Eckhardt v. Des Moines: The Apex of Student Rights

Sean M. Sherman[*]

FOREWORD BY CLARENCE THOMAS[**] & GREGORY E. MAGGS[***]

We are delighted that *The George Washington Law Review Arguendo* is publishing Mr. Sean M. Sherman's Essay, *Eckhardt v. Des Moines: The Apex of Student Rights*. In addition, we are grateful for this opportunity to provide a brief introduction to the article and to describe how it came about.

Many law school casebooks and courses on constitutional law focus almost exclusively on appellate judicial opinions. This focus is understandable. Reading judicial opinions is essential for learning and understanding constitutional doctrines, and instructors often have little time in a busy semester for covering anything else. But judicial opinions by themselves usually reveal only part of a complex story behind a lawsuit. Although judicial opinions discuss the essential facts necessary for resolving the litigated issues, they typically do not provide a full account of a controversy. Judges often describe the parties in a sentence or two, with scant attention to their motivations, experiences, and characters. Opinions also typically do not say much about the legal, social, and political context in which a controversy arose. While those features might be known to readers when a decision is first announced, they may be a mystery to those who read the opinion years or decades later. Judicial opinions also cannot reveal what happened after they are written, such as how they affected the parties, how the public reacted, or how they influenced subsequent cases.

Every fall since 2011, we have had the privilege of co-teaching a semester-long constitutional law seminar at The George Washington University Law School. The goal of the seminar is to move beyond just reading judicial opinions and to learn more about the rich stories that may lie behind constitutional law cases. In the first session of the seminar, the two

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[*] Assistant United States Attorney. J.D., The George Washington University Law School, 2012; B.A., University of Pennsylvania, 2009. I am thankful to Justice Clarence Thomas and Judge Gregory Maggs for their passion in bringing constitutional law stories to life and inspiring me to try and do the same. The semester in their seminar is one that I will never forget. I am also grateful to the editors and staff of *The George Washington Law Review* for their diligent effort throughout the publication process. And to my wife, Rachel, without your love and support I would be lost.

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of us lead a discussion of Professor Michael W. McConnell's essay, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*.[1] In the essay, Professor McConnell puts the *Marbury* decision in context by showing that prior to the Court's decision, Congress had taken numerous steps that had weakened the judicial branch: Congress had canceled a term of the Supreme Court, it had eliminated existing Article III judgeships, it had forced the Justices of the Supreme Court to return to riding circuit, and it had impeached and removed a federal judge.[2] Professor McConnell shows that, while the Supreme Court did offer some symbolic resistance to Congress in *Marbury v. Madison* by holding an act of Congress unconstitutional, *Marbury* in the context of everything else that happened should be recognized "not for its effective assertion of judicial power, but for its effective avoidance of judicial humiliation."[3] During the next eight sessions we assign selected students the responsibility for leading discussions about fine essays uncovering the stories behind other well-known cases. Over the years, these essays have addressed the stories of *McCulloch v. Maryland*,[4] *Wickard v. Filburn*,[5] *Baker v. Carr*,[6] *Korematsu v. United States*,[7] *Lochner v. New York*,[8] *Reid v. Covert*,[9] *Dred Scott v. Sandford*,[10] *Plessy v. Ferguson*,[11] and *Whitney v. California*.[12]

Throughout the semester, using the stories we discuss in class as models, our students are simultaneously busy discovering and writing the story about a Supreme Court case of their own choosing. We ask all members of the

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1 Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13–31 (Michael C. Dorf ed., 2d ed. 2009).

2 *See id.* at 21–22.

3 *Id.* at 31.

4 Daniel A. Farber, *The Story of* McCulloch*: Banking on National Power*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 33–67.

5 Jim Chen, *The Story of* Wickard v. Filburn*: Agriculture, Aggregation, and Commerce*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 69–109.

6 Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 271–98.

7 Neil Gotanda, *The Story of* Korematsu*: The Japanese-American Cases*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 231–69.

8 David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 299–331.

9 Brittany Warren, *The Case of the Murdering Wives:* Reid v. Covert *and the Complicated Question of Civilians and Courts-Martial*, 212 MIL. L. REV. 133 (2012). The author of this excellent essay wrote the original version of it in our seminar.

10 Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996).

11 Michael Kent Curtis, *Albion Tourgee: Remembering Plessy's Lawyer on the 100th Anniversary of* Plessy v. Ferguson, 13 CONST. COMMENT. 187 (1996).

12 Ashutosh A. Bhagwat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 1, at 383–408.

seminar to find a case of special interest to them. They then must uncover and describe the factual context of the case, the legal context (i.e., what laws prevailed at the time), the path of the litigation to the Supreme Court, and the consequences of the case (including its impact on the law, the people immediately involved, and other people). In addition, we ask the students to develop and express a theory for why knowing the whole story of the case, and not just what is in the reported opinion or what is commonly taught about the case in law school, may be valuable. The students then present their essays to the other members of the seminar during the last four weeks of the semester.

One of our first students put a simple but perspicacious question to us on the first day of the semester: "What is the point of knowing the background behind the cases?" Our initial response was merely to ask: "Why would you want to know less?" More knowledge is usually better. But with more experience over the years, we now can identify three more specific reasons to understand the background behind cases. One reason is to draw attention to the people that laws and legal doctrines have affected by hearing their side of the story. In reading more than 120 essays that our students have written, we have learned many new things: that, for example, Clara Buck of *Buck v. Bell* was not in fact an "imbecile,"[13] that some of the plaintiffs who were granted special taxpayer standing in *Flast v. Cohen* because of their concerns about the Establishment Clause actually had little knowledge about or interest in the case,[14] and that the segregated public school system challenged in *Bolling v. Sharpe* was originally a system of public schools Congress had created for emancipated slaves whom no existing schools would admit.[15]

Another reason to study the full stories of cases is that they sometimes reveal that highly significant constitutional doctrines sometimes have come about in unexpected ways. A surprising example involves the story of *Trop v. Dulles*, which neither of us knew before we learned it from a student's essay.[16] The plaintiff, Albert L. Trop, learned, in applying for a passport, that he had lost his U.S. citizenship as a collateral consequence of a court-martial

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13 Peter Funt, The Story of *Buck v. Bell* 32 (2011) (unpublished manuscript) (on file with authors).

14 Jane Thomas, The Story of *Flast v. Cohen* 16-17 (2017) (unpublished manuscript) (on file with authors).

15 Jessica Johnston, The Untold—and Unfinished—Tale of *Bolling v. Sharpe* 13 (2012) (unpublished manuscript) (on file with authors).

16 Matthew Casale, The Story of *Trop v. Dulles*: How a Case About Congressional Power to Expatriate Changed the Eighth Amendment (2013) (unpublished manuscript) (on file with authors).

conviction for desertion in World War II.[17] The desertion consisted of walking off an Army base in North Africa, regretting the decision, and turning back cold and hungry a few hours later.[18] In a civil case seeking the issuance of his passport, the Court first mentioned the "evolving standards of decency" test for assessing whether punishments violate the Eighth Amendment's prohibition on Cruel and Unusual Punishment.[19] Little did Trop or anyone at the time know that the decision later would greatly affect the Supreme Court's subsequent handling of death penalty litigation. Discoveries like this one lead us to wonder whether other decisions have led to the development of other constitutional doctrines that were not initially expected to extend as far as they now do.

Finally, and perhaps most importantly, sometimes learning additional facts about one case reminds us that we may not know as much about other cases as we think we do. The facts reported in an opinion are never all the facts. Most people who read the story of *Marbury v. Madison* or *McCulloch v. Maryland* quickly learn that they were unaware of much of the context of these cases, without even knowing that they were unaware of it. If nothing else, this revelation may make anyone who reads Supreme Court decisions more cautious, recognizing that they may be in the dark about what much of the litigation was truly about.

One thing we have stressed to our students is that the point of telling the story is not to support or contest the Supreme Court's decision. There is a place for commentary that looks critically at the Supreme Court's reasoning and provides an assessment. But we have found that those who are too interested in the outcome of the case often struggle to devote the time and effort necessary to uncover the hidden backgrounds of cases. We do not grade the papers based on the students' doctrinal assessments of the cases, and we certainly do not want to tell anyone what they should or should not think.

Mr. Sherman's article is an expanded version of an essay that he wrote while enrolled in the seminar. As readers will see, Mr. Sherman has found a surprising story behind *Tinker v. Des Moines Independent Community School District*,[20] a landmark case concerning freedom of speech in public schools. Unlike a conventional case comment, which might focus on the holding and reasoning of a Supreme Court decision, Mr. Sherman's article strives to tell the complete story of the case and how it arose. His informative tale, uncovered from primary sources and from communications directly

17 *See* Trop v. Dulles, 356 U.S. 86, 88 (1958).

18 *See id.* at 87.

19 *Id.* at 101.

20 393 U.S. 503 (1969).

with Mr. Eckhardt, brings out key matters of human interest, perhaps the most important of which is that the high school student who started the litigation became all but forgotten. The Essay is an excellent example of the kind of research paper that we encourage our students to write. We hope that the readers of *The George Washington Law Review Arguendo* will enjoy the Essay and that it might pique their interest in uncovering other stories behind cases for which they have so far only read judicial opinions.

INTRODUCTION

Fifty-five years ago, Christopher Eckhardt embarked on a journey that would leave an indelible mark on society as a plaintiff in the 1969 landmark student speech case, *Tinker et al. v. Des Moines Independent Community School District*.[1] Since then, the Tinker family received the majority of accolades, as well as a permanent place in First Amendment lore. Chris was, as he once noted, relegated to being the "et al."[2] Despite Eckhardt's historical marginalization, he and his family played as large a part, if not larger, as the Tinker family. This is the story of a nation at "war"[3] and a handful of young students that stood up for what they believed.[4]

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In February 1965, President Lyndon B. Johnson escalated the Vietnam conflict, and the United States began bombing North Vietnam in a military mission known as Operation Rolling Thunder.[5] Soon after the first bombs were dropped, Americans who opposed U.S. involvement "express[ed] their views at marches, in letters to the editor, and through other acts of protest."[6] American ground combat units in South Vietnam, initially limited to a small number of marines in March of 1965,[7] began to expand dramatically. As the force expanded, so did the protests. In October 1965, events were held in forty U.S. cities,[8] including the first at which a protester was arrested and convicted for burning his draft card.[9] By November 1965, there were

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1 393 U.S. 503 (1969).

2 *Obituary of Christopher Eckhardt*, LEGACY, http://www.legacy.com/obituaries/tampabaytimes/obituary.aspx?n=christopher-eckhardt&pid=162075709 [https://perma.cc/3V3F-H93R].

3 My quotation marks here are not meant to cast aspersions upon the seriousness or casualties of the Vietnam War. They are only meant to bring to light the fact that Justice Stewart refused to sign onto any opinion that called the Vietnam conflict a "war." This will be discussed further below.

4 This case history focuses a bit more on the details of the Eckhardt story, perhaps to the detriment of the Tinkers. Length restrictions require some editing, and in my belief that the Tinkers have had enough written about them, I will be giving them the shorter shrift—my apologies.

5 *See*, *e.g.*, ROBERT S. MCNAMARA ET AL., ARGUMENT WITHOUT END: IN SEARCH OF ANSWERS TO THE VIETNAM TRAGEDY 346–49 (1999).

6 SUSAN DUDLEY GOLD, TINKER V. DES MOINES: FREE SPEECH FOR STUDENTS 11 (2007).

7 *See* MCNAMARA ET AL., *supra* note 5, at 348–49.

8 *See* DUDLEY GOLD, *supra* note 6.

9 United States v. Miller, 367 F.2d 72, 74 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967), *reh'g denied*, 392 U.S. 917 (1968). The draft card burning that would form the basis for the decision in *United States v. O'Brien* would not come about until March 31, 1966. 391 U.S. 367, 369 (1968).

