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IN NTH CI RCUIT DECISION ON SCH OOL SPEECH

William Glade1

In 1989, the Supreme Court made a ruling2 that found the First Amendment protected the burning of an American flag as a form of protest or speech. The action of burning a flag is unpopular in the eyes of almost every American, and probably most would support the laws in forty-eight states that used to prohibit flag desecration before the Supreme Court determined those laws were, in fact, unconstitutional. As shown in Texas v. Johnson, our Constitution requires the protection of all people’s speech, even the unpopular and otherwise undesirable forms of speech. The Supreme Court has protected the rights of numerous unpopular speakers on many First Amendment cases. Our First Amendment rights are some of the most litigated rights in our nation’s history. Because of the wide implications this amendment has on our lives, it is a complex matter in our society. We will try and narrow our scope and examine one key part of First Amendment case law.

In this paper we will look at a specific caveat of freedom of speech: the freedoms of expression3 that students maintain while in school. During the last sixty years, the Supreme Court has repeatedly considered the constitutional rights of students. Although many

1 William Glade is a senior majoring in Communications--Journalism and at Brigham Young University. He would like to thank U of U Professor Ben Whisenant for his contributions. He would like to thank both of his outstanding editors, Matt Delange and Wesley Dean for their contributions.


3 Freedom of Expression, Black’s Law Dictionary (4th pocket ed. 2011). The freedom of speech, press, assembly, or religion as guaranteed by the First Amendment; the prohibition of governmental interference with those freedoms.
of these decisions involve school speech generally, for this paper’s purposes I will focus on *Tinker v. Des Moines*, which specifically deals with the issue of symbolic speech in schools. In *Tinker*, the Court states that wearing an armband fell under freedom of expression and is closely related to pure speech and is, therefore, protected under the First Amendment.

In 2014, the Ninth Circuit Court of Appeals made a ruling in *Dariano v. Morgan Hill Unified School District* that violated students’ rights to freedom of expression; these rights were given to them by the Supreme Court in *Tinker v. Des Moines*. In *Dariano v. Morgan Hill* the court ruled that the administrators had the right to send two students home for wearing t-shirts with an American flag to a school event celebrating Cinco de Mayo. Students began to complain about the shirts to administrators and issued threats against these students about harming them if they weren’t forced to remove the shirts. Given its large Latino population, school administrators worried that the American flag t-shirts would in fact incite violence due to the high racial tensions at the school. The district court decided the school had the right to censor the individuals citing *Tinker v. Des Moines*, and the Ninth Circuit Court upheld the ruling. According to the Ninth Circuit, because the school could reasonably predict that something was going to happen, the school could censor the students’ expression. This was appealed to be heard by the Supreme Court, but for different reasons they refused the case and the ruling made in the Ninth Circuit still stands today.

In this article, I will explain why the court should have protected the symbolic speech of these students and why the Ninth Circuit

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5 *Id.* at 505-506.

6 *Dariano v. Morgan Hill Unified School Dist.*, 745 F.3d 354 (9th Cir. 2014).


8 *Tinker*, 393 U.S. at 503.
decision in *Dariano v. Morgan Hill* restricting student fundamental speech rights should be reversed.

Section I will explore the public forum doctrine, specifically the distinction between the traditional public forum and a limited public forum and why schools are considered limited public forums. In section II, the specific analysis of both *Dariano v. Morgan Hill* and *Tinker v. Des Moines* will be explored, including how each case relates to the expressive speech concerns in schools. Section III will discuss why the ruling in the Ninth Circuit was erroneous and undercut the rights given to students in *Tinker*. Finally, I will prescribe what should happen with this case and why adjusting this decision is important to maintaining the integrity of the First Amendment in schools.

**SECTION I: THE PUBLIC FORUM DOCTRINE**

*Traditional Public Forums*

In order to understand the intricacies of school speech, one must first understand the Public Forum Doctrine and how it applies in this case. In 1939, the Supreme Court stated in *Hague v. Committee for Industrial Organization*, “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and … have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”

The idea that people have a right to assemble and peaceably communicate their ideas on public issues in public space—or in other words on property owned by the government which is commonly used for the dissemination of information—has been protected by modern Supreme Court jurisprudence.

