

# Education Law & Policy Review

## Volume 2

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# Education Law & Policy Review™

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*This issue is dedicated to Mary Beth Tinker, and all persons everywhere, who stand up for justice and a more democratic, peaceful world.*

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As Editor-in-Chief of the *Education Law & Policy Review* (ELPR), I want to acknowledge and thank everyone who has made this exciting special issue on free speech in educational institutions possible, including our charitable supporters, the members of our Executive Advisory Board, the Editors, the Faculty Editorial Board, the Student Editorial Board, and our Education Law Association (ELA) partners. I also want to thank our deans, faculty, students, and staff in the University of Georgia College of Education, Institute of Higher Education, and School of Law for their continued encouragement and support for the ELPR and its mission in advancing scholarship and practice in education law and policy.

I want to give a special thank you to Mary Beth Tinker who was the inspiration for this issue on free speech in educational institutions. And also to Professor Sonja West who invited Mary Beth to the University of Georgia School of Law and initiated the conversations that led to this special issue on free speech. All of us with the ELPR are very excited to share this special issue on free speech with our readers. And this would not have been possible without Mary Beth Tinker and Professor Sonja West, two great champions of free speech, and two wonderfully generous and supportive colleagues.

Mary Beth Tinker has been a personal hero of mine ever since I first read the *Tinker* case, a sentiment shared by millions of students of law and history. In reality heroes often fall short of their legends. But when I had an opportunity to meet Mary Beth and work with her, I was even more inspired by the real Mary Beth, a real person who has lived her life with unreal courage and dedication to helping others, a genuine real-life hero.

In our schools we were often taught that we owed our freedoms to wars and government leaders, and patriotism was too often simplistically defined as supporting government and government officials (e.g., “my country, right or wrong”). In truth, however, we often owe our freedoms to those who had the courage to stand up against wars and against government officials, when the wars and government officials were wrong. Further, there is nothing more patriotic than having the personal courage and conviction to stand up to powerful government officials and demand that they live up to the ideals of our Constitution, not just in word, but also in deed.

Mary Beth showed us that a 13-year-old girl with nothing but a black armband and the courage of her convictions could stand up to government authority, and in doing so, change the world. And because of this, we all owe our current legal rights concerning freedom of speech and expression

in schools to her courage, the courage of her family, friends, and others who refused to passively pretend to support a war they believed to be wrong, and to their refusal to allow school officials to swear to support the Constitution (as is required by Article VI of the Constitution for them to be lawfully employed), but then in practice deny free speech rights to persons they disagreed with in their schools.

Mary Beth will forever be remembered in history as the girl who stood up for freedom even when others around her would not. And by doing so, she changed the law and helped to secure rights of free speech for future generations. The U.S. Supreme Court's decision in *Tinker* has been the keystone of American free speech law since 1969. Further, the principles of liberty articulated in *Tinker* have had a global impact, encouraging young people world-wide to seek greater freedom of expression.

We may not all have an opportunity to strike such a prominent blow for freedom, change the law, and capture a place in history. But we all do have opportunities to stand up for what is right in our own lives and communities every day. When you have that opportunity, what will you do? In answering this, consider also the words of Edmund Burke, that: "No one could make a greater mistake than he who did nothing because he could do only a little" and "the only thing necessary for the triumph of evil is for good men to do nothing." What would our world be like today if people like Mary Beth Tinker, Rosa Parks, Nelson Mandela, Martin Luther King, Jr., Mahatma Gandhi, and others had decided that the little they could do wouldn't really matter, so they did nothing? Instead, they prove that when something is wrong, ordinary people can do extraordinary things, if they will only stand up and speak out for what is right.

Thank you for reading our special issue on free speech in educational institutions. And the greatest thanks, of course, to our authors, Mary Beth Tinker, Frank Lomonte, Scott Bauries, Sonja West, and Mike Hiestand, all great scholars and leading defenders of free speech. Please see pages 183-186 at the end of this volume for how you can help support the continuing work of Mary Beth Tinker and the Tinker Tour, the Student Press Law Center, join the Education Law Association, and help support the Education Law Consortium's pro bono publication of the *Education Law & Policy Review*, a scholarly peer reviewed law journal promoting improvements in law and policy for the common good, and supporting advances in scholarship and practice for educational improvement.

*John Dayton*

September 25, 2015

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**Foreword: Special Issue of the *Education Law & Policy Review*  
Free Speech in Public Educational Institutions**

Mary Beth Tinker\*

*High school students in Oxon Hill, Maryland continue to petition for the return of their art project: “The Murder of Black Teenagers by Police” after it was removed as “too controversial”;<sup>1</sup> A student in Georgia starts a human rights task force to protect the rights of all students after he receives death threats at school for being Jewish, his family is terrorized, his home is vandalized, and a fire is set outside his home;<sup>2</sup> In New Mexico, thousands of students stage walkouts to protest the standardized test, PARCC;<sup>3</sup> Similar protests erupt throughout the country;<sup>4</sup> A 10 year-old’s testimony against the test at a New Jersey school board meeting goes viral;<sup>5</sup> Students dressed as rats and guinea pigs rally against standardized tests at the Rhode Island legislature;<sup>6</sup> In*

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\* Mary Beth Tinker was one of the named plaintiff in the landmark U.S. Supreme Court case recognizing rights of free speech in public educational institutions, *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969). Mary Beth Tinker is a nurse, public speaker, and civil rights advocate championing free speech, social justice, and children’s rights. This Foreword updates and expands on Mary Beth Tinker, *Reflections on Tinker*, 58 AM. U. L. REV. 1119 (2009).

<sup>1</sup> *Student Art about Police Use of Force Causes Controversy at Oxon*, WASH. POST (June 8, 2015), [https://www.washingtonpost.com/local/education/school-officials-removed-art-display-depicting-police-and-black-men/2015/06/18/a997509c-1477-11e5-89f3-61410da94eb1\\_story.html](https://www.washingtonpost.com/local/education/school-officials-removed-art-display-depicting-police-and-black-men/2015/06/18/a997509c-1477-11e5-89f3-61410da94eb1_story.html).

<sup>2</sup> Memorandum to the Anti-Defamation League (Feb. 8, 2015) (on file with the Education Law Consortium, Athens, GA).

<sup>3</sup> *New Mexico High School Students Walk Out in Protest of New Standardized Test*, THE GUARDIAN (Mar. 2, 2015), <http://www.theguardian.com/education/2015/mar/02/new-mexico-high-school-students-walkout-protest-common-core-testing>.

<sup>4</sup> *Id.*

<sup>5</sup> Amanda Oglesby, *Parents Push Back Against NJ’s Newest Standardized Test*, APP (Jan. 23, 2015), <http://www.app.com/story/news/education/education-trends/2014/11/13/parents-try-opt-parcc-test/18982547/>. See also, <https://www.youtube.com/watch?v=ogBuz4dU5Ew> (testimony to Hernando County, Fl. School Board); <https://www.youtube.com/watch?v=m0hTl638Exg> (testimony to Elizabeth, N.J. School Board).

<sup>6</sup> Megan Hauptman, Rick Salamé, & Abigail Savitch-Lew, *The Best Laid Plans*, THE

*Pennsylvania student journalists vote not to use the word “Redskins” in their school newspaper and take a dictionary definition of the word as an “offensive term for Native Americans” to a school board meeting. The editors are suspended, but honored by the Journalism Education Association and The Native American Journalists Association;<sup>7</sup> In Minnesota, students walk out to protest an anti-Muslim comment by a school board member;<sup>8</sup> A tenth grader in Birmingham, Alabama writes to tell me that her “Black Lives Matter” signs were removed from lockers.<sup>9</sup>*

Whew--what “mighty times!” That’s how one student described things, with so many youths speaking up--in school and out--about issues that affect their lives. And, it’s lucky for us that they are---our troubled world needs creative ideas and energy more than ever. But to make their contribution, youth need rights, starting with free speech.

The right to free speech is the means of protecting all other rights.<sup>10</sup> Together with education and civic courage, free speech is the foundation of democracy.<sup>11</sup> When youth exercise their rights of free speech there is hope that our professed democratic ideals of justice and equality might one day be realized. And, there is no greater protection against

INDY, <http://www.theindy.org/226> (last visited Sept. 15, 2015).

<sup>7</sup> Evelyn Lauer, *Teacher, Editor Suspended for Banning Use of 'Redskin' in School Newspaper*, HUFF. POST (Nov. 19, 2014), [http://www.huffingtonpost.com/evelyn-lauer/neshaminy-high-school\\_b\\_5850296.html](http://www.huffingtonpost.com/evelyn-lauer/neshaminy-high-school_b_5850296.html) (“According to SPLC director Frank LoMonte, after receiving the letter, the editors planned to publish the letter with Redskins as “R-----”; however, school administrators directed that they publish the original letter with the complete word. This directive is against Pennsylvania code that gives student editors the right to edit -- including making style changes such as not allowing an offensive racial slur”).

<sup>8</sup> Dana Thiede & John Croman, *Students Walk Out Over School Board’s Comments*, KARE (Sept. 15, 2015) <http://www.kare11.com/story/news/education/2015/09/16/students-walk-out-over-board-members-comments/32498637/>.

<sup>9</sup> Letter from Student, to Mary Beth Tinker (on file with author).

<sup>10</sup> See, John Dayton, EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 137-138 (2012) (“Freedom of speech is the necessary protector of all other rights and therefore of universal human importance. The United Nations Universal Declaration of Human Rights states: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ To protect rights of free speech in the U.S. the First Amendment states: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”).

<sup>11</sup> John Dayton, HIGHER EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 160 (2015).

totalitarianism than educated, empowered youth with a passion for justice. No wonder schools have a vital role in advancing--or stunting--social justice and democracy.

In a landmark ruling for democratic education and student speech, the Supreme Court agreed. Writing for the majority, Abe Fortas declared in *Tinker v. Des Moines Independent School District* (1969) that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”<sup>12</sup> and that “state-operated schools may not be enclaves of totalitarianism.”<sup>13</sup> Instead schools must teach and model respect for the rule of law, justice, and democratic governance.

Several years earlier, in 1965, my brother John and I, along with Christopher Eckhardt and several other students in Des Moines, Iowa were suspended from school for wearing black armbands. We weren’t experts on the Constitution. We were just sad about the Vietnam War. The message of our armbands was to mourn for the dead on both sides of the war, and to support a Christmas truce proposed by Senator Robert Kennedy.<sup>14</sup>

When Dan Johnston--our young, talented American Civil Liberties Union lawyer--challenged our suspensions in court, he cited a violation of the First and Fourteenth amendments to the U.S. Constitution. We lost at the District and Appeals courts, but the Supreme Court victory by 7-2 several years later became a victory not only for us, but for students throughout the nation.<sup>15</sup>

Although there have since been three student speech cases at the Supreme Court that arguably limited the rights of students,<sup>16</sup> the *Tinker* precedent remains the keystone of student speech. *Tinker* has been cited at least 9,899 times in student speech cases and law reviews.<sup>17</sup>

When we wore our armbands to school we had no idea that we would make history or that we were products of our own “mighty times.” The road to the U.S. Supreme Court for my family and I began with our experiences during the Cold War and the Civil Rights Movement, and from there it was a fluke of history that we, and not some other students,

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<sup>12</sup> 393 U.S. 503, 506 (1969).

<sup>13</sup> *Id.* at 511.

<sup>14</sup> John W. Finney, *Kennedy Favors Truce Extension*, N.Y. TIMES, Dec. 25, 1965, at 2.

<sup>15</sup> 393 U.S. 503 (1969).

<sup>16</sup> *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>17</sup> As of Sept. 15, 2015 a Westlaw database search reporting at least 9,899 citations to *Tinker v. Des Moines*, 393 U.S. 503 (1969).

ended up at the Supreme Court for the simple offense of expressing ourselves.

I grew up on the “East Side” of Des Moines, Iowa, the fourth of six children. My father was a Methodist minister, and my parents considered themselves part of a “Social Gospel.”<sup>18</sup> In his sermons, my father related the ideals of all faiths--brotherhood and peace--to racial discrimination and the growing nuclear disarmament movement. He prayed the prayer of St. Francis, “Lord, make me an instrument of thy peace,” and followed St. Francis’ advice to “Preach the Gospel at all times. If necessary, use words.”<sup>19</sup>

My mother was the first teen activist in our family, at age 14, in 1935, when a young preacher came to her church in Corpus Christi, Texas and sent the all-white youth group off to survey the “colored” part of town. Before, the students had only gone there to pick up laundry. Now, their eyes were opened to unpaved roads, outhouses, and kerosene in place of electricity.

When the youths took their survey results to the church’s Board, they were told: “Honey, those people like living like that.” The youths saw through the excuse, as youth tend to do.

My parents met in Chicago and moved to Iowa in 1950, away from the blaring air raid sirens of the “Red Scare” and the Korean War. I was born in 1952, the year the first hydrogen bomb was detonated by the United States. President Truman had approved its production, saying “our homes, our nation . . . are in great danger.”<sup>20</sup>

1954 was also a year of explosions. Another hydrogen bomb was tested, this one a thousand times more powerful than those dropped on Hiroshima and Nagasaki. The Fellowship of Reconciliation, the oldest interfaith peace group in the world, called for a halt to further tests.<sup>21</sup>

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<sup>18</sup> See, Andrew Koppelman, *Left-Evangelicalism and the Constitution: The Evangelical Origins of the Living Constitution*, 128 HARV. L. REV. F. 1, 10 (2014) (“The Social Gospel movement of the late nineteenth century fought alcoholism, sweatshops, decaying tenements, business monopolies, and foreign wars”); Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2715 (2014) (“The Christian “social gospel” critique of capitalistic exploitation of the poor and the New Deal’s concepts of social and economic rights inspired King’s commitments to economic justice”).

<sup>19</sup> Quote attributed to St. Francis of Assisi.

<sup>20</sup> Harry S. Truman, *Radio and Television Report to the American People on the National Emergency* (Dec. 15, 1950), <http://www.presidency.ucsb.edu/ws/index.php?pid=13683>.

<sup>21</sup> Walter Wink, *PEACE IS THE WAY: WRITINGS ON NONVIOLENCE FROM THE FELLOWSHIP OF RECONCILIATION* (2000).

The other explosion in 1954 came with the unanimous U.S. Supreme Court decision in *Brown v Board of Education*, with Thurgood Marshall exclaiming: “We hit the jackpot!”<sup>22</sup>

My parents became increasingly vocal about racial justice as well as peace, and in 1956, my father went to Japan on a peace mission, returning with dolls, kimonos, and picture books. In fourth grade, I wanted to take the dolls to school for a project on Hiroshima. The teacher wouldn’t allow it, until she got a visit from my persuasive mother.

The year of the Little Rock 9, 1957, the public swimming pool near our house in Atlantic, Iowa had a “whites only” policy. When my father and the church’s youth group complained, my father was forced from his church. We moved to Des Moines, where my mother reported in her Christmas newsletter that we were “surrounded by Christian Fellowship that was truly heartwarming.”

At school, things were not so heartwarming. We prepared for nuclear war by diving under our desks at the sound of an alarm, while air raid shelters popped up all over town. I wondered what Strontium 90 fallout was, and what would happen to us when we drank it along with our milk.

My brothers and sisters and I kept hoping that the adults of the world had things under control, but my parents and others didn’t seem convinced. In 1958, a new “peace symbol” was created by Gerald Holtkum to signify nuclear disarmament.<sup>23</sup> It had its debut at a peace march of 10,000 people in London and soon crossed the Atlantic to the U.S.<sup>24</sup>

In the early 1960s, a focus of the Civil Rights Movement was implementation of the *Brown* decision in states refusing to comply.<sup>25</sup> Many schools in Virginia closed in protest of the ruling. Federal Marshalls protected six-year-old Ruby Bridges as she integrated her elementary school.<sup>26</sup>

At the University level, African American students at North Carolina A&T broke Jim Crow laws at a Woolworth’s lunch counter.<sup>27</sup> Integrated

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<sup>22</sup> Lerone Bennett, Jr., *GREAT MOMENTS IN BLACK HISTORY: WADE IN THE WATER* (2d ed. 1992).

<sup>23</sup> Kathryn Westcott, *World’s Best-known Protest Symbol Turns 50*, BBC NEWS (Mar. 20, 2008), [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7292252.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7292252.stm).

<sup>24</sup> *Id.*

<sup>25</sup> John Dayton, *Desegregation: Is the Court Preparing to Say it is Finished?* 84 EDUC. L. REP. 897, 897-898 (1993) (“Opposition to public school desegregation was extensive”).

<sup>26</sup> See, Ruby Bridges, *THROUGH MY EYES* (1999).

<sup>27</sup> Michelle Norris, *The Woolworth Sit-In That Launched a Movement*, NPR (Feb. 1,

groups of young “freedom riders” were beaten and jailed.<sup>28</sup> 30,000 U.S. troops, federal marshals, and national guardsmen were sent to protect James Meredith at Ole Miss.<sup>29</sup>

In Des Moines, the warmth of our congregation cooled. Inviting black friends to church didn’t make us popular with the all-white congregation, and it didn’t help that my mother picketed the local drug store for its hiring practices. When my little brother, Paul, was seen on TV with an “equal” sign, it might have been the last straw.

In 1962, my father was again asked to leave his church. I’ll never forget the going away party in the church basement, or the pointy brass clock that we were given. We had lost our church and home, but we had the clock!

Like many clergy of the time, my father took a job with the Quakers’ American Friends Service Committee. As a fifth grader, I found Sunday Quaker meetings boring, but at least I could read my book there, “One Hundred Years of Lynchings” which I turned into a school project.<sup>30</sup>

My father’s job as a “peace secretary” took him traveling throughout the Midwest. I was thrilled when I got to tag along as his “assistant,” setting out pamphlets and books on “important issues,” like racial justice, the Arab-Israeli conflict, and Vietnam.

The next few years were critical years for our country and our family. In 1963, Martin Luther King wrote his “Letter From Birmingham Jail,”<sup>31</sup> and days later, the Birmingham Children’s Crusade began.<sup>32</sup> Teens and children, some as young as six years old, confronted attack dogs and water

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2008), <http://www.npr.org/templates/story/story.php?storyId=18615556>.

<sup>28</sup> PBS American Experience, *Freedom Riders: Threatened, Attacked, Jailed*, at <http://www.pbs.org/wgbh/americanexperience/freedomriders/> (last visited Sept. 16, 2015).

<sup>29</sup> Debbie Elliot, *Integrating Ole Miss: A Transformative, Deadly Riot*, NPR (Oct. 1, 2012), at <http://www.npr.org/2012/10/01/161573289/integrating-ole-miss-a-transformative-deadly-riot> (“It took some 30,000 U.S. troops, federal marshals and national guardsmen to get James Meredith to class after a violent campus uprising. Two people were killed and more than 300 injured. Some historians say the integration of Ole Miss was the last battle of the Civil War. It was a high-stakes showdown between President Kennedy and Mississippi Gov. Ross Barnett. ‘I’m a Mississippi segregationist and I am proud of it,’ the governor declared”).

<sup>30</sup> Ralph Ginzburg, *ONE HUNDRED YEARS OF LYNCHINGS* (1962).

<sup>31</sup> Dr. Martin Luther King, Jr., *Letter From Birmingham Jail* (Apr. 16, 1963), at [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf).

<sup>32</sup> See, Veterans of the Civil Rights Movement, *Images of the Children’s Crusade: Birmingham (1963)* (last visited Sept. 16, 2015) <http://www.crmvet.org/images/imgbham.htm>.

hoses to march against segregation. More than 2,000 people were arrested. Martin Luther King said that he had never seen anything like it, and that it was the turning point of the civil rights movement.<sup>33</sup> Along with the world, we watched the brave students on TV and cheered for their courage.

That year, my sister Bonnie won an NAACP essay contest, saying, “A great sore, caused by slavery, was opened . . . and is still healing.” She used her prize money to represent our family at the March on Washington in August. That year, our family was named the “Iowa NAACP Family of the Year.”

On September 15th, someone rushed over with the horrifying news that four girls had been burned to death in a church bombing in Birmingham.<sup>34</sup> A service was held in Des Moines, and Bill Eckhardt, the father of our friend Chris, wore a black armband.

In the summer of 1964, the Student Nonviolent Coordinating Committee (SNCC) organized college students for “Mississippi Freedom Summer,” a daring voter registration and education project to challenge the status quo of terror and murder against Blacks who dared to try to register to vote.<sup>35</sup> Immediately, three youths disappeared: Schwerner, Goodman, and Chaney. An urgent call went out for clergy and others to come to Mississippi. On August 4th, the mangled bodies were found. The same day, in the Gulf of Tonkin, a U.S. Navy ship claimed to be attacked.

My parents farmed out all six of us kids, and headed to Mississippi. They returned on my twelfth birthday from Ruleville, Mississippi with stories of incredible bravery, like that of Fannie Lou Hamer, a sharecropper who cooked dinner for my parents after having returned from leading the Freedom Democratic Party at the Democratic Convention. She had been beaten and jailed, and lost her job and home when she tried to register to vote. An older woman hosted my parents, even as her house and dog were being shot at while they were there. We listened, awed by such courage. I knew that I, for one, didn’t have it. I was shy, and had learned to play croquet that summer. I preferred roller skating and slumber parties.

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<sup>33</sup> *Id.*

<sup>34</sup> Sharell M. Burt, *The History of the 1963 16th Street Baptist Church Bombing*, N.Y. DAILY NEWS (Sept. 15, 2015), <http://www.nydailynews.com/news/national/10-key-facts-16th-street-baptist-church-bombings-article-1.2361565>.

<sup>35</sup> Terry Gross: Fresh Air, *50 Years Ago, Students Fought For Black Rights During “Freedom Summer,”* NPR (June 23, 2014), <http://www.npr.org/2014/06/23/324879867/50-years-ago-students-fought-for-black-rights-during-freedom-summer>.

That fall, Black high school students in Mississippi were suspended for wearing buttons to school saying: “One Man, One Vote. SNCC.”<sup>36</sup> The suspensions were challenged in court, where the Fifth Circuit Court of Appeals ruled in favor of one of the student groups, saying that there was no disruption of school.<sup>37</sup> The other student group lost, with the court ruling that they had disrupted school.<sup>38</sup> At the time, I knew nothing of these cases, or that they would become the precedent for the “substantial disruption” standard of the *Tinker* ruling that is still so significant in student speech cases today.<sup>39</sup>

In 1965, Jimmie Lee Jackson was killed in Marion, Alabama for attempting to register to vote.<sup>40</sup> His death sparked the Selma marches and the eventual signing of the Voting Rights Act by President Johnson later in the year.<sup>41</sup> Malcolm X was killed,<sup>42</sup> and there were riots in Watts.<sup>43</sup> I took piano lessons and watched it all on the nightly news from the safety of our living room TV.

By Christmastime, the TV news was more and more about Vietnam--the burning huts, the body bags and caskets, and the body counts. About 1,000 U.S. soldiers had been killed by November, when my mother and brother, John, attended a march against the war in Washington D.C., along with Chris Eckhardt and his mother. Returning to Iowa, they talked about supporting Senator Robert Kennedy’s call for a Christmas truce.<sup>44</sup> They heard of the idea of wearing black armbands, possibly from a Quaker named Herbert Hoover.<sup>45</sup> Students in the Unitarian youth group became

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<sup>36</sup> Kristi L. Bowman, *The Civil Rights Roots of Tinker’s Disruption Tests*, 58 AM. U. L. REV. 1129, 1135 (2009).

<sup>37</sup> *Id.* at 1134. See also, *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

<sup>38</sup> *Id.* at 1137. See also, *Blackwell v. Issaquena*, 363 F.2d 749 (5th Cir. 1966).

<sup>39</sup> *Id.*

<sup>40</sup> David J. Krajicek, *Long-awaited Justice in Cop’s Killing of Jimmie Lee Jackson, Whose Death Helped Spark Alabama Civil Rights Marches*, N.Y. DAILY NEWS (Feb. 1, 2015), <http://www.nydailynews.com/news/crime/long-awaited-justice-killing-jimmie-lee-jackson-article-1.2099217>.

<sup>41</sup> Voting Rights Act, P.L. 89-110 (1965).

<sup>42</sup> *Malcolm X is Assassinated in Manhattan’s Audubon Ballroom in 1965*, N.Y. DAILY NEWS (Feb. 17, 2015), <http://www.nydailynews.com/new-york/nyc-crime/malcolm-x-assassinated-1965-article-1.2111105>.

<sup>43</sup> David Boroff, *Traffic Stop Ignited Watts Riots in Los Angeles Neighborhood 50 years Ago*, N.Y. DAILY NEWS (Aug. 11, 2015), <http://www.nydailynews.com/news/national/traffic-stop-ignited-watts-riots-50-years-article-1.2321722>.

<sup>44</sup> *Supra* note 14.

<sup>45</sup> This Herbert Hoover shared the name of his famous distant cousin, President Herbert Hoover.

interested, and one of them, Ross Peterson, wrote an article for the Roosevelt High School newspaper. Gruesome news of the war on TV most nights made all of us kids start to think about wearing armbands, too.

On December 14, 1965 our local school administrators announced a ban on black armbands. Now, I was torn about what to do. I didn't want to jeopardize my status as a "top student," but I remembered the popular saying "Eichmann only followed orders" referring to the Nazis. I thought of my parents, the Birmingham children, and the people in Ruleville. Finally, I decided I would take a stand and wear the armband, along with Paul and Hope, our family friend Chris Eckhardt and several other students. John decided to try and reason with the administrators first.

At school, almost no one commented on my armband except some boys who teased me. But they always teased me. When I got to math class, though, my teacher, Mr. Moberly, was waiting with a pink slip directing me to the office. There, Mrs. Tarmann, the Girls' Adviser, asked me to take off the armband. I had been so nervous all day, but now, I looked at Mrs. Tarmann and took off my armband. I was suspended anyway, and walked home, full of apprehension about my controversial action.

At Roosevelt, Chris Eckhardt was suspended after threats from students, a teacher, and an administrator, who asked if he wanted a busted nose. To my surprise, that evening the local media took an interest in our story. When the School Board President said that it was a trivial matter, John decided to wear an armband the next day, and was suspended as well. Five students were suspended, but not my siblings, Paul or Hope, whose elementary teacher instead taught a lesson on the Bill of Rights.

We received considerable support in Des Moines, but we were despised by others who accused us of being unpatriotic or Communists. Red paint was thrown at our house, and postcards with hammers and sickles came, saying: "Go back to China or Russia." A radio host threatened my dad on the air. On Christmas Eve . . . a bomb threat. A woman on the phone said she was going to kill me.

We thought this was nothing compared to what Blacks in the south were facing, or the Vietnamese and soldiers. Life went on. In 1967, the Lovings won their case for interracial marriage.<sup>46</sup> The same year, Martin Luther King made a speech against the war, and was killed soon after, in 1968. Racial tensions escalated, as well as anti-war sentiment.

In November of 1968, when I was in 11th grade, we moved to St. Louis. Soon, we traveled to Washington, D.C. for the oral arguments in

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<sup>46</sup> Loving v. Virginia, 388 U.S. 1 (1967).

our case, now before the U.S. Supreme Court. Still shy, and now preoccupied with adjusting to a new school, I barely heard the arguments.

Several months later, I was surprised to hear that we had won by 7-2.<sup>47</sup> We celebrated with ice cream and soda pop at home, but nothing was mentioned in my classes. In 1970, I graduated high school, oblivious to the far-reaching significance of our victory.

I grew up and became a nurse. Un-wrapping gauze dressings on a two-year-old who was burned in a house fire, I became angry at the slum landlord who ignored the building codes. I became frustrated by budget cuts in education and child health; babies born prematurely without prenatal care; a ten-year-old boy slammed against a wall who would never walk or talk again; a teenager pregnant by her father; the three-year-old who had gotten into dad's cocaine; chest tubes placed in young lungs after gunshots or stabbings; a boy blinded by violence. Some days, it seemed like just one senseless tragedy after another of youth paying the price for policies they had no say in.

My experiences as a nurse, along with my upbringing, led me to be a youth advocate. Recently, I left clinical nursing so that I can spend even more time speaking with students as part of my "Tinker Tour." Traveling the country, I share my experiences and those of other youths--now and through history--encouraging students to speak up, take action, and change history. My favorite part? Hearing the many ways that they already are.

In Washington D.C., I meet middle school students attending a Senate hearing on D.C. statehood. Their buttons said "51st state," and "we need a voice." A sixth grader from California told me about his "passion for politics," and why it's wrong for his teacher not to let him disagree with gay marriage. Hopi High School students in Arizona invited me to speak on their weekly radio show. In Ohio, excited students gathered in the high school auditorium, excited about their campaign for a Gay Straight Alliance, and a gender-neutral bathroom. New York students sent a text about a protest against school budget cuts: "Miss Tinker, we have reporters, and some teachers are joining us!"

There are many others, and I tell them all the same thing: When you join with others to stand up for justice and a more democratic, peaceful world, it is a good, interesting, and meaningful life. It certainly has been for me.

With this special issue of the *Education Law & Policy Review*, you can learn about other students and their adult allies who are bringing student voices to life all over the country, and about the evolving laws and policies

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<sup>47</sup> *Tinker v. Des Moines*, 393 U.S. 503 (1969).

governing free speech in educational institutions. This issue features articles by some of the nation's leading experts on free speech in public educational institutions. John Dayton's *A Legal Primer on Free Speech in Public Educational Institutions*, provides a comprehensive analysis of the laws governing free speech in public educational institutions, useful for both scholarship and instruction. Frank D. LoMonte's *Students Do Not Shed Their Constitutional Rights at the Login Screen: Slamming the Schoolhouse Gate on School Control over Social Media Speech*, addresses constitutional limits on administrative regulation of student expression through social media. Scott R. Bauries' *A Benign Prior Restraint Rule for Public School Classroom Speech*, presents a proposal for advancing legal doctrine concerning student and teacher speech in the classroom. Sonja R. West's *Student Press Exceptionalism*, explores how the Court's under-protection of student journalists violates many of the recognized core principles of freedom of speech and of the press. And Mike Hiestand's *A Call to Armbands 2.0: The Tinker Tour*, chronicles the process of turning an exciting idea into a reality, presenting a first person account of the events leading up to and thru the Tinker Tour, and explaining the roles that young people and educators must play in using free speech and the new social media to advance freedom and social progress globally. I hope that you will join us in making our world a better place for everyone by learning more about the power of free speech and adding your voice in support of free speech and human rights.

## **A Legal Primer on Free Speech in Public Educational Institutions: Protecting the Right that Protects all other Rights**

John Dayton, J.D., Ed. D.\*

American liberties, and the prosperity and quality of life possible in a free democracy, continue to attract millions of immigrants to the U.S., and to inspire democratic reforms world-wide.<sup>1</sup> Rights of freedom of expression enshrined in the First Amendment by our nation's Founders have served to firmly establish and preserve the foundations of our national liberty and democracy.<sup>2</sup> As wise students of history, our Founders knew that to realize essential human rights—the rights longed for and fought for by our ancestors—these rights must be permanently and indisputably established in law. They fortified rights of free speech in the First Amendment as the essential means of protecting all others rights, and thereby established freedom of individual thought and expression as the supreme law of the land in the U.S.<sup>3</sup>

They also understood, however, that mere words on paper, even in a Constitution, were not in themselves sufficient protections for these essential rights. These rights must be ceaselessly defended and advanced in our Congress, courts, and communities. They understood that their unalienable rights, and those of future generations, would always be in danger of usurpation through the self-serving schemes of those who seek to co-opt the power of government to silence, dominate, and exploit others. And even more ominously, in danger of atrophy over time from the ignorance and apathy of the People themselves if the People were not properly educated in the lessons of history and the perils of putting their rights and powers in the hands of others without adequate public oversight. Our Founders understood that there must always be effective checks and balances to prevent abuses of power, and that these must be

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<sup>1</sup> See, Eric Foner, *THE STORY OF AMERICAN FREEDOM* (1999); Gene Sharp, *FROM DICTATORSHIP TO DEMOCRACY* (2012).

<sup>2</sup> U.S. CONST. amend. I (1791). See also, Daniel Farber, *THE FIRST AMENDMENT* (2010).

<sup>3</sup> U.S. CONST. art. VI (1787).

vigorously enforced by the strong and persistent voices of enlightened citizens demanding accountability and justice.<sup>4</sup>

As Thomas Jefferson declared: “If a nation expects to be ignorant and free . . . it expects what never was and never will be.”<sup>5</sup> Jefferson wisely recognized education as the *sine qua non* of a truly viable democracy.<sup>6</sup> Genuine democracy is only possible when citizens are adequately educated and empowered in the essential skills of self-governance, including the effective exercise of free speech. Citizens in a democracy must be capable of effectively overseeing their own government and protecting their legitimate rights and interests, or they will in fact be governed and exploited by others under an empty facade of democracy. In a genuine democracy citizens must be able to effectively exercise their rights of free speech to reveal truth, expose corruption, and to demand a redress of grievances when necessary. To preserve and advance democracy and civil liberties citizens must learn the lessons of history; to distinguish between truth and deception; to effectively communicate with other citizens; and to work collectively for needed changes in their common government.<sup>7</sup>

In a democracy, public educational institutions must teach and model the lessons of liberty. Students must understand that freedom of speech is the essential protector of all other rights and the indispensable tool for finding and revealing truth.<sup>8</sup> But they must also understand that freedom of speech, like all other freedoms, is never free. Those who want the benefits of free speech must be prepared to pay the price, including acceptance of the inevitable discomforts, controversies, and conflicts that arise from the vibrant exercise of free speech in a diverse society. As the renowned orator and author Frederick Douglass said: “Those who profess to favor freedom, and yet depreciate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightning.”<sup>9</sup> A nation of free citizens must learn the lessons of freedom of

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<sup>4</sup> See, John Dayton, *EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE* 5 (2012).

<sup>5</sup> Thomas Jefferson, *Letter to William Charles Jarvis*, Sept. 28, 1820, in *THE WRITINGS OF THOMAS JEFFERSON* 160, 161 (Paul L. Ford, ed. 1899), *cited in*, Michael J. Glennon, *National Security and Double Government*, 5 *HARV. NAT’L SEC. J.* 1, 113 (2014).

<sup>6</sup> John Dayton & Carl Glickman, *American Constitutional Democracy*, 69 *PEABODY J. OF EDUC.* 62 (1994).

<sup>7</sup> See, Dayton, *supra* note 4, at 137.

<sup>8</sup> *Id.*

<sup>9</sup> Frederick Douglass, *The Significance of Emancipation in the West Indies: An Address Delivered in Canandaigua, New York*, on 3 August 1857, in *THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, 1855-1863*, at 183, 204 (John W. Blassingame ed., 1985), *cited in*, Sheryll D. Cashin, *Shall We Overcome?*

expression and learn to integrate the necessary elements of tolerance, civility, and civic courage into their hearts and minds from an early age. The common schools are the essential forums for learning these lessons.<sup>10</sup>

### **Legal and Intellectual Foundations for Free Speech in Educational Institutions**

Educational institutions are the nurseries of the democracy, serving to open and inform young minds and empower citizens in effective self-expression.<sup>11</sup> But if academic institutions are to provide citizens with the intellectual foundations necessary to support a free and enduring democracy, students' free speech rights must be respected, protected, and encouraged throughout the educational process so students may mature into citizens well prepared to actively discuss ideas; ask essential questions; speak out on important public matters; vote wisely; and participate fully in a free and democratic society.<sup>12</sup>

Education, free speech, civility, and civic courage are essential elements in sustaining democracy. Totalitarian regimes are only possible when the People are kept ignorant, silenced, divided, and fearful of speaking up and making their own decisions.<sup>13</sup> Students spend much of their formative years in schools where they can either learn the skills of democratic citizens or learn to become passive subordinates vulnerable to oppression and totalitarian control.<sup>14</sup> In *Tinker v. Des Moines Independent School District*,<sup>15</sup> the Court firmly declared: "In our system, state-operated schools may not be enclaves of totalitarianism."<sup>16</sup>

A free society is not, however, a chaotic society. Democracy is incompatible with both chaos and oppression. Democratic lessons are best learned in an environment that is both free and orderly; both candid and

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*Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 n.83 (2005).

<sup>10</sup> See, Dayton, *supra* note 4, at 137.

<sup>11</sup> *Id.* See also, *Letter from Thomas Jefferson to George Wythe* (Aug. 13, 1786), in 5 THE WRITINGS OF THOMAS JEFFERSON, eds. Andrew A. Lipscomb & Albert Ellery Bergh, 396-407 (Washington, 1903), *cited in*, Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 196 ("I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness . . . establish and improve the law for educating the common people").

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 393 U.S. 503 (1969).

<sup>16</sup> *Id.* at 511.

civil. Maintaining proper order and discipline in educational institutions is a paramount concern and an essential duty for school officials. The Court has consistently recognized the authority and obligation of school officials to protect order and discipline in schools, while respecting the legitimate free speech rights of all persons.<sup>17</sup>

But within the context of necessary order and discipline, the First Amendment protects free speech rights of both students and personnel in public institutions. Students are learning to become citizens and leaders in a democracy, and institutional personnel are in a unique position to observe institutional operations and inform the public of legitimate matters of public concern. For these reasons, the Court has vigorously protected free speech rights of students and teachers, and declared 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.”<sup>18</sup>

As the necessary protector of all other rights, freedom of speech is of universal human importance. The United Nations Universal Declaration of Human Rights states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>19</sup> To protect rights of free speech in the U.S. the First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>20</sup> These protections were made applicable to state and local governments through the Fourteenth Amendment to the U.S. Constitution.<sup>21</sup>

At the core of the First Amendment’s free speech protections are strong safeguards for individual political or religious speech.<sup>22</sup> Political or religious speech is most vigorously protected because these types of speech have historically been the primary targets of government censorship. Government officials have always been tempted to use their official powers to silence any criticisms of them personally, to stifle criticisms of their government’s policies and actions, and to generally suppress the communication of any ideas or information that may threaten

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<sup>17</sup> *Id.* at 507.

<sup>18</sup> *Id.* at 506.

<sup>19</sup> U.N. CHARTER art. 19.

<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>22</sup> John Dayton, HIGHER EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 160 (2015).

the status quo supporting the current political or religious regime. Political or religious speech is protected regardless of whether the speaker can prove the expressed ideas are true.<sup>23</sup> All speakers have the right to express their beliefs, and it is up to listeners, not government officials, to decide what is true.

Historically, however, government censorship was most zealous in those cases in which the criticisms of the government were true, or religious ideas were unorthodox but potentially popular. False claims and unpopular ideas are easily disproven and defeated. But an ugly truth about those in power, or a new and powerful religious idea, provides a potent threat to those privileged by the current status quo, and therefore provokes the strongest censorship efforts from those whose power is threatened.<sup>24</sup>

The First Amendment provides broad protections for free speech. Free speech rights cannot be absolute, however, when the free speech of one person threatens the rights or safety of others. As Justice Holmes said: “The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.”<sup>25</sup> Within an evolving hierarchy of First Amendment protections the Court generally prohibits content-based censorship, with political and religious speech receiving the greatest protections, commercial speech receiving less rigorous protection, and obscenity falling outside of the scope of constitutional protection.<sup>26</sup>

The Court recognizes freedom of speech as a fundamental right under the U.S. Constitution. Government officials may only limit fundamental rights, including constitutionally protected speech, by establishing that limitations are necessary to a compelling interest and narrowly tailored to achieving that interest. The Court has also recognized, however, that government officials may apply reasonable time, place, and manner regulations to speech where these regulations are content-neutral; serve an important public interest; and leave open adequate alternative routes of communication.<sup>27</sup>

Further, the Court has recognized the necessity of different standards for different mediums of communication. For example, the Court has allowed greater restrictions on general broadcast communications than on print media. The Court has also recognized different protections in different contexts, vigorously protecting free speech in traditional open

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<sup>23</sup> *Id.* at 161 (“untrue statements in the form of defamation are not protected speech”).

<sup>24</sup> *Id.*

<sup>25</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>26</sup> *Dayton*, *supra* note 22, at 161.

<sup>27</sup> *Id.*

public forums such as public streets and parks, and allowing stronger regulations in forums dedicated to limited purposes, such as public business meetings, when these restrictions are warranted under the circumstances and are not a mere pretext for limiting protected speech.<sup>28</sup>

Public forums range from open forums such as public parks and streets, to limited open forums including public educational institutions, and closed forums such as meetings on national security or other matters legitimately requiring exclusion of direct public participation. In some circumstances reasonable time, place, and manner restrictions on speech are necessary to preserve the public forum for its intended purposes. These restrictions do not violate the First Amendment when they serve important public interests; do not discriminate based on the political or religious viewpoint of the speaker; and leave open adequate alternative routes for free speech.<sup>29</sup>

Freedom of speech is protected not only for the benefit of individuals, but also to assure the free flow of information that leads to the political, intellectual, and cultural advancement of the society through the free market of ideas. Innovative and productive ideas flourish in a free environment where the only limits these ideas are subjected to are the tests of public debate and the reason of an educated and free people. Similarly, ideas that are potentially dangerous to the community are also best refuted in open debate.<sup>30</sup>

American Founders believed in a free market of ideas, with individuals free to accept those ideas that they believed were best, and self-interested government officials prevented from interfering with the operation of this free process. Open public debate and the reasoning power of an educated and free people are the best guarantees that good ideas will prevail, and also the best protections against ideas that are flawed or threats to the common good.<sup>31</sup> As Thomas Jefferson declared after prevailing in one of the nation's most bitter political battles "if there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."<sup>32</sup>

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<sup>28</sup> *Id.* at 161-162.

<sup>29</sup> *Id.* at 162.

<sup>30</sup> *Id.* See also, *Abrams v. U.S.* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

<sup>31</sup> Dayton, *supra* note 22, at 162.

<sup>32</sup> Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), <http://www.inaugural.senate.gov/swearing-in/address/address-by-thomas-jefferson-1801>.

A public educational institution is not, however, a public street or a public park. From the public school through the public university, sufficient order is necessary for effective instruction and other educational activities. School officials must maintain necessary order in the classroom and on the campus to achieve their essential educational missions and to protect the safety and well-being of all persons on the campus. But public educational institutions are not military units in which free speech exists only in theory, absolute conformity is required, and subordinates are expected to follow all orders immediately and without question. In *Tinker* the Court addressed the scope of students' free speech rights in public educational institutions, establishing the legal foundation for student speech.<sup>33</sup>

### Student Speech in Public K-12 Schools

Disputes over free speech have frequently involved public K-12 schools, with the Court addressing the proper balance between individuals' rights of free speech and legitimate institutional needs. In the context of a dispute over the rights of students to express their opposition to government activities while in public schools, the Court famously stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>34</sup> The Court in *Tinker v. Des Moines Independent School District* declared: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."<sup>35</sup>

Although recognizing a constitutional right to speech by students, the Court has also emphasized the importance of teaching children civility and tolerance. The Court stated in *Bethel School District v. Fraser* that public schools "must inculcate the habits and manners of civility" and that this must "include tolerance of divergent political and religious views, even when the views expressed may be unpopular."<sup>36</sup> While recognizing students' rights to freedom of speech, the Court has emphasized the

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<sup>33</sup> Dayton, *supra* note 22, at 162.

<sup>34</sup> *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969).

<sup>35</sup> *Id.* at 511.

<sup>36</sup> 478 U.S. 675, 680–681 (1986). *See also* *United States v. Schwimmer*, 279 U.S. 644, 655 (1928) (Holmes, J., dissenting) (the Constitution embodies "the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate").

accompanying responsibility of exercising civility in expressing their opinions. The Court noted: “Indeed the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others . . . The inculcation of these values is truly the ‘work of the schools.’”<sup>37</sup> Courts have recognized that divergent views are tolerated in a democratic society, and that civil discourse is the appropriate way to express individual views and opposition to the views of others.<sup>38</sup>

The Court has also distinguished between individual student speech, as in *Tinker v. Des Moines*,<sup>39</sup> and student speech in public school sponsored and controlled forums, as in *Bethel v. Fraser*,<sup>40</sup> and *Hazelwood v. Kuhlmeier*.<sup>41</sup> In *Hazelwood* the Court held “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>42</sup> Further, the Court suggested that student speech in public school sponsored forums can be distinguished from individual student speech because school sponsored speech involves “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>43</sup>

Viewed together, the Court’s cases indicate that student speech in public schools generally falls into two categories: 1) Student speech involving individual student expression, as in *Tinker v. Des Moines*;<sup>44</sup> and 2) Student speech in public school sponsored forums, as in *Bethel v. Fraser*,<sup>45</sup> and *Hazelwood v. Kuhlmeier*.<sup>46</sup> In *Tinker* the Court declared that

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<sup>37</sup> *Bethel v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>38</sup> *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976) (“I am firmly convinced that a course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree. Perhaps that carries with it a second lesson: that those who enjoy the blessings of a free society must occasionally bear the burden of listening to others with whom they disagree, even to the point of outrage”).

<sup>39</sup> 393 U.S. 503 (1969).

<sup>40</sup> 478 U.S. 675 (1986).

<sup>41</sup> 484 U.S. 260 (1988).

<sup>42</sup> *Id.*, at 273.

<sup>43</sup> *Id.* at 271. See also, Anne Proffitt Dupre, *The Story of Hazelwood School District v. Kuhlmeier: Student Press and the School Censor*, 221–257 in *EDUCATION LAW STORIES* (Michael A. Olivas & Ronna Greff Schneider, eds.) (2008).

<sup>44</sup> 393 U.S. 503 (1969).

<sup>45</sup> 478 U.S. 675 (1986).

<sup>46</sup> 484 U.S. 260 (1988).

to lawfully limit individual student speech, school officials must establish that the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>47</sup> Although school officials may apply reasonable time, place, and manner restrictions to student expressive activities, if they cannot establish that the speech “materially and substantially” interferes with “appropriate discipline in the operation of the school” the speech generally cannot be prohibited or punished consistent with the First Amendment.<sup>48</sup>

Concerning student speech in public school sponsored forums, such as school convocations, performances, athletic events, school newspapers, and other expressive activities that students, parents, and members of the public might reasonably perceive as bearing the “imprimatur of the school”<sup>49</sup> school officials generally have much broader discretion to limit student speech in a school sponsored forum. Where the forum for expression is sponsored by the school or reasonably perceived as bearing the imprimatur of the school, as in *Fraser*,<sup>50</sup> and *Hazelwood*,<sup>51</sup> student expression in a school sponsored forum can be limited based on establishing a legitimate educational rationale for limiting the speech.<sup>52</sup>

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<sup>47</sup> 393 U.S. 503, 509 (1969) (“In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly 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”).

<sup>48</sup> *Id.*

<sup>49</sup> 484 U.S. 260, 271 (1988).

<sup>50</sup> 478 U.S. 675, 685 (1986) (“We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students”).

<sup>51</sup> 484 U.S. 260, 273 (1988) (“we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

<sup>52</sup> *Id.*

## Student Speech in Public Higher Education Institutions

The factual context for the Court's 1969 decision in *Tinker* involved children in K-12 public schools.<sup>53</sup> But in 1972 in *Healy v. James*,<sup>54</sup> the Court made it clear that free speech rights recognized in *Tinker* applied to public university campuses with even greater force:

At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied "in light of the special characteristics of the . . . environment" in the particular case. And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479 (1960). The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.<sup>55</sup>

There is no greater free marketplace of ideas than a university campus.<sup>56</sup> Because free speech rights are strongly protected for children in K-12 public schools, *a fortiori*, these rights must be even more rigorously protected for adults in public institutions of higher education at

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<sup>53</sup> 393 U.S. 503 (1969).