175,000 U.S. troops in Vietnam.[10]

On November 27, 1965, about thirty thousand Americans participated in a peace march in Washington, D.C., to protest the escalating U.S. involvement.[11] Within the sea of "peaceniks" stood a small contingent of Iowans who had chartered two buses to take them roundtrip on their thousand-mile journey.[12] Among them were Lorena Jeanne Tinker and Margaret Eckhardt, with their fifteen-year-old sons, John Tinker and Chris Eckhardt.[13] Chris carried a sign that read "Follow the Geneva Accords of 1954."[14] John Tinker later recalled that he had "never seen so many people together in one place before," and that the sight made him realize "the vast numbers of people who thought that the U.S. should not be in Vietnam."[15]

After the march, on the long trip home, the bus passengers discussed plans for demonstrating their disagreement with the war once they returned to Iowa.[16] Although the concept of wearing black armbands was discussed, no agreement on a plan was reached and the protesters decided to meet again at the Eckhardt home in early December.[17]

I. THE CENTRAL CHARACTERS

Although the three named plaintiffs were John Tinker, Mary Beth Tinker, and Chris Eckhardt, the Tinker and Eckhardt families influenced the young protesters' views greatly and supported them throughout the controversy.[18] The parents passed their ideals on to their children, spoke up

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10 Kent Germany, *Lyndon B. Johnson: Foreign Affairs*, MILLER CENTER, http://millercenter.org/president/lbjohnson/foreign-affairs [https://perma.cc/QD2M-9Q9H].

11 *See* DUDLEY GOLD, *supra* note 6, at 12.

12 *See* JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S 2–3 (1997).

13 *See id.* John Tinker's older sister, Bonnie, was also with them in D.C. Bonnie, however, was already in college and it is unclear what effect she had influencing her siblings' ensuing protests. *See* John W. Johnson, *The Overlooked Litigant in* Tinker v. Des Moines Independent Community School District (1969), *in* CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY 240, 243 (VanBurkleo et al. eds., 2002) [hereinafter Johnson, *The Overlooked Litigant*].

14 Testimony of Christopher Eckhardt at *36, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 1968 WL 94382 (U.S. 1968) (No. 7–1810–C(1)) [hereinafter Testimony of Christopher Eckhardt].

15 *See* DUDLEY GOLD, *supra* note 6, at 14.

16 *See id.* at 15.

17 *See id.* Strangely, John Tinker recalls that the idea for black armbands came from a man named Herbert Hoover, who was the namesake and eighth cousin of the former President. *See* JOHNSON, *supra* note 12, at 3.

18 Many commentators and letters to the editor complained at the time that it was the "left-leaning parents" that were responsible for the litigation, and that they were exploiting their children to further their liberal agenda. *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 251–52.

for them during the controversy, and supported them throughout the litigation.

A. The Tinker Family

It was no accident that John and Mary Beth Tinker became involved in peace activism; they had practically been bred for it. The Tinker family, Methodist but strong believers in Quaker ideology, had a long history of activism for liberal causes.[19] The patriarch, Leonard Tinker, was "a Methodist minister without a church"[20] and "headed the peace education program for the American Friends Service Committee" ("AFSC").[21] Mary Beth Tinker described her father as "a traveling salesman, only he was selling ideas: . . . 'giving speeches about peace . . . China and Vietnam mostly.'"[22] The family matriarch, Lorena Jeanne Tinker, was also very involved in liberal causes throughout the 1950s and 1960s.[23]

The Tinkers' civil rights advocacy had previously led them into difficulties. In the 1950s, the family lived in the small "Iowa town of Atlantic, where Leonard served as a Methodist minister."[24] In Atlantic, the Tinkers publicly advocated for the right of the town's sole black family to use the city swimming pool.[25] The Methodist bishop asked the family to leave town, and the Reverend was given a "desk job" leading fundraising in Des Moines.[26] Upon arriving in Des Moines, the Tinkers again caused controversy when Lorena invited a black public official to speak to her young-adult class in the church.[27] In 1964, the Tinker parents traveled to Ruhlville, Mississippi "as part of a group of ministers helping to bring attention to the work of the Southern Christian Leadership Conference and Fannie Lou Hamer."[28]

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19 *See* JOHNSON, *supra* note 12, at 2–3.

20 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting).

21 DUDLEY GOLD, *supra* note 6, at 14. In fact, it was the AFSC that had chartered the buses to Washington to attend the protest. *See* JOHNSON, *supra* note 12, at 3.

22 JOHNSON, *supra* note 12, at 14.

23 *See id.* at 12.

24 *Id.*

25 *See id.*

26 *See id.*

27 *See id.* at 12–13.

28 *They Had a Dream Too: Young Leaders of the Civil Rights Movement*, TEX. YOUNG LAW. ASS'N, http://www.theyhadadreamtoo.org/biographies.html [https://perma.cc/QKX8-VD5M]. Hamer was a civil rights activist who was instrumental in organizing the "Freedom Summer Initiative" of 1964, at which the Mississippi Freedom Democratic Party was organized with the purpose of challenging Mississippi's all-white and anti–civil rights delegation to the Democratic National Convention of that year as not representative of all

Leonard and Lorena Tinker passed their convictions on to their five children, Bonnie (the eldest),[29] John (15), Mary-Beth (13), Hope (11), and Paul (8).[30] The entire family regularly attended meetings of the Des Moines Valley Friends, a Quaker association that advocated peace activism and equal rights.[31] The Vietnam war and the political and moral implications were often discussed in the Tinker household and at Friends meetings.[32]

Friends of the Tinkers expressed strong concern that they were starting their children too young in social action.[33] People would tell Lorena, "You're damaging your children or their future."[34] Lorena Tinker even recalls a brief conversation she had with Dr. Martin Luther King Jr., in which the two discussed their shared belief that their young children should be socially active, but also their shared fear that it could lead to harm, or even death.[35] Lorena told Dr. King that "if the cause was important enough, certain risks—even to one's own children—were unavoidable."[36] "King, she sa[id], sadly agreed."[37] The Tinker children reflected these convictions.

In 1965, John Tinker was a sophomore at North High School in Des Moines, Iowa.[38] John was a born pacifist.[39] According to his mother, throughout his childhood, John refused to fight other children and wouldn't even run away, instead standing and letting angry children hit him.[40] John agreed strongly with his parents' views on race and took steps to "live" his convictions. For all of ninth-grade, "John took a bus across town to attend school in a more racially mixed area of the city."[41] John shied away from

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Mississippians. *See* David Lyons, *Courage and Political Resistance*, 90 B.U. L. REV. 1755, 1767–68 (2010).

29 Interestingly, Bonnie was attending Grinnell College at the time and had participated in the anti–Vietnam War march with John and mother in Washington, D.C. *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 243.

30 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 516 (1969) (Black, J., dissenting).

31 *See* JOHNSON, *supra* note 12, at 3.

32 Testimony of John Tinker at *16, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 1968 WL 94382 (U.S. 1968) (No. 7–1810–C(1)) [hereinafter Testimony of John Tinker].

33 *See* JOHNSON, *supra* note 12, at 14.

34 *Id.*

35 *See id*. at 15.

36 *Id.* Although luckily no actual physical harm came to the students involved in the armband controversy, there were realistic threats surrounding them. *See infra* text accompanying notes 110–21.

37 JOHNSON, *supra* note 12, at 15.

38 *See id.* at 2, 11. Chris Eckhardt attended the larger and more affluent Theodore Roosevelt High School. *See id.*

39 *See id.* at 11.

40 *See id.* at 11–12. John said, "I thought if I stood there, maybe he'd change and we'd become friends." *Id.* at 12.

41 *Id.* at 13.

sports, but was a good musician, playing the sousaphone and the violin.[42]

Mary Beth Tinker was an eighth grader at Warren Harding Junior High School when the armband controversy arose.[43] Mary Beth liked to sing and was popular in school.[44] She went to sleepovers with her girlfriends and stayed up talking all night.[45] But she also had a very serious side uncommon for girls her age.

Mary Beth said that she began thinking seriously about the political and social implications of war and peace when she was still in elementary school.[46] She loved going on trips with her father as he spoke about peace activism, and especially enjoyed being in charge of the literature table at his events.[47] In fourth grade, she wrote a report on the atomic bombing of Japan; in fifth grade, she wrote a paper decrying capital punishment.[48] Even before the armband protest, Mary Beth had brought up her concerns about the military escalation in Vietnam, only to be scolded by her teacher: "Mary, there's a pep rally this Friday; don't you ever think of having fun?"[49] Mary had more on her mind than pep rallies.

Hope and Paul Tinker, in elementary school at the time, while not a part of the *Tinker* litigation, provide an insight into the young age at which the Tinker children began their activism. Even at eight and eleven, Paul and Hope were included in family discussions on Vietnam and allowed to speak out for their beliefs.[50] Additionally, although not spoken about frequently, Bonnie Tinker, the oldest Tinker child, was already in college during the events of 1965.[51] Bonnie attended the rally in D.C. with her mother and was also, as far as can be gleaned, an activist.[52]

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42 *See id.* at 12.

43 *See* Testimony of Mary Beth Tinker at *24, *29, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 1968 WL 94382 (U.S. 1968) (No. 7–1810–C(1)) [hereinafter Testimony of Mary Beth Tinker].

44 *See* JOHNSON, *supra* note 12, at 14.

45 *See id.*

46 *See id.*

47 *See id.*

48 *See id.*

49 Tod Olson, *From School to Supreme Court*, 126 SCHOLASTIC UPDATE, no. 2, 17 Sept. 1993, https://go.gale.com/ps/anonymous?id=GALE%7CA13284479&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=07457065&p=AONE&sw=w [https://perma.cc/A9KJ-MW3B].

50 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black, J., dissenting); *see also* JOHNSON, *supra* note 12, at 26 ("The two youngest Tinker children, Hope and Paul, wore black armbands to their elementary school at the end of the crucial week in December . . . [and] had fewer problems with their elementary school over the armbands than did John and Mary Beth with their secondary schools.").

51 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 243.

52 *See id.*

B. The Eckhardt Family

Much like the Tinker children, Chris Eckhardt received his liberal activist views from his parents. Margaret Eckhardt was the President of the Des Moines chapter of the Women's International League for Peace and Freedom.[53] William Eckhardt was a "clinical psychologist and an assistant professor of psychology at the College of Osteopathic Medicine and Surgery in Des Moines."[54] The family had participated in several different religious groups, including the Quakers in North Carolina and the First Unitarian Church in Des Moines.[55] The Eckhardts were active in the same small Des Moines "peace community" as the Tinkers, and the two families were well acquainted.[56]

Chris's mother actively exposed Chris to liberal politics throughout his youth. When Mrs. Eckhardt brought civil rights advocates to Des Moines to speak before the Women's International League, she made sure Chris was in attendance.[57] Through these events, Chris met famous civil rights advocates such as Georgia politician Julian Bond, and John Howard Griffin, the author of *Black Like Me*.[58] Chris also accompanied his parents on a number of civil rights marches.[59]

Chris was a well-balanced and popular student. Like John Tinker, Chris was fifteen and a sophomore; however, he attended the larger, more affluent Roosevelt High School.[60] Unlike the "quiet" and "introspective" Tinker, Chris Eckhardt was more of a zealot.[61] Chris was an elected representative to student government and had "been the president of two separate school student councils."[62] Chris helped form a "political action discussion group" at Roosevelt, to which public figures came to speak with interested students.[63] He was on the track team, active in fishing and weight lifting, and was voted "most likely to succeed" in his senior class.[64] Oddly, he also received the award for cleanest locker.[65]

Chris was mischievous too, and an occasional "gadfly" to the Roosevelt

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53 *See* DUDLEY GOLD, *supra* note 6, at 14.

54 Testimony of Christopher Eckhardt, *supra* note 14, at *29.

55 *See* JOHNSON, *supra* note 12, at 10.

56 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 244.

57 *See id.*

58 *See id.* at 245.

59 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *30.

60 *See* JOHNSON, *supra* note 12, at 11.

61 *Id.* at 13.

62 *Id.* at 10.

63 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 245.

64 *See* JOHNSON, *supra* note 12, at 10.