Later, the Court extended its definition of a “public forum.” In *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, the decision stated,

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“In these (parks, streets, etc. as stated in *Hague*) quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based\(^\text{10}\) exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”\(^\text{11}\) A “content-based exclusion,” is a law regulating the content being shared in public, and it is subject to a judicial review known as strict scrutiny.\(^\text{12}\) Such review requires that courts determine whether the government has a compelling interest and if the law is narrowly tailored to meet that interest.\(^\text{13}\) The strict scrutiny standard is only applied when a law could limit the rights of a suspect class,\(^\text{14}\) which is a protected group or minority,\(^\text{15}\) or infringe on basic human rights. In public forums, this standard will be applied if the law is curtailing speech due to its content rather than how it is being said. It remains very difficult for either state or federal governments to enact laws restricting speech within a public forum because of how courts have used strict scrutiny to defend fundamental rights.

**Limited Public Forums**

*Perry* went on to identify other designations for governmental property including a class known as a “limited public forum.” Justice White wrote, “A second category consists of public property which the State has opened for use by the public as a place for expressive

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\(^\text{10}\) Content-Based laws, or in other words laws which limit the content able to be addressed in a public space, are subject to strict scrutiny.


\(^\text{12}\) *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).


\(^\text{14}\) Suspect classes are classes that are protected under the Equal Protection Clause. These classes are race, religion, national origin and alienage. Adam Winkler, *Strict Scrutiny in the Federal Courts*, VAND. L. REV., 801 (2006).

\(^\text{15}\) The main suspect classes include religion, race, national origin and alienage.
activity.” According to the Court, the government does not have to maintain train stations, legislative buildings, or other facility’s openness if it interferes with the original intent of the location. If, however, the public wishes to use it at a time where it does not interfere with the original intent of the space, then it acts as a traditional forum. This includes parks, street corners, etc. Thus the limited-public forum was born. Both limited public forums and public forums can be subject to time, place, and manner laws which fall under intermediate scrutiny, a lower tier of judicial review. Intermediate scrutiny is used for content-neutral laws, which only dictate when, where, and in what manner people may express themselves, generally in order to maintain public safety.

Public schools are considered limited public forums. Schools are public property where individuals maintain their rights, but the government has a compelling interest to maintain order within and protect their primary purpose of educating school children. With that, it should be understood that all people who live in the United States maintain their rights given to them in the Bill of Rights and other

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17 There is a third category—although not applicable in this case, but for the sake of being thorough will be explained here—which is called a non-public forum. The Court ruled again in Perry that, “Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’” In other words, locations owned by government, but not open to the public for discourse or expression of thought, are closed to the public, and the public does not have the innate right to the freedom of speech in such areas. Common examples for this type of forum are prisons, the Pentagon, and other facilities that are designed for a very specific purpose wherein the integrity of the facility depends on private use by the designated entity.

18 See Cox v. New Hampshire, 312 U.S. 569 (1941) (ruling that although content-based restrictions cannot legally be put in place, the law may restrict the time, place, or manner in which the content is disseminated in order to ensure public safety).

amendments to the Constitution regardless of their age. Just because most primary and secondary students are under the age of eighteen does not mean they are not entitled to the freedoms our country offers. The rights of expression of children and teachers while in school, has its own set of case law that help define a student’s expressive rights. The Supreme Court has made rulings regarding the freedom of speech in public schools—besides *Tinker v Des Moines*—which we will not explore in depth here, yet may still prove educational to the reader and give further context to the complexity of freedom of expression in public schools. *Bethel v. Fraser*\(^{20}\) deals with the use of profanity and vulgarity in speech during school events; the Court deemed it acceptable for the school administrators to censor this type of speech in order to “inculcate... habits and manners of civility.” In 1988, the Court ruled in *Hazelwood v Kuhlmeier*\(^{21}\) that school-sponsored newspapers were subject to the administrator’s review. The administrators could deem what subjects were appropriate or not for the publication based on content and not just when the school could be liable for the articles in the paper. Most recently, in *Morse v. Frederick*,\(^{22}\) the Court ruled that administrators could censor students at school-sponsored, off-campus activities when the speech is propagating the use of illegal drugs. All of these cases are important, yet not implicitly applicable to the *Dariano* case.

**SECTION II: DARIANO V. MORGAN HILL VS. TINKER V. DES MOINES**

*Jurisprudence Support for the First Amendment of Students in Schools*

Censoring expression is not uncommon in public schools, but to be constitutional the speech or expression must be seen as disruptive to the intended purpose of the school. *Tinker v. Des Moines* is

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\(^{20}\) See Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).


\(^{22}\) See Morse v. Frederick, 551 U.S. 393, 402-03 (2007).
the landmark case which gave precedent to determine the legality of censored speech in schools.

