with the dissenting opinion of Justice Harlan in the case. *See id.* at 526 (Harlan, J., dissenting). To use Cass Sunstein's framework, the Fortas's majority opinion is a maximalist opinion that is wide, or broad in its implications, but not sufficiently deep in term of its justification. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (defending an incremental minimalist approach to Supreme Court decision making). Sunstein does not address *Tinker* in his book, but he does reference two other landmark free speech decisions from the 1960s that he categorizes as maximalist decisions, namely: *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Id.* at 17–18, 29, 176, 193–94. While *Brandenburg* is described as a broad ruling that is not deeply justified, Sunstein does point out that this broad ruling came after years of narrower judgments on the issue of incitement. *Id.* at 194. In contrast, *Tinker* was a case of first impression. Although Justice Fortas attempted to justify the decision as being consistent with a half century of jurisprudence, this simply was not the case. *See* discussion *infra* Part III.D. As we will see, the broad ruling in *Tinker* has been followed by a sequence of narrower rulings on the topic ever since. *See* discussion *infra* Part III.C.

[11] *See* discussion *infra* Part III.C. Note that the weaker language in the case does not directly modify the strong language in *Tinker*. It is not sufficiently integrated, and as a result, the weaker language fails to provide nuance.

[12] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[13] *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 47 (1983). The strong reading of *Tinker*, which would require that student speech rise to the level of material and substantial disruption before school officials can intervene, should be, and often is, limited to extreme cases, including cases like *Tinker*, where the school is engaged in viewpoint discrimination, or cases where the school is reaching out to regulate speech that is taking place off campus. *See, e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (punishing student for creating a fake profile of his principal on his grandmother's computer that did not cause a disruption in school, found to be unconstitutional). As the Court stated, "because the School District concedes that Justin's profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there." *Id.* at 216.

[14] *Tinker*, 393 U.S. at 506.

schools. If we care about student speech and expression in primary schools, it should not be because of some abstract notion that more speech and expression by students in schools is good in and of itself. Speaking of speech as a right in the school context implies that freedom to speak and express oneself is the norm, and the school should have to justify any regulation of that right; however, the opposite is true. The norm in schools is to regulate speech and expression in order to educate students. The norm is to dictate a curriculum and to compel reading, writing, and expression that conforms to established norms and criteria. For much of the day, students are compelled to listen and think and are not allowed to speak at all. We continuously reward students with good grades for saying and writing the right things, and we punish students with bad grades for getting it wrong. Disciplining speech and expression in schools is pervasive.

Thus, the question should not have been whether the school can justify infringing on a student's right to freedom of expression when it disciplines a student for her or his speech or expression, but whether the discipline had a sound educational purpose, and whether it adequately served that purpose. As argued in the Conclusion, students may have been better served by focusing on educational rights in schools, rather than free speech rights.

II. THE POLITICAL AND LEGAL BACKGROUND LEADING UP TO THE DECISION IN *TINKER*

A. Tinker *at the End of a Decade of Upheaval, Protest, and Social Change*

There was a wide generation gap between the Baby Boomers who were coming of age during this decade and the Silent Generation that preceded them; for the Baby Boomers, no one over the age of thirty was to be trusted.[15] This decade brought us the sexual revolution and a countercultural revolution known for its student activism; rejection of conformity to traditional conservative norms; mistrust of authority (governmental, corporate, and patriarchal); demands for rights and freedoms for women and minorities; and embrace of experimentation with drugs, sex, and alternative forms of living in community.[16] For some, this was supposed to be "the

[15] The Silent Generation was born between 1925 and 1942, falling between the "Greatest Generation" and the "Baby Boomers." Neil Howe, *The Silent Generation, "The Lucky Few" (Part 3 of 7)*, FORBES (Aug. 13, 2014, 10:52 AM), https://www.forbes.com/sites/neilhowe/2014/08/13/the-silent-generation-the-lucky-few-part-3-of-7/#26db42b62c63. Clothing retailer, The Gap, founded in 1969 in San Francisco, was named to appeal to those who were experiencing this generation gap. *See Our Story*, GAP, INC., https://www.gapinc.com/content/gapinc/html/aboutus/ourstory.html (last visited Mar. 8, 2020). Jack Weinberg, who was a student leader in the Free Speech Movement at UC Berkeley, coined the phrase "don't trust anyone over 30" during an interview with the San Francisco Chronicle in November of 1964. *Don't Trust Anyone Over 30, Unless It's Jack Weinberg*, THE BERKELEY DAILY PLANET (Apr. 6, 2000), https://www.berkeleydailyplanet.com/issue/2000-04-06/article/759.

[16] It is dangerous to overgeneralize about a decade as complicated as the 1960s. The early 1960s were not the same as the mid to late 1960s, and the decade means very different things for different people.

dawning of the Age of Aquarius," when "peace [would] guide the planets and love [would] steer the stars."[17] But these calls for change were not always met with peace and love, and although many groups emphasized passive resistance and peaceful protest, riots became more prevalent as the decade moved on.[18] *Tinker* was decided in February of 1969, less than a year after the My Lai Massacre in Vietnam, and the assassinations of Martin Luther King Jr. and Robert F. Kennedy.[19] While there were protests and riots

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See, e.g., FRYE GAILLARD, A HARD RAIN: AMERICA IN THE 1960S, OUR DECADE OF HOPE, POSSIBILITY, AND INNOCENCE LOST (2018); DAVID FARBER, THE AGE OF GREAT DREAMS: AMERICA IN THE 1960S (1995). As David Farber notes, the economic realities of the post war period (which was a time of economic prosperity) led America to "wrestle with two contradictory sets of values. One was necessary for efficient economic production . . . the other . . . justified . . . expansive personal consumption." FARBER at 4. While the former values included hard work, discipline, and delayed gratification, the latter values included "license, immediate gratification, mutable lifestyle, and an egalitarian, hedonistic pursuit of self-expression." *Id.* Somewhat paradoxically, the embrace of these new consumer values made this new generation question the production-based values of the past, along with those in authority who espoused those values. *Id.* at 5. According to Farber, these market values led (at least the young, middle-class, white) members of this generation to "reject[] authorities' right to tell them what music, clothes, and even drugs were culturally and morally acceptable." *Id.*

[17] *The 5th Dimension - Aquarius/Let The Sunshine In Lyrics*, METROLYRICS, https://www.metrolyrics.com/aquariuslet-the-sunshine-in-lyrics-5th-dimension.html (last visited Mar. 8, 2020). "Aquarius/Let the Sunshine In" was written in 1967 for the musical *Hair*. *Aquarius/Let the Sunshine In*, WIKIPEDIA, https://en.wikipedia.org/wiki/Aquarius/Let_the_Sunshine_In (last visited Mar. 8, 2020). It was released as a single by The 5th Dimension and was number one on billboard charts during the beginning of 1969. *Id.* The lyrics go on to describe the Age:

> Harmony and understanding
> Sympathy and trust abounding
> No more falsehoods or derisions
> Golden living dreams of visions
> Mystic crystal revelation
> And the mind's true liberation
> Aquarius!
> Aquarius!

The 5th Dimension - Aquarius/Let The Sunshine In Lyrics, METROLYRICS, https://www.metrolyrics.com/aquariuslet-the-sunshine-in-lyrics-5th-dimension.html. Woodstock, the most famous concert of all time, took place in the summer of 1969 and was billed as "an Aquarian Experience: 3 Days of Peace and Music." *Woodstock*, HISTORY (Mar. 29, 2019), https://www.history.com/topics/1960s/woodstock.

[18] The violent and often deadly resistance to the Civil Rights Movement by authorities and citizens alike contrasts sharply with the peaceful protests and sit-ins conducted by activists in the movement. Sally Avery Bermanzohn, *Violence, Nonviolence, and the Civil Rights Movement*, 22 NEW POL. SCI. 1–2 (2000). "Between 1956 and 1966, white supremacists committed more than 1000 documented violent incidents aimed at stopping integration, including bombing, burning, flogging, abduction, castration, and murder." *Id.* at 1. *See generally* MICHAEL J. NOJEIM, GHANDI AND KING: THE POWER OF NONVIOLENT RESISTANCE (1994); *see also* Peter B. Levy, *What We Get Wrong About the 1960s 'Riots'*, WASH. POST (July 21, 2019 6:00 AM), https://www.washingtonpost.com/outlook/2019/07/21/what-we-get-wrong-about-s-riots/. Martin Luther King Jr.'s guiding principles of nonviolence and passive resistance were in part inspired by the teachings of Mahatma Gandhi, and of the success of that philosophy and strategy in liberating India from the United Kingdom. *See* NOJEIM, *supra* note 18.

