The Silencing of Student Voices

PRESERVING FREE SPEECH IN AMERICA'S SCHOOLS

David L. Hudson Jr.

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THE CHALLENGE TO FREE SPEECH IN AMERICA'S SCHOOLS

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Contents

Introduction

"BOSTON PUBLIC," Fox's popular series, regularly features stories of drugs, sexual abuse, harassment and violence at an urban public high school. Unfortunately, these stories too often mirror front-page headlines. In the last few years, school shootings in Paducah, Ky., Littleton, Colo., Santee, Calif., and Williamsport, Pa., shocked the nation's collective conscience.

These frightening tragedies have become a dominating image of public education in the minds of many Americans. The violence and sex that pervade popular culture have infected our schools, say many politicians. Parents and administrators fear the influence of violence, drugs and racial tensions on America's youth. The Federal Bureau of Investigation reports that violence has become a serious health problem in public schools.

Too often school officials have failed to consider the importance of constitutional freedoms.

School administrators' response to these legitimate fears often has been to clamp down on student expression deemed different or unusual. Many schools have enacted "zero tolerance" policies that impose harsh penalties for first-time student offenders. School districts have controlled language, censored students' personal Web sites, established dress codes, banned controversial symbols, tossed out books and required uniforms.

Public schools are a cornerstone of society and fulfill the vital function of educating the nation's youth. Young minds are shaped in the classrooms, libraries, gymnasiums, hallways and bus stops of public schools.

Surely no one questions the need to provide a safe learning environment for public school students. The primary role of schools is educating young minds. Federal appeals court Judge Gilbert S. Merritt noted in a recent student-speech case that "learning is more vital in the classroom than free speech."[1] Yet too often school officials with safety concerns have failed to consider the importance of constitutional freedoms, especially the First Amendment. Today's pressing concerns and violent headlines cause school officials to control the flow of information to young people. The First Amendment often lurks as an easy target. It creates controversy when many seek uniformity.

But if students are to learn the lessons of democracy, such as the importance of exercising the right to freedom of speech, they must live in an environment that fosters the free exchange of ideas.

Many free-speech experts believe that students will not learn the lessons of democracy if they cannot experience firsthand the freedom to make their own choices. Therefore, school officials, politicians, teachers and parents should balance legitimate safety concerns with the constitutional right of freedom of speech.

If students are to learn the lessons of democracy, they must live in an environment that fosters the free exchange of ideas.

Public school students did not always possess free-expression rights. The U.S. Supreme Court did not even apply the Bill of Rights to public school students until the 1940s.

But in a landmark decision more than 30 years ago, the U.S. Supreme Court ruled that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In the 1969 case *Tinker v. Des Moines Independent Community School District,* the high court held that school officials violated the First Amendment rights of three students by suspending them for wearing black armbands to protest U.S. involvement in the Vietnam conflict.[2] The Court's statement that students do not lose their constitutional rights at "the schoolhouse gate" is often cited in examining student-expression cases.

Social activism flourished in the late 1960s and early 1970s. The nation's schools were not left behind in pushing the limits of convention and orthodoxy. Several federal courts supported students' quests for individuality by striking down school dress codes that regulated student hair length.

More than 30 years after *Tinker*, however, some legal experts say the picture has become bleaker for public school students. Many schools have adopted stricter dress codes and uniform policies. Respect for individuality and self-expression has taken a back seat to school administrators' more pressing problems.

This report examines several hot-button issues and asks whether students have lost some of the protections set forth in *Tinker*. Many recent court decisions indicate that some school officials think the changing social and legal environment empowers them to ignore the lessons from *Tinker*.

In April 1999, school officials in Allen, Texas, suspended several students, including Jennifer Boccia, for wearing black armbands to their school to

mourn the victims of the Columbine school shooting and to protest what they viewed as overly authoritarian school rules passed after the incident.

Boccia sued in federal court, contending that the suspension violated her First Amendment rights. Jennifer Boccia and the school district settled, but only after the American Civil Liberties Union filed a lawsuit on her behalf.

The Texas case — *Boccia v. The Allen Independent School District* — closely resembles *Tinker*. Has the respect for student free-speech rights shown by the U.S. Supreme Court been forgotten by today's high court? Lawrence Fischman, the lawyer handling the case for Jennifer Boccia, goes so far as to say that "the *Tinker* case might be decided differently today."[3]

A Louisiana high school honor-roll student named Jennifer Roe sued her school district after officials refused to allow her to wear a black armband to protest the school's mandatory uniform policy. When her parents informed the school principal about the *Tinker* case, the principal reportedly said that the board did not care about that precedent.[4]

Ultimately, a federal district court judge ruled in December 1999 in *Fisher v. Bossier Parish School District* that *Tinker* was the "controlling" standard. The judge determined that any attempt to prohibit the student from wearing the black armband would violate her First Amendment rights.

These two cases represent the tip of the iceberg on student free-expression cases. Some notable incidents in the past few years show that public school students have been punished for various forms of expressive conduct:

- A school district in Derby, Kan., suspended a middle-school student for violating a racial-harassment policy by drawing a Confederate flag on a piece of paper during class.[5]

- School officials in Winter, Wis., punished a high school student for using the Internet in a computer lab during non-school hours to look up information about Wicca, a contemporary pagan religion based on witchcraft.[6]

- A Texas school district suspended two students for wearing rosary beads because they thought the beads might be construed as gang symbols.[7]

- A Michigan school suspended a student for wearing

T-shirts bearing the names of the bands Korn and Tool.[8]

- A Virginia high school suspended a student because he had blue hair. His lawyer characterized the punishment as an "unthinking, knee-jerk hostility to unusual or unique personal styles regardless of how innocuous they may be."[9]

- The parent of an Arizona public high school student sued a school district claiming that the school created a racially hostile environment by allowing students to read *The Adventures of Huckleberry Finn*.[10]

- A Tennessee school district considered banning *Brave New World* and *Catch-22* for fear that the books might violate a harmful-to-minors law.[11]

Restrictions on students' constitutional rights are not confined to First Amendment issues. Widespread drug testing, locker searches and even strip searches suggest that other constitutional principles may be at risk. As David Ingebretsen, executive director of the Mississippi American Civil Liberties Union, said, "In the last five years, we have witnessed an assault on student rights, from locker searches to drug testing to restrictions on student clothing."