*Tinker v. Des Moines* states that although schools have special restrictions—the limited public forum concept from *Perry*—it does not mean that the Bill of Rights, and specifically, the First Amendment, loses its ability to govern.\(^\text{23}\) Justice Fortas states in *Tinker*, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^\text{24}\) He continues by citing a previous case,\(^\text{25}\) which notes how the Fourteenth Amendment incorporates the First Amendment, barring states from infringing upon First Amendment rights.\(^\text{26}\) Although the Court does establish a student’s right to express his or herself, in *Tinker* they say that there is a need for state and school officials to have authority over the pupils during school hours.\(^\text{27}\) It is clearly implied that those administrators are able to suspend or expel students for disruptive behaviors, inappropriate attire, or actions of violence;\(^\text{28}\) this is appropriate because a public school is a limited forum and its original design and purpose is to educate, not act as an entirely open forum for public discourse.

An example of this comes from a district court in Michigan. In *Barber v. Dearborn*, the judge considered four issues before granting the preliminary injunction against the school. Judge Duggan looked at: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable harm without the injunction; (3) whether issuance of the injunction would cause substantial harms to others; and (4) whether the public interest would be served by issuance of the injunction.”\(^\text{29}\) Duggan


\(^{24}\) *Id.*

\(^{25}\) *Tinker*, 393 U.S. at 507.


\(^{27}\) *Tinker*, 393 U.S. at 507.

\(^{28}\) *Id.* at 508.

used three Supreme Court rulings to address whether he believed the plaintiff would be able to win based on the merit of his argument: *Tinker v Des Moines*, *Bethel v Fraser*, and *Hazelwood v Kuhlmeier*. Each of the cases address the freedom of speech in schools, and are important in determining the merit of Barber’s argument. After extrapolating from each of these cases, the district court stated that, based on the facts of the case, the administration of the school had no right or reason to censor Barber’s shirt (which had a picture of President George W. Bush with a caption that read: “International Terrorist”) because there was no lewd or inappropriate reference to drugs, sex, or alcohol nor was it sponsored by the school. Which meant it should be considered under the same ruling as *Tinker* and therefore had a strong likelihood of succeeding in court upon the merits of the case.

The issue in *Tinker* is that school administrators tried to silence speech that was peaceful, did not disturb the educational process within the classroom, and did not infringe upon the rights of other students. The district court originally ruled in favor of the school board, but the Supreme Court overruled it saying, “[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” In *Barber v Dearborn*, Judge Duggan cites several different cases in which the Supreme Court states that “the loss of First Amendment freedoms, even temporarily, constitutes irreparable injury.” By examining the facts of this case, it is obvious that the administrators infringed upon the students’ First Amendment rights. Schools are places of learning. It should not be a place where children are indoctrinated

30 See *Barber*, 286 F.Supp.2d 847 at 852-858.
33 *Barber*, 286 F.Supp.2d at 856.
35 *Barber*, 286 F.Supp.2d at 858.
36 *Barber*, 286 F.Supp.2d at 858 (Duggan, J. references the decision in *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
in matters of public opinion and opposing views are discouraged. In *Tinker*, Justice Fortas cites *Shelton v. Tucker*, which states that the nation’s future leaders depend on the exposure they receive in the classroom—which acts as the marketplace of ideas for students—to a wide variety of ideas. This allows the students to cultivate their own understanding of the world and develop critical thinking skills. If students are afraid that they will be suspended for voicing unpopular opinion, then this will cause students to become weak in their ability, as citizens of this nation, to voice their own opinions when it really matters.

As a nation, we cannot allow unpopular or uncommon speech to be silenced—whether in schools, other limited public forums, or traditional public forums—because of the ramifications it could have on the First Amendment and the freedom of expression. The Supreme Court has affirmed this many times through the years. As stated in *Barnette*, schools have a right to control the conduct of students to maintain order and protect the integrity of the school’s educational purpose; but, as illustrated in the district court’s ruling in *Barber*, an administrator’s actions will only “withstand constitutional scrutiny if they show that the t-shirt [or any other form of symbolic speech] caused a substantial disruption of or material interference with school activities or created more than an unsubstantiated fear or apprehension of such a disruption or interference.” Therefore, a fear of a potential violent outbreak is not enough to curtail or censor a student’s right to free expression in school if there is not substantial evidence of possible violence. In addition, unsubstantiated accusations from teachers or students is not enough to infringe on the rights of the speaker while in school.