[19] George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 674 (2000). On March 16, 1968, U.S. Army soldiers massacred several hundred innocent South Vietnamese civilians, including women, children, and babies. *See generally id.* at 674–78. Within a span of approximately three hours, "houses were burned, livestock was killed, and women were raped and sexually molested. Groups of villagers were assembled and shot. . . . In short, approximately five hundred non-combatants died." *Id.* at 675–76. As noted by Eckhardt:

> My Lai is more than a battlefield tragedy. . . . the very word "My Lai" is synonymous with battlefield atrocity. Within the context of the Vietnam Era, it may well have been the turning point in an unpopular war and may well be a high water mark in the "cultural civil war" that befell our country in the late 1960's and early 1970's.

throughout the 1960s, the largest waves took place in the summer of 1967, and just after the assassination of Martin Luther King Jr. during the Holy Week of 1968.[20] During these two years, "125 people were killed, nearly 7,000 were injured, approximately 45,000 arrests were made, and property damage topped . . . approximately $900 million in 2017 dollars."[21]

B. Tinker *at the End of the Civil Rights Decade: Civil Rights, Constitutional Rights, and Free Speech*

At the same time that state and local governments were arresting protestors and suppressing free speech, the federal government passed sweeping civil rights laws and the Supreme Court rendered an unprecedented number of civil rights decisions protecting the people from the overreach of state and local government officials. Thus, for legal academics who are nostalgic for this decade, there is much to celebrate. This was the civil rights decade, the decade that brought us the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.[22] It brought us more landmark Supreme Court decisions expanding the interpretation, application, and enforcement of rights than any decade before or since. These decisions concerned criminal defendant rights, voting and equal protection rights, the right to privacy, and First Amendment religious freedom rights.[23]

Id. at 672–73. Dr. Martin Luther King Jr. was killed on April 4, 1968, and Robert F. Kennedy was killed on November 20th of the same year. *See, e.g.*, Alice George, *When Robert Kennedy Delivered the News of Martin Luther King's Assassination*, SMITHSONIAN MAG. (Apr. 2, 2018), https://www.smithsonianmag.com/smithsonian-institution/emotionally-wounded-robert-kennedy-delivers-news-kings-assassination-180968625/#L1GApGAQGxCMGfZf.99.

[20] PETER LEVY, THE GREAT UPRISING: RACE RIOTS IN URBAN AMERICA DURING THE 1960S 1 (2018). Meanwhile, the riots on campuses throughout the country appear to have been focused more on the war. David Kaiser, *What the 1960s Reveal About What's Next for American Protesters*, TIME (Aug. 25, 2017), https://time.com/4915622/protest-cycle-1960s-charlottesville/. Historian David Kaiser writes, "[a]ll around the nation in 1968-70, college students were becoming more and more hostile to the war in Vietnam, Laos and Cambodia. A huge earlier protest, at Berkeley in 1964–1965, dealt with campus regulations, but by 1968 student hostility focused on the war." *Id.*

[21] LEVY, *supra* note 20, at 1. There were 159 race riots across the U.S. in 1967. Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087, 1093 (2013). After the assassination of Martin Luther King, Jr., "[r]iots erupted in 130 American cities and 20,000 people were arrested." *Id.* at 1094.

[22] *See* Ware, *supra* note 21, at 1093. *See, e.g.*, Pub. L. No. 88-352, 78 Stat. 241 (1964); Pub. L. No. 89-110, 79 Stat. 437 (1965); Pub. L. No. 90-284, § 801, 82 Stat. 81 (1968).

[23] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment protections against unreasonable searches and seizures apply to state criminal prosecutions and that evidence that was obtained through the violation of the Fourth Amendment could not be used in the criminal prosecution); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that the Sixth Amendment required that states provide an attorney to indigent criminal defendants); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (holding that the Fifth Amendment right against self-incrimination extends to police interrogation and that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any

The nostalgia is perhaps greatest for the protection of Free Speech rights during this era. As Richard Delgado notes, "[m]any free-speech devotees insist that the First Amendment has served as a great friend and ally of reform leaders. They point out that without free speech, Martin Luther King Jr. could not have moved massive crowds as he did."[24] In a recent book, Erwin Chemerinsky and Howard Gillman contrast their own veneration for the era to that of today's students, as they state:

> Our students knew little about the history of free speech in United States and had no awareness of how important free speech had been to vulnerable political minorities. The two of us grew up in the time of the civil rights movement and anti-Vietnam War protests. We saw first hand how officials attempted to stifle or punish protestors in the name of defending community values or protecting the public peace. We also saw how free speech assisted the drive for desegregation, the push to end the war, and the efforts of historically marginalized people to challenge convention and express their identities in new ways.[25]

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further inquiries until he has consulted with an attorney and thereafter consents to be questioned."); Baker v. Carr, 369 U.S. 186, 187 (1962) (holding a claim that malapportioned voting districts debased the voting rights of the appellants, thereby violating their right to equal protection under the Fourteenth Amendment, is a justiciable cause of action, and therefore the appellants had a right to a trial and decision on the issue); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding laws that banned interracial marriages violated the Equal Protection and Due Process clauses of the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 484–87 (1965) (holding a law that prohibited the use of contraceptives by married couples violated their constitutional right to privacy as found in the penumbras of the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, and Ninth Amendment); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that it is an unconstitutional violation of the Establishment Clause of the First Amendment for state officials to compose an official school prayer and encourage its recitation in public schools).

[24] Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 60 CASE W. RES. L. REV. 275, 283 (2018) (citing David L. Hudson, *First Amendment Freedoms Crucial to Civil Rights Movement*, FREEDOM F. INST. (Jan. 15, 1999), https://www.freedomforuminstitute.org/1999/01/15/first-amendment-freedoms-crucial-to-success-of-civil-rights-movement/). Delgado goes on to note that:

> this argument ignores the actual relationship between racial minorities and the First Amendment. Historically, minorities have made the greatest strides when they acted in defiance of that amendment. . . . Even during the 1960s civil rights era, the relationship of the First Amendment and social progress was not at all simple. Martin Luther King Jr. and his followers did use speeches and other symbolic acts to kindle America's conscience. But the First Amendment, at least as then construed, offered them little protection. Authorities pronounced their speech too forceful, too disruptive, spoken in the wrong place or without a permit, and they were arrested and thrown into jail. Occasionally, their convictions would be reversed, years later, by dint of gallant lawyering. But the First Amendment, as then understood, at best served as a weak shield. Speech may have served as a powerful tool for reformers, but our system of free speech did not.

Id. at 284.

[25] ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 10–11 (2017). They go on to contrast their views with those of today's students:

> This historic link between free speech and the protection of dissenters and vulnerable groups is outside the direct experience of today's students, and it was too distant to affect their feelings about freedom of speech. They were not aware of how the power to punish speech has been used primarily against social outcasts,

During the 1960s, the Supreme Court decided a number of landmark free speech cases that expanded protections for those engaged in countercultural speech, unpopular speech, and speech that challenged authority.

In keeping with the "free love" spirit of the era, the Supreme Court expanded constitutional protections for speech that involved sexually explicit content. *Memoirs v. Massachusetts* was the high-water mark in terms of constitutional standards for protecting speech involving sexual content.[26] In *Memoirs*, a plurality of the Court held that speech could not be labeled obscene (and thus could not be rendered unprotected speech) unless it was found to be "utterly without redeeming social value."[27] Given the shifting mores of the time, it was difficult to say what, if any, pornographic material fit into this category. After *Memoirs*, the Court was forced to admit that it could not agree on a standard.[28] This meant that the Court would have to

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> vulnerable minorities, and those protesting for positive change—the very people toward whom our students are most sympathetic. Their perception of speech is shaped more by internet vitriol than by the oppression of Eugene Debbs, Anita Whitney, John Thomas Scopes, Jehova's Witnesses who refused to say the Pledge of Allegiance, leftists during the McCarthy era, civil rights activists who were beaten and even killed, Lenny Bruce, draft card burners, or George Carlin. Their instinct is to trust the government, including the public university, to regulate speech to protect students and prevent disruptions of the educational environment.

Id. at 11.

[26] *See generally* 383 U.S. 413 (1966).

[27] *Id.* at 418. This test was articulated by a plurality opinion written by Justice Brennan and joined by the Chief Justice and Justice Fortas. Justice Douglas, in a separate concurrence would have forbidden any censorship that was not linked to illegal action, and thus would protect this kind of material even if it did not have any redeeming social value. *Id.* at 426–433. As with *Tinker*, this high-water mark would not hold. The protection for speech with sexual content receded in *Miller v. California*, when the Court changed this part of the test to "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973). Miller retained the other parts of the obscenity test, namely, "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, [and] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Id.* (internal citations omitted). *See generally* Christopher Roederer, *Obscenity from Fifty Shades of Gray to Virtually Free: Patently Offensive and Socially Valuable Materials that Appeal to Our Shameful and Morbid Interests in Sex*, *in* COMPARATIVE PERSPECTIVES ON FREEDOM OF EXPRESSION (Russell L. Weaver, Mark D. Cole & Steven I. Friedland eds., 2017).

[28] In 1967, the Court handed down a per curium opinion in the case of *Redrup v. New York*, 386 U.S. 767 (1967). In that opinion, the Court acknowledged there was no standard for obscenity that could command a majority. *Id.* at 770–71. As the Court stated:

> Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material, taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value," emphasizing that the "three elements must coalesce," and that no such material can "be proscribed unless it is found to be utterly without redeeming social value." Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity.