<sup>54</sup> 408 U.S. 169 (1972).

<sup>55</sup> *Id.* at 180-181.

<sup>56</sup> *Id.* ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom").

the epicenter of the free marketplace of ideas and academic freedom.<sup>57</sup> Therefore it could be logically deduced that the Court's decision in *Tinker*, protecting rights of free speech in public K-12 schools, also governed public higher education institutions, but with even greater strength, as the Court affirmed in its decision in *Healy*.<sup>58</sup>

This same logic does not, however, yield the result that the Court's decisions in *Bethel v. Fraser*<sup>59</sup> and *Hazelwood v. Kuhlmeier*<sup>60</sup> automatically governed public higher education institutions.<sup>61</sup> The Court's decisions in *Fraser* and *Hazelwood* were clearly directed at K-12 public schools with minor children in attendance.<sup>62</sup> Nonetheless, lower courts continue to apply the legal principles articulated in *Fraser/Hazelwood* to higher education settings as well, in cases involving both students and faculty challenging limits on speech in school sponsored forums.<sup>63</sup> Based on *Fraser/Hazelwood* these cases recognize university

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 478 U.S. 675 (1986).

<sup>60</sup> 484 U.S. 260 (1988).

<sup>61</sup> *See, e.g., Bethel v. Fraser*, 478 U.S. 675, 682 (1986) (“The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. *See Cohen v. California*, 403 U.S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.*, 469 U.S. 325, 340–342 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, “the First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket”).

<sup>62</sup> *See, Bethel v. Fraser*, 478 U.S. 675, 683-684 (1986) (“The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality . . . We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (“We have nonetheless recognized that the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings,’”), *citing Bethel v. Fraser* 478 U.S. 675, 682 (1986).

<sup>63</sup> *See, e.g., Martin v. Parrish*, 805 F.2d 583, 585-586 (5<sup>th</sup> Cir. 1986) (“To the extent that *Martin*’s profanity was considered by the college administration to inhibit his effectiveness as a teacher, it need not be tolerated by the college any more than *Fraser*’s indecent speech to the *Bethel* school assembly”). *But see, Hosty v. Carter*, 412 F.3d 731, 739 (7<sup>th</sup> Cir. 2005) (Evans, J. dissenting) (“In concluding that *Hazelwood* extends to a university setting, the majority applies limitations on speech that the Supreme Court created for use in the narrow circumstances of elementary and secondary education. Because these restrictions on free speech rights have no place in the world of college and graduate school, I respectfully dissent”). *See also, Karyl Roberts Martin, Demoted to*

authority to regulate school sponsored speech much more broadly than individual speech, and only require school officials to establish a legitimate educational rationale for limitations on speech in school sponsored forums.<sup>64</sup>

Because members of the university community are not minor children, however, university officials must recognize some greater license for adult students and faculty concerning, for example, indecent speech, *i.e.*, communication of which is prohibited concerning minors but constitutionally protected for adults, especially when the indecent expression is not legitimately subject to reasonable time, place, and manner restrictions and genuinely involves the communication of protected speech for adults.<sup>65</sup>

### Applying the *Tinker* Test in Practice

According to the Court in *Tinker*, in cases involving student political speech school officials may only limit this speech if they can establish it would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>66</sup> And “where there is no finding and no showing that engaging in the forbidden conduct”<sup>67</sup> meets this standard “the prohibition cannot be sustained.”<sup>68</sup> This required threshold of showing a “material and substantial” interference is the Court’s “*Tinker* test” used to distinguish between student speech that is protected under the First Amendment and student speech that is subject to prohibition and punishment by school officials in public educational institutions.<sup>69</sup>

In articulating this standard, the Court provided a benchmark for school officials in deciding whether the lawful response to the student speech in question was simply to allow the speech or to attempt to intervene to avoid

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*High School: Are College Students' Free Speech Rights the Same as those of High School Students?*, 45 B.C. L. REV. 173 (2003); Virginia J. Nimick, *Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood*, 14 J.L. & POL'Y 941 (2006).

<sup>64</sup> Dayton, *supra* note 22, at 180.

<sup>65</sup> See, e.g., Jessica Golby, *The Case Against Extending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263 (2006); but see, Christopher N. LaVigne, *Hazelwood v. Kuhlmeier and the University: Why the High School Standard is Here to Stay*, 35 FORDHAM URB. L.J. 1191 (2008).

<sup>66</sup> 393 U.S. 503, 509 (1969).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See, Dayton, *supra* note 4, at 144.

a “material and substantial” interference with school discipline and operations. Intervention by school officials is lawful when school officials can meet the standard established in *Tinker*.<sup>70</sup> But where exactly is the line between protected and unprotected student speech and what must school officials do to comply with the *Tinker* test?

To answer this question, envision a continuum with protected speech at one end, and prohibited speech at the other end. At the protected speech end of the continuum is speech that is clearly protected by the First Amendment, including legitimate political and religious speech that causes no interference with necessary order or the operations of the school. At the other end of the continuum is speech that is clearly unprotected including obscenity, slander, terroristic threats, and other obviously unprotected student speech that directly threatens safety, discipline, or school operations. It is easy for school officials to make decisions concerning student speech that clearly falls toward either end of this continuum. It is the cases closer to the middle of this continuum that present the greatest challenges to school officials in deciding whether to allow the speech or to intervene.<sup>71</sup>

The *Tinker* standard is the Court’s attempt to provide guidance for school officials and judges in making decisions in these closer cases nearer the middle of this continuum. But while the *Tinker* standard is a useful general test against which to measure whether the speech is protected, the *Tinker* standard is not a “bright line” test.<sup>72</sup> Bright line tests establish a definite, clear line between protected and prohibited conduct. A speed limit sign, for example, provides a bright line test where going over 55 mph is prohibited while 55 mph and under is lawful. Instead of providing a bright line test, the *Tinker* test acts as a standard in the continuum that must be interpreted in the unique context in which the speech occurs. This makes the *Tinker* test more like a speed limit sign that requires a speed that is “reasonable and prudent under the conditions” rather than providing a definite and absolute limit such as 55 mph.<sup>73</sup>

For administrative convenience it might seem preferable to have a bright line test for what speech is permissible and prohibited, for example, a definite list of permissible and prohibited expressive conduct. The problem of course, is that in human communications context and tone are critically important. The exact same words and conduct may be acceptable in some circumstances and clearly unacceptable in others.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 144-145.

<sup>72</sup> *Id.* at 145.

<sup>73</sup> *Id.*

Further, the human mind is far too creative to be corralled within the bounds of such a finite list, and students would quickly find creative ways around the listed prohibitions. Bright line tests are very helpful where simple measures are possible, such as measuring the speed of a vehicle, applying rules based on the property boundaries of the campus, etc. But a bright line test is unworkable in governing more complex human interactions including student speech.<sup>74</sup>

A bright line test for speech would be too simplistic and inflexible to govern the complexities of human interactions. And such a rigid test would be likely to produce results inconsistent with justice and common sense, punishing some speech that should not be punished, and allowing some speech that clearly should not be allowed. Instead, the *Tinker* test requires a common sense consideration of the facts and circumstances in each case to determine whether these facts and circumstances move the speech in question closer to either protected or prohibited speech.<sup>75</sup>

A careful reading of *Tinker* and subsequent cases, however, does provide some useful guidance in applying the *Tinker* test.<sup>76</sup> To justify limiting individual student speech, school officials must show more than a desire to avoid the unpleasantness, discomfort, or minor arguments and disturbances that normally occur with the expression of unpopular views. Further, mere speculation or an abstract, undifferentiated fear of disruption will not suffice.<sup>77</sup> When challenged, school officials must be able to articulate facts and circumstances that would convince a reasonable person that a material and substantial interference was likely.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 393 U.S. 503 (1969).

<sup>77</sup> *Id.* at 508-509 (“in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society”).

<sup>78</sup> *Id.* at 509 (“In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly 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”).

The *Tinker* test does not require school officials to prove there was an actual disruption, nor are school officials required to allow the disruption to occur before intervening.<sup>79</sup> In order to justify limiting otherwise protected student speech the *Tinker* test requires school officials to show through evidence of facts and circumstances that they reasonably anticipated a material and substantial interference with appropriate discipline in the operation of the school.<sup>80</sup>

So while the Court noted that the mere “discomfort and unpleasantness that always accompany an unpopular viewpoint”<sup>81</sup> are not sufficiently disruptive to establish a material and substantial interference, evidence of violence associated with such conduct; threats of violence; acts of intimidation; significant property destruction or vandalism; substantial disorder; invasion of the rights of others; or sufficient disruption of the educational process, work, order, or discipline of the school would constitute a material and substantial interference under the *Tinker* test.<sup>82</sup>

In *Healy*<sup>83</sup> the Court also recognized the legitimacy of an institutional requirement, for any group seeking institutional recognition, to agree in advance to comply with reasonable time, place, and manner regulations concerning the exercise of free speech on campus:

Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students’ associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.<sup>84</sup>

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<sup>79</sup> *Id.* at 507.

<sup>80</sup> *Id.* at 509.

<sup>81</sup> *Id.* at 509.

<sup>82</sup> *Id.*

<sup>83</sup> *Healy v. James*, 408 U.S. 169 (1972).

<sup>84</sup> *Id.* at 180-181.

In summary *Tinker*,<sup>85</sup> *Healy*,<sup>86</sup> and subsequent cases teach that the unique context and the totality of the circumstances must be considered in each case. Student behavior that might constitute a material and substantial interference under one set of circumstances may not in another. The *Tinker* test is a useful guide, but it still requires school officials to exercise common sense in dealing with the inevitable and endlessly varied disputes over student speech. The *Tinker* test is both a benchmark for lawfully establishing school authority over student speech, and a check and balance against the potential abuse of that authority.<sup>87</sup>

All U.S. jurisdictions are bound by the U.S. Supreme Court's decisions in *Tinker*, *Healy* and other First Amendment precedents by the Court.<sup>88</sup> In some states, however, state constitutional provisions may provide even greater protections for free speech than those recognized under federal law. The federal constitution creates a legal floor-level for the protection of rights. State constitutions may, however, provide for protections above and beyond those guaranteed under the federal constitution. Where state constitutions provide for broader protections of free speech and other rights, state officials must also comply with the mandates of their state's constitution.<sup>89</sup> Although private institutions are not bound by constitutional mandates, many private educational institutions have adopted institutional charters, bills of rights, and policies protecting rights to freedom of expression in their campus community.<sup>90</sup>

### **The Continuing Evolution of Student Speech Law in Public Educational Institutions**

*Tinker*, *Fraser*, and *Hazelwood* are now well-established law. The fourth and relatively more recent in this line of student speech cases is *Morse v. Frederick*.<sup>91</sup> In *Morse* the U.S. Supreme Court issued its first major student speech case in nearly 20 years. *Morse* involved a dispute over student speech at a public school sanctioned and supervised event at

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<sup>85</sup> 393 U.S. 503 (1969).

<sup>86</sup> 408 U.S. 169 (1972).

<sup>87</sup> John Dayton, HIGHER EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 170 (2015).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 551 U.S. 393 (2007). See also, John Dayton & Anne Proffitt Dupre, *Morse Code: How School Speech Takes a ("Bong") Hit*, 233 EDUC. L. REP. 503 (2008).

which Frederick, a student at a public high school, unexpectedly unfurled a 14 foot long banner stating “BONG HiTS 4 JESUS.”<sup>92</sup>

*Morse* resulted in a 6-3 decision in favor of the school principal, Morse. But beyond the Court majority’s agreement that Morse should prevail, there was considerable divergence in the views of the six Justices ruling in favor of Principal Morse. The case produced a total of five separate opinions. The decision in *Morse* does not appear to be an opinion shedding much new and useful light on the boundaries of free speech in public schools generally, and especially for higher education given the clear focus on the status of students as minors in *Morse*. In their opinions, several justices expressed concerns that ultimately the Court’s opinion in *Morse* provided little useful guidance. Justice Thomas stated: “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don’t--a standard continuously developed through litigation against local schools and their administrators.”<sup>93</sup> Similarly, Justice Breyer declared: “I cannot find much guidance in today’s decision.”<sup>94</sup>

While it may still be too soon to draw definitive conclusions about the long-term impact of *Morse*, some initial patterns emerged in the early cases citing *Morse*, with these cases falling into two general categories: 1) Courts that viewed the U.S. Supreme Court’s decision in *Morse* as very limited; and 2) Courts that interpreted *Morse* as recognizing some broader extension of school authority. Those that viewed the Court’s decision in *Morse* as limited need only point to Justice Thomas’ and Justice Breyer’s opinions in *Morse* for support. Nonetheless, other courts reasoned that the Court’s decision in *Morse* logically opened the door to an expansion of school authority concerning student speech when that speech promoted the dangers of drugs or other dangers to those in the school community more generally. What is certain, however, is that the law governing student speech will continue to evolve, with *Tinker* as its bedrock foundation.<sup>95</sup>

### **Employee Speech in Public Educational Institutions**

As the Court recognized in *Tinker v. Des Moines*,<sup>96</sup> and *Pickering v. Board of Education*,<sup>97</sup> public employees retain their rights as citizens to

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<sup>92</sup> 551 U.S. 393, 397 (2007).

<sup>93</sup> *Id.* at 418 (Thomas, J., concurring).

<sup>94</sup> *Id.* at 428 (Breyer, J., concurring).

<sup>95</sup> 393 U.S. 503 (1969).

<sup>96</sup> *Id.*

<sup>97</sup> 391 U.S. 563 (1968).

freedom of speech. They do not, however, have an unconditional right to serve as public employees.<sup>98</sup> The free speech rights of employees are broadly protected in public educational institutions, but school officials have a duty to maintain proper order and discipline in institutional operations.<sup>99</sup> When necessary to protect legitimate school operations, institutional officials may appropriately discipline, reassign, or dismiss employees who unreasonably disrupt the institutional mission.<sup>100</sup>

Allowing school officials to fire employees for speaking about legitimate public concerns, however, would make a mockery of free speech in public educational institutions. If retaliatory firings for speech were allowed, school personnel would likely become far more hesitant to speak out on important matters of legitimate public concern. When public institutions are operated ineffectively or inefficiently employees have a professional duty to reveal problems so they may be remedied for the common good. Further, if there is corruption or other misconduct in the institution, employees are in the best positions to witness these problems and to disclose any malfeasance to proper authorities and the public. A closed culture of retaliation, fear, and silence is a breeding ground for corruption.<sup>101</sup> The broad protection of free speech is the best means of shining the light of truth into every corner of the institution to assure honesty and accountability. As Justice Brandeis said: “Sunlight is the best disinfectant.”<sup>102</sup>

In *Pickering v. Board of Education*,<sup>103</sup> the Court attempted to strike a proper balance between public educators’ rights to free speech, and the legitimate interests of school officials in effectively and efficiently operating the institution. Concerning the free speech rights of public employees, in *Pickering* the Court ruled that public employees have a First Amendment right to comment on legitimate matters of public concern and “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”<sup>104</sup>

Generally, public employees have the same free speech rights as all other citizens. If public officials wish to sanction speech by public employees, including dismissal or other employment sanctions, public

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<sup>98</sup> Dayton, *supra* note 22, at 198.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Louis D. Brandeis, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (Richard M. Abrams ed., 1914).

<sup>103</sup> 391 U.S. 563 (1968).

<sup>104</sup> *Id.* at 574.

officials must be prepared to show that the speech negatively impacted the employment relationship, and that the speech was unprotected in the context.<sup>105</sup>

The *Pickering* test is used to distinguish between protected and unprotected speech by public employees. The initial question is whether the employee's statement addressed a matter of legitimate public concern in order to receive First Amendment protection as a public employee.<sup>106</sup> True statements on matters of legitimate public concern are generally protected speech by public employees.<sup>107</sup> Courts may, however, consider public supervisors' needs for: 1) Regular close contact and a working relationship of loyalty and trust with the speaker; 2) Appropriate office discipline; and 3) Harmony among co-workers.<sup>108</sup>

Regarding false statements related to matters of legitimate public concern, in *Pickering* the Court drew the constitutional line for protection of false statements as free speech at negligence.<sup>109</sup> The Court determined that proof of culpability greater than mere negligence was generally required before public officials could lawfully sanction false statements by employees on matters of legitimate public concern.<sup>110</sup> False statements made recklessly, knowingly, or purposely by public employees are not protected.<sup>111</sup>

*Pickering* continues to serve as the foundation for the law governing free speech rights of public employees.<sup>112</sup> The Court relied on the principles of *Pickering* to resolve disputes in its subsequent public employee speech cases in *Connick v. Myers*,<sup>113</sup> *Rankin v. McPherson*,<sup>114</sup>

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<sup>105</sup> Dayton, *supra* note 22, at 204-205.

<sup>106</sup> 391 U.S. 563, 574 (1968) ("statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors").

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 569-570.

<sup>109</sup> *Id.* at 574.

<sup>110</sup> *See*, Dayton, *supra* note 22, at 205 (2015) ("To make a false statement 'negligently' means that the speaker merely failed to use ordinary care in determining whether the statement was true. To make a false statement 'recklessly' means that the speaker engaged in reckless disregard for the truth. To make a false statement 'knowingly' means that the speaker knew the statement was false but made it anyway. To make a false statement 'purposely' is to make a statement known to be false for the purpose of inflicting harm").

<sup>111</sup> *Id.*

<sup>112</sup> 319 U.S. 563 (1968).

<sup>113</sup> 461 U.S. 138 (1983).

<sup>114</sup> 483 U.S. 378 (1987).

*Garcetti v. Ceballos*,<sup>115</sup> and *Lane v. Franks*,<sup>116</sup> with each case further developing and clarifying aspects of free speech law concerning public employees.

In *Connick v. Myers* the Court clarified: 1) The legal consequences of failing to establish the matter at issue was speech as a citizen on a legitimate public concern; and 2) What constitutes a matter of public concern.<sup>117</sup> In *Rankin v. McPherson*, the Court addressed the appropriate balance between the interests of the State as an employer and the civil liberties of citizens as employees.<sup>118</sup> In *Garcetti v. Ceballos*, the U.S. Supreme Court recognized a significant limitation to the *Pickering* line of cases, holding that when the public employees' speech is part of their official duties, this speech is not protected under the First Amendment.<sup>119</sup>

In 2014, in *Lane v. Franks*,<sup>120</sup> the U.S. Supreme Court had an opportunity to review the judicial balance of employer-employee interests

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<sup>115</sup> 547 U.S. 410 (2006).

<sup>116</sup> 134 S. Ct. 2369 (2014).

<sup>117</sup> 461 U.S. 138 (1983) (“We hold only that, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Id.* at 147-148. “To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case.” *Id.* at 149).

<sup>118</sup> 483 U.S. 378, 384 (1987) (“On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, ‘the threat of dismissal from public employment is . . . a potent means of inhibiting speech.’ Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech”).

<sup>119</sup> 547 U.S. 410 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Id.* at 421. “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* at 421-422).

<sup>120</sup> 134 S. Ct. 2369 (2014).

the Court articulated in *Garcetti*,<sup>121</sup> in a case involving an Alabama community college.<sup>122</sup> Edward Lane, the Director of a state agency for underprivileged youth discovered that a state representative, Suzanne Schmitz, was being paid to work for the program but not showing up for work. After Schmitz refused to report to work as requested by Lane, Lane fired her. In response Schmitz told another agency worker that she intended to “get [Lane] back” for firing her. She also said that if Lane ever requested money from the state legislature for the program, she would tell him, “[y]ou’re fired.”<sup>123</sup> The firing of a state representative also drew the attention of the FBI. Lane was compelled to testify concerning the reasons for the firing, and a jury convicted Schmitz of mail fraud and theft of federal funds. Schmitz was sentenced to 30 months in prison and ordered to pay \$177,251.82 in restitution and forfeiture. Lane was subsequently fired and sued claiming his firing was in retaliation for his compelled, truthful testimony against Schmitz.<sup>124</sup>

In *Lane* the Court noted that protections for the free speech rights of public employees had been well-established law since *Pickering*. The Court stated: “Today, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does”<sup>125</sup> reversing a controversial decision by the lower court against Lane.

If the Court had allowed the lower court decision to stand, holding that Lane’s compelled and truthful testimony was not protected speech, this would have made it much easier for corrupt government officials to intimidate witnesses and hide evidence of their corruption simply by telling employees that they could be lawfully fired for their truthful testimony. Legal scholars questioned how any court could have strayed so far from *Pickering* and other U.S. Supreme Court precedents,<sup>126</sup> including the Court’s clear statement in *Garcetti* that: “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”<sup>127</sup> Legal scholars also questioned how anyone could reasonably believe that justice and the First Amendment allowed an

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<sup>121</sup> 547 U.S. 410 (2006).

<sup>122</sup> 134 S. Ct. 2369 (2014).

<sup>123</sup> *Id.* at 2375.

<sup>124</sup> *Id.* at 2376.

<sup>125</sup> *Id.* at 2374-2375.

<sup>126</sup> *See*, Dayton, *supra* note 22, at 214.

<sup>127</sup> 547 U.S. 410, 411 (2006).

employee/citizen to be put in the position of having to choose between committing contempt/perjury or being fired simply for revealing truthful evidence of government corruption. As the U.S. Supreme Court concluded in *Lane*:

It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials--speech by public employees regarding information learned through their employment--may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs. Applying these principles, it is clear that Lane's sworn testimony is speech as a citizen.<sup>128</sup>

As the Court said in *Lane* "public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights."<sup>129</sup> As the Court further noted: "There is considerable value . . . in encouraging, rather than inhibiting, speech by public employees" because government employees "are often in the best position to know what ails the agencies for which they work."<sup>130</sup> The Court concluded: "It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."<sup>131</sup>

In *Pickering*<sup>132</sup> the Court protected the free speech rights of public employees as citizens. For many decades prior to *Pickering*, however, the U.S. Supreme Court had followed Justice Holmes' view in *McAuliffe v. New Bedford*, holding that: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>133</sup> By the 1960s, however, the Court had firmly rejected the *McAuliffe* era

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<sup>128</sup> 134 S. Ct. 2369, 2380 (2014).

<sup>129</sup> *Id.* at 2377.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2379.

<sup>132</sup> 391 U.S. 563 (1968).

<sup>133</sup> 29 N.E. 517, 517 (Mass. 1892).

view, holding instead that public employment cannot be conditioned on surrendering constitutional rights.<sup>134</sup>

But what if a school employee can prove that school officials wanted to fire him because of his exercise of protected free speech; but school officials can also prove that they wanted to fire him because he was an unfit employee? The Court addressed these “mixed motive” cases, where there is both an illegitimate and a legitimate reason for termination, in *Mt. Healthy City School District v. Doyle*.<sup>135</sup> In *Doyle* the Court determined:

Initially, in this case, the burden was properly placed upon [the employee] to show that his conduct [contacting the radio station regarding school policy] was constitutionally protected, and that his conduct was . . . a “motivating factor” in the Board’s decision not to rehire him . . . having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to . . . reemployment even in the absence of the protected conduct.<sup>136</sup>

If a faculty member merits termination independent of a subsequent free speech controversy, school officials do not have to continue the employment of an unfit employee. The employee is free to proceed in filing a free speech claim under 42 U.S.C. § 1983. But the question of employment was resolved based on conduct independent of the free speech claim.

Concerning the issue of academic freedom in public educational institutions, in *Garcetti v. Ceballos*<sup>137</sup> the Court noted: “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>138</sup> In exercising proper judicial restraint, judges generally do not address issues beyond those necessary to resolving the case before them. Because issues of academic freedom were not involved in *Garcetti*, the Court declined to further address academic freedom in *Garcetti*. Further clarification of the law in this area is needed, and will likely be addressed by the Court in the future. For now, however, the general

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<sup>134</sup> See, *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>135</sup> 429 U.S. 274 (1977).

<sup>136</sup> *Id.* at 287.

<sup>137</sup> 547 U.S. 410 (2006).

<sup>138</sup> *Id.* at 425.

principles of academic freedom are clear, as is the need to protect academic freedom as essential to the preservation of academic integrity in the university.<sup>139</sup>

### **Freedom of the Press in Public Educational Institutions**

Freedom of the press holds an exalted role in the establishment and advancement of American democracy, with the First Amendment prohibiting any law “abridging the freedom of speech, or of the press.”<sup>140</sup> You can reveal whether a nation is genuinely a free democracy by examining the true status of its citizen press.<sup>141</sup> And concerning the student press, it must be remembered that today’s student journalist may be tomorrow’s best hope for exposing corruption, informing the public, and speaking for the People through a free press nationally and internationally.

In general, government officials must not interfere with free speech or press. There are, however, times and circumstances in which reasonable limitations on speech and press are warranted. Government efforts to control journalists and the free press generally fall into two categories: Prior restraints and post-publication punishments. The constitutional hazards of both prior restraints and post-publication punishments are that they may dangerously permit government agents powers to improperly abridge free speech and press. Prior restraints prevent free speech and press, and post-publication punishments have a chilling effect on free speech and press. While both types of controls present constitutional dangers, courts view prior restraints as the greater danger, and for this reason prior restraints are generally judicially disfavored.<sup>142</sup>

In public educational institutions prior restraints have historically occurred as administrators’ demands that students’ publications be officially sanctioned by the institution and subject to prior review and

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<sup>139</sup> See, Dayton, *supra* note 22, at 233 (“For all faculty and students, the scope of academic freedom is not unlimited and these rights are not absolute. The scope of academic freedom in the classroom is related to the subject taught and the maturity of the students. Rights of academic freedom are also linked to duties of academic integrity and professional conduct. Academic freedom will not shield faculty or students from the consequences of academic dishonesty, unprofessional conduct, or other misconduct inconsistent with the legitimate pedagogical concerns of the institution”).

<sup>140</sup> U.S. CONST. amend. I. (1791).

<sup>141</sup> See, Dayton, *supra* note 22, at 184. See also, Garrett Epps, FREEDOM OF THE PRESS: THE FIRST AMENDMENT: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE (2008).

<sup>142</sup> *Id.*

ensorship by school officials. Post-publication punishments have included student suspensions and expulsions, civil suits, and referrals to law enforcement agents for prosecutions. There may sometimes be a legitimate basis for these actions. But under the First Amendment government officials have no legitimate role in “protecting” others from the truth or protecting themselves from public criticisms; no legitimate rights to use government powers and coercive force to hide their own mistakes and misconduct; and telling the truth can never be criminalized without risking grave damage to both freedom and public safety. The truth not only sets us free, it helps to keep us safe. Legitimate rights of free speech and press must be rigorously protected.<sup>143</sup>

Whether speech or press communications are protected or subject to reasonable government regulations and sanctions depends on the facts and circumstances of the case. In public educational institutions, if the facts and circumstances identify communications as individual student speech, the *Tinker* standard applies: School officials may only limit individual student expression if they can establish it would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>144</sup> And “where there is no finding and no showing that engaging in the forbidden conduct”<sup>145</sup> meets this standard “the prohibition cannot be sustained.”<sup>146</sup> While prior restraints on speech and press are generally disfavored, prior restraints may be permitted under the *Tinker* standard. The *Tinker* test does not require school officials to prove there was an actual disruption, nor are school officials required to allow the disruption to occur before intervening.<sup>147</sup>

If facts and circumstances identify communications as school sponsored speech, school officials have much broader authority concerning these communications. Concerning student expression in public school sponsored forums, under the *Hazelwood*<sup>148</sup> test school officials are only required to establish “legitimate pedagogical concerns”, *i.e.*, there was a legitimate educational rationale for limiting student speech in the school sponsored forum. School sponsored forums include school sponsored publications, lectures, convocations, performances, athletic events, and other expressive activities students and other members

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<sup>143</sup> *Id.*

<sup>144</sup> 393 U.S. 503, 509 (1969).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Dayton, *supra* note 22, at 184.

<sup>148</sup> *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

of the public would reasonably perceive as bearing the “imprimatur of the school.”<sup>149</sup>

Government officials may always apply reasonable time, place, and manner (TPM) restrictions to expressive conduct on campus, including student press activities. TPM restrictions are held reasonable if they are: 1) Content neutral; 2) Narrowly tailored to serve a significant governmental interest; and 3) Leave open an adequate alternative channel of communication.<sup>150</sup> Further, government officials may also limit speech and press by establishing a compelling governmental interest for the limitations, and that no less restrictive alternative exists.<sup>151</sup> Concerning actions that threaten imminent dangers, for example, as the Court held in *Brandenburg v. Ohio*,<sup>152</sup> government officials may act to prohibit and punish acts provoking imminent dangers if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>153</sup>

But while these latter powers (*i.e.*, proving compelling interests or imminent dangers) are available to government officials, university officials rarely have needs to exercise the authority recognized under *Brandenburg*, and can more easily apply *Tinker*, *Hazelwood*, and reasonable TPM regulations.<sup>154</sup> A public school is not a public street. In most cases school officials may enforce more rigorous standards of conduct on students and on campus than could constitutionally be enforced on citizens and public areas not under school control.<sup>155</sup> Even in state institutions of higher education, the Court in *Healy v. James*,<sup>156</sup> cited *Tinker*<sup>157</sup> in holding that university officials do not have to tolerate student activities that breach reasonable campus rules; interrupt the educational process; or interfere with other students’ rights to receive an education, recognizing a far more deferential standard of review for school officials than is required under the *Brandenburg* test.<sup>158</sup>

Like many other areas of law, significant unresolved issues remain concerning the proper boundaries of individual rights and institutional authority related to free speech and press. The Court’s decision in

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<sup>149</sup> Dayton, *supra* note 22, at 180.

<sup>150</sup> *Id.* at 230.

<sup>151</sup> *Id.*

<sup>152</sup> 395 U.S. 444 (1969).

<sup>153</sup> *Id.* at 447.

<sup>154</sup> Dayton, *supra* note 22, at 185.

<sup>155</sup> *Id.*

<sup>156</sup> 408 U.S. 169 (1972).

<sup>157</sup> 393 U.S. 503 (1969).

<sup>158</sup> 408 U.S. 169 (1972).

*Hazelwood*,<sup>159</sup> however, is increasingly recognized as the guiding precedent for student publications in all public educational institutions, including higher education institutions. Retreating from more stringent protections of campus newspapers in the 1970s, many lower courts have now embraced *Hazelwood* as a precedent in university student press cases, despite the obvious differences between editors, staff, and audiences for a high school and university student newspaper.<sup>160</sup> Minimizing these distinctions, and following *Hazelwood* as legal precedent, these courts distinguish between expression that is purely private in nature and subject only to general limitations on free speech; and expression that is sponsored, controlled, or reasonably perceived as attributable to the educational institution.<sup>161</sup>

In summary, all expression on campus is subject to some general limits on free speech and press, *e.g.*, a purely private publication distributed on campus and not school sanctioned would still be subject to reasonable TPM restrictions imposed by school officials. Further, student editors and staff are subject to the same rules and limitations that apply to all other students. And under *Hazelwood*, while any censorship based on content raises serious First Amendment concerns, in a school sponsored non-public forum, *e.g.*, a school journalism class, play, etc., reasonable content-based limitations may be imposed for legitimate pedagogical purposes.

### Conclusion

Viewed together, the Court's cases indicate that student speech in public educational institutions generally falls into one of two categories: 1) Student speech involving individual student expression, as in *Tinker v. Des Moines*; or 2) Student speech in school sponsored forums, as in *Bethel v. Fraser*, and *Hazelwood v. Kuhlmeier*. In *Tinker* the Court declared that to lawfully limit individual student speech, school officials must establish that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."<sup>162</sup> Although school officials may apply reasonable time, place, and manner restrictions to all expressive activities, if they cannot establish that the speech "materially and substantially" interferes with "appropriate

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<sup>159</sup> 484 U.S. 260 (1988).

<sup>160</sup> Dayton, *supra* note 22, at 186.

<sup>161</sup> *Id.*

<sup>162</sup> 393 U.S. 503, 509 (1969).

discipline in the operation of the school” the speech generally cannot be prohibited or punished consistent with the First Amendment.

*Tinker* was a 7-2 decision in which the majority of the Court solidly endorsed the vigorous protection of free speech rights for students and faculty. In *Tinker*, it was clear that the Court expected school officials to take the First Amendment seriously. The Court declared in *Tinker*: “The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.”<sup>163</sup> The Court established a high burden of proof in *Tinker*, because school officials are being asked to justify silencing what would otherwise be protected free speech under the Constitution. But the Court also wanted to make clear that school officials had legitimate authority to apply reasonable limits to student speech when necessary. The Court’s “material and substantial interference” standard in *Tinker* attempts to strike a reasonable balance in these competing concerns, and to provide some guidance to school officials and judges in fairly resolving disputes over these issues.

Concerning student speech in public school sponsored forums and other expressive activities that students and community members might reasonably perceive as bearing the “imprimatur of the school” school officials generally have much broader discretion to limit student speech in a school-sponsored forum. Where the forum for expression is sponsored by the school or reasonably perceived as bearing the imprimatur of the school, as in *Fraser*, and *Hazelwood*, student expression in a school sponsored forum can be limited based on establishing a legitimate educational rationale for limiting the speech. Legitimate educational rationales for limiting speech in a school sponsored forum may include, for example, the need to teach civility, limit messages inconsistent with legitimate educational goals, teach professional responsibility, etc.

The Court’s tests in *Tinker* and *Fraser/Hazelwood* continue to provide useful guidance for school officials, lawyers, and judges in sorting out what student speech is protected, what student speech may be prohibited, and in proactively establishing lawful policies and practices concerning student speech. And of even greater importance to all persons, the brave actions of persons like Mary Beth Tinker, and her family, will continue to assure that school officials and all government officials are kept honest and accountable in respecting essential human rights of free speech.

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<sup>163</sup> *Id.* at 513.

## APPENDIX

### **A Legal Primer on Free Speech in Public Educational Institutions**

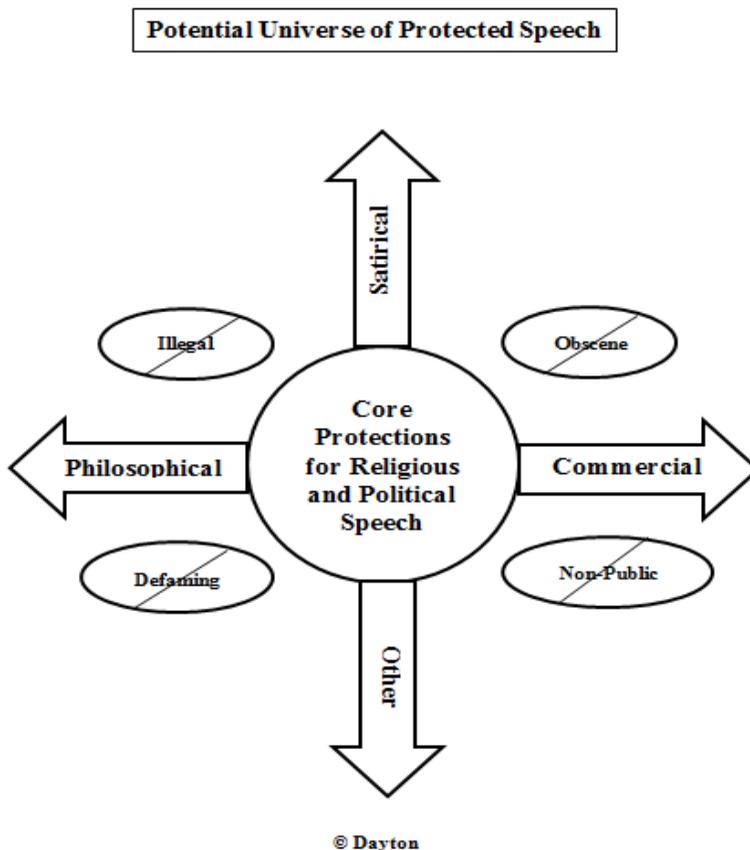
John Dayton, J.D., Ed. D.

#### **U.S. Constitution First Amendment (1791)**

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

In summary, while the general rule under the First Amendment is that speech is protected, the scope of protection necessarily involves balancing the rights of the individual with the legitimate interests of the public. Accordingly, the Court recognizes some special exceptions to general First Amendment protections for free speech. Government officials can limit speech if it is:

- a) Illegal or subversive speech, which can be controlled if it is:
  - i) Directed towards inciting illegal or subversive action; and is
  - ii) Likely to incite imminent lawless action (includes “fighting words” and “yelling fire in crowded theatre”).
- b) Obscene.
- c) Defamatory.
- d) Commercial speech.
- e) Speech in a non-public forum: Regulations must be reasonable in light of the purposes of the forum.



First Amendment principles re: Free Speech:

- First Amendment protections are potentially as broad as the universe of human thought and human ability to express those thoughts.
- At the core these protections are protections for religious and political speech.
- Philosophical, satirical, commercial, and an infinite variety of other types of expression are also protected, balancing individual rights and public needs.
- However, in the potential universe of protected expression speech that is illegal, obscene, defaming, or in a non-public forum does not receive First Amendment protection.

### Student Speech Rights

In *Tinker v. Des Moines*, 393 U.S. 503 (1969), the Court declared:

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate . . . In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are

possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

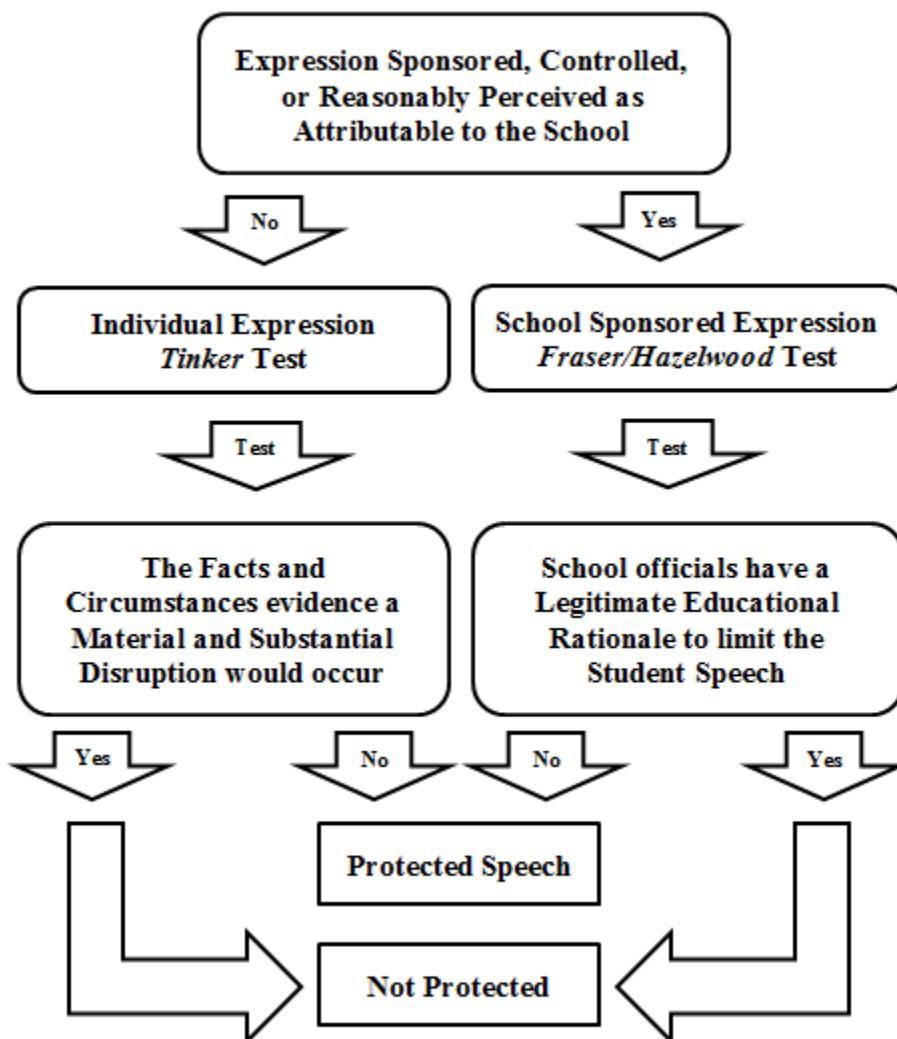
In harmonizing constitutional ideals with concrete realities the Court must strike a proper balance between essential individual freedoms and the legitimate needs of the public. Democracy is incompatible with both chaos and oppression. The school culture must be both free and orderly; both candid and civil. The Court has consistently recognized the authority and obligation of school officials to protect order and discipline in schools, while appropriately respecting free speech rights.

Concerning free speech in public schools the Court has distinguished between two different types of student expression: a) Individual student expression; and b) Public school sponsored student expression:

a) *Individual student expression* is speech not sponsored, controlled, or reasonably perceived as attributable to the school. The *Tinker* standard governs individual student speech. School officials must show through evidence of facts and circumstances that student expression would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” Avoiding minor disruptions, discomforts, and unpleasantness are not sufficient justifications to limit individual expression.

b) *School sponsored expression* (e.g., school newspapers, forums, performances, etc.) that are sponsored, controlled, or reasonably perceived as attributable to the school. The *Fraser* (*Bethel v. Fraser*, 478 U.S. 675 (1986)) and *Hazelwood* (*Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)) decisions govern school sponsored speech. School officials have wide discretion to control content where the expression is sponsored by the school. Limitations can be based on any legitimate educational rationale (e.g., age appropriateness; fit with the educational mission, etc.).

**Student Speech: *Tinker* & *Fraser/Hazelwood* Tests**



## Employee Speech Rights

Generally, public employees have the same free speech rights as all citizens. If public school officials wish to sanction speech by school employees, including dismissal or other employment sanctions, school officials must be prepared to show that the speech negatively impacted the employment relationship, and that the speech was unprotected in the context. The *Pickering* (*Pickering v. Board*, 391 U.S. 563 (1968)) test is used to distinguish between protected and unprotected speech by public employees:

The *Pickering* Test: To determine whether speech is protected, courts generally balance the employee's speech rights against the employer's legitimate interests in efficient operation of the public institution. Questions considered in this balance include:

1) *Was the speech related to a legitimate matter of public concern?* Speech regarding legitimate public concerns generally receives First Amendment protection.

2) *Was the speech true?* True statements receive more protection than false statements.

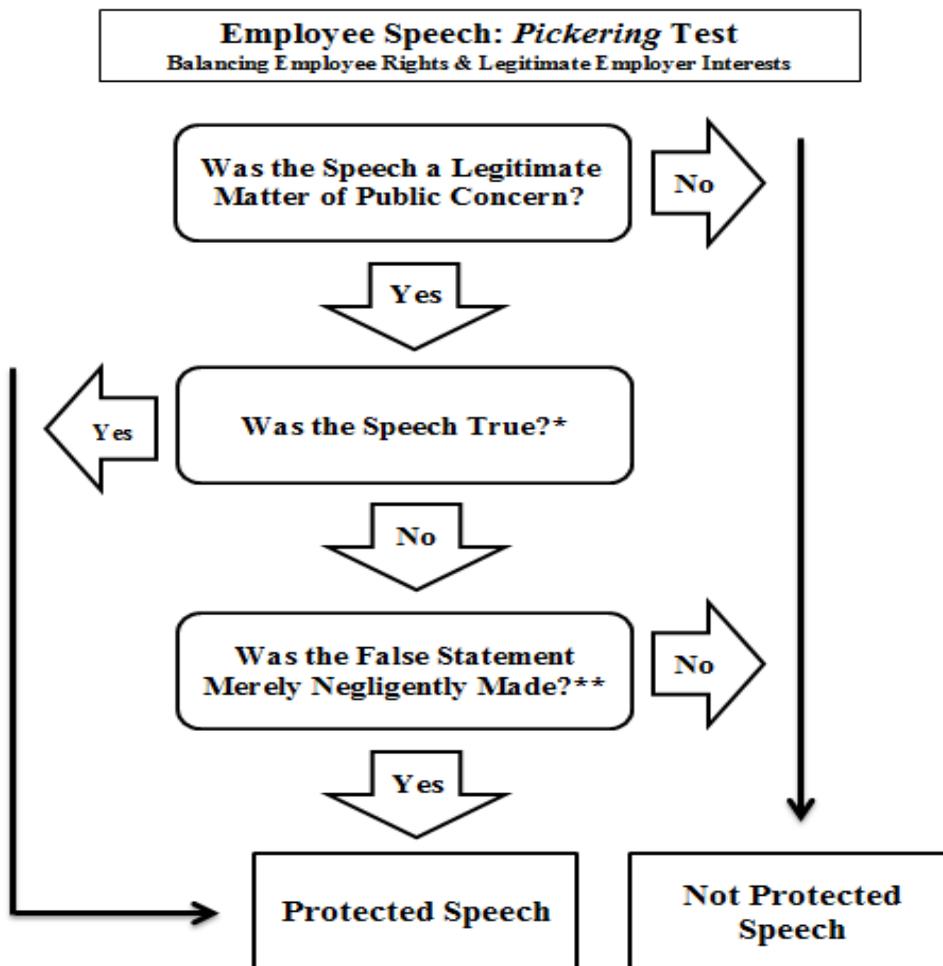
Note: Even if the speech is true, courts will also consider public officials' legitimate needs for: 1) Regular close contact and a working relationship of loyalty and trust with the speaker; 2) Appropriate office discipline; and 3) Harmony among co-workers.

3) *If false, was the false statement merely negligently made by the public employee?* False statements made only negligently may still receive First Amendment protection.

PURPOSELY  
KNOWINGLY  
RECKLESSLY  
-----*Pickering Line*-----  
NEGLIGENTLY

Note: Courts will also consider whether the false statements interfere with the performance of duties or the regular operations of the institution.

In “mixed motive” cases (there is both a legitimate basis for termination and a controversy over free speech) if a teacher merits termination independent of a subsequent free speech controversy, school officials do not have to continue the employment of an otherwise unfit teacher.



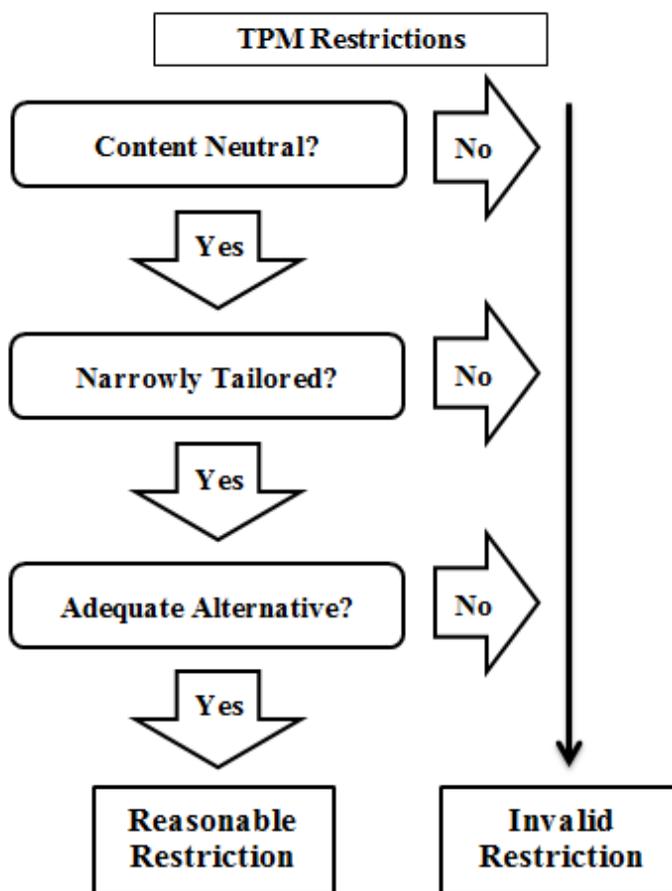
\* *N.B.*: Even if the speech is true, courts will also consider public officials’ legitimate needs for: 1) Regular close contact and a working relationship of loyalty and trust with the speaker; 2) Appropriate office discipline; and 3) Harmony among co-workers.