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37 *Tinker*, 393 U.S. at 512.
38 The Marketplace of Ideas is a communications theory dealing with the ideals behind the First Amendment.
41 *Barber*, 286 F.Supp.2d at 856.
42 *Id.*
The same district court in *Barber* stated, “The courts have never declared that the schoolyard is an inappropriate place for political debate. In fact, as the *Tinker* Court and other courts have emphasized, students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others.”43 Part of becoming an educated citizen44 is the ability to discuss important topics—even topics in which two parties disagree with one another—in a civil manner, without threatening the opposing party because their views may be unpopular or unseemly to the majority. If educators were to only foster and promote popular viewpoints, they would be in danger of robbing students the opportunity to learn how to participate and discuss with people who differ from their opinion,45 this is inherent to the health of our government as a democratic republic.46

Therefore, it is clear to see that censorship of students’ speech in schools is not legal in many cases, nor is it healthy for our society in general. Unless the speech is going to interfere with the educational process, cause violence among students, is expressed in a lewd manner, or is directly related to a school sponsored event then the administrators have no right to censor the students’ rights to the freedom of expression given to them in the Bill of Rights.

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43 *Barber*, 286 F.Supp.2d at 857-858.
44 *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507 (1969) (holding “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).
46 *Tinker*, 393 U.S. at 508-509 (stating that “But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”).
Dariano v. Morgan Hill: The Ninth Circuit Court Got It Wrong

After examining how *Tinker v. Des Moines* applies to the case in *Barber v. Dearborn*, it will be beneficial to consider the case of *Dariano v. Morgan Hill Unified School District*. In spite of what was decided in the Ninth Circuit Court’s ruling of *Dariano v. Morgan Hill*, it can easily be concluded that they misinterpreted the decision of *Tinker*, and thereby ruled incorrectly in the case of *Dariano*. In the United States, we live under rule of law, not rule by mob.47 The Constitution of the United States is explicitly clear that all forms of speech, that is peaceful and does not incite panic,48 must be protected to maintain the integrity of our laws and freedoms.

Consider how the specifics of *Dariano* relate to the circumstances of *Barber*. Like in the case of *Barber*, Dariano had a situation where racial tensions existed due to the diversity within the school. The students in Dariano wore t-shirts with an American flag on it while the student in Barber wore a t-shirt with a political statement about President George W. Bush. In both cases there was no proof that the political statements made by wearing the shirts had caused a disruption during class time instruction. In both cases a student raised concern about the shirts to an administrator, and in both cases the administrators had the impulsive reaction to tell the student to change their shirt or to be sent home. In neither case did the administrators try and discipline those who were making threats towards the students wearing the shirts. The difference lies in the decision of the courts: one court—the Second Circuit Court of Appeals—recognized the law protected the students in this form of passive, peaceful expression of opinion, while the other—the Ninth Circuit Court of Appeals—used the *Tinker* decision to justify the administrators’ censorship of students’ speech because the particular form of speech was unpopular to some attending the school.

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47 *Dariano v. Morgan Hill Unified School Dist.*, 745 F.3d 354 (9th Cir. 2014). (Judge O’Scannlain, Dissenting).

This idea of censoring speech due to its unpopularity is called the Heckler’s Veto Doctrine. The Heckler’s Veto is essentially where listeners try to censor the speech of the speaker by harassing them or bullying them into silence. This applies to expressive speech as well. Chief Justice John Roberts stated in regards to the Heckler’s Veto, “[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” Just because an idea is unpopular or is even offensive, people do not have the right to bully others into silence. As the Chief Justice Roberts said, it is the responsibility of the listener to ignore the speaker, his words, and any expression as well. Any violent reaction by a listener against a speaker will, in fact, hold the listener responsible for his or her actions. The Supreme Court has rejected this doctrine as unconstitutional and invalid. Many circuit courts have rejected

49 Duhaime’s Law Dictionary states that the Heckler’s Veto is “A controversial legal position taken by law enforcement officers based on an alleged right to restrict freedom of speech where such expression may create disorder or provoke violence.” http://www.duhaime.org/LegalDictionary/H/HecklersVeto.aspx


55 Startzell v. City of Phila., 533 F.3d 183, 200 (3d Cir. 2008). “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. In public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. “A heckler’s veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience.”
the idea of censorship by harassment as well. The State must do everything in its power to protect unpopular or generally opposed speech. Censoring those who express an unpopular opinion violates the principles our nation was built upon. In a traditional public forum, the Supreme Court has said that speech may be censored or curtailed if the police officers, along with those who are protesting, do their best to maintain order, yet are unsuccessful after having tried to keep the peace. But, the Supreme Court has specified that states can enact laws regarding the freedoms of speech and assembly that are narrowly tailored to specific needs of society, like maintaining peace in residential neighborhoods. In such situations, “the mere possibility of a violent reaction to [protected] speech is simply not a constitutional basis on which to restrict [the] right to speak.” These are justly found under the time, place, and manner restrictions that may be used by states to enact laws that protect its citizenry in a traditional public forum.