65 *See id.*

School administration.[66] Chris was a member of a social club called the "All Center Bums," a group of about thirty male Roosevelt students[67] which Chris later described as "Des Moines's version of Hell's Angels."[68] The Bums rented an apartment in downtown Des Moines, where they "hung out" after school and on weekends.[69] They sat separately during school assemblies, at which they "refused to cheer for the athletic teams or rise to sing the national anthem."[70] At one point, Chris was denied the right to run for student government because of his membership in the group.[71]

"Outside of school [Chris] was a Boy Scout and a youth leader at church and had a paper route and a lawn mowing/snow-shoveling business."[72] Chris was an active member of the Liberal Religious Youth ("LRY"),[73] an arm of the Unitarian Church and a group of which John Tinker was also a member.[74] Nonetheless, because of their obvious differences in disposition, the two were never close friends, but more of acquaintances.[75] As Eckhardt would say, they "didn't hang in the same social group."[76] Perhaps matching their personalities, Eckhardt wore an armband on December 16 and was suspended, while the more cautious Tinker only wore his on the following day, and was then only sent home, not suspended.[77]

II. A WILD WEEK IN DECEMBER

A. The Meeting(s)[78] of December 11th—Hatching the Plan

On the bus home from the November protest in Washington, it had been decided that a meeting would be held at the Eckhardt home for adults and college and high school students on Saturday, December 11.[79] During the interim period, North Vietnam had offered a twelve-hour truce for the

66 *See id.* at 11, 13.

67 *Id.* at 11.

68 *Id.*

69 *Id.*

70 *Id.*

71 *See id.*

72 *See id.* at 10–11.

73 *Id.* at 3.

74 *See id.* at 10.

75 *See id.* at 13.

76 *Id.*

77 *See infra* text accompanying notes 110–121.

78 There is debate about whether there were one or two meetings over the weekend of December 11, 1965. Because most accounts seem to reflect two separate meetings, one for adults, and another for high school students, I have followed this narrative. It is possible however that there was only one meeting that weekend. *See* JOHNSON, *supra* note 12, at 4.

79 *See id.* at 3.

Christmas holiday.[80] On December 9, 1965, Senator Robert F. Kennedy proposed that the United States not only accept the offer, but should extend the "Christmas Truce" into an indefinite cease-fire.[81] Among the thirty or so people attending the December 11th meeting at the Eckhardt home were Leonard and Lorena Tinker.[82] None of the Tinker children were in attendance, nor was Chris Eckhardt,[83] who was busy shoveling snow out of the driveway.[84]

Although nobody at the Eckhardt meeting recalls the exact source of the idea for black armbands, the *Des Moines Register* carried an article that day about a student who had worn a black armband in protest in his high school.[85] It is therefore possible that this was the inspiration. By the end of the meeting, a consensus was reached that the college students would wear black armbands from December 16th to January 1st, as well as fast on the starting and ending dates.[86] The black armband had two concurrent messages: to mourn the dead in Vietnam and to show support for the acceptance and indefinite expansion of the proposed Christmas Truce.[87] The group called a press conference to announce the planned protest, which led to a broadcast announcement on the 10 PM news[88] as well as an article in the Sunday *Des Moines Register*.[89]

The Eckhardts told their son of the plan, and while Chris believed it sounded "like a nice thing to do," he did not decide right away to participate.[90] The next day, another meeting was held at the Eckhardt home, this one primarily consisting of high school student members of the LRY.[91] At the meeting, the high school students discussed the meeting of the previous evening and the armband plan.[92] John Tinker may have been present, though Mary Beth likely was not.[93] The students decided that while

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80 *See* DUDLEY GOLD, *supra* note 6, at 15.

81 *See id.*

82 *See* LEAH FARISH, TINKER V. DES MOINES: STUDENT PROTEST 5 (1997); *see also* JOHNSON, *supra* note 12, at 4.

83 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *30; Testimony of John Tinker, *supra* note 32, at *20.

84 *See* FARISH, *supra* note 82, at 5.

85 *See War Mourner Sent Home*, DES MOINES REG., Dec. 11, 1965, at 2.

86 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *30; *see also Oppose U.S. in Viet—To Fast*, DES MOINES REG., Dec. 12, 1965, at 8-L.

87 *See* Testimony of John Tinker, *supra* note 32, at *15.

88 *See* DUDLEY GOLD, *supra* note 6, at 15.

89 *See Oppose U.S. in Viet*, *supra* note 86, at 8-L.

90 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *30.

91 *See id.* at *36.

92 *See id.*

93 *See id.*

many of them wanted to wear black armbands during the specified timeframe, there would be no "party line" and that each would decide for themselves whether to wear the armband.[94]

B. December 13th and 14th—Word Gets Out

The days leading up to the armband protest were marked by rising tensions. Ross Peterson, a student at Roosevelt who was a member of the LRY and attendant at the Sunday meeting wrote a brief article for the student newspaper entitled "We Mourn."[95] The article, an attempt to garner more support for the armband protest, let the cat out of the bag:

> ATTENTION STUDENTS
>
> Some high school and college students in Iowa who are interested in expressing their grief over the deaths of soldiers and civilians in Vietnam will fast on Thursday, December 16th. They will also wear black arm bands starting on that same day, December 16th. The National Liberation Front (Vietcong) recently proposed a 12-hour truce on Christmas Eve. The United States has not yet replied to their offer. However, Senator Robert Kennedy has suggested that the truce be extended indefinitely pending negotiations. If the United States takes this action the arm bands will be removed. If it does not the bands will be worn throughout the holiday season and there will be a second fast on New Year's Day. High school and college students are also encouraged to forego their usual New Year's Eve activities and meet together to discuss this complex war and possible ways of ending the killing of Vietnamese and Americans.[96]

The following day, Monday, December 13, Ross showed the article to his journalism teacher, who told him that the school administrators would have to approve it before publication.[97] The administration informed Ross that they would not allow the article to be published.[98] Nonetheless, the idea

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94 *See id.*

95 *See* Defendant's Exhibit One at *64–65, Tinker v. Des Moines Indep. Cmty. Sch. Dist., Civil No. 7-1810-C(1), 1968 WL 94832 (U.S. 1968).

96 *Id.*

97 *See* JOHNSON, *supra* note 12, at 5–6.

98 *See id.* at 6. Had the case been brought regarding the refusal of a public school to allow a story in the student newspaper, it could have reached a very different result. *See* Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 272–73 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student

to wear black armbands in protest was already in circulation among the Des Moines student body.[99]

After hearing about Ross's article, E. Raymond Peterson (no relation to Ross), the Director of Secondary Education in the Des Moines Independent School District, called a meeting of all principals of Des Moines high schools to discuss how the impending protest should be handled.[100] At the meeting, held early in the morning on Tuesday, December 14, the five principals all agreed that wearing black armbands would be prohibited, and that students that wore them would be asked to remove them.[101] If the students refused, their parents would be called, and, if they persisted, they would be sent home from school until they relented.[102]

After the principals had made their decision, E. Raymond Peterson contacted Ross to inform him that the armbands would be banned.[103] Director Peterson stated later that he "felt it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."[104]

Somehow (probably through Ross), the local press got word of the principals' decision to ban the armbands.[105] The following morning, Wednesday, December 15, an article was published on the front page of the Des Moines Register.[106] The article quoted Director Peterson, who explained that the schools had banned the armbands because of a general policy against "anything that is a disturbing situation within the school."[107] Above the article, as if to characterize the students' position, was a political cartoon picturing a soldier with a knife in his back.[108] The knife held a sign stating "anti-war letters and propaganda."[109] Far from being "popular unpopular speech," at this early stage of the Vietnam conflict, popular support was firmly against the students.

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speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns.").

99 *See* JOHNSON, *supra* note 12, at 6.

100 *See* Defendant's Exhibit Four at *68–69, *Tinker*, 1968 WL 94832.

101 *See id.*; *see also* Testimony of E. Raymond Peterson at *45, *Tinker*, 1968 WL 94832.

102 *See* Testimony of E. Raymond Peterson at *45, *Tinker*, 1968 WL 94832.

103 *See* Defendant's Exhibit Four at *69, *Tinker*, 1968 WL 94832.

104 *Id.*

105 *See id.*

106 *See* Jack Magarrell, *D.M. Schools Ban Wearing of Viet Truce Armbands*, DES MOINES REG., Dec. 15, 1965, at 1.

107 *Id.*

108 *Id.*

109 *Id.*

C. December 15th—"Not Exactly a Normal Day"

By all accounts, the day before the armbands were to be worn was "not exactly a normal day" in Des Moines public schools.[110] Following the announcement of the ban, the anxiety among faculty and students, for and against the protest, was palpable. Announcements were broadcast throughout Des Moines middle and high schools repeating the ban on black armbands the following day.[111] Mary Beth Tinker reported that her math teacher, Mr. Mobley, spent the entire period talking about the armbands, how any student wearing one would be thrown out of his class, and that he viewed them as a protest.[112] Mary Beth Tinker openly disagreed with him.[113]

At Roosevelt High School, Chris Eckhardt remembered that the gym teachers were "extremely upset with the prospect of an anti-war protest."[114] They told the students that anyone wearing an armband was a communist sympathizer.[115] Rather than do calisthenics to the normal chant of "Beat North High," the teachers made the students substitute the phrase "Beat the Viet Cong."[116] After gym, Eckhardt was confronted by students who threatened him, saying "[i]f you [wear armbands] . . . you'll find our fists in your face and our foot up your ass."[117]

Wednesday evening, Ross Peterson and another student, Bruce Clark, went to the Tinker home with copies of "We Mourn."[118] Peterson and Clark talked with the entire Tinker family about the planned protest and explained that some students were going to wear the armbands regardless.[119] After reading the article and talking with Peterson and Clark, both John and Mary Beth decided to wear armbands in protest.[120] As all of the students involved later insisted, their parents had nothing to do with their decision.[121]

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110 JOHNSON, *supra* note 12, at 7.

111 *See id.*

112 *See id.*

113 *See* Testimony of Mary Beth Tinker, *supra* note 43, at *29.

114 JOHNSON, *supra* note 12, at 7–8.

115 *See id.*

116 *Id.*

117 *Id.*

118 *See* Testimony of John Tinker, *supra* note 32, at *15.

119 *See id.*

120 *See id.*

121 *See, e.g.*, Testimony of Mary Beth Tinker, *supra* note 43, at *24 ("This decision was my own, neither mother nor father attempted to convince me or said anything to me that I should wear one."); Testimony of John Tinker, *supra* note 32, at *23 ("These views were not imposed upon me by my parents or the Eckhardts; it was my own view."); Testimony of Christopher Eckhardt, *supra* note 14, at *30 ("I announced to my parents that I was going to wear an arm band. They had not tried to persuade me to wear one and did not attempt to dissuade me from wearing one.").

D. December 16th and 17th—The Armband Protest

Before he left the safety of his father's car, Chris Eckhardt, trembling with nervousness, looked to his father defiantly and proclaimed "Eichman only followed orders, didn't he?"[122] Chris decided that he would proceed directly to the principal's office and turn himself in, exercising civil disobedience to a rule he thought unjust.[123] On his way to the Principal's office, the captain of the football team attempted to rip the armband off of Chris and allegedly spoke threateningly to him.[124] Chris saw his friend and compatriot Bruce Clark in the hallway, but was disappointed to see that Bruce had bowed to the rules and not worn an armband.[125]

Chris made it safely to the office, and as he awaited the principal, students walked by the office glass and threatened him with such remarks as "[y]ou're dead."[126] Vice-Principal Blackman emerged shortly thereafter and brought Chris into his office.[127] Blackman asked Chris to remove his armband, but Chris refused.[128] According to Chris, the pressure mounted for him to "dis-band," with Blackman threatening him with "a busted nose"[129] and a school guidance counselor insinuating that his protest would significantly harm his chances at attending college.[130] Chris began to cry, but continued to refuse.[131]

Finally, after repeated efforts to convince Chris had failed, the Vice-Principal called Mrs. Eckhardt and explained that Chris would be suspended if he did not remove his armband.[132] Margaret Eckhardt, ever the activist, insisted, "I think he has every right to wear the armband, and I will not ask him to take it off."[133] Chris was suspended and sent home.[134]

The Tinker family had a relatively easier time of their protesting than Chris Eckhardt. John Tinker decided that he would not wear his armband until December 17 because he thought he should try to speak with the school board first.[135] Mary Beth wore her armband to Warren Harding Junior High

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122 JOHNSON, *supra* note 12, at 8, 16.