\*\* *N.B.*: Courts will also consider whether the false statements interfere with the performance of duties or the regular operations of the institution.

### Lawful Limitations on Speech

The Court recognizes some universal exceptions to First Amendment protections, and these limitations are always available to government officials:

- a) Government officials can always apply reasonable time, place, and manner (TPM) restrictions on speech. TPM restrictions are held reasonable if they are:
  - i) Content neutral;
  - ii) Narrowly tailored to serve a significant governmental interest; and
  - iii) Leave open an adequate alternative channel of communication.
- b) Government officials can always limit free speech by establishing a compelling governmental interest for the intrusion on freedom of expression, and that no less restrictive alternative exists.



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## **Students Do Not Shed Their Constitutional Rights at the Login Screen: Slamming the Schoolhouse Gate on School Control over Social Media Speech**

Frank D. LoMonte\*

*You are the principal of Verona High School dealing with an angry parent, Mr. Capulet. His daughter, Juliet, is a junior at Verona High, and she is distraught over the breakup of her romance with a classmate, Romeo. After getting Juliet pregnant, Romeo reneged on his promise to marry her. When Juliet went to Romeo's house to try to patch up their relationship, she caught him in bed with her best friend, Rosaline, a sophomore at Verona High. As she burst into tears, Romeo cruelly told her: "You're too fat and ugly for me to marry. I'm dumping you for Rosaline. Go drink poison, wench!" Drama over the breakup has polarized Romeo and Juliet's friends at school – gossip is raging throughout the school day – and it has left Juliet so distraught that she threatened suicide and feels too humiliated to come back to school. "I want you to suspend Romeo for what he's done to my daughter," Mr. Capulet demands. "He's interfering with her ability to pursue her education."*

Easy judgment call, right? Off-campus romantic behavior is indisputably beyond the disciplinary authority of the school. Even though Romeo has behaved dreadfully and even though his behavior has spilled over detrimentally onto school grounds, his wrongdoing is a matter to be worked out among the families, not a matter invoking the punitive authority of a government agency.

Now, imagine that – instead of catching Romeo in bed with Rosaline – Juliet sees the following post from Romeo in her Facebook news feed:<sup>1</sup>

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<sup>1</sup> The "news feed" of a Facebook social media page is where an account-holder can see messages and links shared by fellow account-holders whose Facebook accounts she is subscribed to view. Postings may be directed individually by "tagging" the Facebook account name of a desired recipient, or may be made accessible to the sender's chosen set of viewers. *The mechanics of Facebook are explained at the Facebook Help Center*

“You’re too fat and ugly for me to marry. I’m dumping you for Rosaline. Go drink poison, wench!”

Still an easy judgment call, right? None of the underlying facts have changed. But the difference is that now the behavior is “cyber.” And in the view of many judges, policymakers and educators, that distinction is decisive, and converts a purely off-campus social dispute into a matter permitting – and at times, requiring – schools to apply disciplinary sanctions.

Heartbreaking stories about the loss of young lives to “cyberbullying”<sup>2</sup> have caused emotion to overwhelm logic as policymakers struggle to adjust to an always-on world in which seemingly everyone is carrying an instant publishing device.<sup>3</sup> Well-settled principles of constitutional law have been casually abandoned in a desperate effort to respond to the perceived menace of text-messaging and Twitter.

Although federal courts historically have recognized a bright line separating schools’ authority over off-campus versus on-campus speech,<sup>4</sup> recent decisions have blurred that line. Casting about for a workable legal standard, courts understandably are tempted by the most comfortable and familiar one: the Supreme Court’s 1969 *Tinker v. Des Moines Independent Community School District*<sup>5</sup> standard, which for more than 45 years has set the outer limits of disciplinary authority over students’ speech during the school day. Some courts justify treating off-campus speech as in-school speech by virtue of the digital “portability” of the speech itself and its ability to be viewed on campus.<sup>6</sup> Others focus on the disruptive

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page, FACEBOOK, <https://www.facebook.com/help/?ref=pf> (last viewed Jan. 11, 2015).

<sup>2</sup> The U.S. Department of Health & Human Services defines bullying in the school context as including the essential elements of an imbalance of power, an intent to hurt, and repetition of behavior. *Facts about bullying*, STOPBULLING.ORG, <http://www.stopbullying.gov/news/media/facts/#definition> (last viewed Jan. 11, 2015).

<sup>3</sup> As of 2013, surveys showed that 78 percent of Americans ages 12 to 17 carried a cellphone and 37 percent owned a “smartphone,” a powerful computing device that, unlike a standard phone, enables the user to run programs (“apps”) and view Internet Web pages, including social media sites. Ian Simpson, *Smartphone Use Among U.S. Teens is up Sharply: Survey*, REUTERS <http://www.reuters.com/article/2013/03/13/us-usa-internet-teens-idUSBRE92C04C20130313> (last viewed Jan. 15, 2015).

<sup>4</sup> *See, e.g.*, *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979) (rejecting school’s claim that it may regulate a student’s off-campus speech in an “underground” newspaper to the same degree that it regulates on-campus expression).

<sup>5</sup> 393 U.S. 503 (1969).

<sup>6</sup> *See, e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (upholding punishment of off-campus blog post about a school controversy that urged people to contact school administrators and noting that because of the blog’s subject matter, “it was reasonably foreseeable that [the student’s] posting would reach school property”); *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM at \*7 (July 3, 2013) (“school officials have the

reactions that off-campus speech can provoke during the school day, regardless of where it originates and where it is viewed.

It is a profoundly dangerous mistake to equate public schools' authority over in-school speech with their authority over off-campus speech. The two simply are not equivalent. When a K-12 student speaks on campus, the student is: 1) Using government property as a platform for speech that is; 2) Directed exclusively to a school audience made up of students who are; 3) Legally compelled to be there. When a student speaks on personal time on social media, none of these things is true. Consequently, none of the justifications for diminishing students' rights while they are in school applies to speech they disseminate after-hours on Twitter.<sup>7</sup>

The Supreme Court has never said that schools may extend their disciplinary authority to entirely off-campus behavior based on the way in which people might react to the behavior on campus. To the contrary, the Court reaffirmed as recently as 2007 that off-campus and on-campus speech are to be judged under two different legal standards, and that speech that would be punishable when uttered at school would be constitutionally protected when uttered away from school.<sup>8</sup>

Ample non-school remedies exist for uncivil speech on social media. Parental discipline, civil remedies, and criminal enforcement are the appropriate and legally permissible responses when a child engages in injury-causing conduct off school premises and outside of school-supervised functions. A public school is the government, and the government may not punish a citizen for the content or viewpoint of lawful speech absent a finite few exceptions recognized by the Supreme Court.

While cyberbullying can be devastating to young victims, so can overzealous school discipline. Even a single out-of-school suspension can be life-altering, setting a student on the path to failure – doubly so because

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authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption”).

<sup>7</sup> This article will focus on speech that students create on the Internet outside of class time. Different considerations understandably may apply when a student is, for example, posting material to a personal Twitter account from a school computer designated for official-business use, or is posting from a personal device during a classroom lecture. At that point, the school has the enhanced authority to regulate the time, place and manner of speech without regard to its content – a tweet saying “Happy birthday, mom” during a midterm exam would be equally violative of a content-neutral rule against using social media during class as a tweet spewing profanity about the principal. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (explaining principles of content-neutral time, place and manner regulation).

<sup>8</sup> *See Morse v. Frederick*, 551 U.S. 393 (2007).

of the stigma of being branded a “cyberbully.” The risk of misfired discipline is especially acute in the informal, slang-dominated world of online chatter, where remarks are prone to being misunderstood without context.<sup>9</sup> The more that schools interject themselves into students’ off-campus lives, the more responsibility they assume – cyclically, driving ever more intensive scrutiny. As schools appoint themselves “social media monitors” over everything their students say, they will be expected to intercede at the first sign of trouble – with every incentive to “paper the liability file” with a suspension or expulsion, regardless of what is educationally responsible.

Because the risk of misunderstanding is so high and the consequences of an erroneous judgment are so great, and because the *Tinker* standard as understood by today’s federal courts is so deferential to disciplinarians,<sup>10</sup> *Tinker* is insufficiently protective to serve as the standard for school authority over online speech. To provide the essential “breathing space”<sup>11</sup> enabling whistleblowers and editorial commentators to share information with the public confidently and without fear of reprisal, the law must offer more.

Torn between fidelity to constitutional principles and concern for schools’ ability to prevent violence, courts are struggling to adapt *Tinker* principles to a world in which speech has migrated from armbands to tweets. Most recently, a deeply split panel of the Fifth Circuit declined to

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<sup>9</sup> For an especially tragic example, consider the case of Justin Carter, an 18-year-old Texas man jailed for five months and facing federal criminal prosecution on terroristic-threat charges because a violent Facebook chat about an immersive online video game he was playing with friends was reported to police as a genuine threat. See Mac McCann, *Facebook ‘Threat’ Case Unresolved: A year after making a sarcastic comment, Justin Carter still faces prison*, THE AUSTIN CHRONICLE (Feb. 28, 2014), <http://www.austinchronicle.com/news/2014-02-28/facebook-threat-case-unresolved/>.

<sup>10</sup> See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 530 (2000) (“The judiciary’s unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students’ constitutional rights”). The point is most articulately made by Judge Kleinfeld in his dissent from the Ninth Circuit’s refusal to reconsider an errant ruling, *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2001), finding that a school acted constitutionally under *Tinker* in expelling a student for a violent fantasy poem, treating it as a punishable threat to commit violence. Noting that the school had ample non-punitive options including temporarily removing the student pending a psychological evaluation rather than a punitive expulsion for a nonexistent disciplinary infraction, Judge Kleinfeld concluded: “The panel consigns high schools to a constitutional black hole, where freedom of speech exists only to the extent that administrators are comfortable with it.” *LaVine*, 279 F. 3d at 725. (Kleinfeld, J., dissenting from refusal to reconsider).

<sup>11</sup> NAACP v. Button, 371 U.S. 415, 433 (1963).

apply *Tinker* and ruled in favor of a student suspended for creating a profane rap video shared on Facebook, in which he used violent imagery in accusing two high school coaches of ogling and propositioning young girls.<sup>12</sup> The ruling, however, was soon vacated for *en banc* rehearing by the entire circuit.<sup>13</sup> The Fifth Circuit's struggle in student rapper Taylor Bell's case to strike a suitable balance between school authority and individual autonomy exemplifies the difficulties judges experience when the Constitution points in one direction and their sympathies with adult authority figures tug in the other direction.

When discussing schools' authority over social media, commentators are prone to describe the state of the law as chaotic. This Article suggests otherwise. Based on a limited body of a dozen years' worth of precedent,<sup>14</sup> students' First Amendment challenges to school discipline are falling into a more-or-less predictable pattern: The closer that speech approaches a realistic threat of violence, the less protection it will receive, and the closer that speech approaches political commentary on the performance of government employees, the greater protection it will receive.

It is not a novel observation that the *Tinker* standard inadequately protects off-campus speech; indeed, that is the overwhelming consensus of legal scholars, and increasingly of judges such as those in the *Bell* case as well.<sup>15</sup> This Article fortifies and elaborates upon that body of commentary

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<sup>12</sup> *Bell v. Itawamba Sch. Dist.*, 774 F.3d 280 (5th Cir. 2014).

<sup>13</sup> *Bell v. Itawamba County Sch. Bd.*, No. 12-60264, 2014 U.S. App. LEXIS 24789 (Feb. 19, 2015).

<sup>14</sup> The social networking site MySpace, a disproportionately prolific wellspring of student-speech litigation, became available to the general public in 2003. Matt Krantz, *The Guys Behind MySpace.com*, USA TODAY, (Feb. 12, 2006), [http://usatoday30.usatoday.com/money/companies/management/2006-02-12-myspace-usat\\_x.htm](http://usatoday30.usatoday.com/money/companies/management/2006-02-12-myspace-usat_x.htm).

<sup>15</sup> The volume of commentary criticizing the suitability of the *Tinker* standard cannot be captured here, but illustrative examples include: Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1090 (December 2008) ("As a bright-line rule, courts should continue to declare that speech that lacks any sort of physical connection to the school should fall outside the school's jurisdiction."); Rashmi Joshi, *Sharing the Digital Sandbox: The Effects of Ubiquitous Computing on Student Speech and Cyberbullying Jurisprudence*, 53 SANTA CLARA L. REV. 619 (2013) (declaring *Tinker* to be inadequately speech-protective for off-campus expression and proposing the added gloss of a "minimum contacts" jurisdictional test plus proof that the speech was actually and not merely potentially disruptive); James M. Patrick, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855 (Winter 2010) (advocating a "compelling interest" standard to justify school punishment of off-campus expression); Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the*

by highlighting the prohibitive practical impediments to applying the *Tinker* standard in the off-campus world, and what is lost when our online-speech jurisprudence reassigns the benefit of the doubt from the speaker to the regulator, leaving students vulnerable to censorship-motivated overreaching.

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*Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247 (2010) (proposing that students' online speech be subject to school disciplinary authority only if the speech would be constitutionally unprotected in the adult off-campus world); Benjamin L. Ellison, *More Connection, Less Protection? Off-Campus Speech With On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 833 (2010) (proposing as a more rigorous alternative to *Tinker* that student online speech be punishable only if it falls into a recognized category of constitutionally unprotected expression, was intended by the student to reach the school and actually did so); Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U. L. REV. 971 (2008) (calling for standard under which only speech that a student purposefully interjects into the school from off-campus, such as a telephoned threat, would be subject to the *Tinker* level of control); Kyle W. Brenton, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 12226-67 (2008) (arguing that *Tinker* is "the wrong tool for the wrong job" when applied to online speech); Justin P. Markey, *Enough Tinkering With Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150 (Fall 2007) (arguing for a heightened *Tinker* standard applicable only to substantially disruptive speech that the student speaker knowingly or recklessly brings onto the campus); Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 140 (March 2003) (arguing that speech originating off campus should be assessed under real-world First Amendment legal standards and not *Tinker*, "unless the speaker takes additional steps to direct the expression towards the school").

## Legal Foundations of Students' Rights<sup>16</sup>

Outside of the school setting, the First Amendment is understood to make any government regulation or punishment directed at the content of speech presumptively unconstitutional with the exception of a narrow few categories recognized as constitutionally unprotected. These categories include: 1) "Fighting words" so incendiary that they would be expected to provoke an immediate violent response from the listener;<sup>17</sup> 2) Speech that incites others into imminent lawless action;<sup>18</sup> 3) Obscenity, which is understood to encompass only material appealing to a prurient interest in sex that offends community standards of decency and is devoid of

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<sup>16</sup> This article concentrates on student speech in the K-12 context, both because the Supreme Court's student-speech jurisprudence has focused on that setting and because K-12 schools are disproportionately the source of First Amendment litigation involving social media. However, some of the most aggressive uses of punitive authority over off-campus student speech have occurred at colleges. For instance, a Minnesota nursing school expelled a student because a classmate filed a complaint about an argument on Facebook in which the speaker called her a "stupid bitch," a remark that likely would not even have gotten the student expelled had he said it to the classmate's face while on campus. A federal district court upheld the punishment against the student's First Amendment challenge, finding that the decision was virtually immune from judicial scrutiny because it was made by academic rather than disciplinary authorities. *Keefe v. Adams*, Civil No. 13-326 (D. Minn. Aug. 26, 2014) (as of this writing, the decision is on appeal to the Eighth Circuit). See also Jason Mastrodonato, *Former Red Sox Pitcher Curt Schilling Fights Back Against Vulgar Twitter followers, Prompts College Student's Suspension*, BOSTON HERALD (March 2, 2015), [http://www.bostonherald.com/sports/red\\_sox\\_mlb/clubhouse\\_insider/2015/03/former\\_red\\_sox\\_pitcher\\_curt\\_schilling\\_fights\\_back](http://www.bostonherald.com/sports/red_sox_mlb/clubhouse_insider/2015/03/former_red_sox_pitcher_curt_schilling_fights_back) (reporting that a New Jersey community college summarily removed a student for a single Twitter post in which he made a crude sexual remark about the teenage daughter of former baseball star Curt Schilling). The Supreme Court has never directly applied its familiar student-speech analytical framework at the college level, and the Court's handful of rulings involving punishment of college students' speech have typically relied on real-world First Amendment principles applicable in the adult world. See, e.g., *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973) (relying on non-school obscenity precedent in case involving college punishment for content of an independently produced newsletter); *Healy v. James*, 408 U.S. 169 (1972) (relying on non-school legal precedent involving prior restraints and incitement speech, in case involving college's refusal to recognize chapter of radical anti-war group).

<sup>17</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court rarely has found expression to fit within the confines of the *Chaplinsky* exception, and in a 1992 opinion, explained that the exclusion recognized in *Chaplinsky* is less about condoning the content-based regulation of speech than it is about permitting the regulation of an especially inflammatory "mode" of expression, irrespective of the speaker's choice of words. *R.A.V. v. St. Paul*, 505 US 377, 386 (1992).

<sup>18</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

redeeming social or artistic merit;<sup>19</sup> and 4) “True threats.”<sup>20</sup> Speech is a “true threat” and consequently unprotected under the First Amendment if an “ordinary reasonable recipient who is familiar with [the context] would interpret” it as a serious expression of an intent to cause a present or future harm.<sup>21</sup> Defamatory speech exists in something of a gray zone, as it is accepted that courts may enforce civil remedies in favor of a party who is defamed, but (unlike the other categories of unprotected speech) it is increasingly recognized that defamation may not be criminally punished.<sup>22</sup> The Supreme Court has fiercely resisted removing additional categories of speech from the protection of the First Amendment, even where the speech is of demonstrably low value, including in recent years graphic depictions of scenes of animal cruelty<sup>23</sup> and false claims of military heroism.<sup>24</sup>

Beyond the narrow categorical exclusions, a content-based regulation on speech is presumptively unconstitutional and will be struck down unless it passes the most demanding level of scrutiny, requiring proof that the regulation is the least restrictive means necessary to achieve a compelling governmental interest.<sup>25</sup> Even if otherwise justified by a sufficient government interest, regulations on speech may be struck down if they are overly broad so as to encompass more speech than is necessary to accomplish the government’s objective,<sup>26</sup> or if they are excessively vague so that a speaker lacks fair notice of the scope of prohibited conduct.<sup>27</sup>

An important aspect of First Amendment jurisprudence outside the school context is the concept of the “heckler’s veto” – the doctrine that speakers may not be silenced or penalized on the grounds that people who find their speech disagreeable will cause a disturbance.<sup>28</sup> This is, in effect,

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<sup>19</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>20</sup> *Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. United States*, 394 U.S. 705 (1969).

<sup>21</sup> *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009).

<sup>22</sup> *United States v. Stevens*, 559 U.S. 460, 467 (2010); *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952). *But see State v. Powell*, 839 P.2d 139 (N.M. App. 1992) (holding that criminal libel statute cannot be enforced against public statements addressing matters of public concern).

<sup>23</sup> *Stevens*, 559 U.S. at 460.

<sup>24</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>25</sup> *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 216 (1989).

<sup>26</sup> *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008).

<sup>27</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991).

<sup>28</sup> *See Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966) (“Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react

the flip side of the incitement doctrine – while a speaker may be fairly charged with anticipating the violence he invites his audience to join him in committing, he may not be charged with responsibility for the violence of opponents motivated to silence him. If the government anticipates that the content of a speaker’s message will provoke a violent audience backlash, the legally correct response is to protect the speaker from the hecklers.

Contemporary student-speech jurisprudence originates with the foundational *Tinker* case, which established the First Amendment rights of students to engage in peaceful protest activity even while within, as Justice Abe Fortas’ majority opinion memorably declared, “the schoolhouse gate.”<sup>29</sup> Eschewing the traditional “strict scrutiny” framework when confronted with a content-based regulation on speech – in the *Tinker* case, a school board rule that banned the wearing of armbands, under threat of suspension – the Court forged a new standard that has stood ever since as the starting point for free-speech challenges in the public schools: A school may not enforce a content-based restriction on student speech “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline.”<sup>30</sup> Because it relaxes the government’s burden as compared with the off-campus strict scrutiny standard, *Tinker* represents a halfway-measure of First Amendment protection, and the Court justified this compromise by reference to “the special characteristics of the school environment.”<sup>31</sup>

Nowhere did the Court suggest that schools’ punitive authority over “disruptive” speech extended into students’ off-hours, nor has the Court made any such suggestion in the 46 years since *Tinker* was decided. In fact, the Court has been careful to limit intrusions on students’ rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activities.<sup>32</sup>

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that a principal could remove stories from a high school-sponsored student newspaper on the grounds that the articles were incomplete and unsuitable for the maturity of the audience, when the censorship was “reasonably related to legitimate pedagogical concerns.”<sup>33</sup> Nevertheless, the Court

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with disorder or violence”).

<sup>29</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>30</sup> *Id.* at 511.

<sup>31</sup> *Id.* at 506.

<sup>32</sup> See *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) (“*Tinker* acknowledges what common sense tells us: a much broader ‘plainly legitimate’ area of speech can be regulated at school than outside school”).

<sup>33</sup> 484 U.S. 260, 261 (1988).

recognized that, although the school could censor on-campus speech in a curricular setting that is contrary to its educational mission, “[it] could not censor similar speech outside the school.”<sup>34</sup>

In *Morse v. Frederick*<sup>35</sup>, the Court held that a school could punish a student who, at a school-sanctioned event during school hours, stood directly across from the school grounds and displayed a banner interpreted as promoting drug use.<sup>36</sup> Writing for the majority, Chief Justice Roberts expressly rejected the argument that it “[wa]s not a school speech case,” noting that (unlike in this case) the events “occurred during normal school hours” at a school-sanctioned and school-supervised gathering.<sup>37</sup> While the speaker was physically off school grounds – standing on a hillside across the street – the Court took pains to limit its holding to speech at a school-organized event. Citing *Bethel Area School District v. Fraser*,<sup>38</sup> which upheld the punishment of Mathew Fraser for “lewd” double entendre humor in a speech made in front of a school assembly, the Court expressly recognized that speech off campus is entitled to greater First Amendment protection than speech on campus: “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”<sup>39</sup>

Just as the Supreme Court has never equated off-campus speech with on-campus speech – and has strongly suggested the converse – numerous lower court rulings following *Tinker* recognize more robust protection for off-campus speech, even where the speech is about the school and is capable of reaching school or actually does so. In one of the most frequently cited examples, *Thomas v. Board of Education, Granville Central School District*,<sup>40</sup> the Second Circuit held that *Tinker*’s limits on freedom of expression were “wholly out of place” in the context of an “underground” humor magazine that students produced on their own time and with their own money, even though – just as in this case – the magazine was about the school and was brought onto campus by a reader: “[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”<sup>41</sup>

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<sup>34</sup> *Id.* at 266.

<sup>35</sup> 551 U.S. 393 (2007).

<sup>36</sup> *Id.* at 397-98.

<sup>37</sup> *Id.* at 400.

<sup>38</sup> 478 U.S. 675 (1986).

<sup>39</sup> *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

<sup>40</sup> 607 F.2d 1043 (2d Cir. 1979).

<sup>41</sup> *Id.* at 1050. *See also* *Bystrom v. Fridley High Sch.*, 822 F.2d 747 (8th Cir. 1987)

The court in *Thomas* explicitly recognized the bargain struck in *Tinker* that produced a training-wheels level of First Amendment protection during the time students are under the physical control of school authorities. This bargain, the court observed, necessarily rests on the assumption that students reclaim the full benefit of their constitutional rights when they leave campus:

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends . . . Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.<sup>42</sup>

## Social Media and Student Speech

### *Social Networking's Explosive Growth Outpaces Development of the Law*

Social media permeates American society, but most especially among the young, with research showing that 90 percent of 18-to-29-year-old Internet users are active on social networking sites.<sup>43</sup> When faced with an edgy new form of entertainment popular with young people, adults did what they have always done: They panicked.<sup>44</sup> Reports of the heart-wrenching deaths of students who took their own lives after being cruelly hounded via text-messages and social-media posts provoked a wave of questionably constitutional legislation expanding schools' disciplinary authority into cyberspace. New Jersey enacted a statute, hailed as a "model" for the nation, that defines "bullying" – an act carrying

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(recognizing higher quantum of protection for students' off-campus expression than *Tinker* provides for on-campus expression).

<sup>42</sup> *Id.* at 1052.

<sup>43</sup> See *Pew Research Internet Project, Social Networking Fact Sheet*, PEW RESEARCH CENTER, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Jan. 11, 2015).

<sup>44</sup> As Justice Scalia explained in the Supreme Court's 2011 opinion in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2010), which struck down a California statute criminalizing the sale of violent video games to minors, every advancement in communication technology – from radio to motion pictures to comic books to video games – has provoked dire predictions that society's morals, particularly those of the young, would be irretrievably corrupted by the power of the new medium. See *id.* at 2737 (describing, *inter alia*, how courts "did permit broad censorship of movies because of their potential to be 'used for evil'").

punishment up to and including expulsion from school – as any gesture, act or communication that is based on a student's “distinguishing characteristic” and that causes a student severe emotional harm, regardless of whether any conduct takes place on campus or whether there is any discernible impact on the school.<sup>45</sup> North Carolina upped the ante by enacting a statute that criminalizes online speech “with an intent to intimidate or torment” a school employee with penalties of up to a year in jail – but only if the speaker is a student.<sup>46</sup>

Until 2014, when the Supreme Court accepted review of *Elonis v. United States*<sup>47</sup> and agreed to decide the requisite mental state to convict a speaker of the felony of transmitting threats to inflict bodily injury<sup>48</sup> via social media, the Court had never issued a published opinion so much as mentioning the word “Facebook.” Although the Court has lowered the bar for regulation of content in the limited context of speech broadcast over FCC-licensed airwaves based on arguments that the medium is uniquely intrusive into the ears of unsuspecting young listeners,<sup>49</sup> the Court has resisted calls to apply similar reasoning to electronically communicated speech, including speech posted to the web.<sup>50</sup> The Court has consistently made clear that “whatever the challenges of applying the constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”<sup>51</sup>

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<sup>45</sup> N.J. Stat. § 18A:37-14, -15. *See also* Adam Cohen, *Why New Jersey’s Antibullying Law Should Be a Model for Other States*, TIME (Sept. 6, 2011), <http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states/> (acknowledging that the statute is complex, difficult to interpret and may impinge on constitutionally protected speech, but declaring it “worth the trouble”).

<sup>46</sup> N.C.G.S. § 14-458.2(d); *see* Sarah Preston, *A Bad New Law Targets N.C. Students*, THE NEWS & OBSERVER, Dec. 3, 2012 (critiquing statute as unclear and likely to chill even well-founded criticism of teachers and administrators).

<sup>47</sup> 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014).

<sup>48</sup> *See* 18 U.S.C. § 875(c) (“Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both”).

<sup>49</sup> *FCC v. Pacifica*, 438 U.S. 726, 749 (1978).

<sup>50</sup> *See* *ACLU v. Reno*, 521 U.S. 844 (1997) (refusing to adopt reduced level of First Amendment protection for speech on websites, and invalidating congressional attempt to outlaw online speech that is “indecent” or “patently offensive”).

<sup>51</sup> *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

### *Pouring Old Law Into New iPhone Cases: The Courts Respond*

It seems anomalous to speak of online-speech cases in “generational” terms given the relative youth of the medium; the invention of the World Wide Web made the Internet widely accessible to the public only in 1989,<sup>52</sup> and America’s most-used social networking site, Facebook, did not debut until 2004.<sup>53</sup> Nevertheless, the courts’ view of school authority over online speech has evolved in parallel with online technology itself, and with the degree of public alarm over its potential for abuse.

The earliest First Amendment challenges to school discipline over digitally distributed speech were resolved in accordance with the Second Circuit’s view in *Thomas*, recognizing a qualitative difference between off- and on-campus expression. Thus, in *Killion v. Franklin Regional School District*,<sup>54</sup> a federal court in Pennsylvania found that a school violated the First Amendment by suspending a student who emailed a joking “Top Ten list” to his classmates ridiculing the school’s athletic director, including crude jokes about his sex life and genital size. The court relied on the fact that the student himself did nothing to bring the speech physically onto school premises, observing that “school officials’ authority over off-campus expression is much more limited than expression on school grounds.”<sup>55</sup> And in *Beussink v. Woodland R-IV School District*, a district judge in Missouri determined that a school had no constitutional authority to suspend a student for a “crude and vulgar” website mocking specific teachers and administrators, and urging readers to contact the principal to share their complaints about the school.<sup>56</sup>

But as social media and handheld mobile devices with Internet access became ubiquitous – a recent Pew Research Center study found that 73 percent of teens have access to smartphones and 71 percent of all teens use Facebook<sup>57</sup> – courts became more deferential to school authorities and more hesitant to second-guess even thinly justified disciplinary actions.

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<sup>52</sup> *History of the Web*, WORLD WIDE WEB FOUNDATION, <http://webfoundation.org/about/vision/history-of-the-web/> (last visited Jan. 16, 2015).

<sup>53</sup> Vivek Wadhwa, *10 Years after Facebook Launched, Social Media is only Beginning to Shake up the World*, WASHINGTON POST (Feb. 3, 2014), <http://www.washingtonpost.com/blogs/innovations/wp/2014/02/03/10-years-after-facebook-social-media-is-only-beginning-to-shake-up-the-world/>.

<sup>54</sup> 136 F. Supp. 2d 446 (W.D. Pa. 2001).

<sup>55</sup> *Id.* at 454.

<sup>56</sup> 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

<sup>57</sup> *Teens, Social Media and Technology Overview 2015*, PEW RESEARCH CENTER (last viewed May 10, 2015)

[http://www.pewinternet.org/files/2015/04/PI\\_TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf).

The deference was fueled by heart-rending news stories about school violence, including the mass shooting of 26 victims at Connecticut's Sandy Hook Elementary School in 2012,<sup>58</sup> and a rash of teen suicides following online harassment universally referred to as "cyberbullying."<sup>59</sup>

In a turning-point case that has proven influential, *Wisniewski v. Board of Education of Weedsport Central School District*,<sup>60</sup> the Second Circuit retreated from its view in *Thomas* and allowed a school to punish speech created entirely off-campus on a personal electronic device. In *Wisniewski*, the court rejected a student's First Amendment challenge to his suspension for electronically circulating a cartoon drawing to classmates depicting his math teacher being shot in the head; the ruling focused on the emotional impact that seeing the cartoon had on the teacher, who took a leave of absence and demanded to be reassigned to be separated from the student.<sup>61</sup> Following the *Wisniewski* decision, courts began viewing schools' assertion of jurisdiction over off-campus expression with markedly less skepticism. In the most extreme example, *Doninger v. Niehoff*, the Second Circuit permitted a school to punish a student who used a personal blog to importune concerned members of the public to call and email school administrators to help lobby against cancellation of a student-run concert, even though the sum total of the "disruption" to school was the time the principal and superintendent spent answering an unspecified number of inquiries about the concert.<sup>62</sup>

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<sup>58</sup> Mark Arsenault, *20 Children Slaughtered in Conn. School Shooting*, BOSTON GLOBE (Dec. 15, 2012), <https://www.bostonglobe.com/metro/2012/12/15/gunman-rampage-leaves-dead-including-children-conn-elementary-school/W84TE8fnQZePmgUsXrVN1N/story.html>.

<sup>59</sup> The most notorious of these cases involved a 15-year-old Massachusetts high school student, Phoebe Prince, who took her own life in January 2010 after being hounded by classmates over romantic rivalries. Although Phoebe's death became headline fodder as a "cyberbullying suicide," later examinations determined that very little, if any, harassment directed at Phoebe actually occurred on social networking pages as opposed to in-person, although several people did post vicious messages of hatred on social media after her death. See Emily Bazelon, *What Really Happened to Phoebe Prince*, SLATE.COM (July 20, 2010, 10:13 AM), [http://www.slate.com/articles/life/bulle/features/2011/what\\_really\\_happened\\_to\\_phoebe\\_prince/the\\_untold\\_story\\_of\\_her\\_suicide\\_and\\_the\\_role\\_of\\_the\\_kids\\_who\\_have\\_been\\_criminally\\_charged\\_for\\_it.html](http://www.slate.com/articles/life/bulle/features/2011/what_really_happened_to_phoebe_prince/the_untold_story_of_her_suicide_and_the_role_of_the_kids_who_have_been_criminally_charged_for_it.html).

<sup>60</sup> 494 F.3d 34 (2d Cir. 2007).

<sup>61</sup> *Id.* at 36.

<sup>62</sup> 527 F. 3d 41 (2d Cir. 2008) (hereinafter, "*Doninger P*"). For a critique of the ruling questioning both the application of the *Tinker* standard and whether the facts were sufficient to overcome *Tinker* even if it applied, see Nathan S. Fronk, *Doninger v. Niehoff: An Example of Public Schools' Paternalism and the Off-Campus Restriction of Students' First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1435 (June 2010)

Still, some courts have hesitated to entirely obliterate the distinction between off-campus and on-campus speech. In *Wynar v. Douglas County School District*,<sup>63</sup> the Ninth Circuit rejected a student's First Amendment challenge to a 90-day expulsion imposed in response to a series of messages posted to MySpace in which he laid out plans to set a "record" for the most people killed in a school shooting, including discussion the weaponry he would need and how he would obtain it. Although the court found the discipline permissible under a *Tinker* analysis because the speech disrupted school operations, the judges stopped short of adopting *Tinker* as the default standard for all online speech:

We do not need to consider at this time whether *Tinker* applies to all off-campus speech such as principal parody profiles or websites dedicated to disparaging or bullying fellow students. These cases present challenges of their own that we will no doubt confront down the road . . . Given the subject and addressees of [the student's] messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to [the student] that his messages would reach campus.<sup>64</sup>

Similarly, the majority in the Fifth Circuit's (now-vacated) decision, *Bell v. Itawamba County School Board*,<sup>65</sup> expressed doubt about the applicability of *Tinker* to a student's YouTube video disseminated through Facebook during off-campus personal time. The Court rejected the trial court's conclusion that *Tinker* by its terms governed speech regardless of where it originated, stating: "Although we certainly acknowledge that the Internet has yielded previously un contemplated factual scenarios that pose difficult questions, it is not our place to anticipate that the Supreme Court will hold that the Internet has vitiated the distinction between on- and off-

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(observing that "receiving calls from parents and other concerned citizens on a matter of school and community importance is an essential part of a school administrator's position" and not a disruption). At least one commentator believes that the *Doninger I* ruling represents a standard functionally less protective than *Tinker*. See Mickey Lee Jett, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 897-98 (Summer 2012) ("the Second Circuit displaced *Tinker*'s doctrinal matrix in favor of a balancing approach that carries wide-ranging and negative consequences for students' First Amendment expressive-rights jurisprudence").

<sup>63</sup> 728 F. 3d 1062 (9th Cir. 2013).

<sup>64</sup> *Id.* at 1069.

<sup>65</sup> 774 F.3d 280 (5th Cir. 2014).

campus student speech, thus expanding the authority of school officials to regulate a student's speech when he or she is at home during non-school hours.”<sup>66</sup>

The most thorough exploration of the boundaries of school authority over social-media speech came in a pair of companion cases decided by the *en banc* Third Circuit on the same day in 2011, *Layshock v. Hermitage School District*<sup>67</sup> and *J.S. v. Blue Mountain School District*<sup>68</sup> twin fact patterns involving students mocking their principals on the social networking site MySpace, each of which ended with a finding in favor of the student speaker. In the *Blue Mountain* case, which grapples with the *Tinker* “disruption” issue that the school district failed to preserve for appellate review in *Layshock*, a middle-school student angry over a dress-code dispute with her principal took revenge by creating a mock “profile” of him by completing a biographical questionnaire on the social networking site MySpace.<sup>69</sup> The profile was replete with crude sexual language and was accompanied by a childlike introductory message in the voice of the principal, but obviously the work of a prankster, in which the speaker stated: “I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man” among other childish insults.<sup>70</sup> When a student showed a copy of the profile to Principal James McGonigle, he had the student creators brought to the local police station and suspended them for 10 days.

The district court found the profile to be punishable under the *Tinker* standard after first applying a threshold analysis as to whether the speech itself came onto the campus, but a Third Circuit panel dispensed with that threshold inquiry and proceeded straight to *Tinker*, finding no distinction between online speech and on-campus speech.<sup>71</sup> Applying *Tinker*, the panel found that, although very little disruptive behavior actually occurred – there was some joking about the MySpace page, resulting in one teacher having to quiet a rowdy discussion – the profile had substantial disruptive potential, because members of the school community “inevitably would have begun to question McGonigle’s demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to

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<sup>66</sup> *Id.* at 294 n.37.

<sup>67</sup> 650 F.3d 205 (3d Cir. 2011) (*en banc*).

<sup>68</sup> 650 F.3d 915 (3d Cir. 2011) (*en banc*).

<sup>69</sup> *Id.* at 920-21.

<sup>70</sup> *Id.* at 921.

<sup>71</sup> *J.S. ex rel. Snyder. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298 (3d Cir. 2010).

occupy a position of trust with adolescent children.”<sup>72</sup> Accordingly, the speech was unprotected by the First Amendment and punishable under *Tinker*.

On *en banc* rehearing, the court ruled 8-6 that the punishment violated the First Amendment, discounting the school district’s primary argument that crude sexual language could be sanctioned, even on an off-campus website, under the Supreme Court’s *Fraser* standard,<sup>73</sup> which permits punishment for “lewd” speech at on-campus school events.<sup>74</sup> The majority opinion discussed but did not decide whether *Tinker* supplies the proper legal standard for online speech, because even assuming *Tinker* applied, no substantial disruption occurred or was imminently foreseeable.<sup>75</sup> A dissent by Judge D. Michael Fisher and joined by five others concluded that *Tinker* should supply the standard for all student speech regardless of location, and that a potential disruption was amply demonstrated because the mock profile’s jokes about pedophilia might give rise to suspicions about the principal and distract from his ability to do his job.<sup>76</sup> Judge D. Brooks Smith, in a concurrence joined by four other judges, called for maintaining a bright jurisdictional line between on- and off-campus speech. Applying the *Tinker* level of control to off-campus speech would be “an ominous precedent” bringing students’ off-hours commentary about social and political controversies within the ambit of school punitive authority, Judge Smith wrote:

Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student’s classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.<sup>77</sup>

The Third Circuit’s near-even schism over the applicable legal analysis for off-campus speech has fed the perception that the jurisprudence of

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<sup>72</sup> *Id.* at 301.

<sup>73</sup> *Bethel Area Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>74</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011).

<sup>75</sup> *Id.* at 929.

<sup>76</sup> *Id.* at 945 (Fisher, J., dissenting).

<sup>77</sup> *Id.* at 939 (Smith, J., concurring).

online speech is chaotic and unpredictable. Some reasonable predictability, however, is emerging – which makes the outlier cases all the more conspicuous and worrisome.<sup>78</sup>

### Speech that Realistically Portends Violence will be Unprotected

Courts have had little difficulty finding speech to be punishable when it can be understood as threatening or as formulating plans to harm students or school employees. Thus, in *D.J.M. v. Hannibal Public School District*,<sup>79</sup> the Eighth Circuit found no First Amendment violation when a school suspended a student over a series of text-messages with classmates in which he described in graphic detail his plans for a school shooting spree, including which students he would most like to kill.

This is an unremarkable principle that predates social media.<sup>80</sup> In an earlier era, a student who used an off-campus telephone to call a bomb threat into the school would have been similarly unprotected by the First Amendment, since such speech is unprotected even in the adult off-campus world.<sup>81</sup> Indeed, in cases such as *D.J.M.* and *Wynar*, it could be argued that the punishment was less about the content of speech than about the underlying conduct (preparing to do violence) of which the speech merely served as evidence.

### Speech that Severely Harasses Students will be Unprotected

In *Kowalski v. Berkeley County Schools*, the Fourth Circuit dealt with a classic “cyberbullying” fact scenario: A student created a MySpace page cruelly mocking an identified classmate alleging that she suffered from herpes, to which other classmates contributed their own mockery.<sup>82</sup> The

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<sup>78</sup> See Rashmi Joshi, *Sharing the Digital Sandbox: The Effects of Ubiquitous Computing on Student Speech and Cyberbullying Jurisprudence*, 53 SANTA CLARA L. REV. 619, 644 (2013) (observing that “it is clear that the identity of the victim is extremely important to the evolution of caselaw” and that courts are understandably less tolerant of school punishment when the targets of student speech are school administrators, who are more likely to come forward to complain, to have power over their tormentors, and to have recourse to methods of clearing their names).

<sup>79</sup> 647 F.3d 754 (8th Cir. 2011).

<sup>80</sup> See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (*en banc*) (finding no First Amendment violation in school’s suspension of student who wrote letter detailing desires to “sodomize, rape and kill” his ex-girlfriend, which he shared with a classmate who brought it to school to show the girlfriend).

<sup>81</sup> See *State v. Johnston*, 127 P. 3d 707 (Wash. 2006) (upholding constitutionality of state statute criminalizing bomb threats).

<sup>82</sup> 652 F.3d 565, 567 (4th Cir. 2011).

court had no difficulty concluding that the school had punitive authority to discipline the student for creating the page, even though there was no evidence that the student, Kara Kowalski, used school resources to maintain the site or showed the speech to others during school.<sup>83</sup> The court found that Kowalski knew that her off-campus speech “could reasonably be expected to reach the school or impact the school environment,” focusing on the fact that the MySpace group was populated by students from the school, and that the victim’s family “took the attack as having been made in the school context, as they went to the high school to lodge their complaint.”<sup>84</sup> The ruling noted that the victim, “Shay,” missed school to avoid being ridiculed, and noted school officials’ concern that Kowalski’s page might “snowball” into further acts of harassment.<sup>85</sup> Although the fact that one student missed classes is a questionably substantial disruption for *Tinker* purposes – as noted earlier, many off-campus acts by students cause classmates to be emotionally distressed, yet elude school punishment – it seems predictable in the current legal and political climate that acts of severe student-on-student harassment lacking a social or political message will be deemed unprotected.<sup>86</sup>

#### Speech about Students that Falls Short of Severe Harassment will be Beyond School Punitive Authority

When off-campus student speech about classmates is merely insulting and does not cross the line into threats, harassment or defamation, courts properly hesitate to countenance school discipline. Thus, in *J.C. v. Beverly Hills Unified School District*, a federal district court in California found that a school violated both the First Amendment and due process in suspending a student who posted a YouTube video of a mean-spirited restaurant conversation in which she and her friends made profane, derogatory comments about a 13-year-old schoolmate.<sup>87</sup>

In a 2013 ruling, a federal district court in Tennessee declined to dismiss the First Amendment claims brought by the family of a middle-school student who was sent to alternative school for 45 days because of

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<sup>83</sup> *Id.* at 572-73.

<sup>84</sup> *Id.* at 573.

<sup>85</sup> *Id.* at 574.

<sup>86</sup> See also *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (finding that students’ blog containing crude sexual and racial remarks about identified classmates was punishable by school authorities, noting that the creators used a school computer in building the website and that numerous students used school computers to view the site).

<sup>87</sup> *J.C. v. Beverly Hills Unif. Sch. Dist.*, 711 F. Supp.2d 1094, 1098 (C.D. Calif. 2010) (*e.g.*, “the ugliest piece of shit I’ve ever seen in my whole life”).

an exchange of angry Twitter posts about a classmate.<sup>88</sup> The student got into a back-and-forth exchange on Twitter with a friend who believed that the classmate was trying to break up her relationship with her boyfriend. Each of them joked about shooting the rival student – the plaintiff, “A.N.,” accompanied her posts with “emoticons”<sup>89</sup> such as cartoon monkey faces to indicate the statements were made in jest – and in a later post, “A.N.” went on to state: “I hate her. That was my whole point. Carli, goodness, I’m funny. I’ll kill her.”<sup>90</sup> The targeted student’s mother complained to the students’ principal, but the case contains no indication that the daughter missed school or took the remarks seriously.

The district court denied the school’s motion for summary judgment and found an actionable First Amendment claim. Assuming without deciding that the *Tinker* standard applied, the court found that the reaction to the speech fell short of substantially disrupting school activities, and that nothing about the speech “targeted” the school, unlike the threatening remarks in *Wynar*:

The speech was not made at the school, directed at the school, or involved the use of school time or equipment. No disruption of school activities or impact on the school environment has been shown . . . [T]here was no connection between the speech and the school beyond the attendance of the persons immediately involved.<sup>91</sup>

These cases indicate proper reluctance to wade into purely personal feuds that happen to come to the attention of the school solely because a parent seeks to involve the school in settling the dispute.<sup>92</sup>

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<sup>88</sup> *Nixon v. Hardin Cnty. Bd. of Educ.*, 988 F. Supp.2d 826 (W.D. Tenn. 2013).

<sup>89</sup> An “emoticon” is a symbol, typically representing a facial expression such as a smile or a wink, that can be inserted into a text message or social media post to indicate the writer’s sentiments. *United States v. Cochran*, 534 F. 3d 631, 632 n.1 (7th Cir. 2008).

<sup>90</sup> *Id.* at 830.

<sup>91</sup> *Id.* at 839 and n.14.

<sup>92</sup> *See also T.V. v. Smith-Green Cmty. Sch.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011). The *Smith-Green* case was an especially extreme example in which the speech – two students who made a video at a slumber party in which they goosed each other with genital-shaped lollipops – was not even alleged to be harmful to others, but merely offensive. The district court had little difficulty finding such speech to be beyond the authority of schools to punish, even assuming that the *Tinker* principle applied: “at most, this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds. This can’t be what the Supreme Court had in mind when it enunciated the ‘substantial disruption’ standard in *Tinker*.” *Id.* at 784.

## Speech that Criticizes School Employees will be Protected

The Supreme Court has been vigilantly protective of speech addressing matters of public concern, even where the speech is presented in an offensive manner. Key to the Court's much-debated 2011 ruling in *Snyder v. Phelps* – that the government may not punish highly inflammatory anti-gay hate speech by picketers outside military funerals – was that the speech addressed a matter of public concern (*i.e.*, the issue of whether homosexuality should be tolerated).<sup>93</sup> Even though the picketers' speech did not fit polite society's expectation of what a civil discourse on public issues should look like, the Court looked beyond the coarse words and inartful presentation to the nature of the speakers' message:

[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection . . . . The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . . That is because speech concerning public affairs is more than self-expression; it is the essence of self-government . . . . Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.<sup>94</sup>

The Third Circuit implicitly recognized in the *Blue Mountain* and *Layshock* cases that speech capable of being interpreted as criticizing the performance of school officials is entitled to special constitutional sanctity, even if the speech is juvenile and offensive. In Judge Smith's five-judge concurrence in *Blue Mountain* cautioning against extending *Tinker* to off-campus speech, he observed: "We must tolerate thoughtless speech like J.S.'s in order to provide adequate breathing room for valuable, robust speech — the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination."<sup>95</sup>

Judge Sippel made the point more emphatically in *Beussink*,<sup>96</sup> granting a preliminary injunction in favor of a student suspended over an off-

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<sup>93</sup> 562 U.S. 443, 454 (2011).