Id. (quoting *Memoirs*, 383 U.S. at 418–19; *id.* at 460–62 (White, J., dissenting)).

review case after case (publication after publication, and film after film) to determine if the work was protected or obscene.[29] Thus, most every form of sex-related speech was protected. By the end of the decade, the Court went even further in *Stanley v. Georgia*, holding that even though obscene material was not protected speech, one had a right to possess obscene material in the privacy of one's home.[30] Thus, the state could not even criminalize possession of material that was "utterly without redeeming social value" in the home, for one has a "right to read or observe what he pleases" there, and the state authorities have no right to intrude.[31]

On perhaps a more serious note, several Supreme Court decisions during this decade directly involved the speech of civil rights activists, and even those that did not involve civil rights activists, were seen as protecting the speech of those in the movement. Thus, in *New York Times Co. v. Sullivan*, the U.S. Supreme Court overturned an Alabama jury award of $500,000 against The New York Times and several Alabama civil rights leaders for an advertisement that detailed numerous abuses of non-violent civil rights protestors by the police in Montgomery, Alabama, among others.[32] The advertisement was signed by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."[33] Parts of the account allegedly libeled L.B. Sullivan, the Commissioner of Public Affairs of the City of Montgomery, Alabama.[34] The Supreme Court held that the rule of law applied by the Alabama courts was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[35] Although the advertisement did include false statements, the Court held that such statements were inevitable in free debate and that they needed "breathing

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[29] In addition to holding a range of legal standards for determining what was obscene, the justices also held a range of personal standards for what is obscene. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 193–94 (2005). In their now classic work on the Justices of the Supreme Court from 1969–1975, Bob Woodward and Scott Armstrong describe in graphic detail the range of personal standards that were at play behind the scenes in overturning over two dozen convictions under the *Redrup* decision. *Id.* at 192–94. These standards, which were more akin to "locker room talk," were relayed to the authors by the clerks of the Court, based, in part, on their experiences during the infamous "movie days" at the Court when they and the justices would sit and watch the films that that were exhibits in the obscenity cases before the court. *Id.* Oddly, Justice Fortas's views on obscenity are not described in the book. He resigned in May of 1969, a few months after the *Tinker* decision, after failing in his bid to take over the Chief Justice position from Earl Warren. In addition to some financial scandals, Fortas's bid for the Chief Justice position was undermined by the efforts of Senator Thurmond, who put on the so-called "Fortas Film Festival" by showing a number of purportedly obscene films to fellow senators that Justice Fortas had deemed to be protected by the First Amendment and not obscene. Brian L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 230–31, 257–276 (2011).

[30] 394 U.S. 557, 568 (1969).

[31] *Id.* The strong protection granted in *Stanley* was due, in part, to the combination of the right to privacy in one's home and the right to free speech. *Id.*

[32] 376 U.S. 254, 256–57, 264–65 (1964).

[33] *Id.* at 257.

[34] *Id.* at 256.

[35] *Id.* at 264.

space."[36] The Court held that in cases involving public figures one could not award general damages based on a presumption of malice.[37] Rather, the Court held that the Constitution required a rule that:

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[38]

This made it much more difficult for those in authority to silence critics through the use of libel suits.[39]

Local authorities had other mechanisms at their disposal for silencing the speech of protestors.[40] One way of stopping protests was to create permitting schemes and then deny protestors permits.[41] Another was for the city to obtain a court ordered injunction to prevent protestors from engaging in sit-ins, kneel-ins, and marches.[42] The City of Birmingham, Alabama had applied for and received such an injunction on April 10, 1963, in order to stop civil rights activities that had been planned for the Holy Weekend of April 12th through April 14th.[43] Rather than obey the injunction or challenge it in court, numerous civil rights activists decided to ignore the injunction and marched on April 12th (Good Friday) and April 14th (Easter Sunday).[44] They

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[36] *Id.* at 272 (internal quotation marks omitted).

[37] *Id.* at 283.

[38] *Id.* at 279–80.

[39] Donald Trump has threatened to reform the law of libel to make it easier for him to sue his critics. *See generally* Norman Pearlstine, *Analysis: Trump Wants to Toughen the Nation's Libel Laws. Here's Why He Isn't Likely to Succeed*, L.A. TIMES (Sept. 8, 2018), https://www.latimes.com/nation/la-na-trump-libel-20180908-htmlstory.html.

[40] *See* Walker v. Birmingham, 388 U.S. 307, 308–09 (1967).

[41] Daniel L. Schofield, *First Amendment Implications of Controlling Public Protest*, UPCOUNSEL (Nov. 1994), https://www.upcounsel.com/lectl-first-amendement-implications-of-controlling-public-protest.

[42] *See Walker*, 388 U.S. at 308–09.

[43] *Id.* at 309–10. The complaint requested injunctive relief against 139 individuals and two organizations, and stated that:

> respondents [had] sponsored and/or participated in and/or conspired to commit and/or to encourage and/or to participate in certain movements, plans or projects commonly called "sit-in" demonstrations, "kneel-in" demonstrations, mass street parades, trespasses on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama; violation of numerous ordinances and statutes of the City of Birmingham and State of Alabama.

Id. at 309. The complaint further alleged that:

> this conduct was "calculated to provoke breaches of the peace," "threaten[ed] the safety, peace, and tranquility of the City," and placed "an undue burden and strain upon the manpower of the Police Department," [and] that these infractions of the law were expected to continue, and would "lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the City of Birmingham," and that the "remedy by law [was] inadequate."

Id.

[44] *Id.* at 349.

attempted to defend their actions in the contempt hearing by arguing that the injunction was vague and overbroad in violation of their free speech rights, and that the parade ordinance had been administered in an arbitrary and discriminatory manner.[45] But, this was too late; they had violated the injunction, and their free speech rights were no defense.[46] Thus, the circuit judge imposed a fine of fifty dollars and five days jail on each arrested protestor.[47] Although the Supreme Court agreed with petitioners that the injunction and past practice in enforcing the parade ordinance raised constitutional free speech issues, the Supreme Court in *Walker v. City of Birmingham*, like the Supreme Court of Alabama, would not entertain them.[48] The Supreme Court upheld the verdict, holding that protestors could not ignore a court-ordered injunction, as it stated:

> [t]his Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[49]

The same events on the Holy Weekend of 1963 also gave rise to the arrest and conviction of Fred Shuttlesworth, as well as fifty-four other civil rights activists, for marching that weekend without a permit, but their case would not be decided by the Supreme Court until 1969.[50] The trial court below imposed a sentence of ninety days imprisonment at hard labor and nearly one-hundred dollars in fines and costs.[51] Unlike two years before in *Walker*, however, the Supreme Court allowed the petitioners in *Shuttlesworth v. City of Birmingham* to attack the constitutionality of the Birmingham permitting scheme.[52] In other words, unlike in *Walker* where the Court held that they should have challenged the injunction before violating it, the *Shuttlesworth* petitioners were not required to challenge the denial of the permit before marching without it.[53] Instead, the Court held that the scheme was an unconstitutional prior restraint on free speech.[54] As the Court held, "it

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 316–18, 320–21.
[49] *Id.* at 321.
[50] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148 (1969). Many of those arrested in the *Shuttlesworth* case were also involved in the *Walker* litigation. *Id.* at 157.
[51] *Id.* at 150. Note that they were sentenced to an additional forty-eight days for failing to pay the fines. *Id.*
[52] *Compare Shuttlesworth*, 394 U.S. at 150–51 (granting certiorari to consider the petitioner's constitutional claims), *with Walker*, 388 U.S. at 320–21 (holding petitioners were not "constitutionally free to ignore all the procedures of the law and carry their battle to the streets").
[53] *See Shuttlesworth*, 394 U.S. at 150–51; *Walker*, 388 U.S. at 320.
[54] *Shuttlesworth*, 394 U.S. at 150–51.

is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, 'to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places.'"[55]

Finally, this was also the year that the Supreme Court increased the protection for speech that is inflammatory or that could be interpreted as a call to action (i.e., speech advocating for the use of force or violation of the law).[56] In *Brandenburg v. Ohio*, the Court held:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[57]

Sadly, perhaps, the case involved the free speech rights of Ku Klux Klan members and not civil rights activists.[58] Nonetheless, the Ohio Criminal Syndicalism Act, and many others like it, had been used to punish those advocating for revolution since the 1920s.[59] The Court in *Brandenburg* specifically overruled the decision in *Whitney v. California*, which had upheld a similar statute.[60] As the Court stated:

> [a]ccordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of Whitney v. California, . . . cannot be supported, and that decision is therefore overruled.[61]

While the facts that gave rise to the *Tinker* case occurred in the middle

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[55] *Id.* at 159.

[56] *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[57] *Id.* at 447.

[58] *Id.* at 444. Thus, it is worth questioning whether these free speech guarantees did as much for minorities that were struggling for the recognition of their dignity, equality, and freedom as it did for white Americans who were advocating for violence against minorities. The KKK member in Brandenburg threatened "revengeance" which, of course, is not an actual word, but a combination of the words revenge and vengeance. *See id.* at 446. The Klan member stated:

> We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

Id.

[59] *Id.* at 447.

[60] *See generally* Whitney v. California, 274 U.S. 357 (1927).

[61] *Brandenburg*, 395 U.S. at 449.

of this tumultuous decade, the decision itself came right at the end when the Court's free speech jurisprudence was at its zenith.[62] When it came to speech, the Supreme Court took a free-market libertarian/laissez-faire approach that was skeptical of governmental regulation and interference with the free exchange of ideas, even if those ideas had no redeeming social value, were false, racist, or they included advocacy of illegal action.[63] If free speech includes the right to possess obscene material in one's home, the right to ignore a local authority's denial of a permit (under special circumstances), the right to negligently defame public officials, and the right of racists to advocate for violence (as long as it is not imminent, or if imminent, not likely), then why not let children speak freely in schools?[64]

In *Keyishian v. Board of Regents*, Justice Brennan, writing for the majority, adopted the "marketplace of ideas" concept to recognize the free speech rights of faculty and staff at universities.[65] Two years later, the Court in *Tinker* leapt over the gap between university faculty and staff and grade school students to recognize the role of students in that marketplace. Quoting Justice Brennan, the Court in *Tinker* asserted that:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained

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[62] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[63] *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *Brandenburg*, 395 U.S. at 449.