123 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *31–32.

124 *See* JOHNSON, *supra* note 12, at 16–17.

125 *See id.* at 17.

126 *Id.*

127 *See* Testimony of Christopher Eckhardt, *supra* note 14, at *31–32.

128 *See id.*

129 *Id.*

130 *See id.*

131 *See* JOHNSON, *supra* note 12, at 18.

132 *See id.*

133 *Id.*

134 *See id.*

135 *See* Testimony of John Tinker, *supra* note 32, at *16.

school and was initially allowed to remain in class unbothered.[136] Aside from students and teachers warning Mary Beth that she would likely get in trouble, nobody harassed her or insisted she go to the principal throughout her morning schedule.[137] It was not until after lunch, in Mr. Moberly's math class, that she was finally sent to the office for her transgression.[138] Mary Beth was asked to remove her armband, did so, and was sent back to class.[139] About ten minutes later however, she was recalled to the office and suspended from school for violating the prohibition on black armbands.[140] She would not return until January 5th.[141]

A great story from December 16 involves the youngest Tinker children, Hope and Paul. Hope came down the stairs of her home and surprised her parents by wearing a black armband on her little sleeve.[142] Leonard Tinker said, "[N]ot you, too;[143] [W]here are you going with that?"[144] In a sign of the seriousness of the times, little Hope replied, "Even though I'm only ten, I can grieve for the people who have died in Vietnam."[145] Ironically, the responses of Hope and Paul's teachers were far more accepting than any of the older students. There was no ban on armbands for elementary schools, likely because nobody thought a student of such a young age would ever wear one.[146] Paul's teacher used the armband to lead a half hour discussion about freedom of expression, and Hope's teacher similarly explained the symbolic meaning of the armband to her class.[147]

Thursday evening, a meeting was held in the Eckhardt home to determine the actions that would follow.[148] John and others attempted to convince the School Board President to call an emergency meeting to discuss the ban.[149] After the President refused, John Tinker realized that he had no choice but to proceed against the wishes of the administration.[150] The next

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136 *See* Testimony of Mary Beth Tinker, *supra* note 43, at *24–27.

137 *See id.* at *25–27.

138 *See id.* at *27.

139 *See id.*

140 *See id.*

141 *See id.* at *27–28.

142 *See* FARISH, *supra* note 82, at 11.

143 JOHNSON, *supra* note 12, at 26.

144 FARISH, *supra* note 82, at 11.

145 *See id.*

146 *See* JOHNSON, *supra* note 12, at 26.

147 *See id.*

148 *See* Testimony of John Tinker, *supra* note 32, at *16; JOHNSON, *supra* note 12, at 21–22.

149 *See* Testimony of John Tinker, *supra* note 32, at *16.

150 *See id.* at *16–20. He had no choice because the school board meeting was not until

day, John wore his armband to school. He was never threatened nor harassed, and, like his sister, was not sent to the Principal's office until after lunch.[151] In contrast to Chris's experience with the football captain at Roosevelt, a member of the North High football team actually "defended John's right to express his views."[152] After talking with the Principal, John was sent home and told he could not return if he wore the armband; he was never officially suspended.[153]

The *Des Moines Register* continued to feature the armband controversy on its front page, with a headline Friday morning announcing, "Wear Black Arm Bands, Two Students Sent Home."[154] The article described Chris and Mary Beth, the only two students suspended, and stated that while neither had caused a disturbance, they had both been suspended for violating school policy.[155] Ora Niffenegger, the school board president who had refused to hold a special board meeting Thursday evening, stated that he would not condone the wearing of armbands because "[o]ur country's leaders have decided on a course of action and we should support them."[156] The Saturday morning paper again featured a front-page article detailing the suspension of three additional students, including John Tinker, Christine Singer (a truly unsung hero, as there is nothing written at all about her), and Chris Eckhardt's erstwhile friend, Bruce Clark.[157]

III. THE AFTERMATH—THE PATH TO THE SUPREME COURT

The weeks following the armband protest led only to more acrimony

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December 21st, and even if the Board allowed the armbands, there would only be one more day of school before the Christmas break, thus limiting their ability to express themselves dramatically to only a single day. *See* JOHNSON, *supra* note 12, at 21–22.

151 *See* Testimony of John Tinker, *supra* note 32, at *17–19.

152 DUDLEY GOLD, *supra* note 6, at 20.

153 *See id.* There exist a lot more detailed accountings of the "blow by blow" of John Tinker's day. Because of my belief that most of the "glory" of the case goes to the Tinkers, I have focused this version of events more on Chris Eckhardt, and, for the sake of some brevity, have likely given short shrift to the Tinker story. A reader with a strong thirst for all the facts about John Tinker can look to the many other resources. *See, e.g.*, JOHNSON, *supra* note 12; Leigh Wolfe-Dawson, A Biographical Study of Namesake John F. Tinker on the Landmark Legal Case *Tinker et al. v. The Des Moines Independent School District et al.* (Fall 2008) (unpublished Ph.D. dissertation, Colorado State University) (on file with author).

154 Jack Magarrell, *Wear Black Arm Bands, Two Students Sent Home*, DES MOINES REG., Dec. 17, 1965, at 1.

155 *See id.* The fact that neither had caused any disturbance was seized upon in Justice Fortas's eventual Supreme Court opinion. *See infra* note 316 and accompanying text.

156 Magarrell, *supra* note 154, at 1.

157 *See* Jack Magarrell, *Liberties Union Supports Students on Arm Bands*, DES MOINES REG., Dec. 18, 1965, at 1. Although it is unclear from the historical evidence, it seems that Bruce Clark, while not wearing an armband the first day, likely decided on Thursday evening at the meeting with John Tinker to wear armbands the following school day.

and debate. Although the school board president had refused to hold a special board meeting, the regularly scheduled meeting was that Tuesday, December 21st.[158] The armband prohibition was on the docket and promised to bring with it a spectacle foreign to the traditionally low key and rarely attended board meeting. The Tinkers and Eckhardts sought out the assistance of the Iowa Civil Liberties Union ("ICLU") to represent their children at the meeting.[159] The ICLU chose Craig Sawyer, an assistant professor at the Drake University Law School, to represent the students.[160] The *Des Moines Register* chronicled the hardening positions of each side: the ICLU issued a statement condemning the ban, Mrs. Tinker proclaimed that her children would remain out of school "until we see a change in this policy," and president Niffenegger declared that he was "absolutely opposed to this type of demonstration within the confines of the school."[161]

A. The School Board Meetings

The day before the School District was scheduled to begin its Christmas break, the school board held its regularly scheduled meeting[162] The meeting was far from regular.[163] Two hundred local Iowans jammed into the board room for a heated two hour debate over whether the armband policy should be abandoned and the suspensions commuted.[164] Board members, concerned parents, and students in the audience all voiced their opinions.[165] Student Bruce Clark spoke up to highlight the school district's hypocrisy: the students had previously not been prohibited from wearing black armbands to mourn the deaths of black children in a southern church bombing, and once they were actually encouraged to wear black armbands to mourn the "death of the school spirit."[166] Surely, another argued, the Christmas Truce and mourning the deaths in Vietnam was a commensurate cause.[167]

ICLU lawyer Sawyer argued that the school board should abandon the ban, lift the suspensions, and implement a new policy approving all

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158 *See* JOHNSON. *supra* note 12, at 21.

159 *See* DUDLEY GOLD, *supra* note 6, at 22.

160 *See id.*; *Arm Bands on Board Agenda*, DES MOINES REG., Dec. 19, 1965, at 1.

161 Magarrell, *supra* note 157, at 1, 5.

162 *See* JOHNSON, *supra* note 12, at 31.

163 *See id.*

164 *See* Jack Magarrell, *D.M. School Board Split on Issue, 4-3*, DES MOINES REG., Dec. 22, 1965, at 1.

165 *See id.*

166 *Id.* at 3. This particular demonstration even involved walking a coffin through the hallways of the school, so that all students could pay their respects to "school spirit." JOHNSON, *supra* note 12, at 7.

167 *See* Magarrell, *supra* note 164, at 3.

peaceable expression.[168] When asked by one Board member if he would also "support a student's freedom to wear a Nazi armband,"[169] Sawyer responded emphatically, "Yes, and the Jewish Star of David and the Cross of the Catholic Church and an arm band saying, 'Down with the School Board.'"[170] When another Board member moved to postpone the decision, Sawyer demanded, "Take a stand! That's what you're here for."[171] Despite his protestations, the Board voted 4-3 to postpone a final decision and, in the interim, continue the armband suspension policy.[172] A definitive ruling on the policy would be made at the next public school board meeting on January 3rd.[173] As the defeated activists left the meeting, they sang in unison, "We Shall Overcome."[174]

Although the school board had decided nothing permanently, the morning of December 23 provided a possible endgame to the armband protest.[175] The students' hopes were answered as the United States agreed to a thirty-hour truce in Vietnam.[176] Commenting on the news of the Truce, Mrs. Eckhardt stated that "she was sure the arm bands would be removed."[177] She also warned however, that some protesters may put them back on after the truce was over, and continue to wear them through New Year's Eve.[178] Nonetheless, with school out until the New Year, it was possible the armband enthusiasm could wear itself out.

In the time between the school board meetings, the Tinkers and Eckhardts received a number of threatening messages.[179] The Tinkers had red paint thrown at their house,[180] Leonard Tinker was threatened on a radio show, and Mary Beth received a death threat.[181] On Christmas Eve, an anonymous caller threatened the Tinkers that their home would be bombed the following morning.[182] The Eckhardts too, received hate mail and threats, such as one note that read, "Go back to Russia if you like communism so

168 *See id.* at 1.
169 *Id.*
170 *Id.*
171 *Id.*
172 *See id.* at 3.
173 JOHNSON, *supra* note 12, at 42.
174 *See* Magarrell, *supra* note 164, at 1.
175 *See No Bombing, Troop Action in Viet Nam*, DES MOINES REG., Dec. 23, 1965, at 1.
176 *See id.*
177 *Expects No Arm Bands During Truce*, DES MOINES REG., Dec. 23, 1965, at 1.
178 *See id.*
179 *See* JOHNSON, *supra* note 12, at 37.
180 *See id.*
181 *See* DUDLEY GOLD, *supra* note 6, at 25–26.
182 *See id.*

much."[183] Luckily, no violence ensued.[184]

The meeting of January 3rd was as jam packed and heated as the previous.[185] Sawyer was asked by the ICLU not to attend because his "volatile and abrasive" manner had "rubbed [people] the wrong way" at the first meeting.[186] Instead, Dr. Eckhardt and Reverend Tinker defended their children. Leonard Tinker claimed it was "the right of [his] children to act out the anguish we feel as a family."[187] William Eckhardt argued that bowing to authority was a principle "so greatly admired in Nazi Germany."[188] The next day, the *Des Moines Register* ran a banner headline announcing the result, "BAN ON ARM BANDS UPHELD."[189] With this decision, the die was cast, and litigation became the only remaining option for vindication of the students' rights.

B. The Lawyers

On May 14, 1966, the ICLU filed a suit on behalf of the Tinkers and Eckhardts against the Des Moines Independent School District.[190] The suit sought an injunction to end the armband policy and nominal damages.[191] The lawyers for each side were perfect standard-bearers for those they represented. Dan Johnston for the ICLU was a young liberal activist.[192] Allan Herrick, for the school board, was an older conservative and former judge.[193] The two litigators would stand in opposition from the initial complaint through Supreme Court arguments.

After the first school board meeting, the ICLU directors decided that Sawyer would not be the front man for the Tinkers and Eckhardts.[194] The

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183 JOHNSON, *supra* note 12, at 37.

184 *See id.*

185 *See Ban on Arm Bands Upheld: D.M. School Board Split on 5-2 Vote*, DES MOINES REG., Jan. 4, 1966, at 1.

186 JOHNSON, *supra* note 12, at 61.

187 *Ban on Arm Bands Upheld*, *supra* note 185, at 3.