<sup>94</sup> *Id.* at 452 (internal quotes and citations omitted).

<sup>95</sup> *J.S. ex rel. Snyder. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 941 (3d Cir. 2011) (Smith, J., concurring).

<sup>96</sup> 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

campus web page that used harsh profanity to criticize his high school principal, which the principal overheard students discussing at school:

One of the core functions of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.<sup>97</sup>

Similarly, a federal district court in Florida found that a school overreached in suspending a student for creating a Facebook discussion group where she invited others to “express your feelings of hatred” about a particular disfavored teacher: “if school administrators were able to restrict speech based upon a concern for the potential of defamation . . . students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom.”<sup>98</sup> School employees occupy positions of public trust. As such, they are expected to absorb even harsh and at times unfair criticism, so as to leave the essential “breathing space” for citizens to freely discuss the performance of their public servants.<sup>99</sup>

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<sup>97</sup> *Id.* at 1180-81 (internal quotes and citation omitted).

<sup>98</sup> *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1373 (S.D. Fla. 2010); *see also* *Burge v. Colton Sch. Dist.* 53, No. 3:14-00605-ST (D. Ore. Apr. 17, 2015) (applying a *Tinker* analysis and finding that a student's postings to a personal Facebook page that a teacher who gave him a “C” grade was “just a bitch” who “needs to be shot” were protected speech and not indicative of genuinely violent intentions); *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM (July 3, 2013) (declining to dismiss high school basketball player's First Amendment claim arising out of punishment for vulgar remarks about school employees posted to Twitter during a postgame family dinner at a restaurant, including: “I hope Coach brown gets f\*ck\*d in tha \*ss by 10 black d\*cks”).

<sup>99</sup> For this reason, the First Amendment imposes a higher burden for a public official to recover damages for a defamatory statement than for an ordinary citizen. *See New York*

This emerging pattern makes the Second Circuit's decision in the school's favor in *Doninger I*<sup>100</sup> especially anomalous and disturbing, since it involves criticism of school officials much milder than that found to be constitutionally protected in cases such as *Blue Mountain*, and much more clearly resembles political speech – attempting to overturn a school policy decision – than any of the other published online-speech cases.<sup>101</sup> The speech certainly is no less “political” than that protected by the Supreme Court in *Snyder*, which unlike student Avery Doninger's blog did not pertain to an ongoing policy decision or encourage viewers to do anything in particular. *Doninger I* is best understood as being limited to its unique facts for two reasons. First, the panel explicitly left open the possibility that a punishment harsher than removal from class elected office, such as suspension or expulsion, might have violated the speaker's constitutional rights: “We are mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.”<sup>102</sup> Second, *Doninger I* was not the Second Circuit's last word. The judges returned to the case three years later when it was again on appeal from the district court on the merits after a bench trial that ended in the school's favor. In that ruling (“*Doninger II*”), the Second Circuit did not conclusively decide the constitutional issue on the merits, because it found such lack of clarity in the First Amendment case law that school administrators were entitled to dismissal on the grounds of qualified immunity.<sup>103</sup> Although the ruling did not vacate *Doninger I*, the fact that *Doninger I* took place at the preliminary injunction stage and that the circuit's final word on the legal standard was inconclusive, the enduring value of *Doninger I* is negligible.

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*Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing America's “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

<sup>100</sup> *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

<sup>101</sup> See Fronk, *supra* note 62, at 1432 (noting that blogger Avery Doninger's post, criticizing authority figures over a governance decision, “was essentially political speech made while off campus”).

<sup>102</sup> *Id.* at 53.

<sup>103</sup> *Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011) (“*Doninger II*”).

## Striking a Sensible Balance

### *Tinker Is Inadequately Protective of Off-Campus Speech*

The *Tinker* standard, enabling government officials to punish “disruptive” speech, is a halfway measure that is as much a withdrawal as a grant of rights. Allowing government officials to punish in-school speech that would be constitutionally protected in any other setting is justified by reference to “the special characteristics of the school environment,”<sup>104</sup> chiefly the maturity of the audience and its “captive” nature. In light of that unique school environment, lower courts have applied *Tinker* deferentially, upending the usual presumption that the speaker and not the regulator is entitled to the benefit of the doubt in close judgment calls.<sup>105</sup> Recalling that the *Tinker* plaintiffs sought to wear their armbands even into classrooms during instructional time, where school authority is at its zenith, it is inconceivable that the same level of control could apply to speech created at home on personal time.

Off-campus speech – even off-campus speech that is made accessible on the Web – is qualitatively different from on-campus speech. When a student speaks on campus, that student’s speech is thrust upon a captive viewing audience that is compelled by law to attend. A student who is enraged by a swastika on the T-shirt of the classmate seated in front of him has no choice but to look at it. Because it is understandable that young listeners who are forced to view highly inflammatory speech might lash out, *Tinker* lowers the First Amendment bar while students are on campus during the school day, so that speech the government could never punish in the “real world” becomes punishable to protect the “captive audience” within the confines of school.

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<sup>104</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>105</sup> See Patrick, *supra* n.15 at 891 (“*Tinker*’s substantial disruption and material interference standard has become severely watered down because of the deference courts give to school administrators and their determinations of what constitutes a disruption.”); Hayes, *supra* n.15 at 285 (“The *Tinker* standard is unworkable in the Internet age because schools are far too deferential to the school’s claims that the student speech caused substantial disruption without applying their own independent analysis.”); Tuneski, *supra* n.15 at 141 (“the substantial disruption test is an easily manipulated standard with vague guidelines that provide little direction for courts, students and administrator . . . it is not sufficiently rigorous to ensure that the expression of off-campus speakers will not be curtailed”); see *id.* at 173 (“In practice, nearly any controversial or offensive expression that stirs debate or humors students could cause enough of a classroom interruption to satisfy the substantial disruption test”).

When a student speaks off campus, the facts are materially different. A YouTube video is not forced on captive viewers. The speech must be affirmatively sought out. Viewers who are offended can instantly navigate away. The potential audience is not limited to school listeners. It includes (among others) policymakers and the news media. It is one thing to say that a school may interfere with a student's communication with fellow students, but it is quite another to say that the school may interfere with a student's ability to communicate with the general public.

The *Tinker* standard permits preemptive punishment before conduct reaches a disruptive level. In other words, a school can engage in the anticipatory censorship of speech based on a mere forecast of the risk of disruption<sup>106</sup> and at times, courts have even countenanced discipline after the speech had been *proven* non-disruptive, based merely on the unrealized disruptive potential.<sup>107</sup> This invites enough judgment difficulties within school, but exponentially more in the virtual world. Online speech often involves acts by others besides the original speaker – readers using the features of a social media site to indicate “liking” or “favoriting” the initial comment.<sup>108</sup> Exposing a student to suspension from school for the ambiguous act of clicking a thumbs-up icon, or indicating affinity with an unsavory Facebook group, poses monumental issues of proof and of basic fairness.<sup>109</sup>

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<sup>106</sup> See *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (applying *Tinker* to a petition by athletes seeking the removal of an abusive coach, “[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place”).

<sup>107</sup> See, e.g., *Doninger v. Neihoff*, 527 F. 3d 41, 51 (2d Cir. 2008) (*Doninger I*) (permitting after-the-fact punishment of a student blog post that had already been deactivated at the time of the discipline, reasoning that “[t]he question is not whether there has been actual disruption, but whether school officials might reasonably portend disruption from the student expression at issue”).

<sup>108</sup> Each social-media application uses its own nomenclature, but part of the essence of what makes media “social” is the ability of audience members to comment on, or indicate approval of, what others share. In a First Amendment case involving the discharge of a public employee who “liked” the Facebook page belonging to his supervisor’s political opponent, the Fourth Circuit – quoting from Facebook’s terms of service and online FAQ section – explained the mechanism of “liking” a post: “‘Liking’ on Facebook is a way for Facebook users to share information with each other. The ‘like’ button, which is represented by a thumbs-up icon, and the word ‘like’ appear next to different types of Facebook content. Liking something on Facebook ‘is an easy way to let someone know that you enjoy it.’” *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013).

<sup>109</sup> See, e.g., Joce DeWitt, *Statesman Journal: 20 Students Suspended Over Tweet*, OREGON PUBLIC BROADCASTING (March 11, 2014, 10:08 AM), <http://www.opb.org/news/article/20-suspended-over-tweet/> (reporting on suspensions of high school students for retweeting “disparaging” Twitter post alleging that a teacher

Social media is uniquely vulnerable to misunderstandings due to lack of context. To give just one concrete example, the popular “micro-blogging” platform, Twitter, not only includes within its user interface the ability to “re-tweet” the speech of others to a potentially limitless audience of third- and fourth-degree contacts, but also has given rise to various online publishing tools that exist with the express purpose of empowering users to republish Twitter postings in a new-and-different context. Among the most popular of these is Storify, a service that enables users to collect and publish Twitter users’ “tweets” aggregated into a narrative created by the Storify account holder, with or without the knowledge and consent of the original writer.<sup>110</sup> Thus, a Twitter user’s harmless musing about a violent scene from a movie or television program could turn up, devoid of context but attributed to its original author, in a published narrative that gives the remark ominous unintended meaning. The potential for speech to be republished misleadingly in out-of-context ways is a uniquely pronounced hazard of online publishing. If a reader is shown a page ripped from the middle of a book or magazine, or a viewer tunes into a television program in progress, it is immediately apparent that the speech is an incomplete fragment. Not so with a post on a blog or social media page.

Social media uniquely facilitates an informality and immediacy of communication in which it is understood by the audience that remarks may represent momentary “venting” on which the speaker has no intention of acting – harmless expressions of exasperation that would never have been punished if not memorialized. Even discussion forums populated primarily by adult speakers, such as the comment boards of online newspapers, are filled with exaggerated rage and invective by people who have neither the means nor the inclination to take their “virtual” disputes

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acted flirtatiously with students, without addressing the truth or falsity of the underlying comment); Nick Sturdivant, “*Favorited*” tweet gets Hartsville High school student suspended, she says, WBTW.COM (Feb. 9, 2014, 12:53 PM), <http://www.wbtw.com/story/24676559/favorited-tweet-gets-hartsville-high-school-student-suspended> (describing student’s five-day suspension for clicking the “favorite” button on tweets created by others that her school regarded as cyberbullying); Rebecca Roberts, *Granite City Student Gets Suspended for Tweets*, FOX2NOW.COM (Oct. 25, 2012, 11:49 PM), <http://fox2now.com/2012/10/25/social-media-gets-students-suspended-at-granite-city-hs/> (quoting parents whose children received five-day suspensions for “favoriting” a tweet that commented on the sex appeal of a female teacher).

<sup>110</sup> See Patrick Sullivan, *The “Flickr” of an Idea*, NONPROFIT TIMES (March 22, 2014), <http://www.thenonprofittimes.com/news-articles/the-flickr-of-an-idea/> (explaining workings of Storify).

into the physical world. Indeed, an entire cottage industry of “rant-sites” is dedicated to encouraging people to vent.<sup>111</sup>

Compared with more traditional forms of communication, a person publishing a social media message has little control over the scope of the audience. A signature feature of social media is that it facilitates and promotes sharing and redistributing speech, potentially to readers the speaker neither intended nor envisioned communicating with.<sup>112</sup> Further, the interactivity of the Internet allows receivers to use their own volition to “pull” speech, rather than having it “pushed” at them from speaker-initiated sources like the mail or telephone.<sup>113</sup> When a message is sent through the mail or spoken into the phone, there is minimal risk of reaching unforeseen audiences; the same message shared on social media can be forwarded far beyond the speaker’s intended audience, often without the speaker fully apprehending how little control he has over where his words land.<sup>114</sup>

Young speakers are particularly at risk of being misunderstood. To begin with, they are especially uninhibited in sharing personal information and feelings online.<sup>115</sup> Further, every generation develops a slang vocabulary that is purposefully opaque to older eyes and ears (an entire website, *Urbandictionary.com*, is devoted to helping uninitiated adults “translate” their children’s idioms).<sup>116</sup> And while most teens are lifelong technology users and profess to be concerned about privacy, they often do not take advantage of privacy safeguards, even those readily available in the social-media platforms they choose.<sup>117</sup> For example, many teens post

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<sup>111</sup> See Ryan C. Martin, Kelsey Ryan Coyier, Leah M. VanSistine, and Kelly L. Schroeder, *Anger on the Internet: The Perceived Value of Rant-Sites*, 16(2) *CYBERPSYCHOLOGY, BEHAVIOR, AND SOCIAL NETWORKING* 119 (2013).

<sup>112</sup> Lauren Gelman, *Privacy, Free Speech, and Blurry-Edged Social Networks*, 50 *B.C. L. Rev.* 1315, 1329 (2009).

<sup>113</sup> Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 *U.C.L.A. L. Rev.* 1653, 1668 (1998).

<sup>114</sup> Gelman, *supra* note 112, at 1328-29.

<sup>115</sup> See Mary Madden et al., *Teens Social Media, and Privacy*, PEW RESEARCH CENTER (May 21, 2013), <http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/> (reporting results of six-year survey of teen online behavior).

<sup>116</sup> See Hayes, *supra* n.15 at 274 (“High school students constantly subject the English language to continual transformation. ‘Bad’ means good. ‘Retarded’ no longer means having a mental handicap”); Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 *LOY. L.A. ENT. L. REV.* 65, 90 (2005) (commenting that “many judges do not understand popular culture and thus are unable to grasp the student’s perspective,” and offering as an example the risk of confusion if a student used social media to quote or imitate violent lyrics from the Grammy-winning rapper Eminem).

<sup>117</sup> See Johann Schrammel et al., *How Much Do You Tell? Information Disclosure*

information on social media intended with a wink to a narrow audience – on Twitter, there is even a term of art for this rhetorical technique (“subtweeting”) – without considering how this same content might be read out of context.<sup>118</sup> In this regard, “[t]he intended audience matters, regardless of the actual audience.”<sup>119</sup> Thus, even when people say what they mean online, their words can be misunderstood. As social media becomes more mainstream, the number of older users increases. As a result, content created by and intended for young audiences is being read by older audiences who may not understand the vocabulary, cultural references and back-story.<sup>120</sup>

This risk of generational misunderstanding is compounded when the older users come to the social media with the purpose of detecting potential dangers. Partly in response to cyberbullying statutes and regulations, schools have begun monitoring the public portions of students’ social media accounts even without receiving complaints; private contractors are even offering to screen students’ accounts for keywords about violence or illegal activity, which by its nature almost guarantees false-positive contextual misunderstandings.<sup>121</sup> In California, police and school officials were put on high alert of a threat against an entire school district after a student made a careless comment online in reference to a video game.<sup>122</sup> Similarly, in Indiana, a 15-year-old student was disciplined in school and brought up on felony charges after he responded

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*Behavior in Different Types of Online Communities*, (June 2009), paper presented at the Fourth International Conference on Communities and Technologies, University Park, PA, June 25-27, 2009.

<sup>118</sup> DANAH BOYD, *IT’S COMPLICATED* 44 (Yale University Press, 2014). See, for example, the speech in *Nixon v. Hardin Cnty. Bd. of Educ.*, 988 F. Supp.2d 826 (W.D. Tenn. 2013), in which three middle-school girls carried on what resembled a private conversation replete with inside jokes about their hatred for a rival student, but chose the public medium of Twitter to transmit their words.

<sup>119</sup> Boyd, *supra* note 118, at 30.

<sup>120</sup> *Id.* (“Unfortunately, adults sometimes believe they understand what they see online without considering how teens imagined the context when they posted a particular photograph or comment”).

<sup>121</sup> See David Knowles, *California School District Begins Monitoring All Students’ Social Media Activity*, N.Y. DAILY NEWS (Aug. 27, 2013, 3:40 PM), <http://www.nydailynews.com/news/national/calif-school-district-starts-social-media-spying-program-article-1.1438471> (reporting on contractor Geo Listening, which advertises itself as providing school officials with information about students’ online activity “so that they can better intervene in the lives of children”).

<sup>122</sup> Michael Zogg & Jessica Cejnar, *School Scare a Misunderstanding*, DEL NORTE TRIPLICATE (May 1, 2014, 4:21 PM), <http://www.triplicate.com/News/Local-News/School-scare-a-misunderstanding>.

to another student's Facebook comment that someone was going to shoot up the school by saying, "I am the guy."<sup>123</sup>

Of course, misunderstandings are not limited to messages posted by young adults. A middle-aged art professor at a New Jersey college was suspended without pay for eight days after he posted on Google+ a picture of his smiling seven-year-old daughter wearing an oversized T-shirt with a quote from the violent HBO television series "Game of Thrones."<sup>124</sup> College administrators interpreted the quote, "I will take what is mine with fire and blood," uttered by one of the show's most popular characters, as threatening a school shooting. Even after the misunderstanding was revealed and the instructor reinstated with back pay, the school required him to remain off campus for more than a week and to visit a psychiatrist before returning to work.<sup>125</sup> Because of the well-documented history of misinterpretations and overreactions, online speech demands a greater measure of protection than on-campus speech, where the speech is likely to be witnessed in its full context and there is an immediate opportunity to investigate the circumstances and dispel misunderstandings.

*Tinker* is an inapt standard for punitive authority over online speech for additional practical reasons. *Tinker* has been interpreted even to permit a period of prior restraint during which school officials can review what students plan to publish and interdict speech they regard as potentially disruptive.<sup>126</sup> In the most recent example, the Tenth Circuit upheld the Roswell, N.M., school district's policy of requiring students to submit any literature to be disseminated on school grounds to a school administrator for a review period of no more than five days to check for material violating a list of prohibitions, including material that "would cause a substantial disruption or a material interference with the normal operation

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<sup>123</sup> *Jeffersonville Student Accused of Facebook Threat in Court Wednesday*, WHAS11.COM (Dec. 19, 2012, 2:47 PM), <http://www.whas11.com/story/news/crime/2014/10/13/15694402/> (last viewed May 10, 2015).

<sup>124</sup> Stefanie Dazio et al., *Bergen Community College Professor Suspended Over 'Game of Thrones' Quote on Daughter's T-shirt*, THE RECORD (BERGEN, N.J.) (April 17, 2014, 11:25 PM), <http://www.northjersey.com/news/bergen-community-college-professor-suspended-over-game-of-thrones-quote-on-daughter-s-t-shirt-1.998396>.

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g., Sullivan v. Houston Indep. Sch. Dist.*, 475 F. 2d 1071, 1076 (5th Cir. 1973) (stating that "there is nothing *per se* unreasonable about requiring a high school student to submit written material to school authorities prior to distribution"); *Eisner v. Stamford Bd. of Educ.*, 440 F. 2d 803, 809 (2d Cir. 1971) (finding that a pre-distribution approval regime for independently produced student publications is constitutional if the grounds for suppressing distribution are limited to those recognized in *Tinker*).

of the school or school activities.”<sup>127</sup> It is unimaginable that a school could be permitted to enforce the Roswell level of control over speech posted on the Web during personal time by requiring, under threat of disciplinary action, students to refrain from saying anything online that will reach a school audience without submitting it to be reviewed for disruptive potential. If an unmodified *Tinker* standard genuinely applied to all student speech regardless of location, there would be no constitutional impediment to enforcing such an obviously unworkable regulation.

Perhaps most significantly, the *Tinker* disruption standard does not require that the “disruption” be wrongfully motivated to be subject to school proscription. Indeed, courts have permitted schools to punish speech of benign intent, including drawings of cartoon violence<sup>128</sup> and even displays of the American flag,<sup>129</sup> in the interest of maintaining order, based on how others might misbehave in response to the speech. In one illustrative example, the Second Circuit applied *Tinker* to uphold school disciplinary action against a fifth-grader for his crayon drawing of an astronaut using his mind to blow up the school – not because there was any indication that the artist intended to act on this farfetched fantasy, but because “[s]chool administrators might reasonably fear that, if permitted, other students might well be tempted to copy, or escalate, [the student’s] conduct.”<sup>130</sup> It takes little imagination to apprehend the peril to innocent speakers of a legal standard holding student Internet users responsible for how others might “escalate” their speech in disruptive ways.

Journalistic and whistle-blowing speech is, at its most effective, intended and expected to produce an effect that might be termed “disruptive” to the normal operations of a government agency. Penn State University most assuredly was in a state of “substantial disruption” after the disclosure of child-molestation allegations that brought down the school’s president and head football coach.<sup>131</sup> Florida A&M University most assuredly was in a state of “substantial disruption” after the revelation of widespread hazing that followed the death of a marching-

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<sup>127</sup> Taylor v. Roswell Indep. Sch. Dist., 713 F. 3d 25 (10th Cir. 2013).

<sup>128</sup> Cuff ex rel. BC v. Valley Cent. Sch. Dist., 677 F. 3d 109 (2d Cir. 2012).

<sup>129</sup> Dariano v. Morgan Hill Unif. Sch. Dist., 745 F.3d 354 (9th Cir. 2014).

<sup>130</sup> Cuff ex rel. BC v. Valley Cent. Sch. Dist., 677 F. 3d 109, 114 (2d Cir. 2012).

<sup>131</sup> See Michael Sololove, *The Trials of Graham Spanier, Penn State’s Ousted President*, THE NEW YORK TIMES MAGAZINE (July 16, 2014), [http://www.nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html?\\_r=0](http://www.nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html?_r=0) (describing criminal case against former president accused of abetting cover-up of child molestation by former assistant coach Jerry Sandusky).

band member.<sup>132</sup> But no student who spoke out publicly to call attention to these events at Penn State or at FAMU could conceivably have been punished for “disruptive” speech. *Tinker* fails to distinguish between this type of disruption on one hand and a wrongful, ill-motivated disturbance on the other, for the very reason that *Tinker* is locational. Even the best-intentioned whistle-blowing speech inside of a classroom during school might be, to borrow Justice Sutherland’s phrase, “a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”<sup>133</sup> But the same speech that might distract from learning when interjected into instructional time must be protected when delivered off-campus, even if it is foreseen or even intended to provoke a reaction interfering with the school’s normal routine. Indeed, the Supreme Court has long reserved a special solicitude for speech that incites its audience to agitate for social or political change:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>134</sup>

The Second Circuit’s errant holding in *Doninger I*<sup>135</sup> well illustrates the civic hazards of extending the *Tinker* level of control into cyberspace. What the student blogger in *Doninger* stood accused of doing – using harsh language to motivate the public to bombard administrators with

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<sup>132</sup> See Ben Montgomery, *Recounting the Deadly Hazing that Destroyed FAMU Band's Reputation*, THE TAMPA BAY TIMES (Nov. 9, 2012, 12:43 PM), <http://www.tampabay.com/news/humaninterest/recounting-the-deadly-hazing-that-destroyed-famu-bands-reputation/1260765> (describing beating death of drum major Robert Champion and subsequent criminal prosecutions of band members).

<sup>133</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

<sup>134</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (citations omitted).

<sup>135</sup> 527 F.3d 41 (2d Cir. 2008).

phone calls and emails to attempt to reverse a school policy decision<sup>136</sup> – would, in any other context, be regarded as “civic participation.”

Finally, *Tinker* is too risky a standard by which to govern off-campus speech because of its ill-defined and seldom-invoked prong enabling schools to restrict speech that violates “the rights of others.”<sup>137</sup> Since the Court did not explain the panoply of “rights” that schools could be empowered to protect, or limit itself to the rights of other *schoolchildren*, a school relying on *Tinker* could assume authority over a breathtaking amount of off-campus expression – for instance, disclosing a sexual relationship among private citizens in violation of the subjects’ right to privacy.

At times, judges and commentators have rationalized the expansion of *Tinker* into students’ off-hours by placing undue weight on a fragmentary passage in which the Court refers to the disruptive potential of speech uttered “in class or out of it.”<sup>138</sup> In context, however, the *Tinker* passage is not a *withdrawal* of rights, but rather, an *affirmative grant* of rights.

The *Tinker* Court began by reciting what had happened in the plaintiffs’ schools when they showed up wearing antiwar armbands: “There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.”<sup>139</sup> Tracing the history of campus “academic freedom” cases, the Court then found that the *Tinker* children’s speech was constitutionally protected no matter where on campus it occurred:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed

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<sup>136</sup> *Id.* at 51.

<sup>137</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). See David R. Hostetler, *Off-Campus Cyberbullying: First Amendment Problems, Parameters and Proposal*, 2014 B.Y.U. EDUC. & L.J. 1, 14-15 (2014) (expressing skepticism about the broad invocation of the “rights of others” prong of *Tinker* in *Harper v. Poway Unif. Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), which found that schools have authority even to police violations of “soft rights” such as “the right to be left alone and to privacy against unwanted communications” (quotations omitted)).

<sup>138</sup> This was the basis of the district court’s since-overturned ruling in the Taylor Bell case involving a Mississippi high school student punished for a profane rap video. See *Bell v. Itawamba County Sch. Dist.*, 859 F. Supp. 2d 834, 837 (N.D. Miss. 2012), *rev’d*, 774 F.3d 280 (5th Cir. 2014).

<sup>139</sup> *Tinker*, 393 U.S. at 508.

hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, **or on the campus during the authorized hours**, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others . . . But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>140</sup>

Understood in context, the “in class or out of it” passage was the Supreme Court's effort to say that there is no diminished level of freedom of expression in the non-classroom areas of the school building where the purportedly disruptive reactions occurred in that case.<sup>141</sup> It cannot be read as withdrawing First Amendment rights during students' off-hours when they are away from the classroom, cafeteria and playing field.

Had the Supreme Court viewed *Tinker* as a 24-hour infirmity that follows students throughout their lives, there would have been no need to speak in terms of speech “on the campus during the authorized hours.” That passage clearly indicates the Court's understanding that school authority extended to speech *on school grounds* (whether in the classroom, the cafeteria or the playing field) and *during school hours*.<sup>142</sup>

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<sup>140</sup> *Id.* at 512-13 (emphasis supplied).

<sup>141</sup> See Lindsay J. Gower, Note, *Blue Mountain School District v. J.S. ex rel Snyder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709, 728 (2013) (commenting that the disputed passage “seems to embrace only speech made during extracurricular activities,” not off-campus personal speech).

<sup>142</sup> The Fifth Circuit's vacated panel opinion in *Bell* came to this same understanding of the disputed *Tinker* passage, explaining that “the Court was simply indicating that the delicate balance between the protection of free speech rights and the regulation of student conduct extends to all facets of on-campus student speech and not just that occurring within the classroom walls.” *Bell v. Itawamba Sch. Dist.*, 774 F.3d 280, 293 (5th Cir.

*Tinker* of course did not involve off-campus speech at all – the students were ordered to remove their armbands while at school, not to refrain from wearing them at all times. Had the Supreme Court believed it was making a rule extending to the students’ off-hours – had the Des Moines school’s prohibition applied around-the-clock to the wearing of armbands on personal time – there is no telling how the Court might have calibrated the “material and substantial disruption” test. But there is no reason to believe that the Court would have afforded the school equivalent authority to ban the wearing of armbands on students’ personal time, on the grounds that classmates might see the armbands on Saturday and retaliate while at school on Monday. Nor would such a directive conceivably be upheld as constitutional today.

In short, it simply is untenable to make a case that affirmatively granted students First Amendment rights while in the corridors and lunchrooms into a case that affirmatively withdrew students’ First Amendment rights while at home.

### *Foreseeability-Based Standards are Impractical in the Digital World*

To insulate students against disciplinary overreaching into purely personal matters unrelated to school, a number of courts and commentators have embraced a threshold jurisdictional test based on the foreseeability that their speech will reach campus or will result in disruption there. This standard – particularly if based on the effects of the speech reaching the school and not the speech itself – is so easily satisfied that, as a practical matter, it puts off-campus speech on par with in-school speech.

All speech is inherently “portable,” but online speech is especially so, and it therefore will always be the case that speech about the school or of interest to a school audience foreseeably will “reach” the school.<sup>143</sup> A foreseeability-based standard will, as a practical matter, make all speech *about* the school punishable by the school,<sup>144</sup> thus discouraging students from speaking about the educational policies of greatest immediate impact

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2014).

<sup>143</sup> See Gower, *supra* note 141, at 730 (“it will almost always be foreseeable that Internet speech regarding school issues will reach the school audience”).

<sup>144</sup> See Mary-Rose Panpandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1091-92 (“Students’ speech frequently concerns topics related to their school and classmates. Given this reality, it is hard to imagine when it would not be directed to the campus, or when it would not be reasonably foreseeable that students’ digital expression would come to the school’s attention”).

on their lives and about which they are uniquely knowledgeable.<sup>145</sup> Since schools obviously can discipline speech only if it comes to their attention, the speech necessarily will have “reached” the school in some fashion – even if just by a parental complaint – for punishment to result. Courts understandably will hesitate to say that it was unforeseeable for a comment to reach the campus when experience proves that it actually did.

In a smartphone-saturated world in which every lunch is Instagrammed and every accidental groin kick ends up on YouTube, there is virtually no such thing as speech that cannot be seen by a school audience. A student who wears a National Rifle Association T-shirt to march in a gun-rights parade on a Saturday will predictably show up in YouTube videos, Facebook photos and online news broadcasts so that his T-shirt is viewable by classmates and school personnel. Is that student’s “you can have my gun when you pry it out of my cold, dead fingers” T-shirt subject to regulation as on-campus speech because of the student’s certain knowledge that the speech will be viewable at school? To equate off-campus speech with on-campus speech because of its potential to reach the school completely substitutes school authority for the child-rearing authority of the family, so that a T-shirt that a father proudly gave his son to wear on Saturday could land the student a suspension on Monday.

The Second Circuit’s ruling in *Wisniewski* exemplifies just how attenuated the chain of foreseeability can become. In that case, the student’s speech – an instant message (“IM”) accompanied by a cartoon icon of a teacher being shot – reached the school only because a classmate (not a recipient of the message, but someone who knew about the cartoon second-hand) notified the teacher depicted in the cartoon, manifestly against the creator’s wishes.<sup>146</sup> Nevertheless, the court concluded that “it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.”<sup>147</sup> Notably, the *Wisniewski* “reasonably foreseeable” formulation is a mere negligence standard; a student need not intend for his speech to reach the school or to cause a disruption, or even know that it will do so. Since it is always foreseeable that a person might repeat to school authorities a remark heard off campus, essentially all off-campus speech about school matters is fair game for school discipline under the

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<sup>145</sup> See *id.* at 1077 (“Students are particularly likely to provide their parents and other adults with useful information regarding the operation of the schools and their educational experience”).

<sup>146</sup> *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007).

<sup>147</sup> *Id.* at 39.

*Wisniewski* view of foreseeability. That school officials are known to react reflexively at the first utterance of online speech hinting at harm to students or school personnel – even speech that should obviously be understood as humor or hyperbole – makes a foreseeability-based standard especially untenable, since school officials’ own overreactions become self-validating.

### *School Justifications for Jurisdiction over Off-Campus Speech Are Illegitimate*

A justification commonly offered for extending schools’ jurisdiction to cover online speech is the need for compliance with statutory mandates to protect those targeted by hurtful words, particularly the federal anti-discrimination statutes, Title IX and Title VI.<sup>148</sup> These statutes have been interpreted as extending to educational institutions receiving federal funding that permit an atmosphere of severe and pervasive gender-based or race-based harassment that interferes with victims’ enjoyment of the benefit of educational opportunities.<sup>149</sup>

But purported adherence to federal statutes and the desire to avoid potential liability are not justifications for behaving unconstitutionally. A government agency cannot speculatively punish speech based on the anticipation of how regulators might react if the speech resulted in a complaint. Where a statute appears to compel an unconstitutional intrusion into civil liberties, the solution is to interpret the statute as being confined within constitutional boundaries, or if that is not possible, to invalidate the statute in its entirety.<sup>150</sup> Further, interjecting school authority ubiquitously into students’ off-campus lives is a strategy calculated to maximize, not minimize, liability – once schools assume

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<sup>148</sup> 20 U.S.C. § 1681 *et seq.*; 42 U.S.C. § 2000d (2015).

<sup>149</sup> In *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court recognized a Title IX remedy against schools for students subjected to peer harassment based on membership in a statutorily protected class, but only where the plaintiff can prove deliberate indifference to sexual harassment of which the school has actual knowledge, and the harassment is so severe and pervasive that it can be said to deprive the victim of the benefit of educational opportunities.

<sup>150</sup> See *People v. Marquan M.*, 24 NY 3d 1, 11 (N.Y. Ct. App. 2014) (striking down as unconstitutionally overbroad a New York ordinance making it a crime to send “hate mail” or make online posts “with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person,” after concluding that the ordinance could not be judicially narrowed so as to be constitutional). The statute in the *Marquan M.* case was applied to prosecute a 16-year-old student who created a Facebook group consisting of insulting sex-themed gossip about named classmates.

responsibility for policing off-campus expression, they assume a legal duty to do so non-negligently.<sup>151</sup> In any event, the Title IX and Title VI standards are not the *Tinker* standard and cannot be the basis for justifying the application of *Tinker* to online speech. Title IX, for example, applies only to a narrow category of student speech. For an educational institution to be liable under Title IX, harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” and must be based on membership in a protected class as opposed to, for instance, a personal grudge or rivalry.<sup>152</sup> The need to comply with federal statutory proscriptions does not justify entirely removing the distinction between on- and off-campus speech. If the fear of civil liability is driving schools to expand their authority into students’ off-campus lives, the right response is to insulate schools and their employees statutorily for failing to respond to bullying that takes place outside the school setting on the grounds that such bullying is beyond their constitutional authority to control.

Similarly, schools are prone to justify, and courts are prone to rationalize, control over online speech on the grounds that it is necessary to head off on-campus violence. But school punishment often follows a determination that the speaker is *not* dangerous and had *no* intention of acting on social-media posts about violence; indeed, in no published case involving student cyberspeech has the school’s investigation disclosed that the student actually had weapons or was otherwise preparing an attack.<sup>153</sup> The First Amendment is implicated only by the exercise of punitive authority. Schools can freely and without constitutional implications investigate whether a speaker has violent intentions or, like Texas video-gaming enthusiast Justin Carter,<sup>154</sup> was just misunderstood. Restricting the ability to punish proven harmless speech does not tie the hands of a school to promptly investigate whether speech referring to violence portends injurious behavior. More to the point, realistic threats of

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<sup>151</sup> See Pike, *supra* n.15 at 1006 (“A ‘right’ to police electronic speech might easily and rapidly devolve into an onerous responsibility to do so”).

<sup>152</sup> Davis, 526 U.S. at 633.

<sup>153</sup> See, e.g., Bell v. Itawamba Sch. Dist., 774 F.3d 280, 287 (5th Cir. 2014) (observing that neither of the two coaches targeted by the student’s profane rap video testified to feeling frightened that the student would harm them); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (upholding college discipline of student who made a misunderstood joke on Facebook about using a dissecting tool from her mortuary-sciences lab “to stab a certain someone,” even after police investigated and concluded the student was not dangerous).

<sup>154</sup> See McCann, *supra* note 9.

violence are constitutionally unprotected anyway, so schools need not resort to *Tinker* to regulate that limited subset of speech.

Nothing in the way that schools have exercised authority over off-campus expression suggests that they can be trusted to restrain themselves to injury-causing speech. Instead, schools have used their authority over social-media speech in exactly the way they have traditionally used their authority over *on*-campus speech: To punish and deter critics whose speech might portray the school in an unfavorable light. Thus, a New York high school student who started a Twitter chat about the school's budget problems, inviting suggestions for unnecessary expenditures that should be cut, was suspended for what the principal called "inciting a social media riot" by fellow students who posted responsive comments to Twitter during the school day.<sup>155</sup> A Miami principal threatened to suspend student whistleblowers that used the photo-sharing application, Instagram, to alert the public to squalid conditions in their decrepit school that included visible mold growing on cafeteria food.<sup>156</sup> In Kansas, a principal suspended a student for posting a photo of an assistant principal on Twitter with the sardonic caption, "Public Enemy #1" to protest the administrator's heavy-handed punishment of student hecklers at a basketball game.<sup>157</sup> A Tampa-area high school senior was kicked out of his school's chapter of the National Honor Society on the grounds of "disloyalty" for starting a Facebook group that invited the public to complain about the fact that the school was on the verge of being labeled a "failing" school because students were making inadequate academic progress.<sup>158</sup> As these situations, and many comparable ones coming to light throughout the country, illustrate, in the absence of clear judicially established boundaries, schools will use punitive authority over off-campus speech not solely or even primarily for safety reasons, but for reasons of image control.

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<sup>155</sup> Sarah Moses, *Cicero-North Syracuse Student Suspended After Speaking Out Against Failed Budget on Twitter*, SYRACUSE.COM (May 24, 2013, 1:46 PM), [http://www.syracuse.com/news/index.ssf/2013/05/cicero-north\\_syracuse\\_student\\_1.html#incart\\_m-rpt-2](http://www.syracuse.com/news/index.ssf/2013/05/cicero-north_syracuse_student_1.html#incart_m-rpt-2).

<sup>156</sup> Trevor Bach, *Alumni Claim Miami Sunset Punished Students Who Complained About Filth*, MIAMI NEW TIMES (Jan. 20, 2015), <http://www.miaminewtimes.com/news/alumni-claim-miami-sunset-high-punished-students-who-complained-about-filth-6545940>.

<sup>157</sup> Kenneth Palmer & Becca Moran, *Schneider Receives OSS for "Uncomfortable" Tweet*, LAWRENCE (KAN.) FREE STATE (March 12, 2014), <http://www.fsfreepressonline.com/news/2014/03/12/schneider-receives-oss-for-uncomfortable-tweet/> (last viewed May 11, 2015).

<sup>158</sup> *Student Gripes Voiced Via Social Networking*, TAMPA TRIBUNE (March 22, 2013, 3:22 AM), <http://tbo.com/pasco-county/student-gripes-voiced-via-social-networking-87491>.

*Insufficient Protection of Off-Campus Speech Has Real and Lasting Consequences*

Judicial and scholarly discussion about the policing of student speech disproportionately focuses on the interests of school authorities and the consequences of under-regulating speech. Relatively little attention is paid to the consequences on the “false positive” student – the student whose harmless, misunderstood speech results in an undeserved suspension or expulsion. The severity of a school’s disciplinary response receives judicial consideration only when consideration cuts in favor of the school.<sup>159</sup> An expulsion requires no greater First Amendment justification in the view of the courts than does an afternoon in detention.

Study after study is exposing how trigger-happy school officials excessively reach for the remedy of out-of-school suspension for minor (or imaginary) slights, with the burden falling disproportionately on minority students.<sup>160</sup> The most authoritative of these studies, tracking a cohort of 1 million Texas students through their junior-high and high-school years, determined that fully 60 percent suffered at least one suspension over that six-year period, with more than 30 percent actually removed from school at least once.<sup>161</sup> The study by the Council of State Governments and Texas A&M University found that isolated suspensions were a rarity; for students who had at least one involvement with the disciplinary system, the average number of disciplinary episodes was eight, and fully 15 percent experienced 11 or more suspensions. The study also documented “significantly different” suspension rates for black and Latino students as opposed to white students, particularly as to non-violent offenses for which suspension is discretionary rather than mandatory under Texas

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<sup>159</sup> See, e.g., *Doninger v. Neihoff*, 527 F. 3d 41, 52 (2d Cir. 2008) (*Doninger I*) (stating, in upholding school punishment for student’s uncivil remark on off-campus blog, that “it is of no small significance” that the punishment was limited to withdrawal of the “privilege” of holding class office, which carries special expectations of optimal behavior).

<sup>160</sup> See Tanzina Vega, *Schools’ Discipline for Girls Differs by Race and Hue*, THE NEW YORK TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/us/school-discipline-to-girls-differs-between-and-within-races.html> (quoting U.S. Department of Education statistics showing that “black girls in public elementary and secondary schools nationwide were suspended at a rate of 12 percent, compared with a rate of just 2 percent for white girls”).

<sup>161</sup> Gary Scharrer, *Study: 60% of Texas Students are Expelled or Suspended*, HOUSTON CHRONICLE (July 19, 2011), <http://www.chron.com/news/houston-texas/article/Study-60-of-Texas-students-are-expelled-or-2081103.php>.

law.<sup>162</sup> These well-documented inequities in school discipline prompted an unprecedented joint declaration by U.S. Attorney General Eric Holder and Education Secretary Arne Duncan in January 2014 calling on schools to end reliance on “zero tolerance” discipline, saying that schools were themselves disrupting the learning process by resorting to suspension, expulsion, or even arrest for non-violent transgressions.<sup>163</sup>

While school authorities are prone to invoke student safety when arguing for jurisdiction over online speech, school discipline can have its own ruinous consequences. As the nation’s largest teacher union, the National Education Association (NEA) has written:

A suspension can be life altering. It is the number-one predictor—more than poverty—of whether children will drop out of school, and walk down a road that includes greater likelihood of unemployment, reliance on social-welfare programs, and imprisonment.<sup>164</sup>

Research increasingly suggests that school “pushout” policies, removing students for nonviolent misbehavior such as insubordination or defiance, set students on a course to become dropouts and worsen their risk of future incarceration; the phenomenon has become known as “the school-to-prison pipeline.”<sup>165</sup> In just one suburban Washington, D.C. area school

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<sup>162</sup> *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, THE COUNCIL OF STATE GOVERNMENTS KNOWLEDGE CENTER (July 19, 2011, 10:27 AM), <http://knowledgecenter.csg.org/kc/content/breaking-schools-rules-statewide-study>.

<sup>163</sup> Donna St. George, *Holder, Duncan announce national guidelines on school discipline*, THE WASHINGTON POST, Jan. 8, 2014), [http://www.washingtonpost.com/local/education/holder-duncan-announce-national-guidelines-on-school-discipline/2014/01/08/436c5a5e-7899-11e3-8963-b4b654bcc9b2\\_story.html](http://www.washingtonpost.com/local/education/holder-duncan-announce-national-guidelines-on-school-discipline/2014/01/08/436c5a5e-7899-11e3-8963-b4b654bcc9b2_story.html)

<sup>164</sup> Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NEA TODAY (Jan. 5, 2015) [http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut/?utm\\_source=nea\\_today\\_express&utm\\_medium=email&utm\\_content=school\\_to\\_prison\\_pipeline&utm\\_campaign=150114neatodayexpress](http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut/?utm_source=nea_today_express&utm_medium=email&utm_content=school_to_prison_pipeline&utm_campaign=150114neatodayexpress) (last viewed May 9, 2015).

<sup>165</sup> See, e.g., New York Civil Liberties Union, *A, B, C, D, STPP: How School Discipline Feeds the School-to-Prison Pipeline* (last viewed Jan. 13, 2015), [http://www.nyclu.org/files/publications/nyclu\\_STPP\\_1021\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf). The NYCLU studied two years’ worth of disciplinary data from the New York City public schools and discerned markedly higher rates of out-of-school suspensions for black, Latino and especially special-needs students as compared with white students in the general school population, and found that black students “are suspended more often for behaviors that involve subjective or discretionary judgments by school authority figures, such as disrespect, excessive noise and threatening behavior.” *Id.* at 8-9. Drawing on decades of

district, two student athletes committed suicide over a three-year period when facing harsh disciplinary penalties for minor substance-abuse offenses.<sup>166</sup>

After those student suicides, parents in the Fairfax, Va., district used freedom-of-information requests to examine whether wrongfully accused students could receive effective relief through the administrative appeal process. Their research documented that, in 5,025 disciplinary cases spanning the six most recently available years, students who appealed their disciplinary cases to a district hearing officer prevailed exactly zero out of 5,025 times, no matter how ill-founded the allegations.<sup>167</sup> No comparable research on the effectiveness of “name-clearing hearings” has been published on the national level, which itself is a powerful argument against expanding the reach of a disciplinary system that, anecdotally, appears dysfunctional already.

The U.S. Supreme Court has said anything less than a 10-day suspension is so immaterial that the Due Process Clause requires only the most “rudimentary,” informal level of pre-deprivation process.<sup>168</sup> Even where legal recourse is available, a disciplined student invariably will have fully suffered the penalty before judicial review can be had.<sup>169</sup>

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academic research, the report drew a causal link between the increasing “criminalization” of school discipline and later-life involvement in the criminal justice system.

<sup>166</sup> Donna St. George, *Suicide Turns Attention to Fairfax Discipline Procedures*, THE WASHINGTON POST (Feb. 20, 2011, 12:39 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/19/AR2011021904528.html>. See also *Jahn v. Farnsworth*, No. 13-11309 (E.D. Mich. July 16, 2014) (documenting student’s suicide hours after principal placed him on suspension on charges of stealing a teacher’s laptop and informed him that the two colleges that had accepted him would be notified of the suspension).

<sup>167</sup> Caroline Hemenway and Janet Otersen, Letter, *How Fairfax Can Get School Discipline Right*, THE WASHINGTON POST (Apr. 1, 2011), [http://www.washingtonpost.com/opinions/how-fairfax-can-get-school-discipline-right/2011/04/01/AFFx6pJC\\_story.html](http://www.washingtonpost.com/opinions/how-fairfax-can-get-school-discipline-right/2011/04/01/AFFx6pJC_story.html).

<sup>168</sup> *Goss v. Lopez*, 419 US 565, 581 (1975).

<sup>169</sup> To illustrate a typical timeline to resolve a student’s legal challenge, Katherine Evans was a high school senior in November 2007 when she received a three-day out-of-school suspension for “Bullying/Cyberbullying/Harassment” because she created a Facebook group, which lasted for just two days before being deactivated, inviting people to criticize a hated teacher. She did not receive a judgment from the first reviewing court, a U.S. magistrate judge in the Southern District of Florida, on the earliest dispositive motion (a Rule 12(b)(6) motion to dismiss) until February 2010, a year-and-a-half after her graduation. *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010). Had the case proceeded beyond the motion-to-dismiss stage through discovery and to a jury trial, it undoubtedly would have taken more than an additional year to resolve (indeed, even without a trial, the case did not end until February 2011, when the district accepted a settlement under which the bullying suspension was expunged from Evans’ record). This

Because legal remedies are of little practical value, even ill-founded disciplinary decisions habitually go unchallenged, which under-deters schools from overreaching and hinders the evolution of the law.<sup>170</sup>

Even more than in the adult world, government punishment runs the risk of altering the trajectory of a student's life for the worse. A suspension may make the difference between college acceptance and rejection. A suspension may set the student on course to become a high-school dropout, with all of the attendant limitations on professional advancement.

Outside of school, no "materiality" standard applies when government punitive action is challenged as an unconstitutional restraint on speech.<sup>171</sup> It is accepted that any action motivated to deter speech that would chill the willingness of a person of ordinary resolve from speaking can constitute a First Amendment violation.<sup>172</sup> Courts would not countenance a city ordinance against making speeches critical of government officials on the grounds that the "only" punishment was a \$25 ticket.

### *The Off-Campus First Amendment Standard Strikes a Sensible Compromise*

Returning to the Capulet family's hypothetical that began this article, it readily strikes all of us as absurd and intolerable for a school to exert "optimal conduct authority" over students' off-hours behavior, even when that behavior has detrimental in-school spillover effects. Society would not permit schools to punish sub-optimal but legal behavior when students are at home under their parents' supervision. Speech cannot be placed in a uniquely unprotected category.

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is not a commentary on the judge's or the Southern District of Florida's promptness in resolving cases, but rather an illustration of the typical duration of a federal civil-rights matter in any jurisdiction, and why judicial relief is so often practically meaningless for a student facing a college admission decision.