[64] *See, e.g.*, *See Memoirs*, 383 U.S. 413; Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); *Sullivan*, 376 U.S. 254; *Brandenburg*, 395 U.S. at 449.

[65] 385 U.S. 589, 603 (1967). This case involved faculty and staff of the State University of New York who were claiming that New York's teacher loyalty laws and regulations were unconstitutional. *Id.* at 603. There is a wide gap between university faculty and staff, and students in primary education. The marketplace of ideas notion was first discussed by Justice Oliver Wendell Holmes in his dissent in *Abrams v. U.S.*, where he said:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

250 U.S. 615, 630 (Holmes, J., dissenting).

> 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."[66]

This sentiment has considerable force in the context of state-enforced loyalty laws for professors in universities where one might want a range of views and perspectives represented on the faculty and within the classroom. It borders on the absurd, however, to depict the grade school classroom as the "marketplace of ideas." Truth in the grade school classroom is not discovered "out of a multitude of tongues." It is, in fact, provided through "authoritative selection" by the state, the district, the school board, the principal, and the teacher. The right answer (or range of appropriate responses) is not really up for student debate in the grade school classroom. Students are in the grade school classroom to learn the knowledge and skills that hopefully will prepare them to be able to fruitfully and responsibly engage in our less than perfect "marketplace of ideas."

III. ANALYSIS: THE GAPS IN *TINKER*

A. Two Versions of Tinker*: The Strong and the Weak*

The free market approach to speech in schools gave rise to an exuberant defense of students' free speech rights in *Tinker*. At the same time, the Court had to confront the reality that school classrooms are not public squares, but places of learning with set curriculums and a need for a certain level of discipline.[67] *Tinker* has been cited hundreds of times over the past fifty years for a number of legal propositions.[68] The strongest propositions would imply that the First Amendment's free speech provision provides very strong protections for students within the schoolhouse gate and throughout most of the school, most of the time. This strong version of *Tinker* is represented by three of the most often cited headnotes from the case, and those propositions include:

1. Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[69]
2. [A s]tudent's right to express opinion does not embrace merely classroom hours and when he is in cafeteria, on playing field, or on campus during authorized hours, he

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[66] *Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603).

[67] *See id.* at 512–13.

[68] *See infra* notes 69–71, 74–76 and accompanying text.

[69] As of June 30, 2020, Westlaw notes 444 cases that cite this passage. *Tinker*, 393 U.S. at 506; *see, e.g.*, McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 706 (9th Cir. 2019); Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 265 (5th Cir. 2019); Wood v. Arnold, 915 F.3d 308, 319 (4th Cir. 2019).

> may express his opinions, even on controversial subject[s] like conflict in Vietnam, if he does so without materially and substantially interfering with appropriate discipline in operation of the school and without colliding with rights of others.[70]
>
> 3. In absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities or any showing that disturbances or disorders on school premises in fact occurred when students wore on their sleeves black armbands to exhibit their disapproval of Vietnam hostilities, regulation, adopted by school principals, prohibiting wearing armbands in schools and providing for suspension of any student refusing to remove such was an unconstitutional denial of students' right of expression of opinion.[71]

The pages that follow will argue that these propositions of law were not well-supported by precedent, were unnecessarily overbroad and sweeping in scope, and put the Court in the untenable position of second-guessing local authorities' decisions on how to maintain discipline in schools. Thus, this strong version of *Tinker* was destined to be distinguished to near death.[72] At

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[70] As of June 30, 2020, Westlaw notes 423 cases that cite this passage. *Tinker*, 393 U.S. at 512–13; *see, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist, 650 F.3d 915, 926 (3d Cir. 2011); Heenan v. Rhodes, 757 F. Supp. 2d 1229, 1237 (M.D. Ala. 2010); Policastro v. Tenafly Bd. of Educ., 710 F. Supp. 2d 495, 498–99 (D.N.J. 2010).

[71] As of June 30, 2020, Westlaw notes 485 cases that cite this passage. *Tinker*, 393 U.S. at 514; *see, e.g.*, Hunt v. Bd. of Regents, 338 F. Supp. 3d 1251, 1258 (D.N.M. 2018); Ryan v. Mesa Unified Sch. Dist. 195 F. Supp. 3d 1080, 1094–95 (D. Ariz. 2016); Carver Middle School Gay-Straight Alliance v. Sch. Bd. of Lake Cty., Fl., 124 F. Supp. 3d 1254, 1270 (M.D. Fla. 2015). Mark W. Cordes describes the speech protective standard articulated in *Tinker* using the following language:

> In now famous language, the Court pronounced that "students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and held that a school could not prohibit students from wearing black armbands to school to protest the Vietnam War. Although the Court recognized that high schools are special environments for analyzing First Amendment rights, it stated that student speech was protected as long as it did not "materially and substantially interfere" with school operations.

Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL OF RTS. J. 657, 657–58 (2009).

[72] The Supreme Court still regularly cites these propositions, even as they appear to come down with decisions that are inconsistent with these propositions. As the *Hazelwood* Court stated:

> Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours,"—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

484 U.S. 260, 266 (1988) (internal citations omitted). *See also* Morse v. Frederick, 551 U.S. 393, 396, 403 (2007) (stating that "[o]ur cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' . . . '*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the

best, this view of *Tinker* is the exception, and not the general rule or set of rules that govern student speech in schools.[73]

This is not to say that students in schools should be seen and not heard. Schools should foster free speech values; they should be places where students learn to engage with difficult topics, explore ideas, and express opinions. Schools should encourage healthy dialogue on the pressing concerns of the day. But this does not mean that schools should take a laissez-faire approach to free speech. It does not take much imagination to visualize what complete freedom of expression would look like in the hallways, classrooms, or cafeterias of schools. Student speech needs to be guided, channeled, and yes, even limited, as part of the educational process. It is also important to recognize that the educational mission of schools includes many other goals besides freedom of expression, be it literacy, numeracy, imparting scientific skills and knowledge, appreciation of culture and arts, and preparing students to engage as responsible citizens in a multicultural democracy. These other goals and values inform a different side of the *Tinker* decision.

There are a number of other portions of the opinion that indicate a more nuanced or balanced set of legal principles, but these are cited with less frequency. They include:

1. First Amendment rights, applied in light of special characteristics of school environment, are available to teachers and students.[74]

2. State and school authorities have comprehensive authority, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.[75]

3. Constitutional prohibition against abridgment of right to free speech by Congress and states permits reasonable regulation of speech-connected activities in carefully

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work and discipline of the school.'"'). Other than Justice Thomas, no Supreme Court Justice since *Tinker* has argued that the case should be overruled. *See* David Hudson, *Justice Thomas Making Waves in First Amendment Jurisprudence*, FREEDOM F. INST. (May 10, 2011), https://www.freedomforuminstitute.org/2011/05/10/justice-thomas-making-waves-in-first-amendment-jurisprudence/. As he puts it, "as originally understood, [the First Amendment] does not protect student speech in public schools." *Morse*, 551 U.S. at 410–11 (Thomas, J., concurring). Note that I do not agree with Justice Thomas's reasoning in *Morse* that just because students traditionally had no rights in school, they should continue to have no rights in school.

[73] Schools should be able to guide and direct speech activities through reasonable time, manner, and place restrictions, and place reasonable limits on speech as long as they have reasonable pedagogical justifications for doing so.

[74] As of June 30, 2020, Westlaw notes 333 cases that cite this passage. *Tinker*, 393 U.S. at 506; *see, e.g.*, *Morse*, 551 U.S. at 395; *Policastro*, 710 F. Supp. 2d at 503; Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 330 (6th Cir. 2010).

[75] As of June 30, 2020, Westlaw notes 78 cases that cite this passage. *Tinker*, 393 U.S. at 507; *see, e.g.*, Rose v. Nashua Bd. of Educ., 679 F.2d 279, 283 (1st Cir. 1982); Souders v. Lucero, 196 F.3d 1040, 1044–45 (9th Cir. 1999); Zen v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665 (2d Cir. 2012).

restricted circumstances.[76]

These propositions are not so exciting, and are cited much less frequently than the first three bold assertions.[77] They are also difficult to read as being compatible with the stronger rules of law set out above.[78] Yet, these three propositions point toward a more tenable and reasonable interpretation of students' free speech rights within the context of primary and secondary education. While they are weaker in that they are more qualified, they are, in fact, more flexible, and thus are more likely to stand the test of time.[79] They point to the special characteristics of the school environment, the need of local authorities to prescribe and control conduct in schools and the fact that in "carefully restricted circumstances," like a school educational setting, the Constitution permits reasonable regulation of speech-connected activities.[80] Contrary to the strong rule articulated in *Tinker*, there are numerous situations in which it is reasonable to regulate student speech-related activities, even if there is no material and substantial disruption, or even a reasonable forecast of such disruption. Further, a brief look at the facts in *Tinker* will demonstrate why the Court did not need to articulate such a strong rule. These weaker principles would have sufficed.