However, as U.S. Supreme Court Justice William J. Brennan once said when describing his "favorite" part of the Constitution: "The First Amendment … gives us this society. The other provisions of the Constitution really only embellish it."[12]

This report examines the state of students' First Amendment free-speech rights in contemporary America. It examines student dress, Internet access, speech codes, book censorship and other related issues confronting school administrators, teachers and students across the country.

This report does not address freedom of religion issues, which are treated in other First Amendment Center publications, and only touches on free-press principles, which are covered extensively by the Student Press Law Center.[13] However, educators, students and student-advocates can attest to the fact that numerous issues concerning freedom of religion and the press arise daily in the public schools.

Informing students, educators, administrators and the public of the First Amendment issues in public schools should lead to a greater understanding and appreciation of the importance of our "first freedom."

The rise and fall of student rights

BEFORE 1925, the First Amendment only protected individuals' free-speech rights from actions by the federal government. This meant that public school students could not sue local school officials for First Amendment violations. For example, in 1908, the Supreme Court of Wisconsin ruled that school officials could suspend two students who wrote a poem ridiculing their teachers that was published in a local newspaper.[1] The Wisconsin court reasoned that "such power is essential to the preservation of order, decency, decorum, and good government in the public schools." In 1915, the California Court of Appeals ruled that school officials could suspend a student for criticizing and "slamming" school officials in a student assembly speech.[2]

The Court must ensure "scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source."

— JUSTICE ROBERT JACKSON

The Supreme Court first extended the reach of the First Amendment free-speech clause to cover actions by state officials in its 1925 decision *Gitlow v. New York*.[3] But it was not until 1943 that the Court extended First Amendment protection to public school students in the flag-salute case of *West Virginia v. Barnette*.[4]

In *Barnette*, the U.S. Supreme Court struck down a West Virginia law requiring students to salute the American flag. Under the law, parents of students who refused to salute the flag faced criminal penalties and fines.

The outcome of *Barnette* and the resultant First Amendment victory were anything but preordained. Three years earlier, the Court had upheld a similar flag-salute requirement in *Minersville Sch. Dist. v. Gobitis*.[5] But with *Barnette*, the Court overruled itself and issued a landmark opinion on constitutional law.

Writing for the majority, Justice Robert Jackson determined that the Court must ensure "scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[6]

The Court recited historical evidence showing the dangers of trying to coerce conformity and concluded in oft-cited language that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[7]

Although *Barnette* established a baseline for constitutional rights, it was not until the 1969 decision in *Tinker v. Des Moines Independent Community School District* that the Supreme Court refined the protections for public school students.

The *Tinker* case

In 1969, the U.S. Supreme Court extended substantial First Amendment protection to public school students in *Tinker v. Des Moines Independent Community School District.* The case began in December 1965 when a group of adults and students in Des Moines decided to protest U.S. involvement in Vietnam by wearing black armbands to school.

Corbis

Students Mary Beth Tinker and John Tinker were suspended by school officials in 1965 for wearing black armbands to protest the Vietnam War.

School officials learned of the armband plan and quickly passed a no-armband rule. Several students — including John Tinker, Mary Beth Tinker and Christopher Eckhardt — wore armbands anyway. School officials suspended them. The three students sued in federal court, contending that the school infringed on their First Amendment right to engage in symbolic speech.

A federal district court dismissed the complaint. The 8th U.S. Circuit Court of Appeals considered the case en banc and was divided equally. Because the judges had split evenly, the federal district court decision dismissing the case was upheld. The students' last hope was the court of last resort – the U.S. Supreme Court.

Finding for the students, Justice Abe Fortas wrote that it "can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[8]

The majority noted that the school officials could point to no evidence that the wearing of the armbands would disrupt the school environment. Fortas

wrote that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[9] Fortas established what has become known as the *Tinker* rule: "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."[10]

Interestingly, Justice Hugo Black, known as a First Amendment absolutist, dissented in the case. Foreshadowing the words of conservative cultural critics of today, Black warned that the majority's decision could create a "new revolutionary era of permissiveness."[11]

Legal commentators consider *Tinker* the high-water mark of student First Amendment rights. Kevin O'Shea, publisher of the monthly legal tract *First Amendment Rights in Education* (no longer published), wrote that "the *Tinker* opinion effectively launched the modern era of First Amendment rights in the public education setting because it imposed a clear burden on school officials who would seek to restrict student expression."[12]

Legal commentators consider Tinker *the high-water mark of student First Amendment rights.*

But with later decisions, the U.S. Supreme Court limited students' constitutional rights.

The decline of student rights

The decline of student rights began with the U.S. Supreme Court's 1985 decision in *New Jersey v. T.L.O.*, a Fourth Amendment search and seizure case.[13] The Court relaxed the high level of individualized suspicion normally required to search a person, writing that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[14] The ruling stated that the probable-cause standard required for searches of adults could be reduced to a general reasonableness standard.

The next year, the U.S. Supreme Court applied the relaxed standard for student constitutional rights in *Bethel School District No. 403 v. Fraser*.[15] In *Fraser*, the Court ruled that public school officials did not violate the First Amendment rights of a student who, during a general assembly, gave a speech laced with sexual references.