188 DUDLEY GOLD, *supra* note 6, at 28.

189 *Ban on Arm Bands Upheld*, *supra* note 185.

190 *See* Complaint at *5, Tinker v. Des Moines Indep. Cmty. Sch. Dist., Civil No. 7–1810-C(1), 1968 WL 94382 (U.S. 1968).

191 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966).

192 *See* Dan Johnston, *Freedom of Speech: A Casualty of War*, *in* DEFENDING THE FIRST: COMMENTARY ON FIRST AMENDMENT ISSUES AND CASES 45, 52–53 (Joseph Russomanno ed., 2005).

193 *See id.* at 51.

194 *See supra* notes 185–186 and accompanying text. Dan Johnston also claims that it was Drake University that forced Sawyer to withdraw from the case, for fear that the controversy would have a negative impact on the university. *See* Johnston, *supra* note 192, at 52.

choice arose as to who would replace him, and Johnston fit the bill. Johnston embodied the Midwest—"[h]e was rather tall, and light-haired—he looked like a sheaf of wheat."[195] Johnston was green—he was twenty-six and barely a year out of Drake Law School when the *Tinker* case arose.[196] Johnston was from Iowa and graduated from Westmar College in Le Mars, Iowa, in 1960.[197] During his senior year, he traveled to New York City and, inspired by time spent there with activist and liberal author William Stringfellow,[198] returned to Iowa with an inclination toward social justice.[199]

Throughout law school Johnston attended ICLU meetings and volunteered to help in any way he could.[200] After school, he began working as a partner of Norman Jesse in their tiny Des Moines office.[201] The firm handled a number of civil liberties cases.[202] Johnston was chosen because he was familiar with the case from talks with Sawyer and had negotiation skills that Sawyer lacked.[203] According to Johnston, it was Sawyer himself that asked Johnston to take over the litigation.[204] His complete lack of experience was cast in a positive light—with the ICLU promising to foot the bill for the litigation, Johnston was cheap.[205]

At the time of the protest, Herrick, in his sixties, had already been the chief legal representative for the Des Moines Independent School District for years.[206] Herrick was a World War I veteran and a "no-nonsense conservative Republican."[207] Despite his age, Herrick was still a "vigorous man," arriving at his office each morning at six and maintaining a reputation as a "tough taskmaster."[208] Herrick had been an Iowa district judge until he was voted out of office in the "Roosevelt landslide of 1936."[209] Still referred to by many as "Judge Herrick," by all accounts he found the left-wing

195 FARISH, *supra* note 82, at 42–43.

196 JOHNSON, *supra* note 12, at 62; Johnston, *supra* note 192, at 45, 52.

197 *See* JOHNSON, *supra* note 12, at 62.

198 Stringfellow was the author of the book, *My People Is the Enemy*, a 1960s civil rights staple. WILLIAM STRINGFELLOW, MY PEOPLE IS THE ENEMY: AN AUTOBIOGRAPHICAL POLEMIC (1st ed. 1964).

199 *See* JOHNSON, *supra* note 12, at 62.

200 *See id.*

201 *See id.* The office had only two people in it. *See id.*

202 *See id.*

203 *See id.*

204 *See* Dan L. Johnston, *What the Pigeons Have Done to My Statute*, 48 DRAKE L. REV. 519, 519–20 (2000).

205 *See* JOHNSON, *supra* note 12, at 62.

206 *See id.* at 64.

207 *Id.* at 65.

208 *Id.* Younger associates at his firm compared Herrick to Professor Kingsfield from the television series *The Paper Chase*. *See id.*

209 *Id.*

protesters personally offensive.[210] In between the two school board meetings, Judge Herrick had drafted a memorandum for the board arguing that the board had the constitutional authority to ban armbands if they were a "disrupting influence."[211]

C. The Lower Court Litigation

After the second school board meeting, the three student plaintiffs went back to school without their armbands.[212] In continued defiance however, the three wore black clothing for some time afterwards.[213] As Chris said, with his typical revolutionary zeal, "We went back to school, not because we believed the School Board was right, but because the School Board had the might."[214] After lengthy briefing and pretrial procedures that took up the rest of the school year and most of the summer, the case was eventually tried by Chief Judge Roy L. Stephenson beginning on July 25, 1966.[215]

Prior to his appointment, Judge Stephenson was "an attorney and Republican Party stalwart in Des Moines."[216] A World War II veteran, former Unites States Attorney, and Eisenhower appointee, Judge Stephenson likely had far more in common with the conservative Herrick than the young liberal Johnston.[217] Observers recount however, that while Stephenson had a "gruff manner," he "ran a very professional courtroom" and was even-handed throughout the case.[218]

Over the course of a two-day bench trial, each of the three children plaintiffs testified, as well as a number of administrators of the school district.[219] On September 1, 1966, Chief Judge Stephenson issued a brief, three-page memorandum opinion upholding the school board action as reasonable and therefore not in violation of the students' First Amendment

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210 *See id.*

211 *Id.*

212 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 252. This would later present a question of mootness to the Court. However, because the litigation requested nominal damages of one dollar, and because the school board policy was technically still in effect at the time of the hearing, the case was not moot. *See* JOHNSON, *supra* note 12, at 68.

213 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 252.

214 *See id.* at 252–53. Over the course of the semester Eckhardt would get made fun of by students, being called "peace boy" and "communist," among other things. *See id.* at 253.

215 *See* List of Docket Entries at *1, Tinker v. Des Moines Indep. Cmty. Sch. Dist., Civil No. 7-1810-C(1) 1968 WL 94382 (U.S. 1968).

216 JOHNSON, *supra* note 12, at 80.

217 *See Papers of Judge Roy L. Stephenson*, U. IOWA LIBR., http://www.lib.uiowa.edu/scua/msc/tomsc450/msc421/msc421_stephensoncourtcases.html [https://perma.cc/3JKT-BAD5].

218 JOHNSON, *supra* note 12, at 80.

219 *See generally* Testimonies at *15–49, *Tinker*, 1968 WL 94382 (U.S. 1968).

rights.[220] The memorandum opinion, in a small victory for the ICLU, first held that the wearing of armbands, although symbolic conduct, was expression within the ambit of the First Amendment.[221] Foreshadowing Justice Black's caustic dissent, however, Judge Stephenson stated his belief that the courts should be very deferential to the views of local school boards:

> Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are *unreasonable*, the Courts should not interfere.[222]

Working from this standard, Judge Stephenson held that the school board's belief that the anticipated student protest would create a serious disturbance was reasonable, and therefore the regulation prohibiting the armbands did not deprive the students of their First Amendment rights.[223]

Johnston had urged the district court to follow two analogous cases that had recently been decided in the Fifth Circuit,[224] *Burnside v. Byars*[225] and *Blackwell v. Issaquena County Board of Education*.[226] The two companion cases, decided a few days before the *Tinker* bench trial began, held that regulations prohibiting students from wearing "freedom buttons" violated the students' First Amendment rights only where the exercise of such rights did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[227] Judge Stephenson rejected the Fifth Circuit approach, and held that school officials should not be so limited, but rather, "must be given a wide discretion" to determine if and when an anticipated disturbance warranted outright prohibition.[228] This determination would form the basis for the circuit split that would assure a Supreme Court decision on *Tinker*.

On appeal to the Eighth Circuit, the case was initially argued in April

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220 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966). Although the case was victorious at this stage, Allan Herrick likely did not enjoy the victory. His son, only 44, died of cancer a week after the district court decision. *See R.A. Herrick Dies in Omaha*, DES MOINES REG., Sept. 9, 1966, at 17.

221 *See Tinker*, 258 F. Supp. at 972.

222 *Id.* (emphasis added).

223 *Id.* at 973.

224 *Id.*

225 363 F.2d 744 (5th Cir. 1966).

226 363 F.2d 749 (5th Cir. 1966).

227 *Burnside*, 363 F.2d at 749; *see also Blackwell*, 363 F.2d at 753.

228 *Tinker*, 258 F. Supp. at 973.

1967 before a three-judge panel in St. Louis.[229] There is no record of the argument, no transcript, nor newspaper coverage, and hardly anybody really remembers what happened.[230] This is likely because the panel could not reach a decision, and therefore, on April 26, 1967, the court ordered reargument of the case en banc during its October 1967 session.[231] The panel again could not decide, and one month after reargument the court announced a per curiam 4-4 opinion.[232] As a rule, the split decision acted as an affirmation of the district court opinion.[233]

By the time the Eighth Circuit issued its per curiam affirmation, nearly two years had passed since the actual protest. The Tinkers and Chris Eckhardt had grown up. John Tinker had graduated, Chris Eckhardt was a high school senior, and Mary Beth Tinker was in her sophomore year.[234] Throughout 1966 and 1967, both families received their share of threats and hate mail.[235] Chris remembers being called a communist and teased as "peace boy" in school.[236] Among the hate mail was a postcard that warned the Eckhardts that their actions were turning Chris into the next Lee Harvey Oswald.[237] The families also received letters of encouragement and praise for taking a stand.[238] With opinions divided among their neighbors and the country, the plaintiffs appealed to the Supreme Court.

IV. THE SUPREME COURT

By the time the case reached the Supreme Court, the winter of 1968, the pendulum of popular support had swung from condemning anti-war protesters to a strong public sentiment against the war in Vietnam.[239] By the time the Court heard arguments on *Tinker*, the students' armband protest would typify the quintessential "popular unpopular" speech of its day. This dramatic shift in the tide of public opinion may be largely responsible for the opinion upholding the students' rights to protest.

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229 *See* JOHNSON, *supra* note 12, at 117.

230 *See id.* In the only story, attorney Johnston recalls that one of the judges asked him if he was insisting on the one dollar in nominal damages he had demanded in the Complaint. Johnston recalls responding, "No, I didn't have the case on a contingent fee." *Id.*

231 *See id.*

232 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988, 988 (8th Cir. 1967) (en banc) (per curiam).

233 *See id.*

234 *See* DUDLEY GOLD, *supra* note 6, at 45.

235 *See* JOHNSON, *supra* note 12, at 57–58.

236 *See id.* at 57.

237 *See id.*

238 *See id.* at 58. For example, Chris received a letter of praise from a rabbi who had attended Des Moines public schools that said he was "filled with admiration." *Id.*

239 *See id.* at 143.

The Tinker and Eckhardt petitioners' brief requesting certiorari was filed with the office of the Clerk of the Supreme Court on January 17, 1968.[240] While Johnston was still nominally lead counsel, his brief was significantly edited by Mevlin Wulf and David Ellenhorm, both attorneys for the American Civil Liberties Union ("ACLU").[241] Only seven pages long, the concise petition was a classic "circuit split" brief.[242] The Fifth Circuit, in *Burnside*, had taken the "substantial disruption" path toward protecting student rights, while the Eighth Circuit, by affirming the district court, had given wide latitude to local school boards to ban conduct it thought would result in disruption.[243] Only the Supreme Court, the petitioners argued, could resolve the present incongruity in First Amendment jurisprudence.[244] The respondents' brief, drafted by Judge Herrick, was nearly three times as long as petitioners and argued both that the policy was reasonable and that the decision in *Burnside* was not inconsistent with *Tinker*.[245] The Supreme Court disagreed.[246]

A. The Certiorari Puzzler

The respondent brief was submitted on February 12, 1968, and, in a very quick turnaround, certiorari was granted on March 4.[247] The speedy grant did not reveal the divisions on the Court over whether to hear the case at all. Years later, the Justices' papers would show that they were divided 5-4 over whether to hear *Tinker* at all.[248] The five in favor (William Brennan, William O. Douglas, Thurgood Marshall, Potter Stewart, and Earl Warren) were somewhat predictable.[249] Curiously though, among the Justices opposed to hearing *Tinker* was the man that would come to write the opinion, his last on

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240 *See* Petition for Writ of Certiorari, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (No. 68-21).

241 *See* JOHNSON, *supra* note 12, at 123–24.

242 *See* Petition for Writ of Certiorari, *supra* note 240.

243 *See id.* at 5.

244 *See id.* at 4.