<sup>170</sup> See Tuneski, *supra* n.15 at 146 (observing that "students and their families may not want to endure the potential humiliation, hassle and expense of a court battle to reverse a suspension that has already been served in order to benefit the greater good"); Markey, *supra* n.15 at 156 ("given the short duration of their punishment, students are unlikely to challenge the constitutionality of the school's action . . . even if students desire to challenge the punishment, court review may be cost-prohibitive").

<sup>171</sup> See Hayes, *supra* n.15 at 278 ("it does not matter how slight the punishment; any time there is a First Amendment violation, there is irreparable harm").

<sup>172</sup> *Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990) ("the First Amendment . . . protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party") (internal quotes omitted).

We permit schools to discipline students for genuinely unlawful off-campus behavior where that behavior portends dangerousness at school. There would be no objection to a school suspending a student who has been arrested for an off-campus drug deal or armed robbery, and indeed a school would be regarded as negligent for ignoring such behavior.<sup>173</sup> But where off-campus behavior is merely antisocial and not unlawful – for instance, a student is prolifically sexually promiscuous without condoms or other contraception – a school’s role is limited to, at the most, alerting parents or offering counseling. That is the educationally and legally appropriate boundary line for speech as well.

Applying the “real-world” First Amendment standard to the first decade-and-a-half of online speech cases, most would be decided the same way in any event: Speech that realistically portends violence would be punishable, and speech that criticizes school employees would be protected. The subset of cases that would be beyond school punitive authority are: 1) The cases bullying expert Emily Bazelon categorizes as “drama”<sup>174</sup> – the cases in which student-on-student speech does not cross the line of actionably threatening or harassing, but is merely cruel or offensive; and 2) The cases, like *Doninger*, in which students complain about school conditions or school policies in uncivil but constitutionally protected terms. For this subset of cases, schools do not need any greater authority, because adequate alternatives exist – starting with education about best ethical practices and, if necessary, conferring with parents.

More importantly than its impact on the outcome of any particular case, maintaining a firm distinction between on- and off-campus speech will provide students the reassurance they deserve as citizens that they may safely comment on school issues without fear of reprisal. The power differential between student and school administrator is intimidating and the impulse to self-censor is a powerful one – students spend each school day navigating a minefield of rules, constantly mindful they will “get in trouble” if they displease authority figures, in a way that adult speakers are not. The inhibiting effect of ill-defined school punitive authority deprives

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<sup>173</sup> Even where behavior is against the law, courts have recognized due process-grounded limitations in schools’ ability to reach into students’ off-campus lives and impose punishment for behavior entirely unrelated to student status that portends no danger to school safety. See Michael L. Collins, *Are Principals Driving the Cop Car? The Growth in School Discipline for Off-Campus Conduct*, 37 SETON HALL LEGIS. J. 349, 368-69 (2013) (discussing court rulings limiting schools’ ability to apply so-called “24-hour codes” to punish even unlawful off-campus behavior where the behavior has an insufficient nexus to school).

<sup>174</sup> Emily Bazelon, *STICKS AND STONES* (2012).

the public of useful information about the effectiveness of schools from students' unique insider perspective.

The contention that meaningful enforcement of First Amendment standards will inhibit school authorities in making decisions to manage dangerous situations is belied by experience; in no online-speech case yet litigated to a published decision has a student successfully overturned an on-the-spot disciplinary decision made in the heat of the moment. To the contrary, the first generation of online-speech cases almost invariably involves discipline imposed weeks after speech has been disseminated, and frequently after the speech has run its course having provably created no disturbance at all.<sup>175</sup>

It makes no sense to give young people diminished constitutional protection, when they are the citizens most vulnerable to government overreaching. In other contexts, the legal system gives minors the benefit of enhanced, not reduced, legal protection in recognition of their relative powerlessness and inability to fully appreciate and conform to society's behavioral expectations.<sup>176</sup>

Schools as well as students will benefit from the bright dividing line provided by a century's worth of off-campus First Amendment jurisprudence. As schools intrude more heavily into their students' online lives, they raise the expectation – of parents and of the tort liability system – that they will prevent or promptly punish every act of social-media incivility.<sup>177</sup> Scrutinizing students' social-media pages carries all manner of risk, including the fact that school officials may become aware of a student's political or religious affiliations and beliefs, information that they cannot “un-see.” It is manifestly in the best interest of schools – whether they believe it or not – to be kept out of the parenting business when it comes to students' expression on personal time.

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<sup>175</sup> See, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (student removed Facebook comment criticizing teacher after it had been posted for two days, and was suspended when principal learned of the comment after it had already been taken down); *Doninger v. Neihoff*, 527 F. 3d 41, 46 (2d Cir. 2008) (*Doninger I*) (principal punished student 23 days after her blog post, when the threat of disruptive action in response to the post would have dissipated).

<sup>176</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (outlawing imposition of capital punishment for crimes committed by a defendant under 18 years of age);

<sup>177</sup> See, e.g., *R.S. v. Minnewaska Area Sch.* Dist. No. 2149, 894 F. Supp. 2d 1128 (D. Minn. 2012) (mother enlisted middle-school principal to intercede in policing her son's sexually explicit chats on a home computer with a female classmate).

## Conclusion

In a Feb. 15, 2011, address to students at George Washington University about the importance of Internet freedom as a force for democratization throughout the world, then-Secretary of State Hillary Rodham Clinton spoke approvingly of “children in Syria who used Facebook to reveal abuse by their teachers.”<sup>178</sup> America’s students should go to school with at least the same level of confidence in their right to use social media for whistleblowing as students in one of the world’s most oppressive free-speech backwaters.

Courts understandably empathize with school administrators who are called upon to perform a sensitive and difficult job. But no matter how much judges identify with school administrators in factually sympathetic cases, they must be mindful that government officials are prone to use punitive authority over speech illegitimately for image-control purposes.<sup>179</sup> Because students have largely lost the ability to speak freely while on school grounds during school time,<sup>180</sup> it is essential that they

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<sup>178</sup> Hillary Clinton, Sec. of State, Address at George Washington University: Internet Rights and Wrongs: Choices & Challenges in a Networked World, (Feb. 15, 2011), available at <http://www.state.gov/secretary/rm/2011/02/156619.htm>.

<sup>179</sup> See, e.g., Steve Esack, *Dieruff Student Says Allentown Administrators Tried to Quash her Blunt Talk*, THE MORNING CALL (Apr. 9, 2012), [http://articles.mcall.com/2012-04-09/news/mc-allentown-leslie-lukow-20120409\\_1\\_dieruff-student-student-representative-honor-society-and-student](http://articles.mcall.com/2012-04-09/news/mc-allentown-leslie-lukow-20120409_1_dieruff-student-student-representative-honor-society-and-student) (assistant principal demanded to pre-approve student school board delegate’s future speeches, after speech drew attention to school’s disciplinary problems and substandard teaching); Emily Summars, *Editor Files Grievance After Ill. School Censors Pro-Discipline Editorial*, STUDENT PRESS LAW CENTER (Mar. 9, 2012, 12:00 AM), <http://www.splc.org/article/2012/03/editor-files-grievance-after-ill-school-censors-pro-discipline-editorial> (newspaper confiscated and students forced to rewrite it because principal objected to editorial calling for stricter enforcement of school disciplinary standards); *Va. Adviser Removed After Students Criticize School Conditions*, STUDENT PRESS LAW CENTER (Aug. 16, 2011, 12:00 AM), <http://www.splc.org/article/2011/08/va-adviser-removed-after-students-criticize-school-conditions> (newspapers confiscated and faculty adviser removed in retaliation for students’ publication of public records calling attention to unsafe and unsanitary conditions in school facilities);, Nicole Ocran, *Editor of Ind. Student Paper asks School Officials to Return Confiscated Issues*, Student Press Law Center (Feb. 17, 2010, 12:00 AM), <http://www.splc.org/article/2010/02/editor-of-ind-student-paper-asks-school-officials-to-return-confiscated-issues> (newspapers confiscated because principal believed student’s editorial regarding removal of football coach failed to “promote what the school purpose is”).

<sup>180</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (permitting schools to censor speech in curricular contexts such as class-produced student newspapers so long as the censorship is “reasonably related to legitimate pedagogical concerns,” a less demanding burden than *Tinker*).

have some safe space within which they may discuss the shortcomings of school programs and employees without fear. The Supreme Court's frequent admonition – that “the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox” – can be equally applied to the digital “in-box” as well.<sup>181</sup> Indeed, limiting students' online speech to that which would be appropriate on school grounds during class time carries serious First Amendment implications not merely for the speaker but for the reader who, despite having no intention of acting disruptively on campus in reaction to the speech, is denied the right to receive it.<sup>182</sup>

*Tinker* spoke of “the special characteristics of the school environment.”<sup>183</sup> One of these “special characteristics” is that students are impressionable and, while at school, unable to escape speech that is thrust upon them. But another of these special characteristics is that school is a place to inculcate respect for the fundamental freedoms on which American society is built. And it is precisely because students *are* a captive audience for the best hours of their day that, when they leave school and school-affiliated events behind, they turn back into American citizens again. If we tell even high school students that off-campus speech that may provoke discussion at school can bring expulsion, then we are teaching these young people – most of whom are old enough to drive a car, many of whom are old enough to marry, and some of whom are old enough to vote, or to strap on a gun and fight for their country – that free speech is too dangerous for them, and that it must be parceled out stingily by the same government that the students wish to criticize.<sup>184</sup> Nothing could disrupt the educational mission more.

School officials are prone to argue for boundless punitive authority over speech to protect public safety against Columbine-style attacks.<sup>185</sup>

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<sup>181</sup> *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983)).

<sup>182</sup> See *Brown v. Ent'mt Merchants Ass'n*, 131 S. Ct. 2729 (2011) (recognizing that even minors have a constitutionally protected right to receive information – in that case, violent video games – with which government may not interfere).

<sup>183</sup> 303 U.S. 503, 506 (1969).

<sup>184</sup> See Fronk, *supra* note 62, at 1433 (asserting that the outcome of *Doninger I*, allowing schools to punish complaints about school policies that they deem insufficiently civil, “teaches students never to voice their opinion, never to attempt to mobilize their peers around what they may see as an erroneous or unjust administrative decision, and never to disagree with authority figures in any manner”).

<sup>185</sup> See, e.g., *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978 (11th Cir. 2007). In the *Boim* case, the Eleventh Circuit affirmed dismissal of a student's First Amendment claim after she was disciplined for writing a fictional short story about a dream in which she shot her math teacher. Reciting a litany of school-shooting cases assembled from the Wikipedia

This is not just false reasoning, it is a distasteful exploitation of a singularly tragic event. School officials can always investigate speech that portends violence. A reasonable investigation, by itself, carries no First Amendment implications. School officials are well within their authority to call in a student who tweets about violence out of class and question him, and to alert police and turn the matter over for criminal investigation if evidence of a serious threat exists. School officials are well within their authority to briefly remove a student suspected of harboring violent intentions from school during the investigatory process while determining whether a genuine threat exists. School officials are also well within their authority to educate students about appropriate language when speaking to a public audience. And school officials are well within their authority to call a parental conference.

That is plenty of authority to respond to any perceived threat to school safety. It does nothing for school safety to – having ascertained that no laws were broken and no genuine threat was intended – impose purely punitive after-the-fact discipline. To the contrary, imposing unfair punitive discipline is likely to only further enrage and alienate any student who may be feared to be volatile, while serving no positive purpose.

The online medium does not make speech so qualitatively different from other media that a reduced level of First Amendment dignity should apply. Off-campus speech has *always* been able to make its way onto campus, whether through copy machines or through the gossip pipeline, and yet courts have not seen fit to penalize speech based on where the audience transports it.

There is a temptation to believe that the advent of the Internet has so fundamentally “changed the game” that lofty pronouncements about the importance of students’ off-campus First Amendment rights, like those of the Second Circuit in *Thomas*,<sup>186</sup> are outmoded. But courts should look beyond myths and phobias about the Internet to the reality. The reality is that the viewership of a typical student Facebook page or YouTube video is limited to a tiny audience of the student’s immediate social circle.<sup>187</sup> It

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website, the court concluded: “We can only imagine what would have happened if the school officials, after learning of Rachel’s writing, did nothing about it and the next day Rachel did in fact come to school with a gun and shoot and kill her math teacher.” *Id.* at 984.

<sup>186</sup> *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979).

<sup>187</sup> See Dan Frommer & Kamelia Angelova, *Half of YouTube Videos Get Fewer Than 500 Views*, BUSINESS INSIDER (May 29, 2009, 5:08 PM), <http://www.businessinsider.com/chart-of-the-day-youtube-videos-by-views-2009-5> (remarking that “the majority of videos uploaded . . . are hardly watched by anyone” and that only .33 percent of YouTube videos go “viral” with 1 million or more views).

is the same audience that the student in an earlier generation would have reached through a hand-drawn cartoon or a song performed around the lunch table at the shopping-mall food court, and no bigger than the readership of the paper-and-ink student magazine “Hard Times” in the *Thomas* case, which sold 93 copies.<sup>188</sup> For example, in the Third Circuit’s *J.S.* case, the MySpace social networking page at issue was viewed by a grand total of 22 visitors, and was irretrievably deactivated within a few days.<sup>189</sup> In the Second Circuit’s *Wisniewski* case, the student’s instant-messaging icon was distributed to 15 recipients.<sup>190</sup> The trash-talking YouTube video recorded by students in the *Beverly Hills* case was viewed 90 times by an estimated 15 unique viewers; many of the views were duplicates, including views by the student being criticized.<sup>191</sup> This is scarcely such a game-changer that it justifies throwing out half a century of established First Amendment jurisprudence.

We are living in a time of full-blown hysteria over the power of social media to do harm. That hysteria is exacting its toll on scores of luckless social-networking users who have lost their jobs for minor social missteps, often on the self-validating rationale that otherwise harmless behavior (*e.g.*, enjoying a cocktail; wearing a revealing swimsuit; etc.) becomes “bad judgment” when shared publicly to an audience known to overreact.<sup>192</sup> This hysteria is best exemplified by the Kansas Board of

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<sup>188</sup> *Thomas*, 607 F.2d. at 1045.

<sup>189</sup> *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 300-01 (3d Cir. 2010), *rev’d by* 650 F.3d 915 (3d Cir. 2011) (*en banc*).

<sup>190</sup> *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39-40 (2d Cir. 2007).

<sup>191</sup> *J.C. v. Beverly Hills Unif. Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Calif. 2010).

<sup>192</sup> See Jaime Sarriao, *Barrow Teacher Fired over Facebook Still not Back in Classroom*, ATLANTA JOURNAL-CONSTITUTION (Nov. 9, 2010, 5:49 PM), <http://www.ajc.com/news/news/local/barrow-teacher-fired-over-facebook-still-not-back-/-nQmpS/> (describing how teacher Ashley Payne lost her job for two Facebook posts, one showing her lawfully drinking a cocktail while on vacation and another commenting that she was playing a bar game, “Crazy Bitch Bingo”); Chase Glorfeld, *Fired Coach Laraine Cook Fights Back*, IDAHO STATE JOURNAL (Nov. 9, 2013), [http://www.idahostatejournal.com/members/fired-coach-laraine-cook-fights-back/article\\_dbad0a82-483f-11e3-a508-0019bb2963f4.html](http://www.idahostatejournal.com/members/fired-coach-laraine-cook-fights-back/article_dbad0a82-483f-11e3-a508-0019bb2963f4.html) (describing how coach was fired and threatened with revocation of state teaching certificate for “immoral” Facebook photo of beach horseplay in which her fiancée put his hand on her clothed chest); Eric Heisig, *Teacher Settles Lawsuit Against Wayne County School District over Facebook Post Touting Veganism*, CLEVELAND PLAIN DEALER (Apr. 14, 2015, 3:02 PM), [http://www.cleveland.com/court-justice/index.ssf/2015/04/teacher\\_settles\\_lawsuit\\_agains.html](http://www.cleveland.com/court-justice/index.ssf/2015/04/teacher_settles_lawsuit_agains.html) (describing teacher’s firing for posting a photo of a local farm to Facebook with comments about cruel living conditions for livestock, which his supervisor said would offend the local farming

Regents' reaction to an incendiary Twitter post by a University of Kansas professor who provoked a public backlash by venting his outrage at the National Rifle Association after the Sandy Hook school shootings.<sup>193</sup> The Regents first enacted a comprehensive set of restrictions on all off-campus speech by employees, but then, responding to the outcry by faculty, retrenched and enacted a narrower policy that governed speech *only* on social media.<sup>194</sup> In other words, social media is singled out as a uniquely dangerous medium justifying heightened restraints, so that a remark that can safely be written in a letter-to-the-editor or an academic journal can be a firing offense when posted to Twitter.<sup>195</sup>

As with the Kansas faculty policy, schools and colleges are asserting regulatory authority over social media in ways that would be unimaginable for any other off-campus activity. It has become increasingly commonplace for students to be required to sign wide-ranging "social media contracts" agreeing to accept punishment for speech that their school subjectively deems "inappropriate" as a precondition for participating in extracurricular activities.<sup>196</sup> Athletes, in particular, are routinely told they must allow coaches and athletic directors into their

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community and had resulted in a citizen complaint).

<sup>193</sup> Scott Jaschik, *Fireable Tweets*, INSIDE HIGHER ED (Dec. 19, 2013), <http://www20.csueastbay.edu/news/2014/01/InsideHigherEd-Reichmanquotes-121913.html>

<sup>194</sup> *Id.*

<sup>195</sup> See Tuneski, *supra* note 15, at 164 ("Clearly, a student expressing his opinions on a television program would be considered an off-campus speaker; it is inconceivable that the student would become an on-campus speaker merely because another student turned on a television in a school classroom and viewed the broadcast. Like a student speaking on television, a student web page publisher does not speak on-campus merely because his expression may be accessible there").

<sup>196</sup> See, e.g., Keith Reid, *Calif. School District Making Athletes Sign Social Media Contract*, DESERT NEWS (Aug. 6, 2013, 9:05 AM), <http://www.deseretnews.com/article/865584185/Calif-school-district-making-athletes-sign-social-media-contract.html?pg=all> (describing since-rescinded "social media contract" required by California's Lodi Unified School District as a precondition to taking part in extracurricular activities, making it a punishable offense to use profanity on off-campus social media or post "inappropriate" content); Rhett Morgan, *Pride of Oklahoma Band Students Vent in Open Letter to OU President David Boren*, TULSA WORLD (Oct. 18, 2014, 12:00 AM), [http://www.tulsaworld.com/sportsextra/ousportsextra/pride-of-oklahoma-band-students-vent-in-open-letter-to/article\\_93157331-eb82-5b4b-9492-b9dcba50a973.html](http://www.tulsaworld.com/sportsextra/ousportsextra/pride-of-oklahoma-band-students-vent-in-open-letter-to/article_93157331-eb82-5b4b-9492-b9dcba50a973.html) (describing protests by University of Oklahoma band members against policy forbidding "negative" comments on social media; the university's president later rescinded the policy after its legality was questioned). See also Talon R. Hurst, *Give Me Your Password: The Intrusive Social Media Policies in Our Schools*, 22 COMMLAW CONSPECTUS 196, 205-07 (2014) (describing so-called "forced consent" policies in schools and colleges).

innermost privacy circle of online contacts and at times even to surrender their password and login information, so that university employees may read not merely what has been published to a public audience, but even intimate “chat” messages with close relatives and friends.<sup>197</sup> This intrusion is then justified on grounds that include protecting the athletes against the consequences of their own words – that is, making sure athletes do not damage their future marketability with intemperate remarks – a paternalistic notion of government that prior to the current social media hysteria would have been seen as evocative of dystopian science fiction.

Notwithstanding simplistic pronouncements that the Internet makes the location of student speech irrelevant, location matters quite a bit. Location is decisive, in fact, when it comes to the jurisdiction of government agencies to punish behavior, and doubly so when the punishment is preventative on the anticipation of a localized impact.<sup>198</sup> Indeed, the emerging jurisprudence of personal jurisdiction over online behavior in the non-school world recognizes that, despite the potential of a South Carolina-based website to be read and do harm in Oregon, due process requires more than the mere showing that speech could foreseeably be viewed within Oregon.<sup>199</sup> While a city council could enforce decorum rules regulating speech during council meetings, a citizen could not be penalized for indecorous remarks *outside* of the council chambers on the justification that the remarks might cause others to act disruptively during meetings. Nor would the legal system tolerate a regime under which schools could punish students for purchasing skimpy clothing off campus because of the risk that clothing purchased off campus will make its way onto campus and cause a disturbance.

The in-school speech framework is justifiable because schools are not places designated for wide-open communication, and indeed are not open

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<sup>197</sup> Pete Thamel, *Tracking Twitter, Raising Red Flags*, THE NEW YORK TIMES (March 30, 2012), <http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html>

<sup>198</sup> See, e.g., *G.D.M. v. Bd. of Educ. of Ramapo*, 48 A. 3d 378 (N.J. App. 2012) (striking down as unconstitutionally overbroad a New Jersey school district’s so-called “24/7” policy that subjected students to discipline for any violation of the law committed on personal time regardless of its connection with the school, which the court observed could include such an insignificant transgression as littering).

<sup>199</sup> These are the facts of *Millennium Enterprises v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Ore. 1999). For other examples of cases recognizing that, under the Due Process Clause, making speech accessible online within a forum does not equate to physical presence in that forum, see *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414 (9th Cir. 1997) and *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537 (E.D. Pa. 1999).

at all for expressive use to the vast majority of the public. But if a student and a non-student were to appear jointly in an off-campus public forum calling for a boycott of the school to protest standardized testing, it makes no sense that only the student could be punished. Non-students, too, have the ability to “substantially disrupt” school operations through off-campus expression, and any content-based restraint on that expression would be required to survive strict scrutiny, not *Tinker*’s deferential scrutiny. School officials’ authority over student behavior is simply higher on school grounds during class time than it is during off-campus personal time, and the law must recognize a two-tiered standard that respects the distinction.

Official overreactions to social media fail to take into account important countervailing realities. First, social media is significantly more ephemeral than other forms of communication. Newspapers, magazines, motion pictures and books live essentially forever, and may be viewed for decades after their creation. Try finding the MySpace profile for Jill Synder’s principal, James McGonigle;<sup>200</sup> created only eight years ago. It has vanished, never to be seen again. Second, readers apply a “social media discount” to what they read in that informal and unverified medium, and this “discounting” skill should be reemphasized in educational institutions as part of a healthy diet of media literacy. Try saying aloud: “I know it’s true – I read it on Facebook” with a straight face.

In the school setting, bedrock assumptions underlying First Amendment jurisprudence are being inverted in ways profoundly dangerous to student welfare. Although the Bill of Rights exists to protect powerless citizens against the misuse of government authority, and the power differential is nowhere more pronounced than in the custodial school setting, court interpretations ponderously expect more of the youngest speakers than of the most sophisticated ones, and offer the least protection to the least powerful. Young people are expected to anticipate, and accept responsibility for, even the irrational overreactions of audience members in a way that adult-aged speakers are not. Close judgment calls regularly are resolved in the regulator’s favor when the speaker is a student and the regulator is a school, even though the uncertainty of the call would itself compel a judgment in the speaker’s favor outside the school context.

School officials cannot reasonably argue that punitive authority is necessary for them to teach responsible online behavior. In the first place, no teaching takes place when a student is suspended or expelled. That we

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<sup>200</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (*en banc*).

must throw students out of school to educate them is a bizarre fallacy that belongs in the pages of an Orwell novel, not in state education policy. Further, we must remember that the most powerful lessons schools teach are those taught by example, and if students see harmless and obvious jokes punished as seriously as actual threats, that example teaches a very different and destructive lesson: That reason and justice are less important than power, and that those without power have no rights that those with power must respect.<sup>201</sup> A different lesson is needed if we wish to prepare students to be citizens capable of preserving a free democracy: That citizen students do not shed their constitutional rights at the login screen, and that their rights as citizens off-campus are safe from unnecessary and arbitrary intrusions by government agents, including public school officials.

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<sup>201</sup>“[I]f schools fail to teach students the value of free expression, then these students will fail to appreciate the participatory character of a democratic society and will instead feel alienated, thinking the government is being arbitrary.” Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. ENT. L. REV. 65, 89 (2005).

## A Benign Prior Restraint Rule for Public School Classroom Speech

Scott R. Bauries\*

The classroom is perhaps the most vexing speech location in all of First Amendment law. The doctrine of the First Amendment has generally regarded the classroom as a nonpublic, or closed, forum for the purposes of both student and teacher speech,<sup>1</sup> but that same doctrine has developed completely different sets of protection for these two categories of speakers.<sup>2</sup> The doctrine that has developed in the classroom goes beyond the doctrine that normally governs other closed or nonpublic forums, where at least viewpoint discrimination is not generally permitted.<sup>3</sup>

The law of the classroom allows for restrictions on the speech—both its content and its viewpoint—of both teachers and students. Whether, and how, these restrictions apply depends in both cases on an initial

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<sup>1</sup> There is, of course, a substantial amount of dispute over this question. See, e.g., Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free-Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009) (recognizing, but rejecting, the characterization and arguing for the alternative of the “nonforum” for the classroom and the overall school); Alexis Zouhary, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227 (2007-2008) (making the point that both schools and school classrooms are generally considered to be closed forums). For the purposes of this brief article, I do not attempt to resolve these disputes. Rather, I fit the *Garcetti*, *Tinker*, and *Hazelwood* decisions into their natural forum categories, with *Garcetti* and *Hazelwood* representing closed forums and *Tinker*, due to its protections against both content and viewpoint discrimination, representing a limited public forum, limited to certain participants (students).

<sup>2</sup> See *infra*, sections on teachers and students as speakers under the First Amendment.

<sup>3</sup> See, e.g., Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 66 (2008) (stating that the “question is not *whether* Hazelwood permits viewpoint discrimination, but *when*”) (emphasis in original); Brownstein, *supra* note 1 at 722 (“In a nonpublic forum, viewpoint-discriminatory speech regulations receive strict scrutiny while content-neutral and content-discriminatory regulations are evaluated under a lenient reasonableness standard of review”).

categorical determination of whether the speech occurred as part of a classroom or co-curricular lesson or activity. For student speech, if this is so, then *Hazelwood School District v. Kuhlmeier* treats the speech as having occurred in a closed forum, allowing for regulation of both its content and viewpoint based on “legitimate pedagogical concerns.”<sup>4</sup> For teacher speech, if this is so, then *Garcetti v. Ceballos* leaves the speech completely outside the reach of the First Amendment, regardless of its content or viewpoint.<sup>5</sup> Put another way, the categorical determination that speech occurred in the classroom or in a co-curricular activity leads to strong deference to the school in the case of student speech, and total deference to the school in the case of teacher speech.

Neither system of protections (or the lack thereof) adequately respects the individual expressive interests that animate the educational process, nor do they seriously engage with the inherently expressive and discretionary nature of the educational process, and neither will be able to be perfected any time soon.<sup>6</sup> But the unfairness inherent in both sets of doctrine could be mitigated through a slight adjustment—limiting their application to prior restraints on speech. For speech that brings some sort of punishment or consequence on the speaker after the fact, the First Amendment has workable rules that are far superior to those that currently govern such speech in the classroom. For speech that the government wishes to suppress before it is made or published, however, the doctrines governing both teacher and student speech pose no serious speech autonomy or marketplace of ideas problems that are not outweighed by the importance of effective and efficient operation of public schools for all.

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<sup>4</sup> 484 U.S. 260 (1988).

<sup>5</sup> 547 U.S. 410 (2006).

<sup>6</sup> E.g., Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Employment Law*, 48 SAN DIEGO L. REV. 907, 912 (2011) (hereinafter, Secunda, *Right-Privilege*); Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008) (hereinafter, Secunda, *Federal Employees*) (“Consistent with Justice Stevens’ dissent in *Garcetti*, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both.”); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174, 1192 (2007) (criticizing the unthinking formalism of *Garcetti*); Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 446-48 (2000) (criticizing the *Hazelwood* test as vague and overbroad); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 137 (1995) (criticizing the *Hazelwood* test as standardless).

Accordingly, this Article advances the claim that the First Amendment doctrines that apply to the classroom should adopt a benign prior restraint rule.<sup>7</sup> In the case of teacher classroom speech, the *Garcetti* rule should apply where the government's action in interfering with the speech constitutes a prior restraint—the First Amendment should not reach such interference. In cases where a teacher first speaks and then is later punished for that speech, however, basic notions of due process and the dangers of arbitrary governmental decision making are far more pressing, and the *Pickering*<sup>8</sup> balance should be applied.

In the case of student speech, the *Hazelwood* rule is well-suited to the prior restraint of classroom speech because it encourages the government to lay out its legitimate pedagogical justifications for restraint in advance. But as with teacher speech, punishing student speech only after it is made or published gives rise to significant autonomy interests, due process interests, and marketplace of ideas concerns. Thus, this sort of interference should have to contend with the more demanding standard articulated in *Tinker v. Des Moines Independent Community School District*.<sup>9</sup>

As this Article will show, this proposed rule distinguishing between prior restraints and later punishments is not a far step from either the *Garcetti* decision or the *Hazelwood* decision. Working within the categorical structure of the existing cases, it would also introduce a meaningful limit on the tendency of government administrators (and sometimes teachers) to act arbitrarily against ideas that they themselves disfavor, or more importantly, that powerful voices in the community disfavor.

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<sup>7</sup> I refer to this proposed rule as “benign” to distinguish it from the traditional idea of the public censor on publishers as a prior restraint, which gave rise to the First Amendment’s speech protections in the first place. See, e.g., Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 57 (1984). Setting up a prior restraint requirement as a way to better protect speech is, of course, counter-intuitive, given this history, but it works because the entire doctrine of the First Amendment as relates to public school classrooms is also counter-intuitive.

<sup>8</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>9</sup> 393 U.S. 503 (1969). *Tinker* allows regulation of student speech based on the less deferential requirement of “material and substantial disrupt[ion]” of the learning environment, a standard that applies to both content and viewpoint discrimination. *Id.* at 513-14.

## The Classroom and the First Amendment

It has been said many times by many observers that education is a pervasively expressive activity.<sup>10</sup> But the public school classroom is also, paradoxically, a place of restricted expressive rights.<sup>11</sup> The reasons are complex. Below, I elucidate them, beginning with the place of the speech—the classroom—and then moving to the identities of the speakers—the teachers and students. As will become clear, the justifications for reduced First Amendment protections for both teachers and students are strong, but the current doctrine has privileged these justifications too much, resulting in doctrine that is both unthinking and needlessly detrimental to the discourse of the classroom.

### *The Classroom as a Speech Forum*<sup>12</sup>

The Supreme Court has, over the years, developed a set of doctrinal restrictions on the basic right of speakers to speak without interference from the government. This basic right might be thought of as the right to express oneself anywhere, anytime, in any manner, and on any topic, completely free from restriction of any kind. It is plausible to say that, under this baseline right, the Government's sole role as to the expression of individuals and legal entities is to remain completely disinterested.<sup>13</sup> I

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<sup>10</sup> See, e.g., Brownstein, *supra* note 1, at 808 (“Regulating speech is fundamental to what an educator does. Virtually every aspect of a teacher’s responsibilities involves the direction and control of speech.”); Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011) (“As an inherently expressive enterprise, education requires its participants to engage in speech and expressive conduct.”); JOHN TIFFIN & LALITA RAJASINGHAM, IN SEARCH OF THE VIRTUAL CLASS: EDUCATION IN AN INFORMATION SOCIETY 19-47 (1995) (describing education as a system of communication with inter-connected networks and sub-networks).

<sup>11</sup> See, e.g., *Settle v. Dickson County School Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (“Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum”).

<sup>12</sup> This section derives substantially from an earlier work of mine laying the same foundation. See Scott R. Bauries, *Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677 (2014). For ease of reading, quotation marks and block quotations of this work have been avoided.

<sup>13</sup> As any student of the First Amendment would quickly realize, this “baseline right” is purely hypothetical because the doctrine of the First Amendment consists entirely of limitations on it, and has since the beginning. See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any

have in the past described the principle that governs this baseline role as the “neutrality principle.”<sup>14</sup> The Supreme Court’s most recent full articulation of this principle came in the majority’s opinion in *Citizens United v. Federal Election Commission*:<sup>15</sup>

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.<sup>16</sup> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.<sup>17</sup> As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.<sup>18</sup>

The neutrality principle is the bedrock of all First Amendment protection.<sup>19</sup> Governmental discrimination against speakers with *particular viewpoints* on favored topics, or against all speakers on *disfavored topics*, or against *particular speakers* or classes of speakers

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manner that may be desired”); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Nevertheless, it is necessary to begin by deconstructing these limitations to reveal what they limit, and then to continue by reconstructing the limits, that we might better understand where each fits within the First Amendment superstructure.

<sup>14</sup> Bauries, *supra* note 12, at 730. I derived this principle from the seminal work of Kenneth Karst elucidating what he termed the “principle of equality.” See generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

<sup>15</sup> 558 U.S. 310 (2010).

<sup>16</sup> *Id.* at 312 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)).

<sup>17</sup> *Id.* at 312-13 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

<sup>18</sup> *Id.* at 340-41; see also Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 133 (2010) (“*Citizens United* radically affirmed the principle that the First Amendment must be neutral as between different speakers, holding that even corporate speech (at least on political matters) is fully protected by the First Amendment and cannot be subject to increased regulation merely because of its corporate authorship”).

<sup>19</sup> See, e.g., Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 706 (2011); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1304-05 (2006); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270 (2005); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 50 (2000); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); see also Karst, *supra* note 15, at 35.

regardless of topic, all presumptively violate the First Amendment.<sup>20</sup>

But in practice, a strict neutrality principle is difficult to uphold in every case, or even in most cases. Under the baseline expressive right and the baseline responsibility of government to remain completely disinterested in expression, the potential problems become obvious. The classic objection asks what we should do when someone shouts “Fire!” in a crowded theater, causing a panic and possibly injury and death.<sup>21</sup> Other classical critiques ask what we should do about speech that falsely defames the reputation of another, or speech that defrauds, or speech that puts another in reasonable fear for his life or safety. These questions and many others have caused the doctrine of the First Amendment to develop mostly as a set of limitations on the baseline right to speak however, whenever, and wherever one pleases, expressing whatever viewpoint one has on whatever topic one might choose to address. Indeed, it is plausible to say that the baseline right is largely hypothetical, and it is the *limitations* on this hypothetical basic right that make up the entire doctrine of the First Amendment.

These doctrines of limitations in expressive rights break down under three analytical categories—*content-based exemptions*, *government role analysis*, and *forum analysis*.

### Content-based Exemptions

The simplest of these doctrines of limitation are the various content-based categorical exemptions from First Amendment protection that the courts have constructed over time.<sup>22</sup> Harry Kalven referred to the theory underlying these exemptions as the “two-level theory,” owing to the fact that exemptions are typically created due to a determination by the Court

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<sup>20</sup> See Karst, *supra* note 14, at 40 (criticizing Alexander Meiklejohn’s value-based theory of the First Amendment and stating, “A vital public forum requires a principle of equal liberty of expression that is broad, protecting speakers as well as ideas”). This presumptive protection can be overcome, but the government must meet a very demanding burden to overcome it. See, e.g., Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 n.1 (1996) (introducing the general rule that content- or viewpoint-based restrictions imposed on speech by the government, acting in its sovereign capacity, must overcome strict scrutiny).

<sup>21</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919) (opinion of Holmes, J., for the Court) (“The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic”).

<sup>22</sup> See Bauries & Schach, *supra* note 10, at n.5 (collecting cases establishing the various low-value speech exceptions).

that the exempted content constitutes “low-value” speech.<sup>23</sup> These exemptions today include such speech categories as “true threats,”<sup>24</sup> “obscenity,”<sup>25</sup> “fighting words,”<sup>26</sup> “incitement of imminent lawless activity,”<sup>27</sup> and several others.<sup>28</sup>

These categories of speech content have been judicially deemed to be of such low value to the public discourse that they qualify for reduced, or even no, First Amendment protection. Inside schools, the categories apply, but courts do not often find it necessary to discuss them due to the other standards that apply to all speech in schools, as discussed below.

### Government Role Analysis

Government role analysis asks what role the government occupies toward a speaker when it acts to suppress or punish that speaker’s speech. Familiar roles that the Court has recognized include government-as-employer; government-as-patron; government-as-proprietor; and more recently, government-as-speaker.<sup>29</sup> Each of these roles entitles the government’s interests to greater initial weight in an *ex ante* balancing of interests than these interests would receive in some cases if *ex post* balancing were used.

For example, when the government acts as a patron of the arts, which it does primarily through the funding of grants, it must have the power to discriminate between works of art or proposed works of art as to their quality.<sup>30</sup> Arts funding is limited, and it does not serve the public interest to fund art projects that are of low quality or impact. But in order to direct

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<sup>23</sup> Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960).

<sup>24</sup> *E.g.*, *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>25</sup> *E.g.*, *Miller v. California*, 413 U.S. 15 (1973).

<sup>26</sup> *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>27</sup> *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>28</sup> *See* Bauries & Schach, *supra* note 10.

<sup>29</sup> *See, e.g.*, Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 989 (2009) (proposing a new category for government role analysis, “government-as-educator,” based on ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 199–267 (1995)); Blocher, *supra* note 19 (arguing that government speech secures a governmental right to discriminate based on viewpoint when it is the speaker).

<sup>30</sup> *See* PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 61 (2013) (describing arts funding as one of the “snares” inherent in an “acontextual” approach to the First Amendment).

limited public funding to projects of high value, the government must make a determination—one based on content—as to which of two competing works or proposed works is of higher quality.<sup>31</sup>

One government role that has particular significance to the issues discussed in this Article is the role of “government-as-employer.”<sup>32</sup> When the government acts as an employer, it must maintain a certain level of control over its workplace, both to protect the quality of the services it offers to the public and to ensure that its employees do not violate the rights of private individuals. When the government is an employer in certain of its workplaces, it inevitably employs people, such as attorneys, teachers, professors, and press secretaries, who “speak” for a living.

*Pickering v. Board of Education*,<sup>33</sup> the leading case on public employee speech rights, illustrates the case-by-case approach. In *Pickering*, a local Board of Education dismissed a teacher after he sent a letter to a newspaper criticizing the Board’s prior handling of proposals to increase the Board’s revenues.<sup>34</sup> The Board determined that the letter was “detrimental to the efficient operation and administration of the schools of the district” and that these interests justified his dismissal.<sup>35</sup> The Court held the dismissal unconstitutional, holding that, absent substantial justification, “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”<sup>36</sup> The Court engaged in a balancing of the interests of the Board as an employer and the interests of Mr. Pickering as a participant in public debate. The Court ultimately concluded that the Board could state no interest sufficient to overcome the interest of Mr. Pickering in participating as an ordinary citizen in an important public discussion.

In 1983, the Supreme Court modified *Pickering* through its decision in *Connick v. Myers*,<sup>37</sup> holding that a public employee’s internal questionnaire, circulated among her co-employees, was unprotected

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<sup>31</sup> See *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (“Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake”).

<sup>32</sup> See, e.g., Areen, *supra* note 30, at 990-91 (describing this role).

<sup>33</sup> 391 U.S. 563 (1968). For a thoughtful summary of the pre-*Garcetti* jurisprudence, beginning with *Pickering*, see Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1 (2008).

<sup>34</sup> *Pickering*, 391 U.S. at 564.

<sup>35</sup> *Id.* at 564-565 (citations omitted).

<sup>36</sup> *Id.* at 574.

<sup>37</sup> 461 U.S. 138 (1983).

speech, due to its nature as a personal employee grievance, rather than a matter of public concern, and also due to its negative impact on office operations and efficiency.<sup>38</sup> After *Connick*, a court facing a First Amendment retaliation claim is required to engage in a threshold inquiry, which requires the court, prior to engaging in the *Pickering* balancing test, to first ascertain whether the employee's speech addressed a matter of public concern.<sup>39</sup> If the answer to this question is "no," then the speech is unprotected.<sup>40</sup> If the answer is "yes," then the court proceeds to the *Pickering* balancing test, but this threshold determination of public concern precedes the *Pickering* test in all cases.<sup>41</sup>

Following *Pickering* and *Connick*, the Court entertained few public employee First Amendment retaliation claims. However, one significant pre-*Connick* case, *Givhan v. Western Line Consolidated School District*,<sup>42</sup> further clarified that neither the place nor the target of the speech in question is dispositive when determining whether the speech is protected. In *Givhan*, the Court held that an employee's internal complaints to her principal about possible race discrimination in personnel decisions at her school site were protected speech.<sup>43</sup> Thus, the fact that speech on a matter of public concern is made while an employee is at work, to a superior, or otherwise through internal channels (rather than through a public medium), does not render the speech unprotected.

Most observers saw *Connick* as a tilting of the *Pickering* balance in favor of employers,<sup>44</sup> but the basic protection for public employee speech remained.<sup>45</sup> This was the state of public employee First Amendment law when Chief Justice Roberts took the gavel—a general protection of the speech of public employees on matters of public concern against retaliation, subject to override where employer interests outweigh the

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<sup>38</sup> *Id.* at 150-54.

<sup>39</sup> Robert C. Cloud, *Public Employee Speech on Matters Pursuant to their Official Duties: Whistle While you Work?*, 210 EDUC. L. REP. 855, 857-858 (2006).

<sup>40</sup> *Id.* at 858.

<sup>41</sup> *Id.* at 861.

<sup>42</sup> 439 U.S. 410 (1979).

<sup>43</sup> *Id.* at 415-16.

<sup>44</sup> See, e.g., Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 47-50 (1988).

<sup>45</sup> Indeed, the Court added one more significant precedent a few years after *Connick*, *Rankin v. McPherson*, recognizing an expansive definition of "matter of public concern." See *Rankin v. McPherson*, 483 U.S. 378, 381, 385 (1987) (holding that a public employee's expression of hope that the failed shooters of President Reagan in 1981 "get him" if they were to try again was speech on a matter of public concern).

interests of the employee in speaking and the public in receiving the message.

One of the Roberts Court's earliest decisions, *Garcetti v. Ceballos*<sup>46</sup> was what many consider to be a radical departure from the *Pickering* regime, even as limited by *Connick* and *Mt. Healthy*. Like *Connick*, *Garcetti* did not involve an academic employee. Ceballos, the plaintiff, was a "calendar deputy" for the Los Angeles District Attorney's Office.<sup>47</sup> Consistent with his responsibilities in this role, at the urging of defense counsel in a pending case, Ceballos examined a search warrant that had been obtained against the defense counsel's client.<sup>48</sup>

Concluding that the affidavit supporting the warrant was plagued by misrepresentations and serious factual inaccuracies, Ceballos authored a memorandum to that effect and submitted it to his superiors.<sup>49</sup> This submission led to a heated discussion, and ultimately, Ceballos's superiors rejected the memorandum's conclusions.<sup>50</sup> Subsequently, defense counsel called Ceballos as a witness in the suppression hearing, and Ceballos testified substantially in concert with his memorandum, but the judge denied the motion to suppress.<sup>51</sup> Finally, when all was said and done, Ceballos was transferred to a less desirable position.<sup>52</sup>

Ceballos filed suit claiming, among other things, retaliation for the exercise of his First Amendment right to speak on matters of public concern.<sup>53</sup> When the case reached the Supreme Court, the only speech that was at issue was Ceballos's written memorandum to his superiors.<sup>54</sup> The Court considered the memorandum in light of the *Pickering* line of cases and concluded that it was not the kind of speech that the *Pickering* line was designed to protect. Rather than "citizen speech," Ceballos's memorandum was speech made "pursuant to [Ceballos's] duties" as a calendar deputy.<sup>55</sup> The Court then stated as its holding a categorical rule of exclusion from the First Amendment's protection:

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<sup>46</sup> 547 U.S. 410 (2006).

<sup>47</sup> *Id.* at 413.

<sup>48</sup> *Id.* at 413-15.

<sup>49</sup> *Id.* at 414.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 415.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* 420-26.

<sup>55</sup> *Id.* at 415.

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.<sup>56</sup>

The *Garcetti* Court's choice to adopt a categorical rule excluding certain speech from First Amendment protection has drawn fervent criticism. Multiple legal commentators have critiqued the decision on the grounds that it is unthinkingly formalistic.<sup>57</sup> These critiques center upon the Court's adoption of a threshold categorical rule to precede, and in some cases preclude, the interest balancing that would otherwise be conducted in cases alleging First Amendment retaliation.<sup>58</sup> Commentators generally contend that a categorical rule is inappropriate in the context of the First Amendment,<sup>59</sup> and that any such rule is likely to render

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<sup>56</sup> *Id.* at 421.

<sup>57</sup> See, e.g., Secunda, *Right-Privilege*, *supra* note 6, at 912; Secunda, *Federal Employees*, *supra* note 6, at 123 (“Consistent with Justice Stevens’ dissent in *Garcetti*, I reject the dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both.”); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1174, 1192 (2007).

<sup>58</sup> Sources cited *supra* note 57.

<sup>59</sup> *Garcetti* was not the first case in which the Supreme Court set down a categorical rule creating an exemption from First Amendment scrutiny. Under the current understanding of the First Amendment, there are several such exemptions, each of which describes a category of speech that does not qualify for First Amendment protection. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (true threats); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to imminent lawless activity); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (defamation, including a modified, but still categorical, exception if the subject is a public figure); see also *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography). *But see* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down portions of the federal statute criminalizing child pornography, 18 U.S.C. § 2256, as overly broad). In addition to these categories, several speech-related acts have been criminalized or have formed the basis of tort liability in the states with little resulting First Amendment scrutiny. See, e.g., ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1078-91 (4th ed. 2011) (discussing defamation together with privacy torts and intentional infliction of emotional distress). Professor Sheldon Nahmod has pointed out that each of these categories is based on the content of the speech and its intrinsic value, rather than the identity of the speaker, and that the *Garcetti* exemption presents a departure from traditional First Amendment principles. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 570-71 (2008).

unprotected speech that ought to be protected, considering the purposes of the First Amendment.<sup>60</sup> This is a familiar critique of formalist rules, but one commentator has pointed out that the decision is likely to lead to results contrary even to the professed values of formalist judging—namely the fostering of predictability and the cabining of the influence of ideology in the judicial process.<sup>61</sup> Indeed, many courts applying *Garcetti* have over-read the case to deny First Amendment protection of any kind to speech simply made during the course of a public employee’s employment, or speech related to a public employee’s employment.<sup>62</sup> These rulings have caused many to conclude that *Garcetti* was wrongly decided,<sup>63</sup> and have been used as support for more general critiques of the formalism of the Roberts Court.<sup>64</sup>

The *Pickering-Garcetti* line of precedent recognizes that the government must be able to exercise some control over the speech of its employees who are hired to speak, and *Garcetti* held that the government may exercise *total* control where the speech is made “pursuant to official duties.”<sup>65</sup> As is true in the context of categorical exemption from the First Amendment’s protection, this line of precedent inherently lessens, and in some cases completely eliminates, the government’s duty of neutrality toward speech and speakers.

Another government role that is particularly important to this Article’s analysis might best be described as “government as educator.”<sup>66</sup> In its role as the provider of public education to the vast majority of school-age children in the country, the government may restrict the speech of students

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<sup>60</sup>See, e.g., Secunda, *Federal Employees*, *supra* note 6, at 118 (federal employee speech); Rhodes, *supra* note 57, at 1201 n. 204 (academic speech); Sheldon H. Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 56 (2008) (same); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 90 (2008) (whistleblower/government auditor speech).

<sup>61</sup>Rhodes, *supra* note 57, at 1193.

<sup>62</sup>See Bauries & Schach, *supra* note 10 (documenting the broadening of the *Garcetti* categorical exemption in lower court decision making).