B. The Facts According to the Majority in Tinker*: A Generation Gap Between Role Model Students and Out-of-Touch Unreasonable Principals*

The bare facts, according to the majority opinion, are that on December 16, 1965, John and Mary Beth Tinker, ages fifteen and thirteen, and Christopher Eckhart, age sixteen, were suspended from school for failing to remove their black armbands, which they were wearing in protest over the Vietnam War.[81] Their refusal to remove the armbands contravened a school

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[76] As of June 25, 2020, Westlaw notes 29 cases that cite this passage. *Tinker*, 393 U.S. at 513; *see, e.g.*, B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 303 (3d Cir. 2013); Flint v. Dennison, 336 F. Supp. 2d 1065, 1068 (D. Mont. 2004); Doe v. Rector and Visitors of George Mason Univ., 149 F. Supp. 3d 602, 626 (E.D. Va. 2016).

[77] *Compare supra* notes 69–71 and accompanying text, *with supra* notes 74–76 and accompanying text.

[78] One might be tempted to view them as modifying the stronger rules, but this does not always fit well with the language in the decision. *See* discussion *supra* Part III.A. and accompanying text. As the Court stated, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but it is unclear what to take from this. *Tinker*, 393 U.S. at 506. The second proposition above sits alone and so does the third. The third does come a few paragraphs after reciting the strong rule, but the implication is that "reasonable regulations" are ones that apply when either material and substantial disturbances take place, or when it is reasonable to forecast such disturbances. *See* discussion *supra* Part III.A. and accompanying text.

[79] There is a quote that is often ascribed to Charles Darwin, namely, that "[i]t is not the strongest of the species that survives . . . [but] the most adaptable to change." *It is Not the Strongest of the Species that Survives But the Most Adaptable*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2014/05/04/adapt/ (last visited Mar. 8, 2020). It is in fact most likely an interpretation of Darwin's theory of evolution. *See id.*

[80] See *supra* notes 74–76 and accompanying text.

[81] *Tinker*, 395 U.S. at 504.

policy that was adopted by the principals of Des Moines schools just two days before the suspensions.[82] At the very end of the majority opinion, Justice Fortas wrote, "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."[83] According to Justice Fortas, Tinker and Eckhart did not interrupt school activities, disrupt the classroom, interfere with schoolwork, or intrude into the lives of others.[84] Rather, "[t]hey wore [the black armband] 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."[85] The result was discussion of the issue outside of the classroom, but no disorder.[86] Their behavior at school that day was exemplary; these were model students engaged in model free speech activity.[87] The Court held that the armbands in this context were "closely akin to 'pure speech' which, . . . is entitled to comprehensive protection under the First Amendment."[88]

The state officials, namely the school principals in this case, were anything but role models. Once they heard about the parents' and students' plans to wear the armbands from mid-December to the first of the year, they met and devised their armband policy.[89] At best, they had an "undifferentiated fear or apprehension of disturbance," and at worst, they engaged in viewpoint discrimination, wishing to avoid any controversy over the war that the armbands might generate.[90] This was not a general ban on

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[82] *Id.*

[83] *Id.* at 514.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See id.*; Kali Borkoski, Tinker v. Des Moines Independent Community School District: *Kelly Shackelford on symbolic speech*, SCOTUSBLOG (Nov. 7, 2013, 11:13 PM), https://www.scotusblog.com/2013/11/tinker-v-des-moines-independent-community-school-district-kelly-shackelford-on-symbolic-speech/.

[88] *Tinker*, 395 U.S. at 505–06. Note that the Court distinguished this case from those relating to the regulation of the length of skirts, the type of clothing, hairstyle, and deportment. *Id.* at 507–08 (citing Ferrell v. Dallas Indep. Sch. Dist, 392 F.2d 697 (5th Cir. 1968) (holding that a school rule that barred students from enrolling if they had long hair was not "arbitrary or unreasonable" therefore it is allowed to be enforced); Pugsley v. Sellmeyer, 158 Ark. 247, 250, 254 (1923) (upholding a dress code rule prohibiting the use of "face paint or cosmetics" because the rule was not an abuse of the school's discretion or a violation of the law)).

[89] *Tinker*, 395 U.S. at 504. The policy provided that students would be asked to remove armbands, and those who refused would be suspended until they complied and returned to school without the armband. *Id.* As an aside, the Author was born in the middle of the Tinkers' suspensions, which lasted from December 16th through January 1st.

[90] *Id.* at 508, 510. The Court based this assertion on the fact that the principals' meeting was called in response to a student wishing to write an article for one of the school newspapers on the topic of Vietnam, and that the student was discouraged from doing so. *Id.* While the Court does not go so far as to say that this was unconstitutional, that is the implication. *Id.* at 514. If this is correct, then it is not consistent with *Hazelwood*. The high school principals' conduct contrasts sharply with the conduct of the teachers at the local grade school. *See* Borkoski, *supra* note 87. There was no such ban at the grade school. *Id.* When Mary Beth and John Tinker's younger siblings, Hope, age eight, and Paul, age eleven, showed up at school with their black armbands that day, they were not punished, but rather, "their teachers used the armbands

politically sensitive topics or symbols. During the time when the armbands were banned, students were allowed to wear campaign buttons, and even Nazi symbols such as the Iron Cross.[91]

Given that there were no grounds for the ban before the fact, and no conduct that warranted enforcing the ban after the fact, it is hard not to conclude with the majority that, "[i]n the circumstances, our Constitution does not permit officials of the State to deny their form of expression."[92] Given the apparent inescapable conclusion in *Tinker*, what explains all the negative treatment of the case in lower court decisions and decisions by the Supreme Court over the past half century?

C. Tinker *with a Yellow Flag: A Failure to Mind the Gaps*[93]

On this account, what could be wrong with the decision in *Tinker*? The problem with *Tinker* is in the gaps. Problems arise in the gap between the facts and the holding in *Tinker*, in the gap between the conduct of the model students and the unreasonable principals as depicted by the majority opinion, and in the gap within the legal standard itself between the events that justify punishing expression after the fact and when it is reasonable for school officials to forecast events that justify prohibiting expression before the fact.

Notice the gap between the facts as they played out according to the majority and what the majority opinion requires of the school before it could put such a ban in place; namely, "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[94] This rule, which is found in the third strong proposition of law, is actually weaker than that found in the second proposition.[95] The second proposition implies that students have a right to express their opinions at any time and in any place within the school as long as they do not actually "'materially and substantially interfere with . . . appropriate discipline in the operation of the school' and without colliding with the rights of others."[96] According to the majority's version of the facts,

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as a teachable moment about diversity and the First Amendment." *Id.* The names of the younger siblings are not reported in this article, but their names are Paul and Hope, as reported in Justice Black's dissenting opinion. *Tinker*, 395 U.S. at 516 (Black, J., dissenting). This was perhaps the ideal response, but it is unrealistic to expect teachers to stop whatever lesson plans they have for the day and tailor their classes to the demands of students to address whatever controversial topics are in the news at the time. How could students be expected to pass all those standardized tests if that were the obligation?

[91] *Id.* at 510.

[92] *Id.* at 514.

[93] As of February 9, 2020, there are 166 cases listed in Westlaw as including negative treatment of the *Tinker* decision. *Tinker*, 393 U.S. 503 (1969); *see, e.g.*, Baxter v. Vigo Cty. Sch. Corp. 26 F.3d 728 (7th Cir. 1994); Boroff v. Van Wert City Bd. of Educ. 220 F.3d 465 (6th Cir. 2000); Lee v. York Cty. Sch. Div. 484 F.3d 687 (4th Cir. 2007).

[94] *Tinker*, 395 U.S. at 514.

[95] *See generally supra* notes 70–71 and accompanying text.

[96] *Tinker*, 395 U.S. at 512–13 (brackets omitted); *see supra* note 70 and accompanying text.

the students came nowhere near violating this standard.[97] Thus, the student conduct in this case could have been protected with a more moderate or carefully measured standard. Even the relatively weaker standard, which required that there be facts that could reasonably lead the authorities to forecast "substantial disruption or material interference," was not required in this case.[98] According to the majority, the principals were not in possession of facts that would justify forecasting any disruption, much less a substantial disruption; rather, all they had was an "undifferentiated fear or apprehension of disturbance."[99] Further, given that the principals were engaging in viewpoint discrimination, it is somewhat beside the point that they may have had reason to forecast some level of disruption.[100] Justice Harlan in his dissenting opinion would have used a narrower standard that he believed to be more workable.[101] As he stated, "I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[102] A narrow rule like this would have dovetailed nicely with the rule for limited public forums, which forbids viewpoint discrimination.[103] As the Court would later hold in *Perry Education Association v. Perry Local Educators' Association*:

> [p]ublic property [here the school mailroom] which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the

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[97] *Tinker*, 395 U.S. at 514.