Matthew Fraser argued that his speech should receive as much protection as the black armbands in *Tinker*. A majority of the Court disagreed, finding that Fraser's vulgar speech did not compare to the political speech at issue in

Tinker. "It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," the Court wrote.[16]

The Court cited *T.L.O.* for the proposition that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[17] The Court also issued its now-well-known statement that schools must balance students' freedoms with the educational purpose of teaching students good behavior: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[18]

Some federal courts have used the Fraser *decision broadly to censor any offensive student speech.*

Jeffrey T. Haley, Fraser's lawyer, said the Supreme Court drew a false distinction between *Fraser* and *Tinker*. "You have to remember that Matthew Fraser was giving a speech to a student assembly for a political election. He was engaging in political speech. In my mind, the decision the Court made in *Fraser* virtually wipes out *Tinker*," Haley said.

Indeed, some federal courts have used the *Fraser* decision broadly to censor any offensive student speech. These courts have determined that the *Fraser* ruling applies to any student speech that is highly offensive. For example, courts have ruled against students for wearing the anti-drug T-shirt bearing the message "Drugs Suck" and prohibited students from wearing any Confederate flag clothing based on the *Fraser* rationale.[19]

The chipping away of *Tinker* came full circle in the high court's 1988 decision in *Hazelwood School District v. Kuhlmeier*.[20] In *Hazelwood*, a school principal pulled two student articles dealing with teen pregnancy and divorce from the school newspaper, *The Spectrum*. The principal said the subject matter of the articles was too mature and controversial for younger students.

A federal district court judge approved of the principal's actions and dismissed the lawsuit.[21] However, the 8th U.S. Circuit Court of Appeals reversed in 1986, ruling that school officials could not have reasonably forecast that the articles would cause a substantial disruption, as required by *Tinker*.[22]

On appeal, the U.S. Supreme Court ruled in 1988 that a new standard should apply to school-sponsored speech, as opposed to the student-initiated expression in *Tinker*.

The Court determined 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."[23]

The Court found that the school newspaper, which was produced as part of a journalism class, was part of the curriculum over which educators have greater control. "A school must be able to set high standards for the student speech that is disseminated under its auspices — standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world — and may refuse to disseminate student speech that does not meet those standards."[24]

The Associated Press

In his strong Hazelwood *dissent, Justice William Brennan wrote that the principal practiced viewpoint discrimination.*

The majority opinion in *Hazelwood* contained broad language on what type of speech school officials could censor, including any speech that might "associate the school with any position other than neutrality on matters of political controversy."[25]

Justice Brennan decried the majority's reasoning in his dissent, writing that "the First Amendment permits no such blanket censorship authority."[26] Brennan feared that the vague standard articulated in *Hazelwood* would enable school censors to engage in viewpoint discrimination. "The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics," he wrote.[27]

Nathan Lankford

Nadine Strossen, president of the American Civil Liberties Union

Some legal commentators decried the *Hazelwood* decision as taking away the protections of *Tinker*. Nadine Strossen, president of the American Civil Liberties Union, termed the *Hazelwood* decision as "sad back-sliding."[28] Mark Goodman, executive director of the Student Press Law Center, said the decision "has definitely fanned the flames of censorship. Another negative long-term consequence of the decision is that it has led to confusion among

school administrators, students and even courts on how to apply this vague and subjective standard."[29]

Judy G. Rolfe

Mark Goodman, executive director of the Student Press Law Center, said thousands of confused students have called for help since the 1988 Hazelwood *decision.*

Goodman and other First Amendment advocates have pointed out that the reasonable-educator standard remains deferential to school officials. "The standard is largely subjective and allows school officials to mask viewpoint discrimination," he said.[30] Goodman noted that in 1988, the year the U.S. Supreme Court decided *Hazelwood*, his organization received about 588 requests for legal assistance. In 1999, the SPLC received more than 1,500 requests for legal assistance. He identified a "steady increase" in incidents of censorship of the student press.[31]

The two decisions mean that different standards apply depending on whether student expression is student-initiated or school-sponsored. If student expression is considered student-initiated, the *Tinker* standard of substantial disruption applies. If the student expression is school-sponsored, then *Hazelwood*'s reasonable-educator standard applies.

Anti-*Hazelwood* legislation

After the Court's decision in *Hazelwood*, five states — Colorado, Iowa, Kansas, Massachusetts and Arkansas — passed laws ensuring greater First Amendment freedoms for the student press. California had a law in place before the *Hazelwood* decision.

Several other states have considered but not passed similar legislation, including Illinois, Missouri and Michigan.

"The *Hazelwood* decision has created confusion for both high school student journalists and school administrators as to what exactly their rights are," Goodman said. "The benefit of such (state) legislation is that it spells out in clear, objective terms what students can and cannot publish in school newspapers. I do believe that many school administrators oppose such legislation because they wish to retain broad control to censor stories that might prove embarrassing to schools and school officials."[32]

Goodman said he hoped that more states would continue the legislative push for more freedoms for student journalists. He said that states have an obligation to protect students in order to teach about democracy.

"One of the primary purposes of public education is to teach students the values of democracy," he said. "Students can only learn this lesson if they can operate in an environment that fosters the spirit of democracy.'"[33]

Tinker 'revisited' in Texas

A 1999 case in Allen, Texas, demonstrated that certain school officials failed to heed the lessons of the Supreme Court's decision in *Tinker*. School officials punished students for wearing black armbands to school to protest restrictive school policies after the school shootings at Columbine High School in Littleton, Colo., in April 1999. The circumstances of the case closely resemble those of *Tinker*.

Jennifer Boccia, then a high school junior, sued Allen Independent School District in July 1999, contending school officials violated her free-expression rights for suspending her and others for wearing armbands.

After the shootings, school officials instituted a variety of security measures, including more random searches and a crackdown on unorthodox student dress. Diana Philip, director of the Northern Region of the Texas ACLU, said that about 10 Allen High School students wore the armbands to protest restrictive school policies as well as to mourn for the victims.