245 *See generally* Respondents' Brief Opposing Issuance of Writ of Certiorari, *Tinker*, 393 U.S. 503 (1968) (No. 68-21) (stating that "[t]here is no real conflict" and "courts should not 'second guess' the administrators so long as the regulation appeared to be reasonable under the facts and circumstances existing at the time").

246 *See* Order No. 1034, Orders from January 18 Through April 29, 1968, 390 U.S. 941, 942 (1968) (granting certiorari); *see also Tinker*, 393 U.S. 503 (1969).

247 *See id*; Respondents' Brief, *supra* note 245.

248 Certiorari Tally Sheet for Tinker v. Des Moines Indep. Cmty. Sch. Dist. (No. 68-21) (Mar. 1, 1968) (on file with the Manuscript Division, Library of Congress, Supreme Court Papers of Earl Warren, Box 384).

249 *See* Johnson, *supra* note 12, at 128. Justice Douglas noted that he believed the case should be decided on the grounds that it was a prior restraint, but later relented to a narrower opinion. *See id.*

the Court,[250] Justice Abe Fortas.[251] Although it is impossible to know with certainty why Justice Fortas voted to deny certiorari, a brief look into his biography might be helpful in speculation.

From 1940 until his appointment to the Supreme Court in 1965, Fortas worked as a high-profile lawyer in Washington D.C.[252] During the course of his legal career, Fortas had two renowned victories. First, as counsel for a small-time criminal, he successfully argued the leading Sixth Amendment case, *Gideon v. Wainwright*.[253] Second, and more important to the *Tinker* case, Fortas had successfully helped Lyndon B. Johnson prevail in his 1948 disputed election to the Senate.[254] Since that event, Johnson held Fortas as a close friend and adviser, continuing through his Presidency and Fortas's time on the Court.[255]

It has been speculated that a combination of factors led Fortas to vote against certiorari. From a legal perspective, Justice Fortas expressed his hesitation with the view that the Court should second-guess school administrators unless the record showed "clear discrimination or clear abuse."[256] Fortas expressed this uncertainty when he wrote that he believed *Tinker* was a "tough case" on one of his clerk's memoranda.[257] From a more personal perspective, at the time the Court was deciding whether to grant the petition, Fortas's close friend Johnson was "under siege by antiwar

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250 *See* DUDLEY GOLD, *supra* note 6, at 86.

251 *See id.* The other Justices that voted against hearing the case were John Marshall Harlan, Hugo Black, and Byron White. *See* Certiorari Tally Sheet, supra note 248. Justices Black and Harlan would each dissent in the final *Tinker* opinion, thus displaying why they voted against the case from the start. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515, 526 (1969) (Black, J. and Harlan, J., dissenting). Justice White, however, ultimately voted with the majority. *Id.* at 515 (White, J., concurring). I have thus far found nothing enlightening his reason for denying the petition.

In a wholly separate but equally interesting anecdote, a memorandum from one of Chief Justice Warren's clerks urged that certiorari be granted but that the case not be heard until after the Court announced its decision in *United States v. O'Brien*. *See* Memorandum to Supreme Court Justice Earl Warren on *Tinker* (Feb. 19, 1968) (on file with Box 384 of Supreme Court Papers of Earl Warren, Manuscript Division, Library of Congress, Washington D.C.). The Court would go on to announce *O'Brien* in May of 1968 and delay oral argument on *Tinker* until the following Fall term—thus it seems that the clerk's recommendation was heeded. *See* United States v. O'Brien, 391 U.S. 367, 367 (1968).

252 *See* John W. Johnson, *Behind the Scenes in Iowa's Greatest Case: What Isn't in the Official Record of* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 473, 482 (2000) (citing LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990)).

253 372 U.S. 335 (1963).

254 *See* Johnson, *supra* note 252, at 482.

255 *See id.*

256 *Id.* at 483.

257 *See id* (citing KALMAN, *supra* note 252).

protesters."[258] Fortas may have hoped that a vote to deny certiorari would avoid bringing any further problems on the administration.[259]

Regardless of the logic behind Justice Fortas's vote to deny certiorari, in March of 1968 certiorari was granted.[260] Chris Eckhardt, a second semester senior, expressed his optimism for the Supreme Court decision: "Things seem to be getting better and better. The first case [district court] we lost. In the second, no decision could be reached [three–judge appeals court], and in the third, we got a tied vote [en banc appeals court]. Each ruling gets progressively better."[261] Little did Chris know however, that he had just been written out of the history books. Despite "Eckhardt's" alphabetical position before "Tinker," Johnston suggests that the clerk of the court, who assigned the case title, put the Tinkers' name first because there were two Tinkers, and Tinker was considered easier to pronounce.[262] As a result, the clerk of the court officially titled the case *Tinker et al. v. Des Moines Independent Community School District*.[263] Chris Eckhardt was reduced to "et al."[264]

B. Oral Argument

By November 1968, with thirty thousand Americans killed and over half a million stationed in Southeast Asia, Vietnam was the dominant conversation in the United States.[265] On November 5, Richard Nixon was elected to succeed President Johnson, and vowed to continue President Johnson's policies, while simultaneously seeking a truce.[266] On November 12, the day of the *Tinker* argument, the *Des Moines Register* headline reflected Nixon's policy to continue the war—*Nixon: Johnson Speaks for Me*.[267]

Chris Eckhardt and his parents were all in attendance when the Court called their case. It must have hurt their feelings just a bit when, after making the long journey, Chief Justice Warren announced the case as "Number 21, John F. Tinker and Mary Beth Tinker, minors, etcetera et al., petitioners

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258 *Id.*

259 *See id.*

260 *See* Order No. 1034, *supra* note 246.

261 JOHNSON, *supra* note 12, at 130 (alteration in original).

262 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 243.

263 393 U.S. 503 (1969).

264 In an interesting aside, Chris Eckhardt, showing his constant willingness to flout authority, was arrested in March of 1968 for throwing a snowball at a policeman. *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 260–61.

265 *See* JOHNSON, *supra* note 12, at 143.

266 *See id.*

267 *See Nixon: Johnson Speaks for Me*, DES MOINES REG., Nov. 12, 1968, at 1.

versus Des Moines Independent Community School District et al."[268] Against the wishes of the veteran appellate litigators at the ACLU, Johnston insisted, and the Tinker and Eckhardt families agreed, that he would argue the case before the Court.[269] After three years of litigation and months of moot courts with seasoned Supreme Court advocates, Johnston, only twenty-nine years old, began the final argument of his first case.[270]

Johnston spent the first five minutes of his argument reciting the facts and procedural history of the case, practically without interruption.[271] Johnston focused on the facts to show that the "protest" was completely non-disruptive, facts that would become critical to the ultimate *Tinker* opinion.[272]

Justice White was the first to pounce on Johnston and barraged him with questions.[273] Perhaps revealing his reason for voting against granting certiorari, Justice White led Johnston through a long series of questions meant to demonstrate that the purpose for the armbands was to distract and cause a disturbance.[274] Otherwise, White argued, the armbands were meaningless.[275] Therefore, because the intention of the armbands was to distract students, the principals could reasonably believe it would cause a disruption and ban it.[276] Johnston never attacked the underlying premise of the questions, that the purpose was to distract, but rather insisted that as a factual matter, there was no evidence of a substantial distraction or disturbance in the schools that day.[277] Johnston focused on this lack of any evidence of a disturbance throughout his argument.[278] From the notes of the Justices' conference on *Tinker*, it would seem that Johnston succeeded in convincing Justice White that indeed the school district had no reasonable grounds to believe the armbands would cause a disturbance.

Herrick probably knew he was in trouble within minutes of beginning

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268 Oral Argument at 00:00:00, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), http://www.oyez.org/cases/1960-1969/1968/1968_21 [https://perma.cc/A2HR-JHV7]. I asked Chris about this but he does not recall how he felt at the time. John Tinker did not make it to the oral argument. *See* JOHNSON, *supra* note 12, at 144.

269 *See* JOHNSON, *supra* note 12, at 144.

270 *See id.* at 145.

271 *See* Oral Argument, *supra* note 268, at 00:00:59. This recitation of the facts and history is unusual in modern appellate practice, where the advocate usually leads with his legal argument.

272 *See id.* at 00:04:36.

273 *Id.* at 00:06:38.

274 *See id.* at 00:06:38–00:09:11.

275 *See id.* 00:08:03.

276 *See id.* at 00:09:10.

277 *See id.* at 00:08:05.

278 *See id.*

his argument.[279] Herrick countered Johnston on his own terms, confronting the *Burnside* precedent of the Fifth Circuit, but arguing that the administrators could have reasonably believed that the armbands would cause serious disruptions, that the armbands did in fact cause such disruptions, and that the Court should not second guess the discretion of local school boards.[280] A few minutes in, when he tried to draw an analogy between the armband protesters and student protesters in the 1966 case of *Adderley v. Florida*,[281] it proved to be a bridge too far[282] Justice Marshall quickly made his opinion known:

> **Justice Marshall**: Mr. Herrick, how many students were involved in the Adderley case?
>
> **Mr. Herrick**: In the Adderley case?
>
> **Justice Marshall**: Uh-huh. Several hundred, wasn't it?
>
> **Mr. Herrick**: It was a large quite a large number.
>
> **Justice Marshall**: How many were involved in this one?
>
> **Mr. Herrick**: Well, there were—that's a question, Your Honor, of what you mean by involved. There are 18—
>
> **Justice Marshall**: How many were wearing an armband?
>
> **Mr. Herrick**: Well, there were five suspended—
>
> **Justice Marshall**: Five?
>
> **Mr. Herrick**:—for wearing armbands Your Honor.
>
> **Justice Marshall**: Well, were there any wearing armbands who were not suspended?
>
> **Mr. Herrick**: Yes, I think there were two—
>
> **Justice Marshall**: That make seven?
>
> **Mr. Herrick**: They weren't accepted and I'll refer to that a little later.
>
> They were—
>
> **Justice Marshall**: Seven out of 18,000 and the school board was afraid that seven students wearing an armband would disrupt 18,000.[283]

Chris Eckhardt remembers that after this exchange, Justice Marshall "just kind of [sat] back in his chair and . . . [shook] his head a little bit," as if

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279 *See id.* at 00:30:22.

280 *See id.* at 00:27:10.

281 385 U.S. 39 (1966).

282 *See* Oral Argument, *supra* note 268 at 00:29:56.

283 *Id.* at 00:30:21–00:31:14.

this was all he needed to hear.[284]

The remainder of Herrick's argument largely followed the tone of the Marshall exchange. Lorena Tinker recalled that while the Justices seemed sympathetic to Johnston, they were openly hostile toward Herrick.[285] This attitude shift is likely a significant reason that Johnston left the argument feeling that he had a strong case and generally satisfied with the way the argument had progressed.[286] The following day, the *Des Moines Register* carried a front-page article recapping the controversy to date.[287] Alongside the synopsis was an article headlined *2 More Iowans Die in Vietnam*.[288] They were both about the age of Chris Eckhardt and John Tinker.[289]

C. The Conference

On Friday, November 15, three days after oral argument, the Justices discussed the *Tinker* case at their weekly conference. Conference notes kept by the Justices indicate each of their opinions on the merits of the case. Chief Justice Warren believed that the case should be decided on equal protection grounds. His view was that the Tinkers and Eckhardt were denied equal protection because of the school district's double standard: it allowed Iron Crosses and other symbols but singled out one form of conduct of which it disapproved and banned it.[290] Had Sawyer been able to hear the Chief Justice's remarks, he likely would have told the ICLU directors "I told you so!"[291]

As the most senior associate justice, Justice Hugo Black spoke after the Chief. Notes kept by Justices Marshall and Douglas show that Black's words to his colleagues foreshadowed his eventual blistering dissent: "children being allowed to run riot."[292] "[S]chools are in great trouble . . . children need discipline . . . the country is going to ruin . . . this is no 1st Amendment

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284 JOHNSON, *supra* note 12, at 157 (alteration in original).

285 *See id.* at 161.

286 *See id.*

287 *See D.M. Appeal on Arm Bands to High Court*, DES MOINES REG., Nov. 13, 1968, at 1.

288 *See 2 More Iowans Die in Vietnam*, DES MOINES REG., Nov. 13, 1968, at 6.