<sup>63</sup>Rhodes, *supra* note 57, at 1174; Secunda, *Federal Employees*, *supra* note 6, at 117; Norton, *supra* note 60, at 83; Nahmod, *supra* note 60, at 54.

<sup>64</sup>Secunda, *Right-Privilege*, *supra* note 6, at 911.

<sup>65</sup>*Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>66</sup>See generally Zouhary, *supra* note 1, at 2254-55 (explaining the speech-restrictive privileges the government obtains when it steps into its role as educator). Judith Areen uses this term to describe a proposed reconceptualization of state governments as higher education providers. Areen, *supra* note 29. Here, I am using the term more broadly to reflect the substantial body of case law that governs student speech in public schools and classrooms.

to protect its ability to accomplish its public duty to educate.<sup>67</sup>

For example, even the political speech of students may conceivably be limited in schools if it causes or portends a material and substantial disruption of the learning environment. This rule comes out of the seminal case of *Tinker v. Des Moines Independent Community School District*.<sup>68</sup> In *Tinker*, several students wore black armbands to protest the Vietnam War, and they were punished as a result. Uttering those famous words that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>69</sup> the Supreme Court held that student speech may be suppressed based on its content or viewpoint only if such speech “materially and substantially disrupt[s] the work and discipline of the school.”<sup>70</sup>

Based on *Tinker* and subsequent student speech decisions, the Court permits school administrators to suppress speech in schools that is lewd or outside the bounds of decorum.<sup>71</sup> The Court has even approved a school administration’s ability to limit student speech outside the physical limits of the school grounds where it was evident to the Court that the speech occurred at a “school sponsored function.”<sup>72</sup> But these cases presented scenarios that convinced the Court that disrupting the learning environment was inevitable where speech conflicted with or urged the rejection of school rules of behavior—a debatable case surely, but one within the *Tinker* standard nonetheless. So, in most of their interactions outside the classroom, students enjoy capacious, but not unlimited, First Amendment protections, and administrators must steer widely around any prohibitions on political or other speech based on its content or viewpoint unless they can convincingly predict a material and substantial disruption

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<sup>67</sup> Zouhary, *supra* note 2, at 2254-55.

<sup>68</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>69</sup> *Id.* at 506.

<sup>70</sup> *Id.* at 513-14. The Court also mentioned “colliding with the rights of others” as a potential basis for suppression. *Id.* at 513 (*quoting* *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966)). Many commentators, and some courts, have treated this concern as being a “second prong” of the *Tinker* test, justifying speech suppression even where no substantial disruption to learning happens or is reasonably predictable, if the speech in question is found to “collide with the rights of others.” Whatever that vague phrase may mean, there was no plausible argument in *Tinker* that the rights of other students were being interfered with, and no Supreme Court case since has rested its approval of a restriction of student speech on that ground, so the sometimes-alleged “second prong” of *Tinker* was likely an aside or a way of restating the “substantial interference” rule, rather than a separate dimension of the Court’s test.

<sup>71</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>72</sup> *See Morse v. Frederick*, 551 U.S. 393, 401-02 (2007).

to the school environment.

As to speech within the classroom or in furtherance of co-curricular activities such as student newspapers, a different set of rules applies. The foundational case in this area, *Hazelwood v. Kuhlmeier*, held that public school officials may censor student speech by removing certain items from student newspapers published as part of school journalism classes, provided that such removal or censoring is done to serve “legitimate pedagogical concerns.”<sup>73</sup> The Court justified this rule based in part on forum analysis. The Court reasoned that, rather than being a designated public forum for student expression, the school newspaper was part of the school’s curriculum, and therefore was a closed or nonpublic forum, in which speech could be subjected to restrictions reasonable in light of the purposes of the forum.<sup>74</sup>

Because *Hazelwood* was decided in the context of the censoring of a school newspaper, it is reasonable to ask what the case has to do with student speech in the non-journalism class. However, the Court’s framing of its holding makes clear that it was working under the assumption that classroom speech could be restricted in the same way. Drawing a connection between the co-curricular newspaper activity at issue in *Hazelwood* and the classroom, the Court developed its “legitimate pedagogical justification test” as uniquely suited to, and reasonable in light of, the delivery of the school’s curriculum:

These activities may fairly be characterized as part of the school curriculum, *whether or not they occur in a traditional classroom setting*, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.<sup>75</sup>

So, the Court, assuming that speech made in the classroom would be part of the school’s curriculum, then extended the analysis to activities which might not occur in the classroom, but which would “carry the imprimatur of the school.”<sup>76</sup> By drawing this connection, the Court made it clear that both the classroom and certain co-curricular activities carry with them the

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<sup>73</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>74</sup> *Id.* at 267 (citations omitted) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7, 47 (1983)).

<sup>75</sup> *Id.* at 270.

<sup>76</sup> *Id.* at 270-71.

“imprimatur of the school,” and that speech can therefore be restricted in both environments based on “legitimate pedagogical concerns.”<sup>77</sup>

### Forum Analysis

Some of the roles the government may assume are straightforward, while other roles have multiple levels of complexity. The greatest complexity in the doctrine results when the government assumes the role of the owner or manager of property, what we might term, “government-as-proprietor.” In this role, the government, like any property owner or controller, must sometimes exercise control over who may access a certain piece of property and what such persons may do once on the property. This necessity has spawned a truly byzantine web of doctrinal rules, collectively placed under the label “forum analysis,” which determine the extent to which government may suppress or control speech or speakers on its own property, or on property within its control.

The basic distinctions break down into four categories of forums: the traditional public forum, the designated public forum, the limited public forum, and the closed or non-public forum. A traditional public forum is a government-owned space, such as a public park, a beach, or a sidewalk, which has traditionally been “held in trust for the public”<sup>78</sup> and has been freely used by speakers to proclaim things to the public.<sup>79</sup> In such a forum, no content or viewpoint discrimination is allowed unless the

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<sup>77</sup> See Waldman, *supra* note 4 (outlining the application of *Hazelwood* to student speech in the classroom). Incidentally, Prof. Waldman’s article does an excellent job of disentangling what was then a confusing web of applications of *Hazelwood* to all sorts of speech, including the speech of teachers. As this Article demonstrates, *Garcetti* likely subsumes any prior caselaw applying *Hazelwood* to teacher speech, so Prof. Waldman was quite prescient in arguing for a return to *Hazelwood* as purely a student speech case, as it is treated here. See Waldman, *supra* note 3.

<sup>78</sup> See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, 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 privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied”).

<sup>79</sup> See Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U.L. REV. 1975, 1981 (2011) (explaining the various forum categories that govern forum analysis, and the conceptual problems with each).

government can defend such a restriction as necessary to achieve a compelling government interest, but the government may adopt reasonable “time, place, and manner” restrictions, so long as such restrictions are reasonable in light of the expressive interests of speakers and listeners.<sup>80</sup>

For a piece of government property to be a traditional public forum, it must have been used by the public historically for the purpose of speech.<sup>81</sup> For all other government property, the government has the baseline right of exclusion that all property owners have. But the government can also designate a piece of its property that has not traditionally been used for speech as being open for that use. This latter type of forum is called a “designated” or “open” forum, and it places the same restrictions on government as the traditional public forum as to the regulation of speech by its content or viewpoint.<sup>82</sup>

The other two categories grant the government more power to restrict speech, and these categories are the most relevant to the topic of classroom speech. Just as the government may designate a piece of its property to be open to speech, it may also designate that property to be open only for a particular category of speech topics or a particular class of speakers. If so, then the forum is termed a “limited public forum.”<sup>83</sup> A school board meeting, for example, might be designated a limited public forum for discussion of property tax rates, or a publicly owned auditorium might be designated a limited public forum for the presentation of candidate debates for an upcoming election. Lyriisa Lidsky offers a succinct explanation of the general rules that apply in this type of forum:

When the State decides to open a public forum but limits it to certain speakers and topics, the State’s establishment of forum parameters is constitutional, so long as the parameters are reasonable and viewpoint neutral. When the State applies the forum criteria and excludes a speaker based on the subject matter of his speech, the exclusion need only be “reasonable in light of the purposes served by

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<sup>80</sup> *Id.* at 1982. Of course, as with many rights-based limitations on government power, the government can surmount the prohibition on its regulation of speech in a public forum even based on content by satisfying the demanding “strict scrutiny” test, which requires that the government establish a compelling government interest in regulating the speech and that the regulation in question is narrowly tailored to the government’s interest. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1984.

<sup>83</sup> *Id.* at 1984-85.

the forum” and viewpoint neutral, though there is some indication that the Court may be especially stringent in examining viewpoint neutrality if religious viewpoints are involved. Finally, when a State opens a public forum but excludes a speaker whose speech obviously falls within the subject matter constraints of the forum, the exclusion is subject to strict scrutiny.<sup>84</sup>

Finally, a closed or non-public forum is a similar piece of property that the government has *not* opened up to the public for debate on any topic. In such a forum, the government-as-property-owner’s power to select and exclude speakers is paramount, and the government may exclude most speakers and even most potential listeners, as long as such exclusions are reasonable in light of the purpose of the forum, and as long as it does not exclude them on the grounds that it disfavors their viewpoints.<sup>85</sup> The leading case recognizing such a closed forum is *Perry Education Association v. Perry Local Educators’ Association*, in which the Court held the faculty mail system to be closed to a rival teacher’s union, even though it was opened to communications from the then-current bargaining representative.<sup>86</sup>

Intuitively, the classroom most appropriately fits within the concept of the closed or nonpublic forum, because it is well accepted that the government need not permit any speakers within the classroom other than the students, teachers, and school personnel who generally occupy it.<sup>87</sup> But, as to both teachers and students as speakers, the classroom manifestly does not follow the rules of that forum.<sup>88</sup> To understand why, we must examine the different doctrinal limitations that apply in the classroom to teachers and students as speakers.

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<sup>84</sup> *Id.* at 1988-89 (internal citations omitted).

<sup>85</sup> *Id.* at 1989.

<sup>86</sup> *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 46 (1983).

<sup>87</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (comparing the student newspaper at issue in that case with the classroom and justifying content and viewpoint restrictions based on “legitimate pedagogical concerns” in both).

<sup>88</sup> Contrariwise, the overall school environment (hallways, athletic fields, etc.) outside of class and co-curricular activities operates more like a limited public forum, limited to certain participants, but not to certain topics of conversation or viewpoints. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

*The Teacher as a First Amendment Speaker*

Teachers and administrators are simultaneously: 1) Employees, who often must speak to fulfill their contractual employment duties; (2) Citizens, who may speak responsibly on matters of public concern;<sup>89</sup> and 3) Embodiments of “the State,” which the Constitution disables from acting to limit the rights of the other participants in the marketplace of ideas.<sup>90</sup> Like all public employees, public school teachers maintain their basic constitutional rights despite their status as government employees. Under the “unconstitutional conditions” doctrine, a public entity may not condition the provision of a public benefit—including public employment—on one’s relinquishment of a constitutional right.<sup>91</sup>

Nevertheless, courts have permitted the government, acting in its role as employer, to limit public educational employees’ speech that would otherwise be protected in a non-employment setting.<sup>92</sup> In most cases, these limitations have sought to protect interests similar to those served by limits on student speech, often centering on concerns of pedagogical effectiveness and school managerial interests.<sup>93</sup> Until recently, such limitations have largely emerged through case-by-case analysis, rather than through categorical rules. However, the Court’s recent decision in *Garcetti*, discussed above, introduced the categorical rule completely excluding job-required speech from the First Amendment’s protections,

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<sup>89</sup> See generally NELDA H. CAMBRON-MCCABE, MARTHA M. MCCARTHY, & STEPHEN B. THOMAS, *LEGAL RIGHTS OF TEACHERS AND STUDENTS* 228-39 (2d ed. 2009) (discussing teacher rights to free expression).

<sup>90</sup> See *id.* at 93 (discussing the “state action” doctrine in schools).

<sup>91</sup> See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (holding that a public university cannot condition employment as a professor on the professor’s signing of a “Loyalty Oath”); Kathleen A. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (outlining the state of the “unconstitutional conditions” doctrine). *But see* Secunda, *Right-Privilege*, *supra* note 6, at 912 (arguing that the Supreme Court’s line of decisions in *Pickering*, *Connick*, and *Garcetti* have weakened the unconstitutional conditions doctrine to the point of near obliteration).

<sup>92</sup> See *Williams v. Dallas Ind. Sch. Dist.*, 480 F.3d 689, 690-691 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Co.*, 474 F.3d 477 (7th Cir. 2007); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192 (5th Cir. 2007).

<sup>93</sup> See, e.g., *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (“We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum”); see also Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008) (arguing that *Garcetti* is the latest in a series of Supreme Court decisions elevating “managerial prerogative” to constitutional status).

regardless of its content or viewpoint.<sup>94</sup>

Read on its own literal terms, the *Garcetti* rule would plainly bring within its ambit all of the pedagogical and scholarly academic speech of public school teachers. Speaking of the analogous case of public university professors, Justice Souter pointed out in his dissent:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties."<sup>95</sup>

In response to Justice Souter's concerns about the teaching and scholarship of higher education academics, Justice Kennedy hedged:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>96</sup>

Nevertheless, whatever Justice Kennedy meant in response to Justice Souter's concern, it is clear that the terms of the *Garcetti* exclusion apply squarely to the expression of public school teachers in the classroom. Teachers in the classroom, at least while delivering curricular content, managing student behavior, and responding to questions about the material, *always* speak "pursuant to their official duties."

The *Garcetti* rule, recall, does not contain any exception for the suppression or punishment of speech based on its content or even its viewpoint. If it is speech made pursuant to an official duty to speak, it is categorically unprotected. This means that the classroom, at least for teachers, lacks the protections of even a closed or nonpublic forum (the

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<sup>94</sup> See *supra* notes 46-65 (discussing *Garcetti*).

<sup>95</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).

<sup>96</sup> *Id.* at 425.

forum category it is typically assumed to occupy) because even a closed or nonpublic forum requires that excluding or silencing a speaker due to disagreement with his viewpoint be justified by strict scrutiny.<sup>97</sup> In fact, teacher speech in the classroom occupies a status equivalent to “low-value” speech, such as speech inciting a riot, or child pornography, which also receive no protection, regardless of viewpoint.<sup>98</sup> Based on this reading, then, it would seem that, rather than a closed or nonpublic forum, the classroom is a zone of *no* protection when it comes to teacher speech.<sup>99</sup>

As an illustration, in *Mayer v. Monroe County Community School Corporation*,<sup>100</sup> the Seventh Circuit heard the case of a probationary elementary school teacher whose contract was not renewed after she answered a question from a student in her class. In a current events lesson, Mayer was discussing political protests. In response to a student’s question whether Mayer had personally participated in a political demonstration, Mayer said that she did honk her car horn when passing a placard that read “Honk for Peace” during the second Iraq War.<sup>101</sup>

After the school district declined to renew her contract, Mayer sued for retaliation, citing this in-class expression as the basis. During the course of the suit, Mayer stipulated that speaking on current events was one of her official duties, and she rested her hopes entirely on the principles of academic freedom in seeking the First Amendment’s protection.<sup>102</sup> This stipulation made the Seventh Circuit’s decision on the threshold question easy—if speaking to her students on the topic of current events was one of her official duties, then her statements made during the current events lesson in question constituted speech “pursuant to” such duties.<sup>103</sup> However, Mayer contended that the *Garcetti* rule does not control

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<sup>97</sup> See, e.g., Chemerinsky, *supra* note 19, at 57.

<sup>98</sup> See Bauries & Schach, *supra* note 10, at 358, n.5.

<sup>99</sup> Professor Alan Brownstein proposes and defends the new concept of the “nonforum” as the category that should govern speech in schools and at school-sponsored functions. See Brownstein, *supra* note 1. This proposed new forum category, which immunizes speech from any judicial review, governs student, rather than teacher, speech, but it is analogous to the complete lack of protection for teacher classroom speech under current doctrine.

<sup>100</sup> 474 F.3d 477 (7th Cir. 2007).

<sup>101</sup> *Mayer*, 474 F.3d 478.

<sup>102</sup> *Id.* at 479. Based on the Seventh Circuit’s traditional approach to the topic and the lack of helpful precedent from the Supreme Court, see generally Bauries, *supra* note 12, Ms. Mayer’s legal strategy to rely on academic freedom was likely a mistake, and a better approach would have been to contest the compulsory nature of her current events lesson.

<sup>103</sup> *Id.* at 480.

classroom speech.<sup>104</sup>

The court rejected this contention. The Seventh Circuit has historically held that classroom teachers do not have the freedom to choose instructional materials or deliver instruction in ways conflicting with the wishes of their supervisors.<sup>105</sup> Building from this existing rule, the court explained that “the school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech.”<sup>106</sup> The court described a teacher’s classroom speech as a “commodity” that the teacher “sells” to the school district, and explained that, as such, a teacher of history may not contradict his district’s wishes by engaging in revisionist instruction, and a teacher of math may not elect on her own to teach calculus instead of trigonometry.<sup>107</sup> The court also pointed out that, unlike in most employee speech cases, K-12 teachers address their speech to a captive audience, a fact which necessitates that curricular and pedagogical decisional authority rest with those who may be voted out of office for poor decisions.<sup>108</sup>

Similarly, in *Evans-Marshall v. Board of Education*,<sup>109</sup> the Sixth Circuit considered the claim of a high school English teacher who had experienced negative reactions—first from the community, then from the Board of Education, and finally from her principal—regarding her book choices and the pedagogical strategies that she used in relation to the books.<sup>110</sup> Ultimately, the Board voted unanimously not to renew the teacher’s contract, and the teacher sued, alleging unconstitutional interference with and retaliation for her exercise of an alleged right “to select books and methods of instruction for use in the classroom without interference from public officials.”<sup>111</sup> When the case reached the Sixth Circuit, the court rejected the plaintiff’s argument that *Garcetti* should not

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<sup>104</sup> *Id.* at 479.

<sup>105</sup> *See id.* (citing *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (holding that a classroom teacher did not possess a right to teach his students that the Earth was thousands, rather than billions, of years old).

<sup>106</sup> *Id.* (emphasis in original).

<sup>107</sup> *Id.* (“A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can’t use *Cry, The Beloved Country* instead, even if Paton’s book better suits the instructor’s style and point of view; a math teacher can’t decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz”).

<sup>108</sup> *Id.* at 479-80.

<sup>109</sup> 428 F.3d 223 (6th Cir. 2010).

<sup>110</sup> *Id.* at 223-26.

<sup>111</sup> *Id.* at 223.

be held applicable because of the Supreme Court's failure to squarely address the issue.<sup>112</sup> The court acknowledged that the exchange between Justice Kennedy and Justice Souter in the *Garcetti* opinion left open the application of the *Garcetti* rule to certain academic speech, but that K-12 classroom teaching is not among this speech.<sup>113</sup> The court ultimately held that classroom teaching and expressive pedagogical choices, as speech made "pursuant to official duties," are unprotected under the First Amendment.<sup>114</sup>

### *The Student as a First Amendment Speaker*

Students are certainly citizens with speech rights, but they are also public charges, such that their speech rights may be limited for their own protection, as well as for the protection of other students engaged in the educational process alongside them.<sup>115</sup> It is a familiar axiom that students do not completely "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>116</sup> Nevertheless, as discussed above, First Amendment doctrine holds that student speech in public educational settings does not demand the same constitutional protections that similar speech made in open public forums would require.<sup>117</sup>

As discussed above, it is most plausible that, due to the Court's categorical determination that curricular activities, including activities in the classroom, are part of a closed or nonpublic forum, *Hazelwood*, rather

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<sup>112</sup> *Id.* at 233-34.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 230.

<sup>115</sup> *See, e.g.,* Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247 (11th Cir. 2003) ("Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve"); CAMBRON-MCCABE, MCCARTHY, & THOMAS, *supra* note 89, at 94-107 (discussing student rights to free expression). Prof. Brownstein calls into question this "reduced rights" paradigm, and he is correct as he frames the comparison—which is one between adult speech in closed forums and student speech outside the classroom in school or at school-sponsored functions. *See* Brownstein, *supra* note 1, at 729-42. But in the classroom, where the speech of students can clearly be restricted based on its viewpoint even absent a "compelling government interest" and "narrowly tailored means," students certainly have less expansive rights than adults do in any forum they might occupy, even a closed forum.

<sup>116</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>117</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Morse v. Frederick*, 551 U.S. 393, 396-397 (2007).

than *Tinker*, governs student expression in the classroom. Within this paradigm, since the *Hazelwood* case was decided, commentators have puzzled over whether the Court intended to approve viewpoint discrimination by schools and school officials in curricular settings. A close reading of the decision, including the way the majority chose to frame its holding, as well as the evidence at issue in the case, make the contrary case difficult to support.<sup>118</sup>

Based on the facts before the Court, the way in which the Court developed its holding, and the most natural implications of the ruling, it is clear that the *Hazelwood* rule allows for viewpoint discrimination. Most basically, this rule construed this way simply makes sense. A teacher cannot be compelled to allow a student, during an open class discussion of World War II, to deliver a Holocaust denial diatribe, for example, even though telling him to sit down and shut up would qualify as classic viewpoint discrimination.<sup>119</sup> If the *Hazelwood* rule would not permit that sort of censorship, then what rule would? The student in this hypothetical is participating in an open class discussion, so his expression of his viewpoint cannot be said to be materially and substantially disruptive of the learning environment, in the *Tinker* sense. Indeed, his contribution, though disturbing and manifestly incorrect, is on point, providing the teacher with one of those “teachable moments” that engage the dialectical classroom process. He also offers his own unvarnished opinion, so his expression cannot be plausibly characterized as “government speech.”<sup>120</sup> The *Hazelwood* rule is all that remains that might allow for the teacher to simply tell the student he is not permitted to express such an opinion on this point—an action that is perfectly defensible, and may be quite

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<sup>118</sup> See Zouhary, *supra* note 1, at 2252-53 (outlining several reasons, including the text of the Court’s holding, that *Hazelwood* authorized viewpoint discrimination); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 186 (2007) (concluding that *Hazelwood*’s language compels this conclusion); Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1556 (2003) (“If a constitutional exception permitting restrictions on student points of view is not compelled by *Hazelwood*, it is at least arguably consistent with a fair reading of the decision”).

<sup>119</sup> See Waldman, *supra* note 3, at 66 (“The real question is not *whether Hazelwood* permits viewpoint discrimination, but *when*”) (emphasis in original); see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that governmental restrictions on speech and speakers in even closed forums must be “viewpoint-neutral”).

<sup>120</sup> Brownstein, *supra* note 1, at 751. When expression is considered to be the government’s own expression, the general prohibition against content and viewpoint discrimination does not apply. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

necessary, from a pedagogical standpoint to prevent the other students from becoming sympathetic to an idea that has no empirical or historical support, or at least to teach students to distinguish between historical facts and unfounded conspiracy theories.

Other than this common sense reading, vital elements of *Hazelwood* itself indicate that the Court knew it was approving a rule that would allow for viewpoint discrimination for pedagogical reasons. For example, the viewpoint discrimination question came up frequently at oral argument.<sup>121</sup> Justice Scalia engaged in a lengthy interrogation of the plaintiffs' counsel as to how a school might be able to maintain a newspaper at all with any editorial discretion if viewpoint discrimination were prohibited.<sup>122</sup> The dissent also focused on it as a stated concern.<sup>123</sup> That the majority opinion did not specifically approve viewpoint discrimination may have been a matter of cobbling together a majority.<sup>124</sup>

Nevertheless, Justice White's illustrative list of the speech a school could legitimately suppress under the Court's rule ought to have laid to rest any doubts about viewpoint discrimination in the classroom:

Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play disassociate itself, not only from speech that would "substantially interfere with its work or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. . . . In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared

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<sup>121</sup> Zouhary, *supra* note 1, at 2242-44.

<sup>122</sup> *Id.* at 2243 (quoting Transcript of Oral Argument at 21, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (statement of Scalia, J.)).

<sup>123</sup> *Id.* at 2241-43.

<sup>124</sup> *Id.* at 2244.

values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.<sup>125</sup>

Several of these items clearly involve the school selecting between differing viewpoints, and most of them plausibly could involve such choosing under the right circumstances.

The classroom speech cases decided since *Hazelwood*, most of which involve student religious speech, also bear out this interpretation. For example, in *Peck v. Baldwinsville Central School District*, students were given an assignment to create a poster illustrating ways in which the environment could be protected. One student chose to include prayer as one of these ways, and her poster contained a picture of Jesus Christ. The school chose to display her poster, but to obscure the picture of Jesus. The Second Circuit held that the school had a “legitimate pedagogical interest” in preventing the impression that the school was sponsoring religion, and upheld the censorship.<sup>126</sup>

Similarly, in *C.H. v. Oliva*,<sup>127</sup> the Third Circuit held that it was permissible for a school to censor a student’s religious viewpoints expressed in two school assignments. One was a poster assignment asking students to represent things they were thankful for (the student listed “Jesus” among those things), and the other was a class reading assignment to bring in a story from home to read to the other students (the student brought in the story of Jacob and Esau from the Old Testament). In both cases, the school was permitted to remove the student’s references to religious content and expressions of his religious viewpoint from the view and hearing of the other students.

But, if viewpoint discrimination as to classroom and other curricular speech is indeed permitted under *Hazelwood*, then we should consider whether the *Hazelwood* rule should be the final word, or whether the apparent confusion about viewpoint discrimination has prevented us from developing rules of application for *Hazelwood* that would value First Amendment interests more, while protecting school interests as they require. The commentators and courts rejecting the reading of *Hazelwood* outlined above do so mainly because they are concerned about the marketplace of ideas, both as a valuable thing in and of itself and as a

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<sup>125</sup> *Hazelwood*, 484 U.S. at 271-72.

<sup>126</sup> *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 621–23, 633 (2d Cir. 2005).

<sup>127</sup> *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), *aff’d on other grounds*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied*, 533 U.S. 915 (2001).

teaching model for students learning to be democratic citizens.<sup>128</sup> The traditional prescription for speech that expresses an indefensible viewpoint encourages “more speech.”<sup>129</sup> In this view, carving out classroom and curricular speech as a unique category of speech that does not benefit from the prohibition against viewpoint discrimination is unwise and counter to the general principles of the First Amendment.<sup>130</sup>

However, the First Amendment is riddled with categories of speech that receive no protection, even from viewpoint discrimination. Low-value speech,<sup>131</sup> the job-required speech of public employees,<sup>132</sup> and government speech<sup>133</sup> are all categories of speech that do not observe the rule against viewpoint discrimination. Even pure political speech expressed in a traditional public forum can be suppressed based on its viewpoint if the government can meet the strict scrutiny standard.<sup>134</sup> So, while the presumptive prohibition against viewpoint discrimination is real, it is by no means an immutable command of the First Amendment, and the failure to observe it in the classroom, and in school activities that mimic the classroom, is both defensible under *Hazelwood* and *Garcetti* and pedagogically inevitable in large-scale public schooling environments.

### *The Limits of the Current Doctrine*

The real question, then, is whether *Hazelwood* should be the entirety of speech doctrine for students in the classroom, and whether *Garcetti* should be the entirety of speech doctrine for teachers in the classroom. While *Hazelwood* itself seems to refute the proponents of a strong prohibition against viewpoint discrimination in the classroom, they are certainly correct that students being educated in a democratic society should be able

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<sup>128</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 288 (1988). (Brennan, J., dissenting).

<sup>129</sup> See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

<sup>130</sup> *Hazelwood*, 484 U.S. at 288 (Brennan, J., dissenting).

<sup>131</sup> See *supra* notes 23-28 and accompanying text (discussing low-value speech).

<sup>132</sup> See *supra* notes 46-65 and accompanying text (discussing public employee speech doctrine and the *Garcetti* rule).

<sup>133</sup> See *supra* note 120 and accompanying text (discussing government speech).

<sup>134</sup> See, e.g., *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 553 (2001) (Scalia, J., dissenting) (referring to the Court’s government-speech holding in *Rust v. Sullivan*, stating, “This was not, we said, the type of ‘discriminat[ion] on the basis of viewpoint’ that triggers strict scrutiny because the ‘decision not to subsidize the exercise of a fundamental right does not infringe the right’”) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (internal quotation marks omitted)).

to benefit from acting in a democratic fashion, part of which involves offering and defending opinions and debating ideas. *Hazelwood* shows us that schools have a legitimate interest in taking some ideas and some matters of debate off the table, but that does not mean that schools and school officials have been given license to act without any responsibility. Similar to the speech of teachers, the speech of students in the classroom and in co-curricular activities does require some breathing space, even acknowledging the strong interests of schools in saying which “ideas” are “false.”<sup>135</sup>

Below, I outline a slight alteration to the doctrines of classroom speech, which is justified (as are the restrictive protections that prevail in schools) by the unique culturally inculcative and custodial conditions of the school environment, but which balances both control and freedom in a way superior to current doctrine. The rule I propose works within the categorical structure of current First Amendment doctrine, but without creating any new or unwieldy categories. It also works within a reasonable interpretation of the two prevailing cases that currently govern speech in the classroom, *Garcetti* and *Hazelwood*, as well as their classroom speech progeny, so implementing it does not require any action from the Supreme Court to overrule those cases. We might describe the proposed rule as a rule of “benign prior restraint.”

## **Developing a Workable Classroom Speech Doctrine**

### *Living Within the Categorical Approach*

The First Amendment’s basic right (a general speech right which can be limited only based on a justification that would pass strict scrutiny) is decidedly standard-based, but each of the exceptions and augmentations to it introduces some element of categorical analysis. As others have pointed out, this tendency to think of speech as a set of categories negatively impacts the marketplace of ideas.<sup>136</sup> Nevertheless, we are far along that road now, and it makes the most sense at this point to attempt to derive doctrine that can work within the categorical approach, at least until the next shift occurs in the Court’s thinking.

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<sup>135</sup> Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas”).

<sup>136</sup> See, e.g., Nahmod, *supra* note 59.

Accordingly, a successful approach to classroom speech must work within the categorical approach. Below, I outline a small modification to the doctrines surrounding the classroom speech of both teachers and students. This modification might be termed a rule of “benign prior restraint.” I propose to make the standard of protection depend on whether the school or school official’s action in regulating such speech takes the form of a prior restraint or a purely post-speech punishment. This rule can be derived from the language of *Garcetti*, *Hazelwood*, and their progeny, and it comports well with the need to categorically balance the legitimate interests of schools and school officials in enforcing a certain curricular orthodoxy with the legitimate interests of both teachers and students as members of a democratic society, while also preventing undue restraint on the expressive interests of teachers and students as individual speakers.

### *A Benign Prior Restraint Rule for Classroom Speech*

Many scholars and courts have attempted, both before and since *Garcetti* and *Hazelwood*, to find a way to construct the doctrine of the First Amendment to allow legitimate debate and commentary in classrooms, where, after all, teachers should be modeling what it means to be a participant in a democratic republic; while also leaving copious space for the legitimate regulation of classroom content by those we have—by vote or delegation—placed in charge of the administration of our schools and their curriculum. In the next section, I review two representative efforts before moving on to my own proposal, which draws substantially from these accounts.

### Benign Prior Restraint and the Classroom Speech of Teachers.

In recent years, numerous commentators have attempted to flesh out a workable doctrine of public school teacher speech protection.<sup>137</sup> Of these, two accounts in particular stand out as well-argued and defensible under

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<sup>137</sup> See, e.g., Brownstein, *supra* note 1; Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687 (2010); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008); Sheldon Nahmod, *supra* note 60, at 62-67; Alison Lima, *Shedding First Amendment Rights at the Classroom Door: The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173 (2008); Ronald D. Wenkart, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 EDUC. L. REP. 1 (2006).

current standards—one authored prior to the Court’s decision in *Garcetti* and the other authored a few years after it. Like the rule proposed in this article, both of these accounts propose that we make speech protections for teachers depend in part on concepts of prior notice.

Beginning with the former, Professor Kevin Welner, perhaps predicting the eventual development of a *Garcetti*-type rule in the Supreme Court, advanced the claim in 2003 that the punishment of teacher speech made in the classroom should depend on elements of notice.<sup>138</sup> Because Welner’s paper was authored pre-*Garcetti*, it is understandable that, in the main, it states an alternative to the “superficial” applications of *Hazelwood* to teacher classroom speech offered by some courts at that time.<sup>139</sup> Accordingly, even on its own terms, it requires some reconsideration and augmentation in light of the much more stringent *Garcetti* complete exclusion of the job-required speech of teachers from the protection of the First Amendment.

Welner’s approach to notice takes as its main unit of analysis the teacher seeking to make methodological or pedagogical decisions—decisions as to how to deliver course content. The *Hazelwood* progeny cases that Welner critiques fail to protect these teachers’ discretion because that discretion is nearly always overridden by the discretion of the school administrators in establishing the curriculum of the school. Welner’s idea is that the teacher’s discretion should be overridden in this way only if the school is the type that explicitly treats its teachers as “ministerial” employees who are not empowered to exercise pedagogical discretion.<sup>140</sup> Absent such a policy, Welner argues, teachers should have the presumptive right to exercise their professional discretion in how they deliver their lessons.

There is an obvious appeal to Welner’s proposed approach. A presumption that teachers are imbued with pedagogical discretion, rebutted only through a pre-communicated policy to the contrary, would be a useful rule. But today, it would seem that *Garcetti* would stand in the way of such a presumption, at least as applied to the selection of curricular materials and the delivery of the actual lesson. It is hard to imagine that teachers have any First Amendment claim to discretion over these matters after *Garcetti*. As the Sixth Circuit stated in reluctantly applying *Garcetti*

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<sup>138</sup> Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 U.C.L.A. L. REV. 959, 1026-28 (2003).

<sup>139</sup> See *id.* at 1027 (criticizing one such approach, and showing that Welner’s proposed, notice-based approach would work better).

<sup>140</sup> *Id.* at 1026.

to the book selection decisions of a high school English teacher:

As with any other individual in the community, [the teacher] had no more free-speech right to dictate the school's curriculum than she had to obtain a platform—a teaching position—in the first instance for communicating her preferred list of books and teaching methods. '[N]o relevant analogue' exists between her in-class curricular speech and speech by private citizens.<sup>141</sup>

This is true, the court said, “even if it otherwise appears (at least on summary judgment) that the school administrators treated her shabbily.”<sup>142</sup>

However, even under this post-*Garcetti* framework, it is not inevitable that a teacher cannot ever be a First Amendment speaker in the classroom, for example, when she speaks in ways that do not constitute delivering an actual lesson or selecting curricular materials. And even under *Garcetti*, the court is required to engage in a searching review of what the employee's “official duties” actually were, remaining skeptical of overly broad job descriptions and policy manuals. Accordingly, some room remains for a notice-based approach to the application of *Garcetti* that draws from Welner's prescient work.

In a well-argued, post-*Garcetti* student note, Kimberly Gee develops a proposed rule that depends on prior notice, as well. Despite her note having been authored post-*Garcetti*, however, Gee's proposal also works entirely within the *Hazelwood* teacher speech paradigm. Gee proposes, as part of what she terms a “modified *Hazelwood* test,” that we allow the application of the *Hazelwood* “legitimate pedagogical interest” test to govern teacher speech only where the school or district has predetermined that the classroom is a “closed forum.”<sup>143</sup> And even in such circumstances, “teachers should not be disciplined for violating regulations, even if they are reasonably related to legitimate pedagogical concerns, when the schools fail to put them on notice that such regulations exist and apply to the conduct at hand.”<sup>144</sup> Gee's proposal has significant merit, as it balances the liberty interests of teachers with the power interests of government educational authorities and attempts to find a way

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<sup>141</sup> *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340-41 (6th Cir. 2010) (internal citation to *Garcetti* omitted).

<sup>142</sup> *Id.* at 340.

<sup>143</sup> Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 450-51 (2009).

<sup>144</sup> *Id.* at 452.

to allow both interests to operate within their legitimate space. However, a few problems exist that counsel a different approach.

First, Gee gives somewhat short shrift to the importance of *Garcetti* to the classroom speech rights of teachers. Based on the reticence of the federal courts in applying *Pickering*'s "matter of public concern" prong to classroom speech, along with the Seventh Circuit's then-recent decision in *Mayer* applying *Garcetti* to classroom speech, Gee concludes that a *Hazelwood*-based approach, rather than *Garcetti*, would govern any First Amendment question in the classroom, at least where the district or school treats the classroom as a closed forum.<sup>145</sup>

But this conclusion elides the clear rule stated in *Garcetti* that public employees cannot claim First Amendment protection for any speech they utter "pursuant to official duties."<sup>146</sup> Although *dicta* in the *Garcetti* decision disclaims any intent on the Court's part to address the rule's application to academic speech,<sup>147</sup> the *Garcetti* rule nevertheless squarely applies to classroom speech on its own terms. A teacher's classroom speech is certainly speech made "pursuant to official duties." No persuasive case has yet been made that teachers are not speaking "pursuant to official duties" when they teach, so any distinguishing of *Garcetti* in the context of the classroom must rely on some sort of special constitutional status that teachers hold. Although there exists some common perception that this is so, the Supreme Court has never so held, and it is not likely to so hold in the future.<sup>148</sup>

Gee makes an admirable effort to identify a special constitutional status for teachers that would counsel against applying *Pickering* (and by extension, *Garcetti*) to classroom speech, arguing:

*Pickering*'s division of speech into public and private realms makes sense for general government employees, given the authority of the state, as an employer, to ensure the efficiency of services provided through its employees. However, teachers are unlike other state employees in that

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<sup>145</sup> *Id.* at 442.

<sup>146</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006); *see also* *Evans-Marshall*, 624 F.3d at 332 (reluctantly concluding that this application is the unavoidable result of *Garcetti*).

<sup>147</sup> *Garcetti*, 547 U.S. at 428.

<sup>148</sup> *Cf. Bauries*, *supra* note 12 (exhaustively reviewing the First Amendment caselaw and showing that the Supreme Court has never issued a decision that relied on the existence of a special right of academic freedom that exists only for public academic employees, and that the recent decision of the Ninth Circuit purporting to carve out such a right in the *Garcetti* context contradicts the underlying doctrinal structure of the First Amendment).

their employment as educators is always a matter of public concern. Other government employees are not asked to teach lessons that are sufficiently creative to hold students' attention while adhering to state mandated educational guidelines, to foster an environment where students are excited about learning, or to introduce students to a world of diverse people, customs, values, and ideas. The *Pickering* test has not been tailored to address the particular necessities of teaching. The classroom truly is a *sui generis* environment, and courts that apply *Pickering* to in-class teacher speech cases effectively ignore teachers' unique role in society, to the disservice of everyone with an interest in the public school system.<sup>149</sup>

But are these distinctions really of much constitutional significance? And are they even real distinctions? First, is the employment of any other class of public employees not a "matter of public concern"? We constantly debate efficiency and effectiveness in government, and that debate impacts the employment of every person whose livelihood depends on public funding and public needs. That teachers are among the more sympathetic public employees, and among the more familiar to the average citizen, does not necessarily make their jobs any more a matter of public concern than, say, the typical firefighter or police officer.

Second, it is not clear why the specific job duties of teachers should counsel for a different approach or a special set of rights under the First Amendment, as compared with the duties of other public employees. Gee argues that teaching is expressive and creative work, and that the expression in question is governed by publicly derived goals, limits, and expectations, as well as by the discretion of the teacher, but so are lawyering, auditing, speech writing, and leading tour groups in our national parks, all of which are done by public employees, and all of which involve some discretion on the part of the employee in framing the expression. Right or wrong, the *Garcetti* rule says that, when a public employee speaks pursuant to an official duty, it makes no difference whether the employee's speech resulted from reasonable expressive choices—only whether it was made pursuant to an official duty to speak matters. As to this point, it is hard to see why teachers should be treated any differently, and cases decided since the publication of Gee's note

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<sup>149</sup> Gee, *supra* note 143, at 250-52.

confirm this conclusion.<sup>150</sup>

Nevertheless, it is certainly true that the classroom work environment differs from the work environment of most public employees in that it is not only expressive, but also often spontaneous. Good teachers look for “teachable moments” and may adjust their speech on the fly in response to such moments based on their own professional judgment. Just as it would be unfair to judge the action of a police officer which turns out later to have been a violation of the Constitution based on a standard of which the officer could not have been aware at the time,<sup>151</sup> it would be the height of unfairness to revoke a teacher’s First Amendment protections because the teacher uttered speech that later was determined to be in conflict with a job duty of which the teacher could not have been precisely aware at the time. So, both Welner and Gee are certainly correct that the proper approach should be based on elements of notice (or at least constructive notice), and that *ex post facto* “official duties” not to speak should not be the basis for regulating teacher classroom speech.

But to succeed, any solution must work within the categorical approach to employee speech that the Supreme Court obviously favors and shows no sign of jettisoning.<sup>152</sup> If a teacher cannot claim First Amendment protection over speech she utters “pursuant to [her] official duties,” then what is necessary to bring speech under this standard? Even in *Garcetti*, the Court indicated (also in response to the concerns of a dissenter) that the test for whether speech was made pursuant to official duties should not be a wooden one, and should be attentive to an employer’s bad-faith or pretextual designations of speech as being with the job duties of an employee.<sup>153</sup> Courts since then have been especially suspicious of *post hoc* justifications for regulating public employee speech, as such *post hoc* justifications presumptively come from a place of rationalizing an otherwise unconstitutional decision, rather than from a place of effectively

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<sup>150</sup> See, e.g., *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (2010) (applying *Garcetti* to the classroom reading selections of a teacher). The *Evans-Marshall* decision also shows that the landscape for teachers was not monolithic prior to *Garcetti*. In fact, the Sixth Circuit, which issued the *Evans-Marshall* decision, was before that decision the most protective circuit in the federal system of teacher classroom speech, applying an unadorned *Pickering* test to it. See, e.g., *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001).

<sup>151</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that a police officer cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 absent clearly established law barring the conduct at issue, of which a reasonable officer in his shoes would have been aware).

<sup>152</sup> Bauries, *supra* note 12, at 721.

<sup>153</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 524-25 (2006).

and efficiently regulating a public workplace.<sup>154</sup>

This attentiveness to bad-faith, pretextual, and post hoc designation of duties related to speech counsels in favor of the kinds of notice-based approaches favored by both Welner and Gee; but the Court's consistent favoring of categorical approaches to speech also counsels in favor of working within that paradigm. As discussed above, as a constitutional matter, teachers are really no different from other public employees, many of whom fulfill roles that pervasively concern the public and many of whom perform expressive work on behalf of public entities, while also exercising discretion regarding that work. But we may say that it is well within the rule of *Garcetti* to require courts to identify a specific set of employment duties (not general expectations) that governed a teacher's speech on the date in question in the suit before applying the *Garcetti* exclusion, and to exhibit a healthy and searching skepticism as to any showing that an employer-defendant makes on such grounds.

If this is the case, then it is only a small step, and one entirely within the parameters of the *Garcetti* rule, to require that a public educational employer be able to show that, at the time of the speech in question, there was either a written policy, an oral directive, or a provable general understanding among employees, that the speech in question was prohibited. If this is the case, then the *Garcetti* exclusion should apply. If not, then the court should revert to the *Pickering* analysis.

Although reasonable minds may dispute whether a public employee can speak simultaneously as a citizen and as an employee pursuant to a job duty,<sup>155</sup> the Court has resolved this question in favor of employees' being able to occupy only one of these roles at a time when expressing themselves. But that does not mean that when a public employee speaks—even on the job—every word uttered is uttered pursuant to an official duty. Different jobs require—and prohibit—different amounts and kinds of speech, and the *Garcetti* rule acknowledges this fact.

Indeed, the *Garcetti* Court cited approvingly and reaffirmed *Givhan v.*

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<sup>154</sup> See *Lane v. Franks*, 134 S. Ct. 2369 (2014) (rejecting the attempts of the State of Alabama to include testifying in court as part of the plaintiff's official duties when testifying was something he did only on one occasion and was not part of his ordinary duties); *Adams v. UNC-Wilmington*, 640 F.3d 550 (2011) (rejecting the attempts of the university to include popular writings and commentary of a professor within that professor's official duties because the professor was not employed to write such materials, and when he did, he always did so in his private capacity).

<sup>155</sup> See Secunda, *Right-Privilege*, *supra* note 6, at 912-13; Secunda, *Federal Employees*, *supra* note 6, at 123; Rhodes, *supra* note 57, at 1174.

*Western Line Consolidated School District*,<sup>156</sup> a case in which a unanimous Court held to be protected under the First Amendment a school guidance counselor's complaints during the work day to her superiors regarding alleged racial bias that she had perceived in hiring at the school.<sup>157</sup> Although Ms. Givhan spoke at work, during work hours, and to her superiors about work-related matters, her speech was protected because it embraced a matter of public concern.

The *Garcetti* Court did not see fit to overrule that decision on the way to stating its holding; rather, it used *Givhan* as a foil to show a contrast with the plaintiff, Ceballos', expression, which took the form of a legal memorandum authored by an attorney employed in part to author legal memoranda. The natural implication of this use of *Givhan* is that not everything that one says at work or even about work is said to be pursuant to one's official duties, even if one is employed in an expressive role, as every school guidance counselor certainly is. Therefore, every potential *Garcetti* case requires courts to distinguish between job-required or job-prohibited speech on one hand, and speech made while at work, but not required or prohibited by a job duty on the other hand.

In the classroom, this task is fairly simple, but certainly not pro forma. Although it would be useful to have data on this point, it is safe to assume that the vast majority of public school teacher expression in the classroom involves delivering content based on the approved school curriculum and the materials purchased in support of it; managing student behavior; and responding to student questions relating to the course material. As to these matters, it is obvious that *Garcetti* would govern because every public school teacher is specifically employed to deliver the approved curricular content using the approved curricular materials, and is expected to manage student behavior and respond to student questions about the material. But that sort of expression is also certainly not the only classroom expression in which a teacher engages. And more importantly, it is not always clear to a teacher in the classroom just what the approved curriculum requires him to say or not say, or just what the expectations of his school, district or profession allow him to say while managing student behavior, or just which questions from students he may answer and how she may or may not frame such an answer.

Because much of what is said in the classroom is difficult to connect to the specific requirements and prohibitions of the job, courts should tread carefully when seeking to employ *Garcetti*'s "pursuant to official duties"

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<sup>156</sup> 439 U.S. 410 (1979).

<sup>157</sup> See *Garcetti*, 547 U.S. at 420-21 (citing *Givhan*, 439 U.S. at 414).

test, and it would be helpful to have a way to distinguish between job-required or job-prohibited speech and other speech made in the classroom that comports with the overall categorical structure of First Amendment jurisprudence. In prior work, a co-author and I advanced the claim that, given the narrowness of the Court's holding and the care with which Justice Kennedy distinguished Ceballos' speech from that of the plaintiffs in *Pickering* and *Givhan*, the *Garcetti* "pursuant to official duties" test should not be satisfied unless, at the time of the challenged expression, the employee in question would have been legitimately subject to discipline under his employment contract for *failing* to speak.<sup>158</sup> But it became clear to me after the publication of that work that this test, while useful, can only take the courts so far. For example, it would not have worked as intended in the case of Ms. Mayer, who was disciplined for answering a student's question on her own participation in protests. That discipline was upheld under the *Garcetti* test because the district claimed that, in effect, a requirement *not* to answer that question was an official, expressive duty of Mayer's job.<sup>159</sup>

In other words, the flaw in my past work on this topic was in failing to recognize that a duty *not* to speak, in many cases, *is* the "official duty" that the district claims the employee spoke "pursuant to." Thus, the test I articulated in my past work needs an update, and that update should also address other types of unarticulated purported "duties" to speak in a certain way that serve as post hoc justifications in some cases for retaliatory punishments.<sup>160</sup> The work of the courts since *Garcetti* was decided, including the Supreme Court, provides a way forward.