According to Philip, school officials allowed the armbands for three days because they thought the students were only expressing grief for the Littleton victims. However, when school officials learned that the armbands also symbolized protest of school policy, they cracked down.

The Associated Press

Memorial service for victims of the Columbine High School shooting

"This case sounds like it is as close as you could have to *Tinker*," said publisher O'Shea, also a lawyer. "If the students were protesting any kind of restraints on their rights — whether it be First Amendment free-speech rights or Fourth Amendment rights to be free from unreasonable searches or seizures — their expressive activity seems to fall squarely within *Tinker*."
O'Shea said the student claim for free-speech protection in the Boccia case

was perhaps even stronger than the speech claim in *Tinker*. "The political statement in this case appears to be even more compelling than in *Tinker*, because the students in *Tinker* were not directly involved in the situation they were protesting," he said. "Here, these students were protesting against restrictions of their own rights."

Philip agreed the case was "definitely *Tinker*" and represented another "Littleton backlash case." She said the circumstances in the *Boccia* case reflected a greater problem — "school officials' underlying fear of young people."

Fortunately, *Boccia* ended with the school officials' agreeing to remove any record of discipline related to the armbands from the students' record. Still, the fact that students must resort to federal lawsuits to protect their constitutional rights shows the harsh realities facing student expression.

Some experts have noted that students could respond to overly authoritarian school rules with greater cynicism about the system of democratic government. "One of the great concerns of our times is that our young people, disillusioned by our political processes, are disengaging from political participation," said the ACLU's Strossen. "It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass."[34]

PERSPECTIVE

Mother, daughter recount censorship

JENNIFER ROE, an honor student, and mother Elizabeth Fisher learned that some school officials do not show respect or understanding for student free expression.

During the summer of 1999, the sophomore and some friends from Bossier City, La., decided to protest the school's adoption of a uniform policy. They decided to wear black armbands. "I was familiar with the *Tinker* case," Roe said, referring to the 1969 Supreme Court decision providing protection for several students who wore black armbands to protest the Vietnam War.

Unfortunately for Roe, her school principal was not sympathetic to her protest or Supreme Court precedent. "He threatened me that I would be subject to punishment if I did not take off the armbands," she said. Jennifer took off the armbands. "I wasn't going to fight with the principal," she said. "He's a real big guy." Her mother went to see the principal about the incident.

"The principal told me — 'You're welcome to contact a lawyer' — and I even mentioned the *Tinker* case," Fisher said. "He basically flouted it." Eventually, Fisher filed a lawsuit on her daughter's behalf in federal court.

"I did it because my daughter felt so strongly about this issue," Fisher said. "I told her there may be repercussions and that she would have to face the press, but she wanted to pursue it, so I did. It seems like school officials want kids to be little machines, and they ignore and fail to appreciate their differences."

Roe and Fisher, with help from the American Civil Liberties Union, filed a federal lawsuit, claiming a violation of Roe's First Amendment rights. In December 1999, a federal judge ruled in her favor, citing *Tinker*.

"It was great," Roe said. The next year she became junior-class president. "The armband issue and the case did help with my campaign," she said.

But Roe said she had received some subtle backlash from teachers: "I had to specifically ask why I wasn't nominated for certain clubs, like the Aston Club and the Beta Club. They'll say, 'Oh, that must be an oversight,' which is crap because it's happened like three or four times."

Asked what the experience had taught her, Roe offered a candid assessment: "Our First Amendment rights are slowly being taken away, and people aren't noticing."

The Associated Press

A Louisiana principal threatened to punish Jennifer Roe for wearing a black armband to protest the school's uniform policy.

PERSPECTIVE

30 years later, Tinker *principals look back at landmark case*

WHEN 15-YEAR-OLD JOHN TINKER, his sister, Mary Beth Tinker, 13, and Christopher Eckhardt, 16, wore black armbands to their Iowa public school in December 1965 to protest the Vietnam conflict, they never imagined that their actions would lead to a landmark First Amendment decision.

Mary Beth Tinker

Anne Popovich

But 30 years ago, the U.S. Supreme Court handed down arguably the most important First Amendment decision yet for public school students — *Tinker v. Des Moines Independent Community School District.* The decision established that public school students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

However, some free-speech experts — including the lawyer who successfully argued the case before the U.S. Supreme Court — have said that public school students today are losing their free-speech rights.

Most observers view *Tinker* as the high-water mark for student First Amendment rights. "It is the biggest First Amendment case for public schools and public school students ever," Kevin O'Shea, publisher of *First Amendment Rights in Education*, said in an interview.

University of Northern Iowa history professor John W. Johnson, author of the 1997 book *The Struggle for Student Rights: Tinker v. Des Moines and the 1960s,* said that the case is the "*Roe v. Wade* for public school students."

Tinker plaintiff Eckhardt said, "What George (Washington) and the boys did for white males in 1776, what Abraham Lincoln did to a certain extent during the time of the Civil War for African-American males, what the women's suffrage movement in the 1920s did for women, the *Tinker* case did for children in America."

ARMBANDS, SUSPENSIONS AND LOWER-COURT DECISIONS

In early December 1965, a group of adults and students met at the Eckhardt home to discuss ways to convey anti-war sentiments. Several students, including the three who became litigants, decided to wear black armbands to school.

"We had two official reasons for wearing the

PERSPECTIVE

Tinker (CONTINUED)

armbands," John Tinker said. "First, we wanted to mourn the dead on both sides of the war. Secondly, we wanted to show support for Robert Kennedy's call for a Christmas truce."

School officials in Des Moines became aware of the students' plans and on Dec. 14, 1965, passed a policy forbidding the wearing of armbands in school. If a student refused to remove an armband, he or she would be suspended.

A few days later, John Tinker and Eckhardt wore their armbands to their high schools and Mary Beth Tinker wore hers to her junior high. All three were suspended.