289 *See id.* (noting that the two men were 20 and 21 years old).

290 *See* Conference Notes, (Nov. 15, 1968) (on file with Box 385, Folder 4 of Supreme Court Papers of Earl Warren, Manuscript Division, Library of Congress, Washington D.C.); JOHNSON, *supra* note 12, at 165.

291 Craig Sawyer had argued to the school board that all symbols should be allowed, and that it could not proscribe only those with which it disagreed. *See supra* notes 168–170 and accompanying text.

292 *See* Conference Notes, (Nov. 15, 1968) (on file with Box 542, Folder 3 of Supreme Court Papers of Thurgood Marshall, Manuscript Division, Library of Congress, Washington D.C.).

problem . . . question is whether the rule is reasonable."[293] Needless to say, Justice Black believed that the school district had every right to prohibit the armbands and suspend the students. He was not alone, but he was in the minority.

In contrast to Black, when Justice Douglas spoke next, he indicated that he wanted to reverse the lower court on grounds of prior restraint, but he would join a narrower opinion instead.[294] Following Justice Douglas, Justice Harlan indicated, without much elaboration in conference notes, that he would affirm the lower court, thus siding with Justice Black.[295] Justices Brennan and Stewart each said that they agreed with the Chief Justice that the case could be decided on grounds of equal protection, however Justice Stewart indicated that he would not join an opinion that did not leave some room for the school district to discipline students.[296] With three justices left to vote, there were two in favor of affirming, three for reversal on equal protection grounds, and one for reversing on grounds of prior restraint or something narrower.

Justice White spoke next and favored reversal, but not the positions of his brethren.[297] He did not agree with the equal protection argument, and found the prior restraint view too broad.[298] Justice White also believed that a balance was necessary between student expression and a school district's ability to discipline students for expressive acts that were *actually* disruptive.[299] White's compromise view would become the consensus and majority opinion.[300] Applying his approach, Justice White believed that the case mandated reversal because the school district had not adequately shown a disruption was likely: "they [the school district] have not done a good job [of showing that the armbands were disruptive] and therefore [should] loose [sic]."[301]

After Justice White outlined his view, momentum began to build for an opinion forged on his approach. Justices Marshall and Fortas both indicated

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293 *See* Conference Notes, (Nov. 15, 1968) (on file with Box 1431 of Supreme Court Papers of William O. Douglas, Manuscript Division, Library of Congress, Washington D.C.).

294 *See* Conference Notes of Thurgood Marshall, *supra* note 292; JOHNSON, *supra* note 12, at 166.

295 *See* JOHNSON, *supra* note 12, at 167.

296 *See* Conference Notes of Thurgood Marshall, *supra* note 292; JOHNSON, *supra* note 12, at 167.

297 *See* JOHNSON, *supra* note 12, at 167.

298 *See id.*; Conference Notes of Thurgood Marshall, *supra* note 292.

299 *See* JOHNSON, *supra* note 12, at 167.

300 *See id.* at 167–68.

301 JOHNSON, *supra* note 12, at 167; *see also* Conference Notes of Thurgood Marshall, *supra* note 292.

that they could "go with Byron."[302] One commentator argues that Justice Fortas changed his vote in large part due to the fact that his closest friend and patron, President Johnson, would no longer be in the White House when the decision would be announced.[303] The other justices that believed the case should be reversed signaled their willingness to join the White-Marshall-Fortas coalition, and thus the *Tinker* test was born. Because the Chief Justice was in the majority, he assigned the opinion—Justice Fortas, the one-time opponent of granting certiorari, was chosen.[304]

D. The Decision

On February 24, 1969, Chris Eckhardt received a phone call at his dorm at Mankato State University in Minnesota.[305] On the other end of the line, a local news reporter congratulated Chris for his victory.[306] Chris responded, "Who the hell are you and what are you congratulating me for?"[307] Once the reporter explained that the Supreme Court had issued its opinion in favor of the students, Chris gave him a quote that represented 1969: "[F]ar out."[308] That night Eckhardt and his friends had a celebration.[309] Three years, two months, and eight days after the armband protest, Chris and the Tinkers were vindicated.

The final Court pronouncement contained four opinions: Justice Fortas wrote the majority opinion, while Justices Stewart and White each wrote concise concurrences.[310] Justice Black wrote a scathing dissent, and Justice Harlan also wrote a short dissenting opinion.[311] The vote was seven for the students, two against.[312]

Justice Fortas's majority opinion was short by Supreme Court standards, just over eleven pages in the *U.S. Reports*.[313] The opinion famously declared,

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302 *See* Conference Notes of William O. Douglas, *supra* note 293.

303 *See* JOHNSON, *supra* note 12, at 129–30.

304 *See id.* at 168. Johnson has a few theories on why Justice Fortas was chosen to write the opinion. *See id.* First, he believes that because Fortas had written *In re Gault*, a prominent children's rights case, Warren viewed Fortas as the "expert" on children's rights cases. *See id.* Alternatively, Fortas was a good negotiator and would be better able to hold the majority together than White. *See id.* Finally, Johnson suggests that Fortas was "due more opinions" for the 1968–1969 term, and as a practical matter this could help toward fulfilling his "quota." *Id.*

305 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 260.

306 *See id.*

307 *Id.*

308 *Id.*

309 *See id.*

310 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 514–15 (1969).

311 *See id.* at 515–26.

312 *See id.* at 514–26.

313 *See id.* at 503–14.

"First Amendment rights . . . 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."[314] Justice Fortas adopted the Fifth Circuit approach that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[315] Applying this standard, the Justice saw no evidence in the record to indicate that the school authorities had any reason to anticipate that the armband protest, a silent and passive occurrence, would interfere with the work of the school.[316] Therefore, the Court held that the prohibition violated the students' First Amendment rights.

One interesting aside about the opinion is that although *Tinker* was, in effect, a protection for student protests against the Vietnam War, it never addressed the underlying military conflict as a "war."[317] Justice Fortas originally circulated a draft opinion which repeatedly referred to the conflict in Vietnam as "war."[318] In response Justice Stewart wrote a memo to Justice Fortas indicating that unless all references to "war" were altered, Justice Stewart would write a concurring opinion rather than fully join the majority.[319] Two days later, Justice Fortas circulated a new draft which became the published opinion and used terms such as "hostilities," "conflagration," "involvement," and "conflict."[320] The war in Vietnam was written out of *Tinker*.

The two brief concurrences and one concise dissent did not substantially add to or detract from the holding of *Tinker*. Justice Stewart concurred to indicate that although he agreed with the holding, he did not agree that the "First Amendment rights of children are co-extensive with those of adults."[321] Justice White wrote separately to indicate his beliefs that the Court should abandon any First Amendment distinction between communication by words or conduct.[322] In dissent, Justice Harlan wrote that he agreed with the majority; however, he believed that the burden should be

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314 *Id.* at 506.

315 *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

316 *Id.*

317 *See generally id.* at 503–14.

318 *See* Memorandum on Tinker v. Des Moines Indep. Cmty. Sch. Dist., (Jan. 7, 1969) (on file with Box I:185 of Supreme Court Papers of William J. Brennan, Manuscript Division, Library of Congress, Washington D.C.); JOHNSON, *supra* note 12, at 168.

319 *See id.*

320 *See id.*; *see also Tinker*, 393 U.S. at 503–14.

321 *Tinker*, 393 U.S. at 515 (Stewart, J., concurring).

322 *See id.* (White, J., concurring).

on students' to show their message was prohibited for an unconstitutional reason, not on the administration to show that their rule was constitutional (as the majority had held).[323] Applying his burden scheme, Justice Harlan believed the plaintiffs had not made ample showing to invalidate the prohibition.[324]

Finally, while Justice Fortas's majority opinion in *Tinker* is seen as "landmark," Justice Black's dissent is equally powerful, albeit vicious. After Justice Fortas delivered the majority opinion in open court, Justice Black began his oral dissent with an emphatic repudiation: "I want it thoroughly known that I disclaim any sentence, any word, any part of what the Court does today."[325] The disclaimer was followed by a twenty minute extemporaneous speech which can best be summarized by the first line of his written opinion: "The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court."[326]

Justice Black argued that even if he were to concede to the majority that the First Amendment protected the students' conduct as "speech," the school system had near plenary authority to regulate such speech during school hours and on school grounds.[327] Black further argued that even under the majority's disruption standard, there was ample evidence that a disruption could have resulted from the armbands to justify a prohibition on them.[328] He ominously viewed the majority opinion as portending the downfall of American education, with each student speaking his mind whenever he or she sees fit and school administrators unable to discipline the students because the Supreme Court had usurped their authority.[329]

E. Public Reception of the Decision

The reactions to the *Tinker* decision were mixed. On February 25, 1969, the *New York Times* ran a front-page article that viewed the holding of *Tinker* as a narrow decision that only protected passive expressive conduct.[330] A

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323 *See id.* at 526 (Harlan, J., dissenting).

324 *See id.*

325 JOHNSON, *supra* note 12, at 176.

326 *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

327 *See id.* at 517.

328 *See id.* at 517–18. Justice Black pointed to the threats against Chris Eckhardt, as well as the disruption in Mary Beth's math class, as evidence that disruption actually occurred, just as the administrators predicted. *See id.*

329 *See id.* at 521–22.

330 *See* Fred P. Graham, *High Court Upholds a Student Protest*, N.Y. TIMES, Feb. 25, 1969, at 1, 25.

similar article appeared in the *Des Moines Register*.[331] Both papers also carried editorials that indicated greater accord with Justice Black's dissent than with the majority. In the *Times*, an opinion piece entitled "Armbands Yes, Miniskirts No," argued that a strong line had to be drawn between "free expression and disorderly excess" in order to make sure that the *Tinker* opinion did not lead to the results Justice Black conjectured.[332] In the *Register*, one editorial claimed that, in *Tinker*, "[t]he high court has sent tremors running through the educational system by its dictum that symbolic free speech may emerge from the mouths of babes at school . . . ."[333]

The views of letters that have been preserved in Supreme Court archives also indicate that the public may have identified more with Justice Black than with the majority opinion. Justice Fortas received a large amount of correspondence critical of his opinion.[334] The letters mostly recited fear for the slippery slope from *Tinker* to total anarchy in education. For example, one principal from Oregon attached to his letter a neo-Nazi leaflet that was being circulated throughout his school.[335] The Principal passionately argued that because of *Tinker*, he was powerless to stop the distribution of such corrosive literature.[336]

In contrast, Justice Black's archived papers include over 260 letters related to *Tinker*, with all but eight expressing strong support for his dissenting view.[337] With the counterculture movement in full swing, many Americans identified with Justice Black's defense of traditional values and discipline.[338] Illustratively, one lawyer from California wrote, "Your dissent . . . was one bright ray of sunshine that brought hope and encouragement to the hearts of millions of Americans. I salute you and encourage you to continue your battle for righteousness and sanity."[339]

V. THE *TINKER* LEGACY AND THE LIVES OF THE PLAINTIFFS

In an article marking the Thirtieth Anniversary of the *Tinker* decision, Chris Eckhardt put the case in its "proper" historical perspective: "What George [Washington] and the boys did for white males in 1776, what

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331 *See* Ronald J. Ostrow, *Campus Rioters Warned by Court in D.M. Ruling*, DES MOINES REG., Feb. 26, 1969, at 1.

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

333 JOHNSON, *supra* note 12, at 182 (citing an editorial by Richard Wilson in the *Des Moines Register*).

334 *See id.* at 190.

335 *See id.*

336 *See id.*

337 *See id.* at 191.

338 *See id.*

339 *Id.*

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."[340]

While reasonable people may disagree with Eckhardt's hyperbolic characterization of the relative weight of *Tinker* as compared to the abolition of slavery or the American Revolution, the case was certainly meaningful. Subsequent precedent, however, has narrowed the strongly pro-student *Tinker* opinion.