However, these same principles are applicable to limited-public forums, and, as we have already discussed, must be maintained and protected even in school settings. Students have the right to make political statements in schools without having to fear suspension due to the unpopularity of their views among other students and teachers, as long as they are not disrupting class. In the case of Dariano v. Morgan Hill, the students were exercising their rights by silently wearing a t-shirt with the flag of the United States of America, yet

56 Roe v. Crawford, 514 F.3d 789, n.3 (1993). The “heckler’s veto” involves situations in which the government attempts to ban protected speech because it might provoke a violent response. In such situations, “the mere possibility of a violent reaction to [protected] speech is simply not a constitutional basis on which to restrict [the] right to speak.”

57 Hedges v. Wauconda Community School District, 9 F. 3d 1295, 1299 (7th Cir. 1993). [T]he police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler’s veto.

58 Gregory, 394 U.S. at 117.

59 Id. at 118.

60 Roe, 514 F.3d 789, n.3.
because of a few students’ concerns about the effect wearing those shirts would have on other members of the student body, the administrators suspended the students wearing the shirts rather than suspending those who were issuing threats. Thereby they reinforced the idea among students that they could censor speech of other students by threatening violence against those with differing opinions.61 This is a Heckler’s Veto and it should not have been upheld by the Ninth Circuit Court.

SECTION III: “THE FIRST AMENDMENT DOES NOT TOLERATE MOB RULE BY UNRULY SCHOOL CHILDREN.”62

Administrators of a school may be seen as officers of the peace for schools, just as a member of the police force is an officer of the peace in society. School administrators should do all within their power to protect the speech of students and teachers from the Heckler’s Veto so that they may feel safe and free to express their opinions while in school. To not have an open environment where students and teachers can do so would be a crime against the civil rights protected by the First and Fourteenth Amendments. It would also prove detrimental to the learning experience of the student, and would hinder their ability to become educated citizens who are able to discuss important political issues without employing violence or breathing threats against all those who oppose their own views. In short, the Ninth Circuit Court failed the citizens within its jurisdiction by allowing censorship to become precedent. Rather than protecting speech and encouraging students to learn how to have constructive dialog when difficult issues are addressed, the court affirmed that students could use the Heckler’s Veto to bully their peers into silence. Teaching the students how to discuss important topics civilly is important for future political debates they will encounter after moving on from their formal educational years.

Expressive speech, however unpopular, must be protected. Flag burning, wearing armbands in school to protest war, or wearing a t-shirt with the American flag on it are all expressions that should be protected by the Constitution. The Supreme Court needs to hear the appeal of the Dariano case to help clarify the rights that students have concerning the freedom of speech while at school. Dearborn and Dariano stand opposite each other with contradictory rulings. It is the job of the Supreme Court to clarify what the precedent should be when two or more Circuit Courts have made conflicting rulings.

Not only is it the duty of the Supreme Court to hear this case, but they are also responsible for protecting the rights of all citizens when their rights have been unlawfully curtailed. This is one of those cases. Jurisprudence clearly shows that the Ninth Circuit’s ruling is incorrect and that it needs to be reversed immediately before the negative and unintended consequences happen.

Our country’s foundation is based upon the fact that all men are “created equal” and each person is entitled to certain unalienable rights not only as a citizen, but as a human being. Our very government is set up to prevent mob rule by the majority with the checks and balances which are built into the tribrach system we have in place. Traditionally, when the executive and legislative branches have overstepped their boundaries, it has been the judicial branch that has reminded them about those rights that we are given under the Constitution. The decision in Dariano was erroneous and sets the precedent that a Heckler’s Veto is acceptable in schools in the Ninth Circuit Court’s jurisdiction. We need the Supreme Court to take cases regarding the freedom of expression in schools to help further clarify the law and protect the minority, without any regards to their popularity.

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63 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
64 Id.