They challenged their suspensions in federal court, contending that school officials violated their First Amendment free-expression rights by punishing them for the conveyance of their beliefs. "The school board was trying to suppress and did suppress the expression of our ideas," John Tinker said.

However, in 1966, a federal judge sided with school officials who argued that they had enacted the policy out of a reasonable fear that the anti-war armbands would create school disturbances. The next year, a full panel of the 8th U.S. Circuit Court of Appeals issued a split opinion, which meant that the federal district court's opinion stood.

The only place left for the students to take their case was to the U.S. Supreme Court.

Dan Johnston, who represented the three students, said he never thought the case would get that far.

"I thought it was an easy case and that we would win a long time before that in the federal district court," Johnston said. "The school board in my opinion did not have sufficient justification to suspend the students, and we developed enough of a factual record that I thought we would win there."

Eckhardt said that "fortunately … we did lose at the lower court level, because if we had won there, this case could never have become such a landmark decision."

SUPREME COURT JUSTICES SIDE WITH STUDENTS

After attending oral arguments before the high court in 1968, Eckhardt said he felt confident that a majority of the justices would side with the students. "When I heard Justice Thurgood Marshall ask the question — 'seven out of 18,000, and the school board was afraid that seven students wearing armbands would disrupt 18,000. Am I correct?' — then I was confident we would prevail."

In reaching its 7-2 decision and reversing the lower courts, the Court noted that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it" and was "closely akin to 'pure speech.'"

The Court stressed that school officials needed more than an "undifferentiated fear or apprehension of disturbance … to overcome the right to freedom of expression."

PERSPECTIVE

Tinker (CONTINUED)

Legal experts almost universally praise the case and the standard that developed from it when discussing the protection of student expression.

Justice Abe Fortas, author of the majority opinion, wrote: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk; and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society."

Fortas determined that when balancing the right of school officials to control the learning environment and students' right to freedom of expression, school officials could only restrict expression if they could reasonably forecast that the expression would create a "substantial disruption" or "material interference" with school activities or violate the rights of others.

The Court also noted that Des Moines school authorities did not ban the wearing of "all symbols of political or controversial significance" — including the Iron Cross.

Justices Hugo Black and John Harlan wrote dissenting opinions. Black warned that the Court's decision in *Tinker* would mark "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."

Eckhardt said of Black's statement: "Thank God it is more permissive — what is America if we don't have freedom?"

Tinker added, "I wonder if Justice Black wasn't being overly defensive because between the time we wore the armbands and the time of the Court's decision there was a marked increase in the number of student demonstrations, especially on college campuses throughout the country."

Legal experts almost universally praise the case and the standard that developed from it — called the *Tinker* standard — when discussing the protection of student expression in schools.

"It really was — and is — the landmark student First Amendment case," said Mark Goodman, executive director of the Student Press Law Center. "It set the stage for all First Amendment cases involving students."

Goodman said that for at least 15 years it provided "ample protections" for students who ran afoul of school authorities for unpopular expression.

POST-*TINKER* DECISIONS

But the Supreme Court began to "whittle away" at the protections granted in *Tinker* beginning with the 1986 decision *Bethel School District No. 403 v. Fraser*, according to Goodman.

In *Fraser*, the high court ruled that school officials did not violate the First Amendment rights of Matthew Fraser when they suspended him for giving a speech containing sexual innuendo at a student assembly. Fraser's speech was in support of

PERSPECTIVE

Tinker (continued)

a fellow student running for student government.

The Supreme Court distinguished the political speech of the *Tinker* students from what it termed the lewd and indecent speech of Fraser.

Many First Amendment experts have said that a more conservative Supreme Court went too far in limiting the *Tinker* standard not only in *Fraser*, but also in its 1988 decision in *Hazelwood School District v. Kuhlmeier.*

In *Hazelwood*, the U.S. Supreme Court ruled that students' First Amendment rights were not violated when a school principal censored two student articles on controversial topics: teen pregnancy and divorce.

The Court established the so-called *Hazelwood* standard, more deferential to educators, which provides: "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."

O'Shea, also a lawyer, agreed with Goodman that the Court had "chipped away at the sides" of *Tinker* but said this was to be somewhat expected. "It is only natural in the course of events that after a sweeping victory, which *Tinker* was for public school students, that the courts will set some limits," he said. "Any decision of that nature will be limited somewhat."

Tinker said that *Fraser* and *Hazelwood* didn't bother him too much "because *Fraser* was not about pure political speech and the *Hazelwood* case involved a school newspaper — both are distinguishable."

"The Supreme Court in *Fraser*, *Hazelwood* and the 1985 Fourth Amendment case of *New Jersey v. T.L.O.* cut back on the freedoms given students in *Tinker*," Professor Johnson said.

Joan Bertin, executive director of the National Coalition Against Censorship, said, "The signals have certainly been in the direction of retrenchment."

In fact, Dan Johnston, who now practices law in New York, goes so far as to say that the current Supreme Court probably would decide *Tinker* differently than its predecessors.

"The real question now is whether the present-day Supreme Court would reach the same decision," Johnston said. "I think the answer is probably not."

Bertin agreed with Johnston's assessment. "The situation for high school students is grim as the current Supreme Court is not nearly as receptive to minors' First Amendment rights as was the case in 1969," she said.

Some experts have suggested that any retrenchment has been partly the result of a different age with different issues. Johnson points out that in the late 1960s "students did not wear earrings, only the Beatles wore long hair and there were no gang

PERSPECTIVE

Tinker (CONTINUED)

"If we intend to have a democracy, it is important that we teach democracy in the schools."

— JOHN TINKER, *litigant*

symbols, body piercings and satanic symbols."

"The issues today are a lot tougher," he said.

Johnston said that Justice Black was partly correct when he warned of a more permissive age: "Schools are a lot freer than they were in those days."