In particular, the case of *Lane v. Franks*, decided in 2014, illustrates that the Court views the *Garcetti* rule as narrow and limited to facts that are very similar to the facts of *Garcetti*. *Lane* involved the trial testimony of a former community college administrator who had discovered that one of his subordinates was illegally drawing a paycheck from his federally-funded program without doing much, if any, work.<sup>161</sup> He fired the subordinate, who was (unfortunately for Lane) an influential sitting member of the Alabama Legislature, and she allegedly vowed retaliation. After Lane testified against her in a federal criminal trial, that promised retaliation allegedly came when everyone in his department was laid off, and all were rehired thereafter except Lane.

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<sup>158</sup> See Bauries & Schach, *supra* note 10.

<sup>159</sup> See *Mayer v. Monroe*, 474 F.3d 477 (7th Cir. 2007).

<sup>160</sup> See *Evans-Marshall v. Board of Educ.*, 624 F.3d 332 (6th Cir. 2011).

<sup>161</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014).

In the First Amendment retaliation case that resulted, Lane claimed that he had been fired in direct retaliation for his testimony. The Eleventh Circuit held that Lane's testimony was speech made "pursuant to [Lane's] official duties" because (drawing from an unfortunate dictum in Justice Kennedy's *Garcetti* opinion) it "owed its existence" to Lane's public employment.<sup>162</sup> The Supreme Court unanimously reversed.<sup>163</sup>

In rejecting the holding of the Eleventh Circuit, the Court easily concluded, both in its main opinion and in a more concise concurring opinion authored by Justice Thomas, that testifying truthfully in a judicial proceeding was not even arguably one of Lane's "ordinary job responsibilities" as a community college administrator.<sup>164</sup> The Court also forcefully rejected the Eleventh Circuit's "but for" test, which was based on the "owes its existence" dictum from *Garcetti*,<sup>165</sup> explaining that no party had suggested that Lane's job required him to testify in criminal trials.<sup>166</sup>

The interesting aspect of *Lane*, as compared with *Garcetti*, is the introduction of the word "ordinary" to the words "official duties" or "job responsibilities" expressed within the *Garcetti* holding.<sup>167</sup> As at least one circuit court has recognized the addition of this adjective, which the Court's main opinion repeated nine times, and which even the brief concurrence of Justice Thomas repeated another three times, and that it was likely deliberate, and most plausibly clarifies the truly narrow nature of the *Garcetti* exclusion.<sup>168</sup>

In *Lane*, the use of this phrasing obviously was meant to highlight that Lane was not hired as a "professional witness." He was an educational

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<sup>162</sup> *Lane v. Franks*, 523 Fed. App'x 709, 711 (11th Cir. 2013) (citing *Garcetti* for the "owe[d] its existence" quote in support). My prior work has identified this dictum, along with a few others, as introducing regrettable ambiguity to the *Garcetti* rule, and muddying the waters sufficiently to allow a great deal of mischief in the lower courts. See generally Bauries & Schach, *supra* note 10.

<sup>163</sup> *Lane*, 134 S. Ct. at 2369.

<sup>164</sup> *Id.* at 2375.

<sup>165</sup> See *Lane*, 523 Fed. App'x at 711.

<sup>166</sup> *Lane*, 134 S. Ct. at 2379.

<sup>167</sup> I am indebted to Professors Brenda Kallio and Richard Geisel for drawing my attention to the Court's repeated use of this word during their presentation of their work-in-progress, *Exploring the Boundaries of First Amendment Protection for Expressions on Matters of Public Concern by School Personnel*, at the Annual Meeting of the Education Law Association in 2014.

<sup>168</sup> See *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014) ("In particular, the use of the adjective "ordinary"—which the court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*").

administrator whose duty to testify arose only as a result of circumstances that could not have been predicted. “Ordinarily,” in other words, he would not have had any official duty to testify, so his expression in offering his testimony remained protected from *post hoc* punishment.

Applied to the classroom context, this clarified conception of the *Garcetti* exclusion suggests that prior restraint can serve a benign role in relation to teacher classroom speech. Under this approach, teachers performing their “ordinary” teaching duties—delivering lessons, communicating with students about the course material, selecting readings, etc.—would be acting “pursuant to [their] ordinary job responsibilities” in the overwhelming majority of cases. But in cases such as *Mayer*, where a teacher speaks in the classroom spontaneously on a topic that is ancillary to her delivery of the curriculum or management of student behavior, the *Garcetti* exclusion should apply unless she was given a specific prior directive *not* to engage in such speech, or there existed a prior norm of prohibition that would have been known to a teacher in her circumstances.

#### Benign Prior Restraint and the Classroom Speech of Students.

In the student speech context, the categorical rule functions differently from the categorical rule in the teacher speech context. Under *Garcetti*, the categorical rule exists to completely remove from the First Amendment’s protection speech that would otherwise be within its protection due to its source—the ordinary job duties of the employee. However, under the student speech precedent, *Hazelwood v. Kuhlmeier*,<sup>169</sup> the categorical rule exists to determine the First Amendment forum within which student speech exists.

*Tinker v. Des Moines* and its “materially and substantially disrupts” test applies presumptively to student speech within schools. Courts therefore presumptively treat schools as limited public forums, limited by the speakers who are allowed to participate (students and teachers), but limited in what may be discussed only based on the prevention or cessation of material and substantial disruption to the school’s operations. But *Hazelwood* places an important limitation on that presumptive classification—where the speech in question occurs in furtherance of a curricular or co-curricular activity that “bears the imprimatur of the school” (*i.e.*, is required or authorized by it), school officials may regulate the speech as long as the regulation in question is “reasonably related to

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<sup>169</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

legitimate pedagogical concerns.” Because the classroom is always a curricular venue that bears the school’s imprimatur, courts generally apply the *Hazelwood* test to the classroom speech of students,<sup>170</sup> and such application certainly comports with the *Hazelwood* decision.<sup>171</sup>

But here again, the *Hazelwood* test would seem to cross the line from reasonable in light of school realities, to unreasonable and unfair, where it is applied in a *post hoc* manner to silence speech that, while not falling under any prior restraint in state, district, school, or classroom policy, happens to offend the individual teacher, the administration, other students, or some member of the public. Not all student speech—even all student speech uttered in the classroom—deserves to be placed into the *Hazelwood* category. For example, the plaintiffs in *Tinker* did not remove their armbands when they entered the classroom,<sup>172</sup> and the various plaintiffs in the many T-shirt cases that have worked their way through the appellate courts under the *Tinker* framework have not done so either (until they were forced to, that is).<sup>173</sup> Yet, their speech was either protected or unprotected based on the disruption it caused or did not cause (or that it was likely to cause or not cause), not whether the school had “legitimate

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<sup>170</sup> See, e.g., *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277 (3d Cir. 2003) (relying on *Hazelwood* in upholding a teacher’s confiscation of pencils that a student sought to distribute during a classroom holiday party because they contained a religious message); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir. 1995) (relying on *Hazelwood* in upholding a teacher’s grade of “zero” to a student who responded to the teacher’s directive to propose a paper topic by proposing the life of Jesus of Nazareth); *id.* at 155 (“Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere”); see also *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 423 (3d Cir. 2003) (holding that suspension of a kindergarten student for saying “I’m going to shoot you” while pointing his fingers at other students during a “cops and robbers” game at recess was “a legitimate decision related to reasonable pedagogical concerns and therefore did not violate [the student’s] First Amendment rights”).

<sup>171</sup> See *supra*, notes 74-78 and accompanying text (discussing the *Hazelwood* Court’s assumption that its standard would apply in the classroom).

<sup>172</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966) (“After being in their schools for varying lengths of time, each plaintiff was sent home by school officials for violating the regulation prohibiting the wearing of arm bands on school premises”).

<sup>173</sup> See, e.g., *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468, (6th Cir 2000).

pedagogical concerns” in regulating it.<sup>174</sup> Thus, merely entering the classroom does not have the effect of transforming the student speech forum—only the additional element of curricular content does.

Thus, in working within the categorical structure of student speech doctrine, an adapted rule should address the appropriate cases for treating student classroom speech as though it occurred within the closed curricular forum that permits even viewpoint discrimination, or the more open non-curricular school forum that looks skeptically at restrictions based on both viewpoint and content. Although the student classroom speech context does not have the benefit of a recent Supreme Court decision leaning in the direction of *Lane*’s “ordinary job responsibilities” formulation, it is possible to derive directly from *Hazelwood* a similar formulation, and as in the case of teacher classroom speech, this formulation suggests that a prior restraint rule can serve a benign role as to student classroom speech.

In particular, Justice White’s reference, in various forms, to the ideas that the newspaper at issue in *Hazelwood* was a “regular classroom activity,”<sup>175</sup> and that the teacher of the Journalism II course ordinarily exercised supervision over both the content and the format of the articles in the publication,<sup>176</sup> suggests that concepts of notice were embedded within the Court’s decision. Put another way, the exercise of editorial control over the class’s newspaper by school officials was not new or surprising, even though the students objected to how that editorial control was exercised in the particular case.<sup>177</sup>

Contrast this with a hypothetical counterfactual. Say the students working on the paper are instead discussing and brainstorming the idea of doing a student pregnancy story, and a student sitting nearby who recently had a miscarriage overhears the discussion and becomes very upset. Reacting to the upset student’s complaint, the teacher sends the speaking students to the principal’s office, where they are disciplined for creating a “hostile work environment.” Because the speech occurs within the classroom—a quintessential curricular environment—and it is in relation to curricular goals—selecting story ideas for the upcoming issue—it would seem that applying the deferential *Hazelwood* test would seem

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<sup>174</sup> See, e.g., *Defoe*, 625 F.3d at 332 (applying *Tinker*); *Boroff*, 220 F.3d at 468-69 (same).

<sup>175</sup> See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988).

<sup>176</sup> See, e.g., *id.* at 268-69.

<sup>177</sup> See *id.* at 269 (“Respondents’ assertion that they had believed that they could publish ‘practically anything’ in *Spectrum* was therefore dismissed by the District Court as simply ‘not credible’”).

proper here. But without notice that the mere discussion of teen pregnancy would violate the teacher's behavioral expectations and lead to discipline, the punishment of the students would seem unfair.

Nevertheless, the current approach among at least some of the federal courts to student classroom speech would apply *Hazelwood* to this hypothetical because of the obviously curricular nature of the student speech.<sup>178</sup> Under these cases, the fact that the speech occurred in the classroom and in connection with a curricular activity such as a writing assignment or class discussion would be enough to settle the categorical forum question, leading to the application of a more deferential (and therefore less speech-protective) standard. Such application arguably would undermine the reasoning of *Hazelwood* itself, which, recall, placed importance on the "regular" nature of the official monitoring of content and expression on the newspaper.

A better approach to the categorical forum question would ask whether the speech in question would have been perceived by the student speakers (or hypothetical, reasonable students standing in their shoes) as falling within some restriction or prohibition deriving from the teacher's or the school's curricular or pedagogical goals or expectations (including student behavioral expectations). Any such inquiry would have to depend, at least in part, on whether the speech in question was explicitly prohibited by a written school or classroom policy, or whether similar speech had led to discipline for other students in the past.<sup>179</sup> Absent such elements of notice, courts should review the school's disciplining of the speakers under the less deferential (and therefore more speech-protective) *Tinker* standard, as a small number of decisions have thus far.<sup>180</sup>

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<sup>178</sup> See, e.g., *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277 (3d Cir. 2003); *Settle v. Dickson County School Bd.*, 53 F.3d 152, 155-56 (6th Cir. 1995).

<sup>179</sup> See, e.g., *W. v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (upholding school discipline against a student for drawing a Confederate flag in class, an action that directly conflicted with the school's then-recently-adopted "Racial Harassment and Intimidation" policy).

<sup>180</sup> See e.g., *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 985 (11th Cir. 2007) (relying on *Tinker* in upholding the 10-day suspension of a high school student who wrote in a personal notebook in class about her "dream" of shooting her teacher, on the grounds that the writing "created an appreciable risk of disrupting [the school] in a way that, regrettably, is not a matter of mere speculation or paranoia"); *Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist.*, 2013 WL 3148272, at \*7 & n.7 (E.D. Mich. June 19, 2013) (rejecting the application of *Hazelwood* to student classroom speech critical of homosexuality as part of a debate on gay rights and stating, "When it comes to pure student speech, such as the speech at issue here, *Tinker* provides the framework for assessing whether a particular speech restriction comports with the constitutional guarantee of free speech").

## Conclusion

The augmentation of existing First Amendment standards proposed here does not seek to remake the landscape of First Amendment doctrine in the classroom. Nor does it seek to alter the largely categorical approach to speech protections that exists throughout the First Amendment, and that clearly draws the support of most of the current Supreme Court.<sup>181</sup> Rather, working within the categorical structure that the Supreme Court has erected through its decisions in *Garcetti* and *Hazelwood*, the proposal set forth in this article makes the case for appending a limited notice element to the categorical inquiry that precedes judicial application of the least speech protective standards that apply to student and teacher speech.

These least protective standards have in several cases been seen as applicable generally to speech made in the classroom environment, without regard to any notice that the speakers in question might have had that their targeted speech would have been subject to discipline or regulation. Correcting this lack of notice through a benign rule requiring prior restraints as a precursor to the application of the completely deferential *Garcetti* “official duties” exclusion and the very deferential *Hazelwood* “legitimate pedagogical concern” test would not solve all of the problems inherent in those decisions or satisfy their many critics, but would impose an element of fairness on their application to the *ad hoc* punishment and suppression of speech made by teachers and students—the main participants in the vital and ongoing dialog of the public school classroom.

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<sup>181</sup> See, e.g., Bauries, *supra* note 12, at 721 (demonstrating that even the dissenters to *Garcetti*, in proposing their contrary ways of resolving the case, proposed categorical rules of decision).

## Student Press Exceptionalism

Sonja R. West\*

*Imagine two students walking down the hall of their public high school. The first student enters his English class wearing a t-shirt depicting the President with images of alcohol and illegal drugs.<sup>1</sup> On his wrist, he sports a bracelet with a phrase that references female body parts.<sup>2</sup> And then, during a class discussion, he makes arguments against his gay and lesbian classmates.<sup>3</sup> The second student, meanwhile, turns into a different classroom. In her class, she engages in truthful and accurate speech about issues of great*

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<sup>1</sup> See, e.g., *Guiles v. Marineau*, 461 F.3d 320 (2d. Cir. 2006) (upholding the right of a middle-schooler to wear a t-shirt depicting President George W. Bush with the words “Chicken-Hawk-In-Chief.” The shirt also showed “a large picture of the President’s face, wearing a helmet, superimposed on the body of a chicken. Surrounding the President are images of oil rigs and dollar symbols. To one side of the President, three lines of cocaine and a razor blade appear. In the “chicken wing” of the President nearest the cocaine, there is a straw. In the other “wing” the President is holding a martini glass with an olive in it. Directly below all these depictions is printed, “1st Chicken Hawk Wing,” and below that is text reading “World Domination Tour.” The back of the T-shirt has similar pictures and language, including the lines of cocaine and the martini glass. The representations on the back of the shirt are surrounded by smaller print accusing the President of being a “Crook,” “Cocaine Addict,” “AWOL, Draft Dodger,” and “Lying Drunk Driver.” The sleeves of the shirt each depict a military patch, one with a man drinking from a bottle, and the other with a chicken flanked by a bottle and three lines of cocaine with a razor”).

<sup>2</sup> *Hawk v. Eaton Area School District*, (3d Cir. 2013) (upholding the right of two middle-school students to wear bracelets that stated “I ♥ boobies! (KEEP A BREAST).”

<sup>3</sup> *Glowacki v. Howell Pub. Sch. Dist.*, No. 11-15481 (E.D. Mich. Jun. 10. 2013). See also, *Federal Court Rules Michigan Teacher’s Discipline of Student for Anti-Gay Remarks Violated the Student’s Free Speech Rights*, NATIONAL SCHOOL BOARD ASSOCIATION, (June 27, 2013), <http://legalclips.nsba.org/2013/06/27/do-not-post-still-working-on-draft-federal-district-court-in-michigan-rules-teacher-who-disciplined-student-for-anti-gay-remarks-during-classroom-discussion-violated-the-students-free-speech-rights/#sthash.z0eb9cWX.dpuf>.

*concern to her classmates like bullying,<sup>4</sup> violence,<sup>5</sup> and teen pregnancy.<sup>6</sup> She also challenges her school's policies on testing<sup>7</sup> and special treatment of student athletes.<sup>8</sup>*

*---Remarkably, it is the second student's speech that is far more vulnerable to official censorship under the United States Supreme Court's rulings. Why? Because the room the second student entered was her high school journalism class, and her speech appeared in the student newspaper.*

Constitutional protection for student speakers is an issue that has been hotly contested for almost 50 years. Several commentators, moreover, have made powerful arguments that the Court has failed to sufficiently protect the First Amendment rights of all students.<sup>9</sup> But this debate has overlooked an even more troubling reality about the current state of expressive protection for students—the especially harmful effect of the

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<sup>4</sup> See Sara Gregory, *Virginia Student's Column on Bullying Shot Down by School's Principal*, STUDENT PRESS LAW CENTER (Nov. 21, 2013, 12:00 AM), <http://www.splc.org/article/2013/11/virginia-students-column-on-bullying-shot-down-by-schools-principal> (“A student's column criticizing sexuality-based bullying was deemed inappropriate for her high school's student newspaper by the principal, editors say”).

<sup>5</sup> William C. Nevin, *Neither Tinker, Nor Hazelwood, Nor Fraser, Nor Morse: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 785 (2015) (“In the first year after the . . . shooting at Columbine . . . scholars were quick to note the rush to censorship across the country, including discipline for a high school newspaper columnist who suggested satirically that assassinating the president would be a good stress reliever; the efforts in Colorado, Georgia, New Mexico, and Tennessee to ban the style of trench coats worn by the Columbine shooters; and--ironically enough--cases in Louisiana and Texas involving administrators who attempted to prevent students from wearing black armbands. It was simply, as Professor Clay Calvert wrote, “a story of censorship”).

<sup>6</sup> Dan Simmons, *Stevenson High School officials halt publication of student newspaper*, *the Statesman*, CHICAGO TRIBUNE (Nov. 20, 2009), [http://articles.chicagotribune.com/2009-11-20/news/0911190739\\_1\\_halt-publication-student-press-law-center-teen-pregnancy](http://articles.chicagotribune.com/2009-11-20/news/0911190739_1_halt-publication-student-press-law-center-teen-pregnancy).

<sup>7</sup> Amanda Granato, *New Policy Mandates Schedule for Assigning Homework*, THE RIDER ONLINE (Nov. 8, 2012), <http://www.therideronline.com/top-story/2012/11/08/new-policy-mandates-schedule-for-assigning-homework-tests-projects/>.

<sup>8</sup> Nicole Ocran, *Student Newspaper Containing Critical Article Confiscated at Iowa High School*, STUDENT PRESS LAW CENTER (Feb. 10, 2010, 12:00 AM), <http://www.splc.org/article/2010/02/student-newspaper-containing-critical-article-confiscated-at-iowa-high-school>.

<sup>9</sup> See, e.g., Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protection for Journalism for Journalism Students and Advisors*, 2014 B.Y.U. EDUC. & L.J. 71 (2014).

Court's precedents on student journalists. Under the Court's jurisprudence, schools may regulate with far greater breadth and ease the speech of student journalists than of their classmates. Schools are essentially free to censor the student press even when the speech at issue is truthful, legally obtained, non-disruptive, and about matters of public concern.

As a constitutional matter, the lack of protection for student journalists should be alarming. This is because the suppression of student journalists not only potentially violates the First Amendment's Free Speech Clause (as does the censorship of other student speech), but it also infringes on the constitutional guarantee of a free press. Unlike their non-press classmates, student journalists fulfill distinctive roles that the Supreme Court has repeatedly recognized as constitutionally valuable. And like reporters outside of the school setting, these young journalists face high risks of government oppression and manipulation if left unprotected. Official censorship of student journalists thus raises numerous First Amendment concerns that should demand heightened—not weakened—court scrutiny.

In Part I of this essay, I examine the Supreme Court's jurisprudence on student speech and explain how its rulings have created an incongruous framework in which student journalists receive less First Amendment protection than other student speakers. In Part II, I discuss the Court's recognition of the unique and important roles of the press, and I demonstrate how the student press furthers these vital constitutional goals. Finally, in Part III, I explore how the Court's under-protection of student journalists violates many of the recognized core principles of freedom of speech and of the press.

### **The Demise of Constitutional Protection for Student Journalists**

The United States Supreme Court has addressed the constitutional rights of student speakers in only a handful of cases. Most famously, in the 1969 case of *Tinker v. Des Moines*, the Court upheld the free speech rights of students whose school had punished them for protesting the Vietnam War. The Court in *Tinker* described student speech freedoms in broad and sweeping terms, declaring that students are “persons” under the First Amendment and do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>10</sup>

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<sup>10</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

In two later cases, the Court continued to endorse the basic premise of *Tinker* that student speakers have a constitutional right of expression.<sup>11</sup> Even while ruling in favor of the schools in these cases, which involved a student's "lewd and indecent" speech at a school assembly<sup>12</sup> and a message that was "viewed as promoting illegal drug use" at a "school-sanctioned event,"<sup>13</sup> the Court nonetheless upheld the core holding that schools may not punish or suppress student speech unless the speech would "materially and substantially interfere" with the work of the school or interfere with the rights of other students.<sup>14</sup>

When a case came before the Court involving a high school's censorship of a student newspaper, however, the Court did not apply the strong protections of *Tinker*. In this case, *Hazelwood School District v. Kuhlmeier*, the school principal forced the student newspaper editors to remove two pages from their newspaper, because he objected to two of the students' stories—one about the experiences of three students with teen pregnancy and another about the impact of divorce on students.<sup>15</sup>

This time the Court did not hold that the student journalists had constitutional rights to free expression that protected them from government censorship. Instead, it distinguished *Tinker* as addressing a different question.<sup>16</sup> *Tinker*, the Court stated, dealt with "educators' ability to silence a student's personal expression that happens to occur on the school premises."<sup>17</sup> This case, the Court explained, was different, because it involved "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>18</sup>

Once deemed to be a "school-sponsored publication" or a non-public forum, the Court held that the students' speech lost virtually all of its constitutional protection. The school's power to censor the students'

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<sup>11</sup> *But see*, Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What's Left of Tinker*, 48 *DRAKE L. REV.* 527, 530 (2000) ("Simply put, in the three decades since *Tinker*, the courts have made clear that students leave more of their constitutional rights at the schoolhouse gate").

<sup>12</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>13</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007). *See generally* Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 *LEWIS & CLARK L. REV.* 27 (2008) (arguing that the *Morse v. Frederick* decision is unsupported by precedent and could encourage schools to sanction more events in the future).

<sup>14</sup> *Tinker*, 484 U.S. at 512-13

<sup>15</sup> 484 U.S. 260 (1988).

<sup>16</sup> *Id.* at 270-71.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 271.

speech thus became nearly absolute. When dealing with student speech in a “school-sponsored” forum, the Court held, school officials are free to “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>19</sup> These concerns can include, the Court explained, anything the school officials deem to be “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”<sup>20</sup> School officials also may regulate student speech that takes “any position other than neutrality on matters of political controversy” or that could be reasonably perceived as “inconsistent with the shared values of a civilized social order.”<sup>21</sup>

The effect of *Hazelwood* on student journalists has been profound. From 1988 to 2003, the Student Press Law Center (“SPLC”), a non-profit advocacy organization for student journalists, saw a 350-percent increase in calls to its center—“a nearly constant rise that shows no sign of decline.”<sup>22</sup> These calls, according to the SPLC, generally involved reports of censorship of “articles, editorials and advertisements that are perceived as ‘controversial’ or that school officials feel might cast the school in a negative light.”<sup>23</sup> The SPLC also reported a rise of faculty journalism advisors reporting that their jobs had been threatened if they refused to cooperate with the school’s censorship.<sup>24</sup>

As a technical matter, the *Hazelwood* decision does not apply just to student journalists. The line it draws, rather, is based on whether the student expressive activity occurs in an open public forum or as part of a school-sponsored, non-public forum. Thus courts in a few cases have applied its restrictive framework to non-media student curricular activities like art shows, debates and academic presentations.<sup>25</sup> At the same time, moreover, not all student journalism is necessarily subject to *Hazelwood*-

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<sup>19</sup> *Id.* at 273.

<sup>20</sup> *Id.* at 271.

<sup>21</sup> *Id.* at 272 (internal quotations omitted) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

<sup>22</sup> *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, The Student Press Law Center, 6, <http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/HazelwoodGuide.pdf> (last visited June 26, 2015).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003) (finding that *Hazelwood* governed a high school assembly program); *Curry ex rel. Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 735 (E.D. Mich. 2006) (applying *Hazelwood* standards to a school project).

level censorship. For example, when the student journalism is extracurricular, independent or otherwise deemed to be part of a public forum, it does not fall under *Hazelwood*.<sup>26</sup>

Yet particularly at the high school level,<sup>27</sup> the reality is that the *Hazelwood* decision impacts student journalists far more frequently than other types of student speakers. Much of this disparity is due to how the decision was crafted. In *Hazelwood*, the Court relied on certain factors and used specific language that more naturally applies to student journalists than it does to other student speakers.<sup>28</sup> For example, in trying to determine whether the student newspaper in *Hazelwood* was a non-public forum, the Court pointed to characteristics that tend to describe the student press such as newspapers, yearbooks, literary magazines, or television broadcasts. These factors include asking whether the speech was produced as part of the curriculum, supervised by a faculty member, or financed by the school. The Court also expressed concern with student speech bearing the name or “imprimatur of the school” such as the student newspaper, because the Court concluded that these forums raise the danger that “the views of the individual speaker [will be] erroneously attributed to the school.”<sup>29</sup> These factors all inevitably capture the speech of the student press.

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<sup>26</sup> *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799, 806 (E.D. Mich. 2001) (finding that because the school newspaper was a limited public forum the principal could not censor the student written article).

<sup>27</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 n.7 (majority opinion) (“[We] need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level”). *See generally* Frank D. LoMonte, “*The Key Word is Student*”: *Hazelwood* Censorship Crashes the Ivy-Covered Gates, 11 FIRST AMEND. L. REV. 305 (2013) (pointing out the confusion among the circuit courts over the applicability of *Hazelwood* to student speakers at the college and university level and arguing that *Hazelwood* is inapplicable to the college and university level).

<sup>28</sup> *See Resolution One 2013: AEJMC Resolution: 25<sup>th</sup> Anniversary of Hazelwood v. Kuhlmeier*, ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION (April 2, 2013), <http://www.aejmc.org/home/2013/04/resolution-one-2013>, (stating that *Hazelwood* is “significantly reducing the level of First Amendment protection afforded to students’ journalistic speech”); *see also* Kaitlin Tipsword, *After 25 Years, Impact of Hazelwood on student journalism is Mixed, Experts Say*, STUDENT PRESS LAW CENTER (Jan. 30, 2013, 12:00 AM), <http://www.splc.org/article/2013/01/after-25-years-impact-of-hazelwood-on-student-journalism-is-mixed-experts-say> (quoting Frank Susman, the attorney who represented the students in *Hazelwood*, “The difference that was cited here was that the student newspaper was a school exercise. Wearing the armband was just private speech out of the school context, as opposed to a class of Journalism I or Journalism II . . . Because of that distinction, *Tinker* didn’t really apply”).

<sup>29</sup> *Hazelwood*, 484 U.S. at 271 (1988).

In *Hazelwood*, therefore, the Court created a two-tiered regime for high school students in which “a student’s personal expression that happens to occur on the school premises” receives the expansive protections of *Tinker*, while student journalists, who are typically part of a “school-sponsored” expressive activity, are subject to the highly restrictive *Hazelwood* standard. In other words, high school student journalists, the Court has implicitly decided, have fewer constitutional protections than other types of student speakers.

On its face, this outcome seems paradoxical. And, indeed, an analysis of the text of the First Amendment, the Supreme Court’s declarations on the unique role of the press, and the Court’s free speech precedents points in the opposite direction. Student journalists deserve more, not less, constitutional protection.

### **Student Journalists Fulfill Constitutional Press Functions**

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>30</sup> Although freedoms of both speech and press are specifically mentioned in the text of the Constitution, modern First Amendment law places nearly all of its emphasis on speech. Our individual and collective speech rights are expansive and robust. Government regulations on speech based on its content are held to the Court’s most stringent test of strict scrutiny. And, in the same vein, subject-matter, viewpoint- or speaker-based restrictions are presumed unconstitutional.

The *Tinker* decision applies much of this constitutional free speech shield to student speakers. The Court in *Tinker* declared that schools “may not be enclaves of totalitarianism” and that students are not “closed-circuit recipients of only that which the State chooses to communicate.”<sup>31</sup> Instead, the Court held, students “are possessed of fundamental rights which the State must respect” including the “freedom of expression of their views” even when they involve “controversial subjects.”<sup>32</sup>

In contrast to its vigorous free speech jurisprudence, the Court has given far less attention to the Press Clause. It has never held, for example, that a particular right or protection emanates solely as a right of press freedom.<sup>33</sup> Yet while the Court has refused to interpret the Press Clause as

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<sup>30</sup> U.S. CONST. amend. I.

<sup>31</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>32</sup> *Id.*

<sup>33</sup> See David A. Anderson, *Freedom of the Press* 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting

providing explicit protection to press speakers,<sup>34</sup> it has nonetheless repeatedly and consistently affirmed<sup>35</sup> that press speakers are different than non-press speakers. The Court has declared that the press fulfills an “historic, dual responsibility in our society.”<sup>36</sup> These unique constitutional roles include gathering and disseminating news to the public and checking the government and the powerful.<sup>37</sup>

Student journalists also further these vital First Amendment functions. Even accepting that the rights of student speakers in general “are not automatically coextensive with the rights of adults in other settings,”<sup>38</sup> and must be “applied in light of the special characteristics of the school environment,”<sup>39</sup> the Court in *Hazelwood* made a crucial error by failing to give any weight to student journalists’ constitutionally special role as part of the press.

### *Gathering and Disseminating News to the Public*

The Supreme Court has declared “an untrammelled press [to be] a vital source of public information.”<sup>40</sup> The information provided by the press enables the public to “vote intelligently or to register opinions on the administration of government generally”<sup>41</sup> and answers “the public need for information and education with respect to the significant issues of the times.”<sup>42</sup>

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the freedom of the press”); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (“The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech”).

<sup>34</sup> Sonja R. West, *The Stealth Press Clause*, 38 GA L. REV. 729, 732 (2014) (“The oft-told story that the Court has treated press and nonpress speakers alike does not hold up to close examination. Despite its protestations to the contrary, the Court has made clear that there is a special constitutional space for the press”).

<sup>35</sup> Although it has done so often only in dicta. See generally RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014) (discussing the dangers of Supreme Court dicta praising the press and the unique function it serves).

<sup>36</sup> *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984) (describing the dual responsibilities as “reporting information and . . . bringing critical judgment to bear on public affairs”).

<sup>37</sup> *Id.* at 750; see also Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014) (arguing that press speakers should be protected when fulfilling these constitutional roles).

<sup>38</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>39</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>40</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

<sup>41</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

<sup>42</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); see also *Estes v. Texas*, 381 U.S. 532,

When it ignored the censorship of student journalists in *Hazelwood*, however, the Supreme Court stifled the public's ability to receive information about matters of public concern. Student articles targeted since *Hazelwood* have addressed important topics such as the easy availability of drugs in public schools,<sup>43</sup> treatment of gay and bi-sexual teenagers,<sup>44</sup> gangs,<sup>45</sup> depression among teenagers,<sup>46</sup> English as a second language,<sup>47</sup> medical marijuana,<sup>48</sup> rape culture,<sup>49</sup> and bullying.<sup>50</sup>

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539 (1965) (praising the role of the free press in “generally informing the citizenry of public events and occurrences”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society”).

<sup>43</sup> See Joanna Brenner, *High School Journalists Ordered to Print Administration-Approved Newspaper*, STUDENT PRESS LAW CENTER (Nov. 25, 2009, 12:00 AM), <http://www.splc.org/article/2009/11/high-school-journalists-ordered-to-print-administration-approved-newspaper?id=2003> (discussing the easy availability of drugs).

<sup>44</sup> See *Story on Gay Teen Life Sparks Controversy*, STUDENT PRESS LAW CENTER (DEC. 1, 1996, 12:00 AM), <http://www.splc.org/article/1996/12/story-on-gay-teen-life-sparks-controversy> (discussing a school's review of its policy after a student written article over student's experiences as gay was published in the school newspaper); see also Emily Summors, *Tenn. Yearbook's Profile of Gay Student Brings Calls for Investigation*, STUDENT PRESS LAW CENTER (May 3, 2012, 12:00 AM), <http://www.splc.org/article/2012/05/tenn-yearbooks-profile-of-gay-student-brings-calls-for-investigation> (“Some community members are asking for an investigation of the yearbook adviser at Lenoir City High School, after the 2012 book included an article about an openly gay student”); Catherine MacDonald & Christopher Carter, *LGBT Content a Target for Censorship*, STUDENT PRESS LAW CENTER (Sept. 1, 2009, 12:00 AM), <http://www.splc.org/article/2009/09/lgbt-content-a-target-for-censorship> (discussing a high school's new policy after a student written article that reported on student LGBT issues affecting students was published in the school newspaper).

<sup>45</sup> See *Censorship-Fighters From Wis., Pa., Recognized with 'Courage in Student Journalism' Award*, STUDENT PRESS LAW CENTER (Nov. 11, 2014, 10:38 AM), <http://www.splc.org/article/2014/11/censorship-fighters-from-wis-pa-recognized-with-courage-in-student-journalism-award> (discussing some high school newspaper school editors who won the Courage in Journalism Award for addressing gang issues).

<sup>46</sup> See *Students Struggle With Depression—And With Telling The Story*, NPR (May 24, 2014, 7:47 AM), <http://www.npr.org/2014/05/24/315445104/students-struggle-with-depression-and-with-telling-the-story> (discussing a high school that did not permit its students to write about depression in their high school newspaper).

<sup>47</sup> Freya Sonnichsen, *When English Comes Second*, CENTRAL TIMES (Dec. 22, 2014), <http://www.centraltimes.org/showcase/2014/12/22/when-english-comes-second/#sthash.0E9x9dLC.dpuf> (discussing the struggles high school students encounter when English is not their first language).

<sup>48</sup> See Greg Parlier, *Lakeland Student Fights to Write Story*, THE LEDGER (Apr. 27, 2014, 2:49 AM), <http://www.theledger.com/article/20140427/NEWS/140429269/1326?Title=Lakeland-Student-Fights-to-Write-Story> (discussing a high school teacher forbidding a student

Student journalists, moreover, do not focus solely on issues concerning teenagers and high schools. They also cover matters of local, state, and national importance such as elections,<sup>51</sup> low-income housing,<sup>52</sup> gun control,<sup>53</sup> the minimum wage,<sup>54</sup> religion,<sup>55</sup> and other current events.<sup>56</sup>

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from writing about the legalization of marijuana).

<sup>49</sup> See Scoot Kaufman, *WI School Officials Seize Control Over Student Paper After 'Rape Culture' Article Appears*, RAW STORY (Mar. 12, 2014, 10:48 AM),

<http://www.rawstory.com/rs/2014/03/wi-school-officials-seize-control-over-student-paper-after-rape-culture-article-appears/> (“School district officials in Fond du Lac, Wisconsin have instituted new guidelines for student journalists after a high school newspaper published a story on the dangers of rape culture”).

<sup>50</sup> See Sara Gregory, *Virginia Student's Column on Bullying Shot Down by School's Principal*, STUDENT PRESS LAW CENTER (Nov. 21, 2013, 12:00 AM),

<http://www.splc.org/article/2013/11/virginia-students-column-on-bullying-shot-down-by-schools-principal> (“A student’s column criticizing sexuality-based bullying was deemed inappropriate for her high school’s student newspaper by the principal, editors say”); see also Emily Chiles, *Sticks and Stones May Break Her Bones But Their Words No Longer Hurt Her*, THE KIRKWOOD CALL (Feb. 1, 2014), [http://www.thekirkwoodcall.com/\\_stories\\_/features/2014/02/01/sticks-and-stones-may-break-her-bones-but-their-words-no-longer-hurt-her/](http://www.thekirkwoodcall.com/_stories_/features/2014/02/01/sticks-and-stones-may-break-her-bones-but-their-words-no-longer-hurt-her/) (discussing a high school student who has been the victim of bullying).

<sup>51</sup> See Sara Gregory, *High School Journalists Cover the 2012 Elections*, STORIFY (2012), <https://storify.com/saragregory/high-school-journalists-cover-the-2012-elections> (highlighting student journalists who covered the 2012 elections); see also *The Call Votes Obama for a Second Term*, THE KIRKWOOD CALL (Oct. 31, 2012),

[http://www.thekirkwoodcall.com/\\_stories\\_/opinion/staff-editorials/2012/10/31/the-call-votes-obama-for-a-second-term/](http://www.thekirkwoodcall.com/_stories_/opinion/staff-editorials/2012/10/31/the-call-votes-obama-for-a-second-term/) (discussing the high school newspaper’s staff’s support for Obama in the 2012 elections); Mark Z. Barabak, *Obama Wins Second Term After Defeating Romney*, THE EAGLE’S TALE (Nov. 7, 2012), <http://eaglestaleonline.com/news/2012/11/07/obama-wins-second-term-after-defeating-romney/> (discussing Obama’s defeat over Romney in the 2012 elections); William Douglas, *New Congress is Most Diverse in History*, THE EAGLE’S TALE (Jan. 6, 2015), <http://eaglestaleonline.com/news/2015/01/06/new-congress-is-most-diverse-in-history/> (discussing the diversity of the 114<sup>th</sup> Congress).

<sup>52</sup> Mischa Nee, *The Closure of the Buena Vista Mobile Home Park is Inexcusable*, THE CAMPANILE (Oct. 13, 2014),

<http://www.palycampanile.org/archives/4665#sthash.jQ31nUbM.dpuf> (criticizing the closure of a local mobile home park and blaming it on the negligence of persons of higher economic status).

<sup>53</sup> See Katie Alaks, *Editors' Roundtable: Illinois Concealed Carry*, CLARION (Apr. 3, 2012), <http://rbclarion.com/uncategorized/2014/04/03/editors-roundtable-illinois-concealed-carry/> (discussing the different views the editors of a high school newspaper have over their state’s new concealed carry law).

<sup>54</sup> See Brian Crotty & Neal Hasan, *Why Minimum Wage Deserves Maximum Attention*, CENTRAL TIMES (Dec. 19, 2014),

<http://www.centraltimes.org/showcase/2014/12/19/why-minimum-wage-deserves-maximum-attention/> (discussing why the minimum wage is an important issue for students to pay attention to).

The role of the press in informing the public does not include just the dissemination of news to the public but also the equally important work of collecting valuable information on the public's behalf. Thus the Supreme Court has observed that "news gathering is not without its First Amendment protections,"<sup>57</sup> because "without some protection for seeking out the news, freedom of press could be eviscerated."<sup>58</sup> This unique news-gathering function of the press reflects an understanding that journalists serve as "surrogates for"<sup>59</sup> or as "the 'eyes and ears' of the public."<sup>60</sup>

Once again, student journalists also fulfill this crucial task of gathering newsworthy information. In addition to utilizing the traditional tools of reporting such as interviewing sources and attending government meetings, student reporters commit time and resources to pursuing other sources of information. Two Ohio high school journalists, for example, used a public record request to uncover that an incident at their school, which their principal had publicly referred to as an "allegation of assault," actually involved a rape charge.<sup>61</sup> And a student in New Jersey relied on anonymous sources for an article investigating complaints that the school district's superintendent harassed teachers and staff members.<sup>62</sup>

Like the press outside the school setting, student journalists engage in a qualitatively different and uniquely valued type of speech than other types

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<sup>55</sup> See Arsheen Kour & Fatima Elfakahany, *Kennesaw City Council Denies Muslim Mosque, Stomps on 1<sup>st</sup> Amendment Rights*, THE CHANT (Dec. 5, 2014), <http://nchschant.com/2341/opinions/kennesaw-city-council-denies-muslims-mosque-stomps-on-1st-amendment-rights/> (discussing their local city council's decision regarding a permit to build a mosque).

<sup>56</sup> See Kristen Hare, *In St. Louis, High School Journalists Are Telling Their Own Stories About Ferguson*, POYNTER (Nov. 21, 2014, 1:33 PM), <http://www.poynter.org/news/mediawire/282183/in-st-louis-high-school-journalists-are-telling-their-own-stories-about-ferguson/> (discussing different high school students writing about Ferguson); see also Allie Biscupki, *Ferguson to Iowa City*, WESTSIDE STORY (2013), <http://wsspaper.com/longform/2014/11/Ferguson> (discussing the Ferguson protests).

<sup>57</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

<sup>58</sup> *Id.* at 681.

<sup>59</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (plurality opinion).

<sup>60</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

<sup>61</sup> Kristen Hare, *Ohio High School Journalists Push for Records, Break a Story*, POYNTER.ORG (Oct. 17, 2013 3:24 PM), <http://www.poynter.org/news/mediawire/226181/ohio-high-school-journalists-push-for-records-break-a-story/>.

<sup>62</sup> Dani Kass, *Protections Inconsistent For Student Journalists Who Withhold Names of Sources*, STUDENT PRESS LAW CENTER (Nov. 17, 2014, 4:58 PM), <http://www.splc.org/article/2014/11/protections-inconsistent-for-student-journalists-who-withhold-names-of-sources>.

of speakers. By allowing them to be silenced, the Court has robbed the public of information and education about pressing matters.

### *Checking the Government and the Powerful*

Simply conveying information to the public is not the only job of the press. It also, according to the Supreme Court, “plays a unique role as a check on government abuse”<sup>63</sup> and “serve[s] as an important restraint on government.”<sup>64</sup> According to the Court, “the Framers of our Constitution thoughtfully and deliberately” sought to protect “the right of the press to praise or criticize governmental agents.”<sup>65</sup> First Amendment scholar Vincent Blasi similarly concluded that “the generation of Americans which enacted the First Amendment built its whole philosophy of freedom of the press around the checking value.”<sup>66</sup>

Student journalists similarly serve this vital checking function, often by reporting on issues about their school administration. In Texas, student journalists exposed criticisms of a new policy on testing, homework and projects.<sup>67</sup> Students in Michigan, meanwhile, covered a lawsuit pending against the school by residents of a nearby neighborhood who claimed diesel fumes from idling buses constituted a nuisance.<sup>68</sup>

The role of the press as government watchdogs raises unique risks that journalists will be targeted by public officials. Due to the power imbalance inherent in the school setting student reporters who seek to investigate their own administration face an even more severe danger of being censored by the very government officials they are seeking to investigate. Two Arizona high school students, for example, were not allowed to run a story about the school district’s teacher assessment testing.<sup>69</sup> A Florida high school principal forced student journalists to

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<sup>63</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

<sup>64</sup> *Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 585 (1983).

<sup>65</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *see also id.* (“the Constitution specifically selected the press” for this protection because it “serve[s] as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve”).

<sup>66</sup> Vincent Blasi, *Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977).

<sup>67</sup> Amanda Granato, *New Policy Mandates Schedule for Assigning Homework*, THE RIDER ONLINE (Nov. 8, 2012), <http://www.therideronline.com/top-story/2012/11/08/new-policy-mandates-schedule-for-assigning-homework-tests-projects/>.

<sup>68</sup> *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799 (E.D. Mich. 2004).

<sup>69</sup> Brian Stewart, *Students Ask School Board to Decide if Principal Was Right in not*

remove a story about the “achievement gap” between white and minority students on state test scores.<sup>70</sup> High School administrators in Iowa confiscated copies of the student newspaper that contained an article probing into inconsistencies in penalties given to student athletes who had violated the school’s policies.<sup>71</sup> Students in Maryland were told by their vice-principal that they could not publish an article that raised questions about their principal’s side business and allegations against the principal of plagiarism.<sup>72</sup>

It is an insufficient response to suggest that other journalists, not associated with the school, could investigate and report on these types of issues. Student journalists cover issues that might not catch the attention of other reporters who are less familiar with and have more limited access to the workings of the school. They have an incentive to devote time and resources to matters that other reporters lack. And the students bring new insights and a different perspective to their coverage. One student journalist, for example, was criticized for reporting on a sensitive issue in her student newspaper rather than leaving the coverage to the “professional press.” She wrote in response that outside journalists did not have the ability to cover her high school “with the same scope and attention to detail that we strive to achieve.” She added that because the students “live here” they are “in a unique position to provide this important coverage.”<sup>73</sup> Allowing censorship of student journalists thus comes at a high cost—the cost of silencing unique voices from our public debate.

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*Allowing Story to Print*, STUDENT PRESS LAW CENTER (June 10, 2009, 12:00 AM), <http://www.splc.org/article/2009/06/students-ask-school-board-to-decide-if-principal-was-right-in-not-allowing-story-to-print>.

<sup>70</sup> April Hale, *Florida High School Newspapers Passed Out With a Hole*, STUDENT PRESS LAW CENTER (Oct. 27, 2006, 12:00 AM), <http://www.splc.org/article/2006/10/florida-high-school-newspapers-passed-out-with-a-hole-c763>.

<sup>71</sup> Nicole Ocran, *Student Newspaper Containing Critical Article Confiscated at Iowa High School*, STUDENT PRESS LAW CENTER (Feb. 10, 2010, 12:00 AM), <http://www.splc.org/article/2010/02/student-newspaper-containing-critical-article-confiscated-at-iowa-high-school>.

<sup>72</sup> Michael Beder, *Md. Student Paper Wins Fight Over Article on Allegations Against Principal*, STUDENT PRESS LAW CENTER (May 2, 2008, 12:00 AM), <http://www.splc.org/article/2008/05/md-student-paper-wins-fight-over-article-on-allegations-against-principal>.

<sup>73</sup> Shane McKeon, *An Open Letter to Students*, THE SHAKERITE (Sept. 17, 2013 12:00 AM), <http://shakerite.com/opinion/2013/09/17/an-open-letter-to-students/>.

### ***Hazelwood* Violates Established First Amendment Principles**

Much like their non-school counterparts, student journalists thus occupy a role that the Supreme Court has recognized repeatedly as constitutionally valuable. Not only does the *Hazelwood* decision fail to recognize these contributions, however, it also contradicts many established First Amendment principles. In several ways, allowing student press speakers to be censored violates the most basic cornerstones of our expressive rights.

#### *Publication of Lawfully Obtained, Truthful Information*

In a series of cases in the 1970s and 1980s, the Supreme Court addressed the question of whether the press can be punished for publishing truthful information that was lawfully obtained. This line of cases led to what is known as the *Daily Mail* principle, which states that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.”<sup>74</sup>

In all of these cases the Court found that restrictions on the ability of the press to publish truthful, lawfully obtained, newsworthy information were unconstitutional. The Court wrote its decisions in press-specific terms<sup>75</sup> and emphasized again the important role of the press to “inform citizens about public business.”<sup>76</sup>

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<sup>74</sup> *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979); *see also* *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that “where a newspaper publishes truthful information . . . punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”); *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (stating that the state’s interest in maintaining the institutional integrity of its courts is insufficient to justify punishing the speech at issue); *Oklahoma Pub. Co. v. Dist. Court In & For Oklahoma Cnty.*, 430 U.S. 308 (1977) (holding that a state court may not “prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (reasoning that the state may not punish the press for publishing information regarding events that are of legitimate concern to the public).