[98] *Id.*

[99] *Id.* The district court had held that it was reasonable for the school to anticipate a disturbance at school if students wore the armband. *Id.* at 505–06. The Supreme Court held, however, that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

[100] A much narrower reading of *Tinker* would limit the holding to prohibiting viewpoint discrimination in the suppression of expression absent a showing that it was necessary to avoid material and substantial interference with schoolwork or discipline. As the Court noted, while other symbols were permitted, "a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement 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." *Id.* at 510–11. Limiting the holding in *Tinker* to this proposition would require ignoring the stronger statements above. This reading also comes very close to the standard that Justice Harlan articulated in his dissent. *Id.* at 526 (Harlan, J. dissenting). Justice Black in his dissent stated, "I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war." *Id.* at 518 (Black, J., dissenting). Justice Black believed that the Court should have deferred to local authorities with regards to what was reasonably foreseeable. *Id.* at 521. Given the controversial nature of the Vietnam conflict and the fact that the Tinker family was subject to so many threats of violence after, it is not unreasonable for the principals to have anticipated some level of disturbance.

[101] *Tinker*, 395 U.S. at 526 (Harlan, J., dissenting).

[102] *Id.* Justice Harlan also stated, "I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions." *Id.*

[103] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

> forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[104]

This also would have made the *Tinker* decision easier to reconcile with the Court's later decision in *Hazelwood School District v. Kuhlmeier*.[105] In *Hazelwood*, the Supreme Court overturned an Eighth Circuit Court of Appeals decision that had found that a high school principal violated students' free speech rights when he edited out student articles concerning teenage pregnancy and the impact of divorce on students in the school newspaper.[106] Following *Tinker*, the Court of Appeals for the Eighth Circuit found that because there was "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school," deleting the two pages from the newspaper violated the students' First Amendment rights.[107] The Supreme Court distinguished *Tinker* by finding that the newspaper was not a public forum, and that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[108]

The Court purported to retain *Tinker* as the general rule, regarding "educators' ability to silence a student's personal expression that happens to occur on the school premises," and distinguished this rule from the rule that applies to other activities that the public "might reasonably perceive to bear the imprimatur of the school."[109] The latter category includes all activities that are part of the curriculum, including those outside the classroom, if they are supervised by faculty and "designed to impart particular knowledge or skills to student participants and audiences."[110] This contrasts sharply with *Tinker*, where the majority applied its more stringent rule to the classroom and beyond.[111] Given that the vast majority of the school day includes speech

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[104] *Id.* at 46.

[105] *See generally* Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

[106] *Id.* at 263–66.

[107] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1375 (1986), *rev'd*, 484 U.S. 260 (1988).

[108] *Hazelwood*, 484 U.S. at 273. Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Id.* at 267 (internal citations omitted) (internal quotations omitted). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. *Perry*, 460 U.S. at 46.

[109] *Hazelwood*, 484 U.S. at 271.

[110] *Id.*

[111] As the majority held: "A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without

that "might reasonably perceive to bear the imprimatur of the school," *Tinker* provides the exception and not the rule.[112] The rule that governs most speech in school after *Hazelwood* is that the censorship need only be reasonably related to a legitimate pedagogical purpose.[113] There is a large gap between this and the apparent general rule from *Tinker*. This turns the second strong proposition from *Tinker* on its head. While students might not shed all of their First Amendment rights at the schoolhouse gate, it would appear that they must leave them at the entrance to the classroom, the theater, and perhaps even the gym and stadium, depending on the activity taking place there. This is effectively the same rule that governs limitations on prisoners' rights and the rights of students under the Fourth Amendment to be free from unreasonable searches and seizures at school.[114]

As noted above, there is a wide gap between the students' model behavior and the lack of disruption that resulted, and the principals' unreasonable behavior in instituting the ban and then enforcing it under the circumstances as described by the Court.[115] Because of this gap, given the

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'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." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969) (internal citations omitted).

[112] While this Article argues that most speech at school involves a limited public forum or school-sponsored speech, others hold the view that the "most common types of student speech issues" are when "speech happens to occur at school." Cordes, *supra* note 71, at 660. Cordes argues that *Morse v. Frederick* governs these situations and that *Morse* adopted a balancing test that takes into consideration the type of restriction imposed, how central or peripheral the speech is to core First Amendment values, and the strength of the state interest. *Id.* at 659–60. This balancing test does not resemble anything articulated in the *Tinker* decision, which according to *Hazelwood*, governed speech that "happens to occur on the school premises." *Hazelwood*, 484 U.S. at 271. Cordes reads *Tinker* as only applying to cases involving viewpoint discrimination on core political speech, and thus, on his reading, *Tinker's* highly protective standard has a very limited scope of application. Cordes, *supra* note 71, at 663. While this may be the best way to read *Tinker*, in light of *Morse*, it is not the most natural reading of *Tinker* and it is not how the Court in *Hazelwood* read *Tinker*. It is also not the way many other courts have read *Tinker*. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986).

[113] *Hazelwood*, 484 U.S. at 273.

[114] The rule for regulating prisoners' fundamental rights is that they must be reasonably related to legitimate penological purposes. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977). As the Court stated in *Jones*, "[i]n a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id.* (internal quotation marks omitted). Of course, what is reasonable in a prison setting is different from what is reasonable in an educational setting. While the general rule requires probable cause in order for a search to be reasonable, the standard is significantly lowered for searches of children in schools. N.J. v. T.L.O., 469 U.S. 325, 340 (1985) ("[T]he school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."). As stated in *Bd. of Educ. v. Earls*:

> "special needs" inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

536 U.S. 822, 829–30 (2002) (internal citations omitted) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995).

[115] Justice Black does not view the disruption that resulted from the armbands as lightly as the majority opinion. *Tinker*, 393 U.S. at 517–18 (Black, J., dissenting). As Justice Black stated:

way the Court describes the case, one can imagine a wide array of scenarios where a student's expression (speech or expressive conduct) is not so virtuous, and where the school discipline seems more reasonable or appropriate. For example, take Mathew Fraser, a student of Bethel High School who delivered a speech back in 1983 that included a copious amount of sexual innuendos.[116] His speech did not cause a "substantial disruption of or material interference with school activities," yet he was suspended for three days and taken off the list of potential graduation speakers after he gave the speech.[117] If Mathew Fraser did not leave his free speech rights at the schoolhouse gate, and if those rights were commensurate with the rights of adults in other contexts, say the courthouse, then his speech would have been protected.[118] Just two years after *Tinker*, and fourteen years before *Fraser*, the Supreme Court in *Cohen v. California* held that the State of California could not punish Mr. Cohen, a nineteen-year-old, who was prosecuted for wearing a jacket in the corridor of a courthouse that had the words "Fuck the Draft" written on it.[119] The Court in fact quoted *Tinker* when chastising the

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> Their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons.

Id.

[116] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677–78 (1986) (upholding the school's decision to suspend a student for referencing "elaborate, graphic, and explicit sexual metaphor[s]" in a school speech). As the Court noted, "[d]uring the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* Justice Brennan, in his concurrence, quoted the speech (stop reading if you are offended by sexual innuendo):

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
> So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687 (Brennan, J., concurring).

[117] *Id.* at 678.

> During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that, on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

Id. The Supreme Court did not hold that these disturbances amounted to a material and substantial disruption. *Id.* at 678–79. Neither the district court, nor the circuit court, found that these rose to a material or substantial disruption. *Id.* at 679; *see also id.* at 690 (Marshall, J., dissenting); *id.* at 691–93 (Stevens, J., dissenting).

[118] *See generally id.* at 675.

[119] *See generally* Cohen v. California, 403 U.S. 15 (1971).

> On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a

reasoning of the California court, as it stated, "[t]he rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'"[120] While the Court in *Cohen* implied that Cohen's rights were commensurate with Tinker's, it is hard to imagine that Fraser's rights were commensurate with Cohen's.[121]

Finally, there is a significant gap within the last (third) strong proposition from *Tinker*.[122] Contrary to the very strong second proposition, authorities do not need to wait for the substantial disruption or material interference before they act. All they need are facts that "might reasonably" lead to that forecast.[123] While the requirement of a "substantial disruption of, or material interference with, school activities" sets a high bar, the allowance of "reasonable forecasting" makes that bar adjustable depending on who the final arbiter of "reasonableness" is.[124] The Court in *Tinker* took it upon itself to overturn the decision of the district court, the trier of fact which had found that the principals had reasonable grounds for such a forecast.[125] Questions of fact and reasonableness are often quintessential question for juries and finders of fact.[126] There is often a certain amount of deference shown to agencies and local institutions with expertise in the nuances of the given industry or field of regulation.[127] The Supreme Court in *Hazelwood* emphasized this last point when it stated, "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[128] Thus, there are numerous cases that distinguish *Tinker* on the ground that the relevant school body did possess

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> jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

Id. at 16.

[120] *Id.* at 23 (citing *Tinker*, 393 U.S. at 508).

[121] *See generally id.*; *Fraser*, 478 U.S. 675; *Tinker*, 393 U.S. 503.

[122] *See supra* note 71 and accompanying text.

[123] The first part of the third proposition requires facts that "might reasonably have led school authorities to forecast substantial disruption[s]." *Tinker*, 393 U.S. at 514; *supra* note 71 and accompanying text.

[124] *Tinker*, 393 U.S. at 514; *see supra* note 71 and accompanying text. Remember, the second proposition gave students a generous right to express opinion as long as it did not "materially and substantially interfere with appropriate discipline in operation of the school and without colliding with rights of others." *Tinker*, 393 U.S. at 513; *see supra* note 70 and accompanying text.

[125] *See Tinker*, 393 U.S. at 514.