Legal experts said that greater freedom came from *Tinker*. Goodman and others agreed with Tinker and Eckhardt about the continued importance of the Court's 1969 decision. Goodman, for example, said that *Tinker* is "still very much vital law" and "not a day goes by" that he does not cite the case to some student who has been punished for engaging in non-school-sponsored expression.

"The lasting legacy of *Tinker* — even though the knee-jerk reactions of many school officials resemble those of a pre-*Tinker* age — is that the burden is on school officials to reasonably show that student speech could very well be disruptive before they can censor," O'Shea said.

Tinker says the case sends a message to educators about the importance of teaching democracy to young people. "If we intend to have a democracy, it is important that we teach democracy in the schools," he said.

Both Tinker and Eckhardt said that the ideals of democracy cannot be learned by students if constitutional rights to freedom of speech and expression must be left at the schoolhouse gate.

PERSPECTIVE

Matthew Fraser reflects on free-speech decision

MATTHEW FRASER says the U.S. Supreme Court gutted students' First Amendment rights when they ruled against him in 1986 in *Bethel School District No. 403 v. Fraser.*

In the decision, the Court ruled 7-2 that Washington state high school officials could suspend Fraser for delivering a speech with sexual references before a student assembly at Bethel High School.

Fraser's speech nominated classmate Jeff Kuhlman for a student government office. The speech contained numerous sexual references. Excerpts from the speech include:

> *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 is a man who will go to the very end — even the climax, for each and every one of you.*

"I wrote the speech about an hour before the assembly," Fraser said. "One teacher told me it would 'raise some eyebrows.' But no teacher told me that it violated school policy.

"I knew it would cause some reaction, but I did not think it would merit me a suspension."

Fraser decided to give the speech. The next day an assistant principal informed Fraser that he had violated a school rule, which read: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

School officials gave Fraser a three-day suspension but allowed him to return after two days. He sued in federal court, contending that the suspension violated his First Amendment rights.

Two lower courts sided with Fraser, finding that his speech did not cause a substantial disruption under the standard articulated by the Court in *Tinker v. Des Moines Independent Community School District.*

In *Tinker,* the high court ruled that Iowa school officials violated the First Amendment rights of several students when they suspended them for wearing black armbands to protest U.S. involvement in the Vietnam War.

SUPREME COURT DECISION

However, on appeal, the Supreme Court reversed and sided with the school officials by a 7-2 vote.

"Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," Chief Justice Warren Burger wrote for the majority. "A high school assembly or classroom is no place for a

"I knew it would cause some reaction, but I did not think it would merit me a suspension."

— MATTHEW FRASER, *litigant*

PERSPECTIVE

Fraser (CONTINUED)

The Associated Press

U.S. Supreme Court Justice Thurgood Marshall

sexually explicit monologue directed towards an unsuspecting audience of teenage students."

Burger wrote that there was a "marked difference" between the political speech at issue in *Tinker* and the "sexual content" of Fraser's speech. He added that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."

Justices Thurgood Marshall and John Paul Stevens dissented. Marshall wrote a short opinion, saying that the school officials failed to show that Fraser's speech was disruptive.

Stevens wrote a longer dissent, beginning with words spoken by actor Clark Gable in *Gone with the Wind*: "Frankly, my dear, I don't give a damn."

"When I was a high school student, the use of these words in a public forum shocked the Nation," he wrote. "Today Clark Gable's four-letter expletive is less offensive than it was then."

Stevens noted that none of Fraser's teachers who reviewed the speech before he delivered it told him that it would violate a school rule. Stevens wrote that "it seems highly unlikely that [Fraser] would have decided to deliver the speech if he had known that it would result in his suspension."

Although he lost his case, Fraser said he won great acclaim in his school. He was selected by his fellow students by write-in vote to give the school's graduation speech. "The school officials martyred me," Fraser said. "There were football players in the school who made signs saying 'Stand firm for Matt.' The last student newspaper was like an ode to Matt Fraser."

Of course, Fraser still wishes the Supreme Court had ruled differently.

LAWYERS REFLECT ON DECISION

Jeffrey T. Haley handled the case for Matthew Fraser as a cooperating attorney with the American Civil Liberties Union of Washington.

He said that when the Supreme Court granted review of the 9th Circuit's decision, he feared his side could lose. "Looking back, I wish perhaps that I had asked the 9th Circuit not to rule so strongly in our favor," Haley said. He said that the Supreme Court missed a teaching opportunity.

"Because the purpose of school is education, it is important to teach students about our government and the Bill of Rights," he said. "I fear that we are incorrectly educating our youth about the First Amendment and the Bill of Rights. If a student's speech is not obscene before a student assembly, then I would draw the line in favor of allowing the student speech."

William Coats, who argued the case for the Bethel School District, said he felt confident when the high court accepted the case. "We were never looking for a test case," he

PERSPECTIVE

Fraser (CONTINUED)

said. "This case occurred because of one phone call. I got a call from a school official saying, 'We had a student give a lewd speech before a student assembly. Can we discipline him?' I said yes."

Coats disagreed with the notion that the Supreme Court sent a wrong message to public school students about the First Amendment and the Bill of Rights. "School officials have the responsibility to maintain an atmosphere that is conducive to the school setting. Schools have to maintain order and control and school officials can teach students proper decorum in different settings."

FRASER'S IMPACT

Kevin O'Shea, publisher of the monthly legal newsletter *First Amendment Rights in Education*, said that "*Fraser* represents the first major step away from *Tinker*."

O'Shea said there had been a split of authority in the lower courts over how to apply *Fraser*. Some lower courts have applied the decision to student expression that is school-sponsored. Other courts apply the principles of *Fraser* to any student speech that is considered vulgar or lewd — such as a T-shirt with a vulgar message.

Coats said that the broader application of the *Fraser* case was appropriate. "Schools should be able to prohibit vulgar and lewd speech in a school speech. This type of speech is inherently disruptive. But certainly, speech before a student assembly should not resemble speech in a pool hall, tavern or even the boys' locker room."