A. Student Expression Cases Since Tinker

Although the *Tinker* precedent remained a near absolute protection of student expression for almost twenty years, it began to be narrowed in the 1980s, starting with *Bethel School District No. 403 v. Fraser*.[341] In 1983, Matthew Fraser, a senior at a public high school in Washington, gave a speech nominating his friend for student government office.[342] The speech was filled with sexual innuendo and double entendres such as, "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."[343] The school suspended Fraser, who appealed his suspension all the way to the Supreme Court.[344] Reversing lower court decisions that had held Fraser's speech protected under *Tinker*, the Supreme Court held that the school district could, consistent with the First Amendment, punish Fraser for his vulgar speech.[345] The Court distinguished *Tinker* as protected political speech in contrast to the offensive, indecent, unprotected speech in *Bethel*.[346]

Two years later, in *Hazelwood School District v. Kuhlmeier*,[347] the Court held that school officials could censor the content of student newspapers without violating students' First Amendment rights.[348] The newspaper articles in question concerned teenage pregnancy and divorce.[349] As both sides conceded that the articles were not vulgar or offensive, the case arguably did more to narrow student expression than the *Bethel* precedent.[350]

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340 DUDLEY GOLD, *supra* note 6, at 100.

341 478 U.S. 675 (1986).

342 *See id.* at 675; *see also id.* at 687 (Brennan, J., concurring).

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

344 *See id.* at 675 (majority opinion).

345 *See id.* at 679–80, 685.

346 *See id.* at 685.

347 484 U.S. 260 (1988).

348 *See id.* at 260.

349 *See id.* at 263.

350 *See id.* at 266–67.

The Supreme Court held that unlike the personal expression in *Tinker*, the newspaper was "school-sponsored express[ion]" and therefore the school could determine what forms of expression were consistent with its educational objectives.[351]

Finally, and most recently, in *Morse v. Frederick*,[352] the Court ruled on a case that was a mix between political and offensive student expression.[353] Student Joseph Frederick was suspended for holding up a sign while on a school field trip that read "BONG HiTS 4 JESUS" as the Olympic torch relay passed through their town.[354] The Court upheld Frederick's suspension.[355] The Court stated that in light of *Fraser* and *Kuhlmeier*, it had become clear that the *Tinker* "'substantial disruption' analysis" was not always the required rule for school administration actions.[356] The Court held that because the poster was advocating illegal drug use, it was punishable by the administration, even though the banner was arguably a passive expression.[357] Additionally, in a thorough historical explication, Justice Thomas concurred in *Frederick* to explain his view that the decision in *Tinker* should be overruled because it had no basis in the Constitution.[358] Despite Justice Thomas's opinion, and although *Tinker* has arguably been diluted by the subsequent cases, it is still good law.

B. The Tinkerers

Briefly, it is interesting to comment upon the "supporting characters" in the *Tinker* story. Herrick, the lawyer for the school district, remained a lawyer in Iowa until his death at the age of ninety-three.[359] Johnston served in a number of different legal occupations, public and private, in the time since *Tinker*.[360] Though he passed away in 2016, he is remembered for being a "pioneer for free speech"[361] and had remarked of *Tinker*, "Don't get a case like this, with clients like this, when you're 30 years old. The rest of life is

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351 *Id.* at 273.

352 551 U.S. 393 (2007).

353 *See id.* at 393.

354 *See id.* at 397–98.

355 *See id.* at 397.

356 *Id.* at 405 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

357 *See id.* at 409–10.

358 *See id.* at 410 (Thomas, J., concurring).

359 *See* JOHNSON, *supra* note 12, at 198.

360 *See id.* at 198–99.

361 Mackenzie Elmer, *Iowa Lawyer in Tinker Free Speech Case Dies*, DES MOINES REG., Oct. 22, 2016, at A3, 8A.

dull."[362] The litigation was, according to him, the highlight of his career.[363] Justice Fortas resigned from the Supreme Court in May of 1969, making *Tinker* one of his last authored decisions.[364] Fortas resigned amid rumors of financial scandal and alleged kickbacks from former clients in exchange for his advising President Johnson on pardons.[365] President Nixon appointed Justice Blackmun to succeed Justice Fortas after two preceding nominees failed to pass the Senate.[366]

C. John and Mary Beth Tinker

John and Mary Beth Tinker have been sought out for interviews consistently since 1969.[367] The two were featured in a portion of historian Peter Irons collection, *The Courage of Their Convictions*.[368] In 1991, they were featured in a *Life* magazine article hailing *Tinker* as one of the most important cases of the 20th Century.[369] Although both are often willing to speak to groups and be interviewed, they have each tried to distance themselves, much as a type-cast actor, from their younger roles as the "*Tinker* children."[370]

After *Tinker*, John Tinker, as a pacifist, received conscientious objector draft status.[371] He has since held a number of different jobs but never ceased pursuing social justice.[372] At one point, while working in computer consulting, John maintained a side business called "Peace Parts," where he took old but usable electronics and sent them to Latin American countries.[373] John has lived in a number of small towns throughout Iowa.[374] Mary Beth became a registered nurse and, at one point, ran a youth activism program based in Washington, D.C.[375]

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362 JOHNSON, *supra* note 12, at 199.

363 *See id.*

364 *See* Johnson, *supra* note 252, at 486.

365 *See id.*; Bob Woodward, *Fortas Tie to Wolfson Is Detailed*, WASH. POST, Jan. 23, 1977, at A1, A12.

366 *See* Warren Weaver Jr., *Blackmun Approved, 94-0; Nixon Hails Vote by Senate*, N.Y. TIMES, May 13, 1970, at 1.

367 *See* JOHNSON, *supra* note 12, at 200–01.

368 *See id.* at 203.

369 *See id.*

370 *Id.* at 201.

371 *See id.*

372 *Id.*

373 *See id.*

374 *Id.*

375 *See* Mary Beth Tinker, *About the Tinker Tour*, TINKER TOUR, https://tinkertourusa.org/about/tinkertour/ [https://perma.cc/A7AF-KZRW]. As indicated earlier, there is a massive amount of information about the lives of the Tinker children

D. Chris Eckhardt

Chris Eckhardt began college at Mankato State University in 1968.[376] For the next two and a half decades, Chris attended a number of other colleges.[377] Finally, in 1994, twenty-five years after starting out, Chris received his baccalaureate degree in political science from the University of South Florida.[378] Chris "held a variety of jobs: he sold life insurance, produced cable television programs, published a peace-oriented newspaper, served as a federal mediator, and worked for state governments in corrections and social services."[379] In one interesting twist of fate, Chris unsuccessfully ran for the Des Moines School Board in 1978.[380] For some time he had a website, the Baker Act Conspiracy, although what it advocated is not clear.[381]

If one reflects on the story of *Tinker*, Chris was at the center of the controversy: the meetings were at his house, he wore an armband the first day, he was threatened with violent reprisals, and he was suspended. Despite Eckhardt's role in the case, until recently he received practically no recognition. When Roosevelt High School wanted a commencement speaker in the 1970s, even though Chris had attended Roosevelt, the school asked Johnston to speak.[382] When an Iowa education professor wanted to bring a "living artifact of the sixties" into his class, he asked John Tinker.[383] When *Life* magazine wanted to focus on the case as one of the great civil liberties decisions of the century, it interviewed and featured Lorena and Mary Beth Tinker.[384] Chris let his envy and frustration show when, in one interview, he

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subsequent to the case. In the interest of brevity and because of the already large focus on the Tinkers, I have omitted a thorough discussion of their lives. For more information, see generally JOHNSON, *supra* note 12, at 199–205.

376 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 261.

377 *See id.*

378 *See id.*

379 *Id.*

380 *See id.*

381 *See* THE BAKER ACT CONSPIRACY, https://web.archive.org/web/20121126091238/http://www.thebakeractconspiracy.com/ [https://perma.cc/EW3N-AJLW]. The Florida Mental Health Act of 1971 (commonly known as the "Baker Act") is a Florida statute allowing for involuntary examination of an individual, otherwise known as emergency or involuntary commitment. FLA. STAT. § 394.463 (2018). Involuntary examination can be initiated by courts, law enforcement, physicians, or mental health professionals. *See* § 394.463(2)(a); STATE OF FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES MENTAL HEALTH PROGRAM OFFICE, HISTORY OF THE BAKER ACT—IT'S DEVELOPMENT AND INTENT 1–2 (2002), https://www.myflfamilies.com/service-programs/samh/crisis-services/laws/histba.pdf [https://perma.cc/P49Z-WJEP].

382 *See* Johnson, *The Overlooked Litigant*, *supra* note 13, at 261.

383 *See id.*

384 *See id.* at 261–62.

refused to call the case anything but "*Eckhardt v. Des Moines*."[385]

Despite the lack of recognition for the first few decades, the nineties were a better time for Eckhardt. "In 1990, when neither John nor Mary Beth Tinker wanted to accept an invitation from the [ACLU] to speak"— likely because they were *always* speaking about the case!—"they passed the honor on to Eckhardt."[386] In 1993, Eckhardt received the Earl Warren Civil Liberties Award on behalf of the three plaintiffs.[387] Sadly, Chris passed away in 2013.[388]

CONCLUSION

After researching and reading a case history such as *Tinker*, two important questions come to mind. First, why did the Court in *Tinker v. Des Moines* reach its outcome? One factor that may help explain the decision is the shift in public sentiment over the course of the litigation. In 1965, when the children staged their protest, roughly 61% of Americans supported the Vietnam War.[389] By the time *Tinker* was announced in 1969, only about 35% of Americans still supported the conflict.[390] Most Americans identified with the students' view that the war should be ended.[391] Thus, speech that had begun as the protest of a small minority was eventually vindicated as the harbinger of majority opinion. It is only conjecture, but one wonders if the case may have come out differently had public opinion not shifted dramatically over the four-year litigation. This embrace by the Court of "popular unpopular speech" may indicate that *Tinker* is more a case confined to its historical facts than a landmark precedent.

This leads to the second important inquiry—in light of the more recent narrow precedents on student speech, what is *Tinker*'s relevance today? It is arguable that *Tinker* is just different from the subsequent cases. *Tinker* involved students protesting a war in which their peers were being drafted, fighting, and, too often, dying. In this context, and weighing the seriousness of the subject matter, the *Tinker* protesters were effectively engaged in political speech, the most sacred form of protected speech. When the

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385 *See* JOHNSON, *supra* note 12, at 205.

386 Johnson, *The Overlooked Litigant*, *supra* note 13, at 262.

387 *See* JOHNSON, *supra* note 12, at 205.

388 *See* David L. Hudson, Jr., *Christopher Eckhardt Left His Mark as Student-Speech Litigant*, FREEDOM F. INST. (Jan. 3, 2013) https://www.freedomforuminstitute.org/2013/01/03/christopher-eckhardt-left-his-mark-as-student-speech-litigant/ [https://perma.cc/A5RC-5PK4].

389 *See, e.g.*, *Explorations: The Vietnam War as History*, DIGITAL HIST., http://www.digitalhistory.uh.edu/active_learning/explorations/vietnam/vietnam_pubopinion.cfm [https://perma.cc/539A-D7CW].

390 *See id.*

391 *See id.*

political statement of the black armband is compared with the vulgarity of *Bethel* or the absurdity or illegality of "BONG HiTS 4 JESUS," there is ample justification to view the cases as distinguishable.

While allowing the case law to remain seemingly irreconcilable is dissatisfying and may not lead to a clean doctrinal principle on student speech, the cases allow the Court to weigh future cases in light of their context and circumstances. If a student speech case were to arise in which an administration prohibits a serious, important, and passive protest, as arguably the *Tinker* speech was, the Supreme Court could draw on that precedent to uphold the students' rights. However, if, in context, the speech is further along the spectrum toward obscenity or absurdity, the recent precedent allows greater leeway to school administrators to discipline students in ways *Tinker* may have precluded. Therefore, the more recent precedent likely moves the scales back a bit from the extreme pro-student tilt of *Tinker*. Justice Black would be pleased to hear it.

In the wake of recent precedents, *Tinker v. Des Moines* surely represents the apex of student rights to free expression. Whether one agrees that recent changes are for the better, the story and characters involved in *Tinker* are fascinating examples of people who believed they could make a difference. The case has been and should continue to be taught in schools throughout the nation to inspire future generations. In that sense, Chris Eckhardt will have changed the course of history.