[126] In Fourth Amendment criminal due process cases, the courts generally see it as their role to determine what is a "reasonable" search under the Amendment, but this is due in part to the fact that the text of the Amendment contains the notion of reasonableness. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). In other areas of law, such as in tort law, these are questions left to the jury.

[127] *See, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

[128] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

sufficient facts to make the forecast.[129] The *Hazelwood* holding provides significantly more leeway for the above mentioned non-judicial actors, for it went on to hold that, "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights."[130]

D. A Few Points on the Free Speech Rights of Children in Schools Before Tinker*: The Gap Between* Tinker *and Existing Law*

Tinker is often cited for the proposition that "[n]either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[131] The Court in *Tinker* implied that this was trite and well-settled law.[132] As it stated, "[t]his has been the unmistakable holding of this Court for almost 50 years."[133] The Court cited two cases as authority for this proposition, *Meyer v. Nebraska* and *Bartels v. Iowa*, but neither case supported the proposition.[134] In those cases, the Supreme Court held that the Constitution prevented states from forbidding the teaching of a foreign language to students.[135] The Court in *Tinker* described these cases as "unconstitutionally interfer[ing] with the liberty of teacher, student, and parent."[136] This proposition is false. The petitioners in these cases were the schoolteachers who had been convicted under the statute, and while the Court spoke of the teachers' liberty interests and that of the parents, there is no mention of any liberty interests of students.[137] The Court speaks of the parents' right to control, and the state-sanctioned duty of parents to provide

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[129] *See, e.g.*, Lavine v. Blaine Sch. Dist., 257 F.3d 981, 983–84, 989 (9th Cir. 2001) (holding that a student's expulsion did not violate the First Amendment because based on the totality of circumstances, the school district reasonably forecasted substantial disruption when an eleventh grade student handed his teacher a poem about coming to school and shooting twenty-eight people dead); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (holding that a student's creation of "vulgar and misleading message about the supposed cancellation of an upcoming school event" created a foreseeable risk of substantial disruption); Snyder v. Blue Mountain School District, 593 F.3d 286, 290 (3d Cir. 2010), *reh'g en banc granted No. 08-4138* (3d Cir. June 3, 2010) (holding that a student's creation of an online profile of the school's principal was a substantial disruption because of its potential future impact); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 735–36, 739 (8th Cir. 2009) (holding that a Confederate flag on student clothing was inherently disruptive in the context of race-related violence at school and within the community); *c.f.* Zamecnik v. Indian Prairie Sch. Dist. # 204, 636 F.3d 874, 876–79, 882 (7th Cir. 2011) (reaffirming the panel decision granting summary judgment in favor of students who were prohibited from wearing t-shirts with a homophobic message in school and specifying that facts that might lead to forecasting substantial disruption may include a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school).

[130] *Hazelwood*, 484 U.S. at 273 (internal citations omitted).

[131] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see supra* note 69 and accompanying text.

[132] *See Tinker*, 393 U.S. at 506.

[133] *Id.*

[134] *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).

[135] *See Meyer*, 262 U.S. at 402–03; *Bartels*, 262 U.S at 409–11.

[136] *Tinker*, 393 U.S. at 506.

[137] *See generally Meyer*, 262 U.S. 390; *Bartels*, 262 U.S. 404.

"children education suitable to their station in life," but again there is no mention of students' rights to determine what education was suitable to them.[138] There was no student right to receive education in German in those cases.[139]

In another early case cited by the majority, *Pierce v. Society of Sisters*, the Society of Sisters argued that the law, which required students to attend public school, "conflict[ed] with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession."[140] The Court, however, did not hold that the law was unconstitutional on the grounds that it violated a student's rights to influence her or his parents' choices. Rather, it held that the law was unconstitutional on the grounds that it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[141] The Court further noted that:

> [n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers, and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[142]

Thus, nothing in these early cases supports the view that students had free speech rights in schools.

The only Supreme Court case that came close to the idea that children had free speech rights within the schoolhouse gate was *West Virginia State Board of Education v. Barnette*, but that case did not involve any speech on the part of the petitioner.[143] Rather, it involved the student's freedom of

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[138] *Meyer*, 262 U.S. at 400.
[139] *Id.* at 403; *Bartels*, 262 U.S. at 411.
[140] 268 U.S. 510, 532 (1925).
[141] *Id.* at 535.
[142] *Id.* at 534.
[143] 319 U.S. 624, 642 (1943). Note that Justice Fortas in his majority opinion in *Epperson v. Arkansas* incorrectly characterized the decisions in *Meyers* and *Bartles* as involving both the right of the teacher and of the pupil, as he stated:

> The earliest cases in this Court on the subject of the impact of constitutional guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States. But as early as 1923, the Court did not hesitate to condemn under the Due Process Clause "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn. In that year, the Court, in an opinion by Justice McReynolds, held unconstitutional an act of the State of Nebraska making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade. The State's purpose in

conscience and the right of the student not to be compelled to speak, and, in particular, not to be compelled to salute the flag and recite the Pledge of Allegiance.[144] The other cases, cited in a string cite by the Court in *Tinker*, all involved the rights of teachers.[145]

Thus, contrary to the view expressed by the majority in *Tinker*, the decision did not rest on a half century of precedent upholding students' free speech rights in schools. Rather, the *Tinker* majority uncritically applied the reasoning from prior cases that supported teachers' free speech rights in schools to schoolchildren, as if the teacher and student stood on equal footing. When Justice Brennan, writing for the Court in *Keyishian v. Board of Regents* said that, "[t]he 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,'" he was arguing for the free speech rights of teachers against a board of regents that was imposing a loyalty oath, and not the rights of students.[146]

The Court's strongest proposition of law, requiring a showing that "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'" was borrowed completely from the Fifth Circuit opinion in *Burnside v. Byars*, a case that involved the suspension of students for wearing buttons that read "'One Man One Vote.'"[147] The court in *Burnside* made up this particular rule out of whole cloth in the second to last paragraph of the opinion, citing no

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> enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the "baneful effect" of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but, it held that these were not adequate to support the restriction upon the liberty of teacher and pupil. The challenged statute, it held, unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge.

393 U.S. 97, 105 (1968) (footnote omitted) (citing *Meyer*, 262 U.S. 390).

[144] *Barnette*, 319 U.S. at 629.

[145] *See generally* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 204, 212 (1948) (holding that the teaching of private religious classes in public schools is an unconstitutional infringement of the Establishment Clause); Wieman v. Updegraff, 344 U.S. 183, 184, 191 (1952) (holding that a loyalty oath for teachers was an unconstitutional infringement of free speech); Sweezy v. New Hampshire, 354 U.S. 234, 235, 238–42 (1957) (holding the Attorney General invaded a professor's constitutional rights of freedom of association and political expression when investigating the professor's subversive political behavior); Shelton v. Tucker, 364 U.S. 479, 488–89 (1960) (holding that it was unconstitutional to require school employees to submit an affidavit listing every organization to which they belonged or regularly contributed within the preceding five years); Keyishian v. Bd. of Regents, 385 U.S. 589, 592, 609–10 (1967) (state law requiring university staff and faculty members to certify that they did not belong to the Communist party was unconstitutionally vague).

[146] *Keyishian*, 385 U.S. at 603 (quoting United States v. AP, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[147] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). *Burnside* involved a ban on students wearing "freedom buttons" that read "One Man One Vote" at school. 363 F.2d at 746. Students who violated the ban were suspended for one week even though the ban only caused mild curiosity and no disturbances. *Id.* at 748.

authority for the rule.[148] Earlier in the *Burnside* court's discussion, the court merely required that school regulations be reasonable, in that they measurably contribute to the maintenance of order and decorum in the school.[149] The court emphasized that it did not support undermining the authority of the school. As it stated:

> [w]e wish to make it quite clear that we do not applaud any attempt to undermine the authority of the school. We support all efforts made by the school to fashion reasonable regulations for the conduct of their students and enforcement of the punishment incurred when such regulations are violated. Obedience to duly constituted authority is a valuable tool, and respect for those in authority must be instilled in our young people.[150]

Thus, even the court in *Burnside* would have deferred to the decision of the school if it had measurably contributed to the maintenance of order or decorum in the school. However, there was no evidence that the students in *Burnside* had interfered with any educational activity, created any commotion, or that the "freedom buttons" they wore "tended to distract the minds of the students away from their teachers."[151]

The decision of the principal in *Burnside*, like that of the principals in *Tinker*, bordered on the irrational. Contrary to the popular view, and the view that appears to be taken by the Supreme Court in *Tinker*, the problem with these decisions was not so much that they violated the well-established free speech rights of students, but that they were not educationally sound decisions. Rather than contributing to a sound educational environment and enhancing the educational experience of their students, these principals materially and substantially disrupted the learning process of these students by suspending them from school.[152] This conduct, much more than the

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[148] *Id.* at 749.

[149] *Id.* at 748. As the *Burnside* Court stated:

> The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning. In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities. . . . [A] reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system.

Id.

[150] *Id.* at 749.

[151] *Id.* at 748.

[152] Again, it is worth contrasting the approach taken by these principals and the approach taken by the younger Tinkers' teachers. *Compare* Borkoski, *supra* note 87, *with Tinker*, 393 U.S. at 504.

conduct of wearing armbands or buttons, most likely caused more disruption to the educational environment at the school as the litigation proceeded through the courts. Rather than choosing to treat these situations as educational opportunities, the schools created their own disruption.