Fraser said that there should be a distinction between speech in a classroom and speech in a student assembly. "There should be a heightened level of protection for speech in a student assembly. If there is any hour in the entire year that is entitled to the protections of the First Amendment, it should be when students give nominating speeches for political offices."

Haley, who still works as a cooperating attorney with the ACLU, agreed that, in the context of school-sponsored speech, student speech for government offices should receive the highest level of First Amendment protection.

O'Shea said that the case was "emblematic of the greater willingness of lower courts to carve out exceptions to *Tinker*" and had started what he termed a "troubling trend of restricting student First Amendment rights."

"It is a façade that the courts protect student rights," Fraser said. "As a practical matter, school administrators do what they want to do."

The Fraser *decision incited a "troubling trend of restricting student First Amendment rights."*

— KEVIN O'SHEA,
First Amendment Rights in Education

Book-banning

RAY BRADBURY'S nightmarish vision of book burnings in *Fahrenheit 451* has become all too real for public school students. Even literary classics have not been spared.

Public school students have a First Amendment right to receive information and ideas. A primary method of learning for many students, of course, comes from reading books and, more recently, accessing material on the Internet.

Some public school officials and parents believe the best way to inculcate values in children is to shield them from material they consider questionable. Parents and school board members have complained about a variety of books, including literary classics such as *The Adventures of Huckleberry Finn* by Mark Twain and *I Know Why the Caged Bird Sings* by Maya Angelou. The successful Harry Potter series by J.K. Rowling has incited controversy all over the country. Parents from Minnesota to South Carolina have asked school officials to remove wizard Harry from shelves because the books allegedly promote the occult. Author Judy Blume, whose own books have been the target of censors, said these parents believed the books teach "witchcraft, sorcery and Satanism."[1]

Parents and school board members have complained about a variety of books including literary classics such as The Adventures of Huckleberry Finn *by Mark Twain.*

The question of what books are educationally suitable for children divides school districts, parents, librarians, teachers, communities and even U.S. Supreme Court justices.

Board of Education, Island Trees v. Pico

A book-banning case[2] reached the U.S. Supreme Court in 1982. The Board of Education of the Island Trees Union Free School District No. 26 in New York determined in 1975 that nine books should be removed from the libraries of Island Trees High School and Island Trees Memorial Junior High School. The titles:

Slaughterhouse-Five by Kurt Vonnegut
The Naked Ape by Desmond Morris
Down These Mean Streets by Piri Thomas
Best Short Stories of Negro Writers, edited by Langston Hughes
Go Ask Alice by anonymous
Laughing Boy by Oliver LaFarge
Black Boy by Richard Wright
A Hero Ain't Nothing But a Sandwich by Alice Childress
Soul on Ice by Eldridge Cleaver

The school board appointed a book-review committee, which recommended that only two of the books — *The Naked Ape* and *Down These Mean Streets* — be removed. The school board rejected the committee's recommendations, saying it had the moral duty to protect children. Several members of the board described the books as "anti-American, anti-Christian, anti-Semitic and just plain filthy."

The Associated Press

Harry Potter books at Cedarville High School in Cedarville, Ark.

Four high school students and one junior high school student challenged the school board's action in federal court, contending that the actions of the school board violated the First Amendment.

In 1979, a federal district court granted summary judgment to the school board, ruling that the removal of the books did not raise a First Amendment issue. "While removal of such books from a school library may … reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any First Amendment rights."[3]

The district court determined that federal judges should not normally intervene in the daily operations of the schools unless "basic constitutional values" were "sharply implicated." A three-judge panel of the 2nd U.S. Circuit Court of Appeals reversed the district court, finding that the students should have been given an opportunity to prove that the justifications for book removals were "simply pretexts for the suppression of free speech."[4]

The case proceeded to the U.S. Supreme Court, which ruled on June 25, 1982, that there were genuine issues of material fact as to why the school board officials removed the books. Writing for the plurality, Justice William

Brennan wrote that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[5]

Brennan emphasized the First Amendment protects the right to "receive information and ideas" and recognized that "the school library is the principal locus of such freedom."[6] He determined that whether the removal of the books violated the First Amendment depends upon the motivation for the school board's actions. He explained that school boards could remove the books if they thought they were "pervasively vulgar" or educationally unsuitable. However, school boards could not remove books simply because they disagreed with the ideas conveyed in those books.

Brennan wrote: "In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of public opinion.'"[7]

"In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books."

— U.S. SUPREME COURT JUSTICE WILLIAM BRENNAN, 1982

The Court cited the deposition testimony of one school board member who said that *A Hero Ain't Nothing But a Sandwich* was "anti-American" because it notes that George Washington owned slaves. "I believe it is anti-American to present one of the nation's heroes, the first president … in such a negative and obviously one-sided" light, the board member testified.

Four justices dissented, including current Court members William Rehnquist and Sandra Day O'Connor. The dissenters described the plurality's opinion as a "lavish expansion" of the Court's First Amendment jurisprudence. They reasoned that it would force federal courts to become "super censors" of school boards and that having federal judges second-guessing school boards' reasons for rejecting books would hamper school boards' ability to inculcate fundamental values.[8]

Justice Brennan made clear in his opinion that this case concerned only the removal of books from the school library: "Our adjudication of the present case does not intrude into the classroom, or into the compulsory courses taught there."[9] Brennan also noted that the decision only applied to the removal of library books, not the acquisition of them.

Still, the *Pico* case stands as an important First Amendment victory. "We won in two important respects," said Arthur Eisenberg of the New York Civil Liberties Union, co-counsel for the students. "We overcame the substantial hurdle when the Court rejected the school board's argument that the school

board's control over library books posed no First Amendment issue. We also won as a practical matter because within one year of the Supreme Court's decision on remand, the school board restored the books.

"The *Pico* case is significant because it resisted the oversimplified claim advanced by the school board that because the school board buys the books, they have the authority to determine what books are on the library shelves without First Amendment concerns," Eisenberg said. "From a principled First Amendment understanding, book acquisitions should be treated the same as book removals."[10]

The problem for constitutional advocates and others concerned about book censorship is that the *Pico* case was decided on narrow grounds. Four members voted with Brennan and four members dissented. Justice White sided with Brennan's opinion in sending the case back to the lower court. However, White sidestepped the First Amendment issue: "The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point."

The American Library Association's Office for Intellectual Freedom reports that it has received more than 4,000 book challenges since 1990.

Eisenberg said, "Because the case was decided on a 4-1-4 vote, we did not obtain the most useful precedent that we wanted. The contours of freedom from book censorship are not as settled as we would like."[11]

Lower courts have recognized the limitations of the *Pico* ruling as binding precedent. One lower court wrote: "Even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the school board's removal decision was based on unconstitutional motives." Another lower court said that while the court in *Pico* failed to produce a majority opinion, it "must be used as a starting point."

Attack on literary classics

Unfortunately, attempts to ban books remain a constant issue in schools. The American Library Association's Office for Intellectual Freedom reports that it has received more than 4,000 book challenges since 1990.

According to the ALA, the most challenged books in the 1990s included *The Adventures of Huckleberry Finn, I Know Why the Caged Bird Sings, Of Mice and Men, Heather Has Two Mommies* and *The Chocolate War.* It lists the most challenged authors as Alvin Schwartz, Michael Wilhoite, Judy Blume, Katherine Paterson, R.L.

Stine, Robert Cormier, Stephen King, Roald Dahl, Maya Angelou and Mark Twain.

"We are concerned about censorship from both the right and the left," Eisenberg said. *The Adventures of Huckleberry Finn* has been the target of censors who claim it is anti-black, primarily for Twain's usage of the word "nigger." On the other side, Maya Angelou's *I Know Why the Caged Bird Sings* has been the target of censors who call it "anti-white."

An example of such a case is *Monteiro v. Tempe Union High School District.*[12] Kathy Monteiro sued in federal court on behalf of her 9th-grade daughter, identified in court papers only as Jane Doe, claiming that the required reading of *Huckleberry Finn* and William Faulkner's short story "A Rose for Emily" contributed to a racially hostile work environment prohibited by federal anti-discrimination laws.

The Associated Press

Several schools in the country have attempted to ban Maya Angelou's I Know Why the Caged Bird Sings.

Her complaint alleged that her daughter and other African-American students were subjected to racial slurs with increasing frequency and intensity after these classic literary works were assigned.

After a federal district court dismissed the lawsuit, Monteiro appealed to the 9th U.S. Circuit Court of Appeals, which affirmed the lower court. The appeals court cited *Pico* for the proposition that students have the right to receive a "broad range of information so that they can freely form their own thoughts."

"To begin with, Monteiro's amended complaint — and other lawsuits threatening to attach civil liability on the basis of the assignment of a book — would severely restrict a student's right to receive material that his school board or other educational authority determines to be of legitimate educational value," the court wrote.

The court noted that if it allowed Monteiro's lawsuit to proceed, unlimited challenges to a wide range of literary classics would follow. "White plaintiffs could seek to remove books by Toni Morrison, Maya Angelou and other prominent black authors on the ground that they portray Caucasians in a derogatory fashion," the court wrote. "Jews might try to impose civil liability

for the teachings of Shakespeare and of more modern English poets where writings exhibit a similar anti-Semitic strain."

Allowing such a suit to proceed would have a "significant chilling effect on a school district's willingness to assign books with themes, characters, snippets of dialogue, or words that might offend the sensibilities of any number of persons or groups."

The court noted that if it allowed Monteiro's lawsuit to proceed, unlimited challenges to a wide range of literary classics would follow.

The court reinstated Monteiro's civil rights claim based on the alleged racial harassment but dismissed those portions of the lawsuit that claimed that the assignment of the works of Twain and Faulkner contributed to the alleged harassment.

Attack on books with gay and lesbian themes

Another trend has been the censorship of books with gay and lesbian themes. A December 2000 lawsuit in Anaheim, Calif., alleged that school district officials removed a series of 10 volumes titled *Lives of Notable Gay Men and Lesbians* from an area junior high school. The suit claimed that a history teacher ordered a librarian to remove the books because they were "inappropriate."

The books in question profile a number of famous gays and lesbians, including the Greek poet Sappho, novelists James Baldwin and Willa Cather, economist John Maynard Keynes, playwright Oscar Wilde, writer T.E. Lawrence, entertainers Marlene Dietrich, Liberace and K.D. Lang, and tennis player Martina Navratilova.

Two Orangeview Junior High School students sued in federal court, contending in *Doe v. Anaheim Union High School District* that the actions of the school officials violated the First Amendment.

The school officials contended the books were removed because they were too difficult for middle school students and could have led to the harassment of those students seen with the books. The students, represented by the ACLU, countered that "these explanations are a pretext for viewpoint-based censorship." The ACLU contended that the books could help create a school environment in which homophobia could be addressed and challenged.[13]

The ACLU reached a settlement with the Anaheim Union High School District. Under the settlement, the 10 books were placed in a district high school. The books no longer are available at the junior high school, but other books with gay and lesbian themes on a lower reading level are available.[14]

The unfortunate outcome of book-banning is that students are denied access to information and ideas that may challenge their beliefs, inform their thinking and enrich their understanding, according to Joan Bertin of the National Coalition Against Censorship. "A mind is a terrible thing to waste," she said. "There is an ineffable loss that is a tragedy because ideas are precious. You never know what idea will spark a young person."[15]

Anne Popovich

Joan Bertin, National Coalition Against Censorship