E. A Few Points on the Free Speech Rights of Children Outside of School: A Gap Between Tinker*'s Presumption that Children Were Free to Speak Outside the Schoolhouse Gate and the Reality*

Because the United States Constitution does not apply to private actors, and because parents have a right to discipline their children, the freedom of children to speak outside of school is more of an exception than a rule.[153] Parents did, and routinely still do, ban or censor the speech of children, both inside and outside the home.[154] As Cynthia Godsoe notes:

> [s]ince Blackstone's time, the parental discipline privilege has condoned parental assault on children in the name of discipline. Every state has such a privilege. Many are very broad, permitting any caregiver of the child to administer corporal punishment bringing physical injury that stops short of "severe bodily injury or death."[155]

Of course, parents may also allow children to speak more freely than at school, or in other contexts, and they may allow them access to materials and the speech of others that the state might otherwise ban. Thus, one year before *Tinker* was decided, the Supreme Court in *Ginsberg v. New York*, upheld a New York law making it illegal to sell pictures depicting nudity to children under seventeen years old, even if those pictures were not otherwise obscene and would thus be constitutionally protected.[156] Part of Justice Brennan's rationale included the somewhat controversial statement that,

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[153] Stephan Jaggi, *State Action Doctrine*, OXFORD CONSTITUTIONAL LAW, https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e473 (last visited Mar. 14, 2020). The Supreme Court has recognized that parents have a largely unfettered right to raise their children as they wish. Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

[154] While it is true that parents also do not have free speech rights vis-à-vis private employers, adults can negotiate speech rights (individually or through collective bargaining) or change employers if their employer is too restrictive of their speech rights. *See First Amendment in the Workplace: Can Employees Really Say Anything They Want?*, COMPLY RIGHT (June 15, 2018), https://www.complyright.com/policies/can-employees-exercise-complete-freedom-of-speech-in-the-workplace. Employers are also very limited in how they can discipline employees. *Id.* Children do not have the right to collective bargaining or to change their legal guardians. *See* Joe Stone, *Can the Biological Mother Change the Legal Guardianship of Her Child*, LEGALZOOM, https://info.legalzoom.com/can-biological-mother-change-legal-guardianship-her-child-21647.html. The state's background rules allow parents to have more control over their own speech and that of their children than the state allows for children.

[155] Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 UNIV. OF MINN. L. SCH. 281, 282 (2017). While this Author agrees with Godsoe that the parental discipline privilege should be abolished, it does not follow that students have free speech rights or that they are free to say what they want, when they want, and in any way they wish. Parents can effectively discipline their children without physically and psychologically harming them.

[156] 390 U.S. 629, 631–35 (1968).

"[m]oreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[157] Justice Stewart, in his concurrence in *Tinker*, noted that in the previous term, the Court had just decided in *Ginsberg v. New York* that children's First Amendment rights are not coextensive with the rights of adults.[158] He reiterated that, "a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[159]

IV. CONCLUSION

As noted from the outset, *Tinker* not only came at the end of a decade known for upheaval, protest, and change, but a decade that witnessed continued state-sanctioned violence and resistance to change.[160] It came at the end of a decade that not only witnessed major civil rights advancements at the federal legislative level, but an unprecedented number of advancements in the protection for constitutional rights by the Supreme Court, where it stepped in to protect the proverbial "little guy" from state authorities. The protection of free speech and expression was at its highest point by the time of the *Tinker* decision. The social and legal developments of the decade seemed to naturally and inexorably call for the Court to protect the vulnerable students in *Tinker* from the principals in that case. But some of the language implies too much; it goes too far. If children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," then it is not full-blown free speech rights that children need, but rather a right to an education, which provides that capacity for choice.[161]

The more serious harm in *Tinker*, like in *Burnside* before it, was not

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[157] *Id.* at 639.

[158] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514–15 (Stewart, J., concurring). Parents' inability to block information that may be "inappropriate" for children partly justified the Court's decision in *FCC v. Pacifica* to uphold the Federal Communications Commission's censoring of George Carlin's routine "Filthy Words" over the radio in the middle of the afternoon. 438 U.S. at 749–50. The decision was based on the need to shelter children from offensive material and because parents would not otherwise be able to censor the materials. *Id.* at 749. Conversely, in *Ashcroft v. ACLU*, the parent's ability to use blocking and filtering software to prevent children from accessing inappropriate material was part of the justification for striking down Child Online Protection Act ("COPA"). 542 U.S. 656, 667–68 (2004). It was a less restrictive means of achieving the goals of COPA than requiring providers to block the material at the source. *Id.* at 667.

[159] *Tinker*, 393 U.S. at 514–15 (Stewart, J., concurring) (quoting *Ginsberg*, 390 U.S. at 649–50).

[160] *See supra* Section II.A.

[161] *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (internal citations omitted). Over fifteen years ago, Erwin Chemerinsky decried the fact that the Supreme Court had withdrawn from involvement in American schools, in what he called the "deconstitutionalization of education." Chemerinsky, *supra* note 1, at 112. Chemerinsky celebrates *Tinker* and is critical of the Court's subsequent school speech decisions, viewing them as a prime example of deconstitutionalization. *Id.* at 124–25. He fails to see that *Tinker* itself represented a missed opportunity to address the relationship between free speech rights and the right to an education, preferring the laissez-faire approach to speech over a substantive positive right to an education.

that students' speech rights were infringed, but that the discipline that they received for their expression, which was suspension from school, did not further legitimate educational goals.[162] It neither helped preserve or enhance the educational environment in general, nor did it further the educational interests of the disciplined students in particular. One can only imagine what might have happened if instead of focusing on the free speech rights of students, the Supreme Court had recognized that students had a fundamental right to an education. Even though education is essential for the meaningful exercise of most every other right and privilege, to this day, there is no recognized federal right to an education.[163] While many states have since recognized such a right, there does not appear, at present, to be a coherent approach to the infringement of that right when students are disciplined by excluding them from school.[164] The negative impact on the education of the suspended student is direct and relatively obvious, and while the conventional wisdom would have it that excluding disorderly students would improve the learning environment of others, there is a considerable amount of research that indicates otherwise.[165] Suspensions as a form of discipline are not

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[162] *See generally Tinker*, 393 U.S. 503 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[163] As the Supreme Court noted in *Brown v. Bd. of Educ.*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. 483, 493 (1954). Despite this strong language, the Court in *San Antonion Indep. Sch. Dist. v Rodriguez*, by five votes to four, held that education is not a fundamental right. 411 U.S. 1, 38 (1973). Justice Brennan argued that:

> Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. . . . This being so, any classification affecting education must be subjected to strict judicial scrutiny.

Id. at 63 (Brennan, J., dissenting).

[164] *See* Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 20–24 (2016).

[165] *See, e.g.*, M. KAREGA RAUSCH & RUSSELL SKIBA, THE ACADEMIC COST OF DISCIPLINE: THE RELATIONSHIP BETWEEN SUSPENSION/EXPULSION AND SCHOOL ACHIEVEMENT 16 (Ctr. for Evaluation & Educ. Pol'y at Ind. Univ., 2005). *See also* Black, *supra* note 164, at 56–57. As Derek Black notes:

> "[s]tudents who have been suspended score substantially lower on end-of-year academic progress tests than those who have not, and even students with a propensity to be suspended perform worse in years where they are suspended relative to years when they are not." Third, the negative effects of the initial suspension compound over time and set "into motion a trajectory of poor performance that continues in subsequent years, even if a student is not suspended again."

Id. (quoting Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 82 (2016)). "Over the course of two years, the average student who did not experience a suspension experienced a six-point increase in achievement on end-of-year exams, while students who experienced a single suspension actually regressed by one point during that same period." *Id.* at 56–57. As further stated by Derek Black:

generally good for the school environment and other students in school.[166] Because suspensions have a negative impact on the school climate, unreasonably harsh suspensions have a serious negative impact on other students.[167]

If the emphasis was on the rights of students to a sound education in schools, rather than free speech, the courts in *Tinker* and *Burnside* should have come to the same result, namely, that the school discipline in these cases was not justified. If the Supreme Court had fully appreciated that the educational "horse" needed to come before the free speech "cart," then it and other courts might have developed a more coherent and consistent jurisprudence around the rights of students in schools that more meaningfully addressed what was in the best interest of our children's education. This, arguably, would have been better than the mental gymnastics that it takes to reconcile *Tinker* with subsequent Supreme Court decisions like *Hazelwood*, *Fraser*, *Morse*, and the multitude of lower court decisions in this area. While an emphasis on education may not have resulted in the protection and fostering of more speech, it may have resulted in better-educated students who someday would become better speakers, more informed voters, and all-around better contributors to our republic.

> Nuanced studies indicate that a school's approach to discipline and frequency of suspensions heavily influence student achievement. Even after controlling for race, poverty, and school type, suspension rates predict more than one-third of a school's overall academic achievement. With all other things being equal, academic achievement is lower in schools with higher suspension rates. As one study put it, "serving a high percentage of poor minority children does not mean that a school will necessarily have a high suspension rate," but having a high suspension rate does seem to mean that academic achievement, as measured by test scores, will decline.

Id. at 48–49.

[166] *See id.* at 56–57.

[167] *Id.* at 50–51. This impacts not only the suspended students, but also the achievement of other students and the ability of schools to retain quality teachers. *Id.*