<sup>75</sup> West, *Stealth Press Clause*, *supra* note 5, at 738-740.

<sup>76</sup> *Cox Broad. Corp.*, 420 U.S. at 496; *see also id.* at 491–92 (noting that great responsibilities are placed upon the news media to report on the government); *id.* at 491 (explaining how, “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations”).

The *Hazelwood* decision, however, is in violation of the *Daily Mail* principle. Under *Hazelwood*, government actors may prohibit a newspaper from publishing information that meets exactly these criteria for no other reason than that it is deemed to be “ungrammatical,” “inconsistent with the shared values of a civilized social order,” or otherwise contrary to “pedagogical concerns.” This is in theory and in practice a far lower standard than requiring the government to establish a need “of the highest order.”

### *Protection of Editorial Process*

The Supreme Court also has held that the press has a constitutional right to maintain control of its editorial process, and that the First Amendment protects the press’s “journalistic judgment of priorities and newsworthiness.”<sup>77</sup> Justice Potter Stewart once declared that the First Amendment “is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country.”<sup>78</sup> In the 1974 case of *Miami Herald Publishing Co. v. Tornillo*,<sup>79</sup> the Court endorsed this principle, holding that a Florida statute requiring newspapers to run replies from political candidates who had been criticized in the paper was unconstitutional. The problem with the law, the Court said, was that it intruded “into the function of editors” to decide what to include or not include on the pages of their newspaper.<sup>80</sup>

The Court has, on several occasions, noted that editorial freedom for the press is “a matter of particular First Amendment concern”<sup>81</sup> and a “crucial process” that cannot be regulated “consistent with First Amendment guarantees of a free press as they have evolved to this time.”<sup>82</sup> The press, the Court explained, “does not merely print observed facts the way a cow is photographed through a plateglass window”<sup>83</sup> but rather adds value to that information through editorial decision-making.<sup>84</sup>

While censorship is often the primary concern when it comes to regulation of the press, the Court in *Tornillo*, addressed a situation where a

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<sup>77</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 118 (1973).

<sup>78</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 403-404 (1973) (Stewart, J., dissenting).

<sup>79</sup> 418 U.S. 241, 244 (1974).

<sup>80</sup> *Id.* at 258.

<sup>81</sup> *Herbert v. Lando*, 441 U.S. 153, 191 (1979) 191 (Brennan, J., dissenting in part).

<sup>82</sup> *Tornillo*, 418 U.S. at 258.

<sup>83</sup> *Id.* at 258 n.24 (quoting 2 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 633 (1947)).

<sup>84</sup> *Tornillo*, 418 U.S. at 258.

newspaper was being forced by the state to include material. This was also a constitutional violation, the Court held, because it interfered with the newspaper's editorial freedom. The Court noted that it has long "expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print."<sup>85</sup>

Yet the *Hazelwood* decision allows for direct government interference with the editorial decision-making process of student journalists. Every time a school official tells a student journalist what can or can not be included in his or her news publication or broadcast, it has struck at what Justice Byron White referred to as "the very nerve center of a newspaper" and "collides with the First Amendment."<sup>86</sup>

The right of editorial discretion is violated not only by straight-forward censorship but also by orders compelling the students to include messages that are not their own or use alternative wording.<sup>87</sup> Consider, for example, a high school student newspaper in Pennsylvania that refused to use the term "redskins" to describe the school's athletic teams. The student editorial board had voted against using the term, announcing that the board had "come to the consensus that the term 'Redskin' is offensive."<sup>88</sup> The principal, however, ordered them to use the word in a future edition of their newspaper. In response to the students' refusal to comply, the principal suspended the newspaper's faculty advisor and student editor as well as docking the newspaper \$1,200 in student funding.<sup>89</sup>

This type of government regulation of the press is in direct contrast to the Supreme Court's holding that forcing the editors of a newspaper "to publish that which 'reason' tells them should not be published is unconstitutional."<sup>90</sup>

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<sup>85</sup> *Id.* at 256; *see also* *Columbia Broad. Sys., Inc.*, 412 U.S. at 118 (holding that a regulation forcing broadcasters to air paid editorial advertising was unconstitutional).

<sup>86</sup> *Tornillo*, 418 U.S. at 261 (White, J., concurring).

<sup>87</sup> Emily Richmond, *Suspended For Not Using a Racial Slur*, THE ATLANTIC (Oct. 16, 2014, 1:49 PM), <http://www.theatlantic.com/education/archive/2014/10/students-suspended-for-not-using-a-racial-slur/381551/>.

<sup>88</sup> *Unsigned Editorial: Why We Won't Publish the R-Word*, THE PLAYWICKIAN (Oct. 23, 2013), <http://playwickian.com/unsigned-editorial-why-we-wont-publish-the-r-word/> (stating the term "is racist, and very much so").

<sup>89</sup> Richmond, *supra* note 87.

<sup>90</sup> *Tornillo*, 418 U.S. at 256 (quotations omitted).

*Prohibition on Prior Restraints*

If there is a single bedrock principle in the Court's First Amendment jurisprudence, it is the prohibition on prior restraints. The Supreme Court has declared that the "chief purpose"<sup>91</sup> of "the liberty of the press" is "to prevent previous restraints upon publication."<sup>92</sup> Prior restraints on speech, the Court has emphasized, "are the most serious and the least tolerable infringement on First Amendment rights"<sup>93</sup> and "an immediate and irreversible sanction."<sup>94</sup> If punishment after publication runs the risk of chilling speech, "prior restraint 'freezes' it at least for the time."<sup>95</sup>

The harm of a prior restraint, moreover, "can be particularly great when [it] falls upon the communication of news and commentary on current events."<sup>96</sup> For this reason, the Court places a "heavy burden"<sup>97</sup> on the government to justify a prior restraint and such regulations on speech come with a "'heavy presumption' against its constitutional validity."<sup>98</sup>

Once again, however, the Supreme Court, under the *Hazelwood* decision, allows exactly this type of censorship of student journalists. The facts of the *Hazelwood* case itself involved a prior restraint when the principal removed two pages of the student newspaper before publication. *Hazelwood* specifically declares that school officials "may refuse to disseminate" student speech that school officials conclude does not meet their "high standards."<sup>99</sup>

Many high school journalists in a post-*Hazelwood* world are subject not only to prior restraints but also to prior review.<sup>100</sup> In other words, they must submit their work to school officials for approval before it may be published. In *Near v. Minnesota*, Chief Justice Hughes writing for the Court specifically decried as the "essence of censorship"<sup>101</sup> a law that

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<sup>91</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971).

<sup>92</sup> *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

<sup>93</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Near*, 283 U.S. at 559–60.

<sup>97</sup> *New York Times Co.*, 403 U.S. at 714.

<sup>98</sup> *Nebraska Press*, 427 U.S. at 583.

<sup>99</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>100</sup> Neel Swamy, *Has Hazelwood Run Dry? Let's Talk About Censorship in High Schools*, THE UNDERGRADUATE TIMES (July 8, 2014), <http://ugtimes.com/2014/07/editorchoice/has-hazelwood-run-dry-lets-talk-about-censorship-in-high-schools/> (discussing censorship in high schools and high school students being subject to prior review).

<sup>101</sup> *Near*, 283 U.S. at 713.

forced a newspaper to go before the government prior to publication and prove that its articles “are true and are published with good motives.”

### *Subject- and Viewpoint-Based Discrimination*

The Court has further held that the government cannot regulate speech based on its subject-matter<sup>102</sup> or viewpoint.<sup>103</sup> Government regulations of speech based on its message, the Court has said, “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>104</sup> And when the target of government regulation is not just a particular subject matter but a specific viewpoint on that issue “the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.”<sup>105</sup>

Such regulation, therefore, is presumed to be unconstitutional.<sup>106</sup> The Government should not receive “the benefit of the doubt” in such cases, the Court has held, or else “we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.”<sup>107</sup>

*Hazelwood* directly violates this basic free speech concept. Rather than requiring a skeptical review of school officials’ restrictions on student

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<sup>102</sup> See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys”); see also *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right”); *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 537-38 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating” (internal quotations omitted)).

<sup>103</sup> See *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014) (“The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination”); see also *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others”).

<sup>104</sup> *Turner Broad. Sys.*, 512 U.S. at 641; see also *Consol. Edison Co.*, 447 U.S. at 536 (“But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited “merely because public officials disapprove the speaker’s views”) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).

<sup>105</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

<sup>106</sup> *Id.* at 828 (“Discrimination against speech because of its message is presumed to be unconstitutional”).

<sup>107</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

journalists, the Court has created a standard that is highly deferential to government regulators. Under *Hazelwood*, the Court specifically allows administrators to censor speech based on its subject-matter, noting that schools can regulate speech about “potentially sensitive topics.”<sup>108</sup>

Even the most “egregious form”<sup>109</sup> of regulation of speech—viewpoint discrimination—is likewise tolerated under *Hazelwood*. The Court in *Hazelwood* gave school officials the power to censor “student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’”<sup>110</sup> as well as any speech that might “associate the school with any position other than neutrality on matters of political controversy.”<sup>111</sup>

### *Regulation through Chilling Effect*

Underlying all First Amendment concerns of government regulation of expression is the danger of a chilling effect. Because of the custodial and supervisory power of school officials over high school students, the risk of chilling the speech of student journalists is high.

The Court has stressed repeatedly that government regulation on speech may bring about a serious secondary harm—self-censorship. The Court has called this “a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms.”<sup>112</sup> The concern that the mere threat of potential censorship or punishment for speech might deter speech is so great, the Court has said, that it “must be guarded against by sensitive tools.”<sup>113</sup>

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<sup>108</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>109</sup> *Rosenberger*, 515 U.S. at 829.

<sup>110</sup> *Hazelwood*, 484 U.S. at 272.

<sup>111</sup> *Id.* But see, Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 464, 464-65 (2004) (stating that pre-*Hazelwood* “student journalists had the relative freedom to publish articles on a variety of controversial topics” and federal courts upheld the rights of students to report on “teen sexuality, birth control and abortion, drug abuse and criminal conduct by students, as well as commentaries critical of school policies and personnel”).

<sup>112</sup> *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 598 (1973); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (expressing concern that a regulation “would have an undoubted ‘chilling’ effect on speech relating to public figures that does have constitutional value”); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (noting that a chilling effect “is incompatible with the atmosphere of free discussion contemplated by the First Amendment”).

<sup>113</sup> *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 604 (1967).

The evidence that *Hazelwood* has led to self-censorship by student journalists is strong.<sup>114</sup> One study, for example, found that “the types of editorials published *pre-Hazelwood* were significantly different than those published *post-Hazelwood*,” including a large drop-off in the number of critical editorials that were published, those that were published tended to be on “safer issues”<sup>115</sup> and students were less likely to “criticize school policies or tackle controversial subject matter.”<sup>116</sup> A high school student newspaper editor from New York explained to *The New York Times* that he and his co-editors chose not to publish articles “that could potentially cause backlash from the school administration” because there is “too much risk, not enough reward.”<sup>117</sup>

Unlike direct censorship or regulation of speech, chilling effects can be hard to detect because it is difficult to know when speech has not been expressed. The Court once explained that the danger of self-censorship is that it is “a harm that can be realized without an actual prosecution.”<sup>118</sup> The invisibility of the chilling effect on student journalists is especially concerning, because studies have found that even quite subtle forms of intimidation can lead to self-censorship by students.<sup>119</sup> Threats can include retaliation against their journalism advisers or budget cuts to the publication. These types of indirect pressure on student journalists can be “just as effective at silencing student-speech as taking scissors to a newspaper article.”<sup>120</sup>

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<sup>114</sup> Maggie Backwith, *Twenty Years of Hazelwood*, STUDENT PRESS LAW CENTER (Dec. 17, 2007, 12:00 AM), <http://www.splc.org/article/2007/12/twenty-years-of-hazelwood> (“There’s no doubt in my mind that newspapers after the *Hazelwood* case became more conservative and less willing to take on the more controversial, sensitive stories,” said Hall, the former adviser at Kirkwood High School in Missouri).

<sup>115</sup> Carol Lomicky, *supra* note 111, at 470-71.

<sup>116</sup> *Id.* at 472.

<sup>117</sup> See also Elizabeth Perle & Taylor Trudon, *Student Reading Contest Winner: Brave High School Journalists*, THE NEW YORK TIMES (July 15, 2013, 11:41 AM), <http://learning.blogs.nytimes.com/2013/07/15/student-reading-contest-winner-brave-high-school-journalists/>.

<sup>118</sup> *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988).

<sup>119</sup> A 2014 survey found that approximately a third of students reported that they had decided not to publish something based on the belief that school officials would censor it. Frank D. LoMonte, *Survey: One-Third of Journalism Students, Teachers Nationwide Report Administrative Censorship*, STUDENT PRESS LAW CENTER (Feb. 18, 2014, 12:00 AM), <http://www.splc.org/article/2014/02/press-release-survey-one-third-of-journalism-students-teachers-nationwide-report-administrative-cens>.

<sup>120</sup> Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 MAINE L. REV. 90, 120 (2013); see also Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J. L. & EDUC. 609, 610 (giving examples where “student journalists write something that administrators

## Conclusion

With the *Hazelwood* decision, the Court created a counterintuitive legal framework that leaves most public high school journalists with less First Amendment protection than other student speakers. This contradicts what the Constitution and the Court's precedents declare about the importance of the press. Student journalists fulfill constitutionally unique and recognized roles that are deserving of heightened constitutional status.

The costs of the Supreme Court's failure to protect student journalists' constitutional rights are real. By allowing the government to censor these speakers, the Court is denying the public important information, eliminating needed scrutiny of government officials and silencing unique voices from our public debate. Student speakers provide valuable insights about important issues that are likely not found outside of the school setting.

Student journalists are, of course, not perfect. They make, and will continue to make, errors of all kinds. But the Court has said repeatedly that the Constitution does not demand perfection of our press and has accepted that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."<sup>121</sup>

Finally, the idea that these students can be "taught" good journalism through government censorship is especially troubling. As Justice Brennan observed in his dissent in *Hazelwood*, government-sponsored censorship teaches students a different kind of lesson—"that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."<sup>122</sup>

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do not like and the journalism adviser is retaliated against to silence the students").

<sup>121</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). *See also, id.* at 260 (White, J., dissenting) ("Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed").

<sup>122</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 299 (1988). *See also, Id.* at 291 (Brennan, J., dissenting) (noting that the students "expected a civics lesson, but not the one the Court teaches them today"); *see also* *New York Times v. Sullivan*, 385 U.S. at 388-389 (*quoting* James Madison: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press"(*quoting* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876 ed.)).

The Court has stated that protection of the press is “not for the benefit of the press so much as for the benefit of all of us.”<sup>123</sup> This is no less true for student journalists, and the special value they add to our democracy.

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<sup>123</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

## A Call to Armbands 2.0: The Tinker Tour

Mike Hiestand\*

It started in a hot tub. The idea for what would become the international Tinker Tour--a journey that covered nearly 25,000 miles while traveling through 41 states, three nations, and stopping at more than 100 schools, colleges, libraries, churches, juvenile detention facilities, and conventions--was born in my hot tub in Washington State, just after I received an email from Mary Beth Tinker. Mary Beth was one of the named student plaintiffs in the landmark 1969 Supreme Court case *Tinker v. Des Moines Independent School District*,<sup>1</sup> which set the precedent for student speech in American schools and whose iconic story is routinely included in high school, college, and law school textbooks.<sup>2</sup>

As she travels the country meeting people, Mary Beth always carries around a small notebook, taking down the names of those she speaks with, jotting down a bit of their story, and recording their contact information. The notebook is a constant companion and a simple, low-tech way of staying connected to the hundreds of teachers, students, lawyers, and other *Tinker* fans she meets each year. In fact, she had the notebook when we met for the first time at a student media convention a few years ago.

As a media law and First Amendment attorney focused specifically on the rights of students, I had been writing about and telling Mary Beth's story for over two decades, so it was a big deal for me when we finally met. Looking back to that meeting--and seeing myself in a photo taken of

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<sup>1</sup> 393 U.S. 503 (1969).

<sup>2</sup> See, e.g., JOHN DAYTON, EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 139 (2012); KLINTON W. ALEXANDER & KERN ALEXANDER, HIGHER EDUCATION LAW: POLICY AND PERSPECTIVES 226 (2011); MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 116 (1992).

us at the time—I see the same star-struck look that was to become commonplace on the Tinker Tour.<sup>3</sup>

I don't know whether she consulted her notebook before sending me an email congratulating me on my retirement from full-time work with the Student Press Law Center<sup>4</sup> in October 2012, but it probably played some role. However the email arrived in my inbox, its timing was perfect. For, sitting in my hot tub, pondering what lay ahead, the idea for the Tinker Tour hit me like a bolt of lightning. It was clear—Mary Beth Tinker and I needed to go on a bus tour to continue and to further our work in supporting the First Amendment and students rights.

### **Believe-Make**

That the Tinker Tour was a good idea seemed obvious. Unlike most of the figures students read about in their history books, Mary Beth was, in many ways, one of them. She was just 13 when, as she tells it, she used “the little bit of courage she had” to change American history.<sup>5</sup> Moreover, unlike the Benjamin Franklins, Susan B. Anthonys, Martin Luther Kings, and Rosa Parks they read about, Mary Beth could actually chat with them after a Tinker Tour assembly about Tweeting, “twerking,” or anything else on their minds. And, of course, take a selfie. She is history come to life; in short, the perfect civics lesson.

So the Tinker Tour was something that needed to happen. But in November of 2012, it was just Mary Beth and I sitting at a café table in Seattle. It was exciting. It felt good. Mary Beth felt like she was also at a bit of a turning point in her life, looking forward to a change from her regular work as a pediatric nurse in Washington, DC. Still, the idea of a “Tinker Tour” (what a fun name!) felt pretty far-fetched, like something out of a movie.<sup>6</sup> The thought of just the two of us raising money, planning, and doing a nationwide bus tour seemed daunting, so we went in with a less direct approach. We did not want to get bogged down by the overwhelming list of things we had to do to stage a national bus tour; therefore, we focused on our steadfast belief it was a good idea and

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<sup>3</sup> See, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 1, 2015), <http://tinkertourusa.org/>.

<sup>4</sup> See, STUDENT PRESS LAW CENTER (2015), <http://www.splc.org/>.

<sup>5</sup> See, Stephen J. Wermiel, *Human Rights Hero: Mary Beth Tinker*, 35 HUM. RTS. 26 (2008).

<sup>6</sup> Update: *A Personal Message From Mary Beth Tinker's Other Half (of the Tinker Tour)*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 21, 2013), <http://tinkertourusa.org/2013/05/21/update-a-personal-message-from-mary-beth-tinkers-other-half-of-the-tinker-tour/>.

something we both wanted to happen. Instead of the more common model of make-believe, which requires making before truly believing, we decided to try believe-make and take it one day, even one moment, at a time. It was a theme that, for me, would define the Tinker Tour.

After sketching out and agreeing on our basic vision for the tour, the first step was lining up support, financial and otherwise. Fortunately, it was 2012, and the fundraising tools available to the average person had improved. In the past, a project like the Tinker Tour would usually have required a major sponsor or two. While we knew many people and groups would be rooting for us, finding major funders willing and able to pony up the \$120,000 we estimated it would cost to take our untested tour on the road seemed a serious challenge.

Finding our dream team of endorsing organizations,<sup>7</sup> however, was actually pretty easy. We did not talk to anyone that did not see the merit of the Tinker Tour. Like us, many people and groups believed in the idea. We were blessed to have lots of groups willing to put their names on the Tinker Tour “bus” (at no cost). But the economy at the time was still in recovery mode and our initial efforts to find a corporate sponsor or major foundation to sign on to our “pipe dream,” bore little success.

The one exception was the Student Press Law Center (SPLC). As an intern there, then legal fellow, then staff attorney, independent legal consultant and finally “Special Project Attorney” between 1989 and today, I was a known entity. The SPLC, and particularly executive director Frank LoMonte, was an early and staunch supporter. They agreed to make the Tinker Tour a “special project,” eventually contributing about \$25,000 toward the cost of the tour. They also agreed to help us in collecting and managing the remaining funds and made their staff available to provide marketing and promotional assistance.

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<sup>7</sup> The list of official Tinker Tour endorsing organizations included: American Civil Liberties Union, American Constitution Society, American Society of News Editors Youth Journalism Initiative, Associated Collegiate Press, Association for Education in Journalism and Mass Communication, Campaign for the Civic Mission of Schools, Center for Scholastic Journalism, Close Up Foundation, College Media Association, Constitutional Rights Foundation, The First Amendment Center, The Foundation for Individual Rights in Education, Journalism Education Association, Junior National Young Leaders Conference, Marshall-Brennan Constitutional Literacy Project, National Association for the Advancement of Colored People, National Coalition Against Censorship, National Constitution Center, National Council for the Social Studies, National History Day, National Scholastic Press Association, Newseum, Poynter Institute, Reporters Committee for Freedom of the Press, Robert H. Smith Center for the Constitution at James Madison’s Montpelier, Silha Center for the Study of Media Ethics and Law, Society of Professional Journalists, Street Law, Student Press Law Center, Teaching for Change, and the Youth News Service L.A. Bureau.

But it became clear that the bulk of the financial support for the tour would need to come from somewhere else—perhaps lots of “somewhere elsers.” Hello crowdsourcing! Instead of having to convince a bank, a corporate sponsor, a foundation, or a rich benefactor to provide the money, we could simply ask lots of regular people who believed in our idea to make a bunch of smaller donations (there was that “Believe-Make” theme again!).

We launched our Tinker Tour campaign on a relatively new crowdsource platform called Start Some Good (SSG).<sup>8</sup> It was surprisingly easy. We did spend quite a bit of time thinking things through and putting them on paper, and eventually onto our online SSG campaign page. But technically, the hardest part was putting a video together. We wrote a script and Mary Beth used her smartphone video camera to shoot most of it. With some very basic editing, we probably could have gone with what we had, but we thought it might be nice to kick it up a notch. Neither of us had much experience at the time working with video editing software so we did something else that would become a familiar part of the Tinker Tour: We asked for—and received—help. Over the years both of us have worked with student journalists across the country whose job it is to tell stories in new and creative ways. Finding editing and production help was as easy as putting out a feeler.<sup>9</sup>

As with everything, our idea was to just keep moving forward, little by little, and trust that it would eventually come together. Using new fundraising tools and putting together our “support team” required time and energy more than money. It was not like we were going to lose our shirts if the crowdsource campaign failed, which was comforting to our spouses (and us).<sup>10</sup> Since we so strongly believed in the project, investing the time and energy to see it through felt good.

We launched our SSG campaign on April 23, 2013. It would run for exactly 40 days, until June 1. It is entertaining to look back at our blog during those days. We were on a bit of a roller coaster ride. We had a nice jump out of the blocks. And then we sort of went into sleep mode, a

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<sup>8</sup> *Tinker Tour: The Power of an Armband*, STARTSOMEGOOD.COM, [http://startsomegood.com/Venture/tinker\\_tour/Campaigns/Show/tinker\\_tour\\_the\\_power\\_of\\_an\\_armband](http://startsomegood.com/Venture/tinker_tour/Campaigns/Show/tinker_tour_the_power_of_an_armband) (last visited May 7, 2015).

<sup>9</sup> Brian Schraum, a former publications fellow for the Student Press Law Center, now a professor at Washington State University, graciously offered to edit and polish the final video. He later helped us create our initial Tinker Tour website as well.

<sup>10</sup> A thank you to both of our wives, Patty Hiestand and Kesh Ladduwahetty, without whose support on so many fronts the Tinker Tour would have remained just a hot tub dream.

pattern that we would later learn was common in crowdsourcing. Surprise, surprise—people like doing things at the last minute.

We ended up reaching our goal in dramatic fashion. Mary Beth and I were attending a 4-day workshop on “Transformational Speaking” hosted by Gail Larsen.<sup>11</sup> The theme behind all of Gail’s work was: “If you want to change the world, tell a better story.” After coming across her book and loving it a year or so before, it felt like a natural fit for the Tinker Tour where stories would play a big role. I contacted Gail who generously agreed to give Mary Beth and I scholarships to join her in Santa Fe, New Mexico.<sup>12</sup>

We started the workshop on Thursday, May 30, 2013, with a long way to go to reach our financial goal. In fact, with just 5 days left of our SSG campaign, we were still \$25,000 short of our “Tipping Point” goal of \$50,000, which was the bare minimum we had said we needed to hit before we felt we could reasonably do a fall-only tour. If we did not hit our tipping point we would not collect any funds. Privately, I had resigned myself to having given it my best. I had learned a lot; prompted some fun discussions; had become truly good friends with an American legend; and now was learning a lot about authentic speaking, and myself, in beautiful Santa Fe. It had been a good run.

But a few things happened during the final days of the campaign that provided the momentum we needed. First, we were invited by the National Constitution Center to park our “bus” (which we still did not have) on Independence Mall and officially kick off the Tinker Tour there, in the shadow of the Liberty Bell as part of the Center’s 2013 Constitution Day.<sup>13</sup> That made for good press. Then we were invited to the U.S. Supreme Court by Justice Alito and the Supreme Court’s Historical Society to take part in a discussion of the *Tinker* case on November 6, which would fall right in the middle of our tour (and also happened to be my 50<sup>th</sup> birthday!).<sup>14</sup> We received an anonymous \$2,500 donation on

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<sup>11</sup> Gail Larsen, *Transformational Speaking with Gail Larsen*, REAL SPEAKING: TRUTH WELL SPOKEN, <http://www.realspeaking.com/> (last visited May 7, 2015).

<sup>12</sup> The rest of the funding was provided by longtime Student Press Law Center supporter and First Amendment true-believer, Professor Tom Eveslage of Pennsylvania, who along with his wife Sonja personally committed the seed money that jump-started the project.

<sup>13</sup> *Tinker Tour Invited to Launch from Philadelphia’s Independence Mall on Constitution Day this Fall*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (April 26, 2013), <http://tinkertourusa.org/2013/04/26/tinker-tour-invited-to-launch-tour-from-philadelphias-independence-mall-on-constitution-day-this-fall/>.

<sup>14</sup> *Tinker Tour Headed to the U.S. Supreme Court!*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 8, 2013),

SSG, our biggest to date.<sup>15</sup> Finally, we were invited to park our bus inside the convention halls at both the National High School Journalism Convention in Boston and the National Conference for High School Social Studies Teachers in St. Louis.<sup>16</sup> It had morphed from a dream into something that started to look very real. People were now regularly commenting on the campaign's progress and cheering us on.

And we were hustling. One of my favorite photos is that of Mary Beth working her cell phone the night before our campaign ended, while pacing outside her room in Santa Fe.<sup>17</sup> It worked. At about 1:30 p.m. on June 1, just hours before our deadline, we crossed the "Tipping Point."<sup>18</sup> The Tinker Tour was a go. We were no longer just in "Believe" territory. It was time to Make.

### **Making It Happen**

I knew that planning a national bus tour was not going to be easy. But it actually turned out to be easier than I thought. It did not hurt that the Universe seemed to be rooting for us in ways that were hard to ignore. Not long after hitting our fundraising goal, I was at a book club I attended regularly in my home near Bellingham, Washington. A Shaman led the group (another long, fun story). Hearing about what Mary Beth and I were doing, he said it felt like a "Holy Mission," which he said meant things had a way of naturally coming into alignment without a bunch of pushing and shoving. It certainly felt like it.

One of the first orders of business was securing the Tinker Tour bus. We looked everywhere and had a number of interesting offers. For example, we received an offer for a very used old yellow school bus that was being retired in Michigan. That seemed a little more rustic than we were ready for. We also heard from one of our supporters about her

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<http://tinkertourusa.org/2013/05/08/tinker-tour-headed-to-the-u-s-supreme-court/>.

<sup>15</sup> *Thank You, Anonymous!*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 20, 2013),

<http://tinkertourusa.org/2013/05/20/thank-you-anonymous/>.

<sup>16</sup> *Waiting for our Free Speech Angel (or 20,000 Angel-ettes)*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 28, 2013), <http://tinkertourusa.org/2013/05/28/waiting-for-our-free-speech-angel-or-20000-angel-ettes/>.

<sup>17</sup> *Thanks Mark! \$45,188 Down; \$4,812 to Go; 22 Hours Left*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (June 1, 2013), <http://tinkertourusa.org/2013/06/01/thanks-mark-45188-down-4812-to-go-22-hours-left/>.

<sup>18</sup> *The Tinker Tour is Coming to a School Near You!*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (June 1, 2013), <http://tinkertourusa.org/2013/06/01/the-tinker-tour-is-coming-to-a-school-near-you/>.

elderly neighbor's late 80's model motor home that was now permanently parked and that we could have for a song. It had the highly unusual combination of a bedroom with two single beds . . . tempting. But in addition to being over three decades old it also was pulling 100,000 miles. The focus of the Universe was getting closer, but not quite there. We had some fun hounding PBS Newshour's Jim Lehrer, whose passion for both journalism and buses (he collected vintage buses and had written a book on the subject) seemed like a good fit.<sup>19</sup> But he did not bite. And, of course, we lined up rental quotes for buses and RV's, which was our backup all along, but which would have really stretched our budget.

In the end, the beautiful, almost new RV that would become "Gabby," our beloved Tinker Tour free speech bus, happened in a very storybook-like fashion when I ran into a former neighbor and told her of our plans. Her eyes widened as she explained that she had just purchased a slightly used 28-foot motor home, sort of against their better judgment. But the price, she said, had been hard to refuse. Still, they felt stretched. Long story short, things simply fell into place after that. We got an unbeatable deal on a beautiful vehicle that gave us no more trouble than a single flat tire, and sustained no more visible wear and tear than a single, minor scratch I caused the first day I drove it, learning a valuable lesson about cutting corners that served me well the rest of the tour.

Traveling the country in a hot pink, peace-sign covered RV "disguised" as a bus could not, of course, have been anything other than an adventure. We put out the word that we were accepting invitations and quickly received more than we could accept. As part of the deal, our hosts would handle the logistics with respect to where, when, and to whom we would talk. We provided a list of sessions and a sample schedule. They would also be responsible for finding a spot for us to park Gabby overnight--which, when you are in Queens, N.Y., for example--could take some doing, or for arranging for other accommodations. Other than that, we charged only a small "gas money" fee to help offset expenses (\$100 for high schools and \$250 for colleges). Pretty much everything was handled online, where our hosts could log in to update their event schedule, which we would confirm with them about a week beforehand. There were, of course, glitches here and there--and we could be hard to reach as we spoke and traveled--but the goal was to keep things simple and all in all things worked pretty smoothly. We made all of our dates.

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<sup>19</sup> *Jim Lehrer, Here's my Number. Call Me, Maybe?*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 3, 2013), <http://tinkertourusa.org/2013/05/03/jim-lehrer-heres-my-number-call-me-maybe/>.

All told, our national tour logged in at 24,816 miles. We divided the tour into a fall tour of all of the locations east of the Mississippi River and, after a second round of fundraising and another successful crowdsource campaign, a spring tour that hit stops west of the Mississippi River. In the spring, having spent our fall nights with Gabby in high school parking lots, teachers' driveways, campgrounds, and Walmarts, and having successfully navigated downtown Philadelphia, Boston, Queens, Atlanta, New Orleans, and a bunch of other places where a 28-foot RV does not really belong, we downsized to "Ralph," a minivan we plastered with free speech-themed magnets. Ralph might not have had quite the same panache as Gabby, but he tripled our gas mileage and made us feel a little bit better about the footprint we left behind. He also ensured we got a regular, hot shower as we now overnighted mainly in homes and hotels.

The Tinker Tour was inspirational. It was rewarding. It felt historic. It was, at times, grueling. But it was truly magical. There are so many memories and stories, many of which we tried to capture as we blogged, Tweeted, Facebooked, and Instagramed the whole way, the evidence of which made its way to the Tinker Tour Web site, where it remains archived.<sup>20</sup> We did our thing and tried to share a little bit of what was on the minds of the young people to whom we spoke. There will always be a few moments in particular that stand out: Mount Rushmore;<sup>21</sup> parking next to the Liberty Bell; crossing the George Washington Bridge in New York City (twice); visiting Martin Luther King's home (after successfully parallel parking Gabby between the ESPN Monday Night Football buses in downtown Atlanta); Halloween in New Orleans; speaking at the Birmingham Civil Rights Institute;<sup>22</sup> celebrating my 50<sup>th</sup> Birthday with "Tinker Night" at the United States Supreme Court;<sup>23</sup> driving Gabby into the convention center elevator in downtown Boston;<sup>24</sup> Norris Dam State

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<sup>20</sup> See, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (May 1, 2015), <http://tinkertourusa.org/>.

<sup>21</sup> *Captain's Log (TT Day-8) Censored at Mount Rushmore by Mary Beth Tinker...and All is Well*, ZENGER CONSULTING, (September 10, 2013), <http://www.zengerconsulting.com/this-that-and-the-other-an-occasional-blog/captains-log-tt-day-8-censored-at-mount-rushmore-by-mary-beth-tinkerand-all-is-well>.

<sup>22</sup> *On Tour: Tuscaloosa and Birmingham, Alabama*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (November 6, 2013), <http://tinkertourusa.org/2013/11/06/on-tour-tuscaloosa-and-birmingham-alabama/>.

<sup>23</sup> *On Tour: Celebrating First Amendment Advocates at the Supreme Court*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (November 7, 2013), <http://tinkertourusa.org/2013/11/07/on-tour-celebrating-first-amendment-advocates-at-the-supreme-court/>.

<sup>24</sup> *On Tour: JEA/NSPA Boston!*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (November 15, 2013),

Park in Tennessee (just because); popping in unannounced on my old college roommate in Chicago;<sup>25</sup> seeing my first girlfriend (who I had not seen since I was in 8<sup>th</sup> grade) during a stop at the University of Alabama; dedicating a “First Amendment locker” at Harding Middle School (Mary Beth’s historic alma mater, in Des Moines);<sup>26</sup> the Redwoods; a Peace Sign park outside Amarillo, Texas;<sup>27</sup> crossing the Golden Gate Bridge;<sup>28</sup> driving across Nebraska (and other parts of the nation most people never see); and on, and on, and on.

That list does not even touch upon the people whose paths we crossed in those places. One moment in particular occurred as we pulled into McComb, Mississippi, a big battleground in the struggle for civil rights in the United States. During the late 1950’s and early 1960’s, it was the site of several race-based bombings and civil rights protests, including sit-ins by the young black community, which resulted in a number of arrests and expulsions from school.

Driving Gabby--in all her bright pink, free speech glory--through downtown McComb a few days before Halloween, I was having my usual fun smiling and waving at those gawking at the strange sight. We parked across from the local high school, where the next day we would have a fun, lively free speech rally. It occurred to me as we were settling in for the night that we would almost certainly be talking with some of the grandkids of Black residents who, believing a better world was possible, risked their lives in McComb fighting for the right to vote and to drink from the same water fountain as their neighbors.

Measured in years, it truly was not that long ago. Measured by our being invited to bring Gabby and the Tinker Tour to McComb High School, it was a different world. Once again, there was Believe-Make in action.

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<http://tinkertourusa.org/2013/11/15/on-tour-jeanspa-boston/>.

<sup>25</sup> *Tinker Tour Week 5 in Review*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (October 20, 2013), <http://tinkertourusa.org/2013/10/20/tinker-tour-week-5-in-review/>.

<sup>26</sup> *On Tour: An Amazing Day at Harding Junior High*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (November 20, 2013), <http://tinkertourusa.org/2013/11/20/on-tour-an-amazing-day-at-harding-junior-high/>.

<sup>27</sup> *Peace! (On Route 66)*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (April 14, 2014), <http://tinkertourusa.org/2014/04/14/peace-on-route-66/>.

<sup>28</sup> *On Tour: Palo Alto, California*, TINKER TOUR USA: EMPOWERING YOUTH VOICES THROUGH FIRST-AMENDMENT ACTIVISM (March 24, 2014), <http://tinkertourusa.org/2014/03/24/on-tour-palo-alto-california/>.

Our audiences were intrigued by the logistics, the oddity and “magic” of this crazy thing called the Tinker Tour, and our travel adventures were always fun to share. But in the end, of course, they all came to hear Mary Beth’s story.

### **The Story**

In December 1965, Mary Beth was, as she describes herself, a shy, quiet, normal 13-year-old girl living in Des Moines, Iowa, who got good grades and liked to go roller skating with her best friend Connie on the weekends. Of course, when you dig a bit deeper and hear about her remarkable parents, and their courageous early stands for equality and civil rights (some that cost her minister father several jobs), she was never as “normal” as she modestly claims. But her point is important: She never intended to become the national free speech hero she has become.

In fact, the idea for wearing the armbands to school to mourn those who had been killed in the Vietnam War on both sides, was really the brainchild of her older brother, John, and his friend Chris Eckhardt, who attended one of the first big peace protests in Washington, D.C., in the fall of 1965, as the Vietnam War was just starting to take center stage in American life. John and Chris, who were both in high school at the time, were traveling back from the rally in a van when the idea for the armband protest took root. Those two, joined by a handful of other students who were members of their Quaker youth group in Des Moines, planned and led the protest.<sup>29</sup> Mary Beth was, she freely admits, a reluctant joiner, when, on the morning of December 16, she walked with her friend Connie to Warren Harding Junior High wearing a small armband made of black cloth (despite subsequent famous photos of her and John, there were no peace signs or other symbols on the original armbands).

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<sup>29</sup> Mary Beth said she never understood why she, rather than Chris and John, would become the “poster child” of the case. Despite her objections and early attempts to pass them off to her brother and “the other older kids,” reporters seemed drawn to the young girl with the cute, flip haircut. “After a while,” she said, “I just gave up.” Destiny seemed intent on putting Mary Beth in the spotlight. In fact, one of my favorite, lesser-known stories from the events of 1965 is that, on the day he donned the armband, John wore a dark suit to school. It was a big day for him. He had given the protest a lot of thought and knew it was a serious act for which there would likely be consequences, so he dressed the part. Unfortunately, because of his dark suit, no one noticed his now “camouflaged” black armband. His protest was not noticed until later in the day when he took off his jacket and displayed the armband over a white shirt. John, who remains a committed political activist, joined us to kick off the tour in Philadelphia and at various other stops along the way.

Like Rosa Parks, who had refused to give up her bus seat nearly ten years to the day before, the story of what happened to Mary Beth that day is now part of American lore. And it is a great story. As a First Amendment attorney, I love telling it. It helps me immediately connect with my student audiences in a way that then gives me an opening as I later try to explain the confusing, complex and often contradictory laws that have been applied to student speech in the years following the Supreme Court's 1969 *Tinker* decision.<sup>30</sup>

Mary Beth's story isn't about the law or the First Amendment. At 13, she was into roller-skating and math and trying to find her place as a newly-minted teen. If she had heard of the First Amendment at all it probably was not much more than as an option on a multiple-choice test. The story is refreshingly simple: It is about young people who spoke from their heart and, despite opposition from the "powers that be," insisted their voices had a right to be heard.

I truly never tire of hearing Mary Beth tell it. And our audiences certainly did not either. The *Tinker* Tour gave those we spoke to a chance to listen to someone from their history textbook speak and ask her a question. Mary Beth would usually begin our *Tinker* Tour program by talking about the important role young people throughout history have played in bringing about social change. She told stories, for example, about a young Frederick Douglass and a "young juvenile delinquent" named Benjamin Franklin. She told them of the work of young people in the early 1900's to organize workers in banning child labor. She'd then move forward in time, surprising most students (and teachers) by telling them of how 15-year-old Claudette Colvin refused to give up her seat on a Montgomery, Alabama, bus--nine months before Rosa Parks.

Mary Beth would then talk about her family's direct involvement in the civil rights movement and how her dad was fired from his job as a minister in Atlantic, Iowa, after he led a small group that called for an end to segregation of the city's swimming pool. She talked of her mom's protests about the unfair treatment of African-Americans outside a local shop in Des Moines and about how her parents joined others in Mississippi to help register African-American voters as part of Freedom Summer in 1964. The auditoriums we spoke in fell silent as she told the story of a town's sheriff shooting at the home of their African-American host one night. She talked of her older sister, Bonnie, being at the Lincoln Memorial when Martin Luther King delivered his "I Have a Dream" speech and, of course, of her brother John's leadership in the armband

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<sup>30</sup> 393 U.S. 503 (1969).

protest.<sup>31</sup> “Those were the people I was surrounded by,” she told them: “That wasn’t me. I was a shy, good student who’d never been in trouble.”

In 1965, she explained that she and her youngest sister, Hope, were responsible for making dinner: “We would come home from school every day. I was thirteen and Hope was two years younger. While making dinner, we would turn on the TV and watch images of the war. Like the smoking huts of the villagers, and children running from their huts screaming in terror, and the soldiers lying on the ground in body bags. And this famous journalist named Walter Cronkite would read the body count of how many soldiers had been killed that day. And so, it affected us very much. We were very upset about it. We were sad.”<sup>32</sup>

So on that December morning, Mary Beth told of how she dug deep and found the courage she needed to wear the armband to school. My favorite part of Mary Beth’s armband story—one that is usually left out (or even completely botched in most retellings I’ve seen)—is, I think, one of the story’s most powerful lessons. After wearing the armband largely without incident through her lunch period, Mary Beth was met at the door of her math classroom by her favorite teacher, Mr. Moberly, who was holding a pink slip directing her to go to the office. As she entered the office, she was met by a school official who ordered her to remove the armband.

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<sup>31</sup> One of my great gifts on the Tinker Tour was being voted an “honorary Tinker” and having the privilege of getting to know John and meeting all of Mary Beth’s surviving siblings and many of the extended Tinker clan. They remain a remarkable, loving, socially aware bunch.

<sup>32</sup> It was at the point in her talk when she touched upon how much war affects young people that Mary Beth would often ask me to come up on stage to talk about my experience with the Vietnam War. My uncle, Thomas Walsh, was an F-5 pilot in the Air Force during the war. He was my mom’s older brother and only sibling. He arrived in Vietnam about nine months after Mary Beth wore her armband to Harding Junior High School. Shortly after his arrival, on September, 10, 1966, he was killed when his plane was shot down over the Dinh Tuong province of South Vietnam. He left behind my aunt and five cousins (one of whom he never saw as my aunt was pregnant when he was deployed). I was not quite three years old at the time and have little conscious memory of that time. However, as I told our audiences, “my first real memory of being on Planet Earth” occurred two and a half years later, in early April 1969, at Eglin Air Force Base in Florida, when my dad left for his tour of duty in Vietnam. I talked of how I remember being in our station wagon at the end of the runway with my mom and three younger brothers as he flew overhead in the F-4 Phantom jet he now piloted. Like Mary Beth and her sister, as a five-year-old, I didn’t know a thing about the politics or the economics of the war. “What I did know,” I told those we spoke to, “was that I was very, very sad. Sometimes that’s exactly the message we rely upon young voices to tell us.” My dad returned safely.

Of course, the Hollywood version of the story would have Mary Beth make some sort of passionate defense of free speech. In real life, however, she quietly took off the armband and went back to class, breathing a sigh of relief, she says, that she had taken her stand and “that was the end of that . . . I had mustered all the courage I had to wear the armband . . . and at that moment, it ran out.” She was, of course, later called back to the office and suspended anyway, which is why nearly five decades later we got to travel the country on the Tinker Tour!

The lasting message for me—and I think all of the other “normal” students and others who heard this—was that heroes do not always have to fight. Sometimes they just have to stand up. And in doing so, they change the world.

### **The Girl on Fire**

One of the more interesting things I witnessed on tour was what happened immediately after nearly every talk we gave. Whenever possible, we left time to answer questions and give people a chance to say hello to Mary Beth. She was usually surrounded. And at pretty much every stop, 80 percent of those surrounding her were young women. They wanted to talk to her, share a story, take a selfie, hug her, and thank her. They just wanted to be around her. You could see it. You could feel it. Something was going on. Young people, and particularly young women, felt a strong connection to the shy, quiet girl from Des Moines who changed the world. As I told a reporter after speaking at a high school journalism convention: “A few years ago, the Dalai Lama made headlines when he said that the world will be saved by the western woman. That’s a tall order. But as I watched young women gather around Mary Beth, one couldn’t help but wonder if he wasn’t on to something.”<sup>33</sup>

I only half-joked with Mary Beth that she was sort of the 1960’s version of Katniss Everdeen--the so-called “Girl on Fire”--from the *Hunger Games* series. Katniss, a teenage girl in a dystopic future described as a “galvanizing symbol of rebellion.”<sup>34</sup> During the middle of our fall tour, the second movie in the trilogy, *The Hunger Games*:

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<sup>33</sup> Frank LoMonte, *Mary Beth Tinker Closes One More Chapter in the History Books, and Turns the page to Another*, STUDENT PRESS LAW CENTER, (December 10, 2013), <http://www.splc.org/blog/splc/2013/12/mary-beth-tinker-closes-one-more-chapter-in-the-history-books-and-turns-the-page-to-another>. The Dalai Lama made these statements during the 2009 Vancouver Peace Summit.

<sup>34</sup> *Katniss Everdeen*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Katniss\\_Everdeen](http://en.wikipedia.org/wiki/Katniss_Everdeen) (last updated May 1, 2015).

*Catching Fire*, was released to record crowds, made up largely of young women. If the young people we talked to were looking for a role model, for a real-life person who symbolized the possibility of a better world, Mary Beth Tinker was a pretty solid choice.

As Supreme Court Justice Clarence Thomas would say decades later, Mary Beth and the other *Tinker* plaintiffs “effected a sea-change in students’ speech rights.”<sup>35</sup> Judges and legal scholars have cited the *Tinker* decision nearly 10,000 times since it was handed down in 1969.<sup>36</sup> It has been used to uphold the rights of students publishing newspapers, distributing leaflets, staging plays, singing songs, airing radio and TV shows, wearing (or wearing less) clothes, inviting controversial speakers to campus, and forming student clubs.<sup>37</sup>

Before the Supreme Court issued its opinion in *Tinker*, it was not clear whether students had any meaningful First Amendment protections when they walked on campus. After *Tinker*, as some of our older audience members who were in school at the time told us during the tour, high school principals backed off rules that required girls to wear skirts and boys to cut their hair. College presidents in the 1960’s and 70’s were legally required to let students protest the war and pretty much anything else, as long as they did so peacefully. *Tinker*, they told us, really did change the world in which they lived.

Mary Beth wore an armband to school because in 1965 wearing an armband (or other piece of clothing)<sup>38</sup> was one of the few speech tools available. Additionally, a student upset with the Vietnam War could write a letter to the editor (which the editor might or might not publish), hand out leaflets, or join one of the antiwar protests. There were not many other options available. In 2015, however, the speech tools have changed.

After Mary Beth’s talk, during our question time, I often asked the audience to hold up their smart phones. Even in the junior high schools, most of those in the audience had one. “Think about the power you hold in the palm of your hand,” I would remind them. “You could invite a student from Egypt, holding her own smart phone, to join us right now, for

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<sup>35</sup> “*Tinker* effected a sea change in students’ speech rights, extending them well beyond traditional bounds.” *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring.)

<sup>36</sup> A March 22, 2015 search of the Westlaw database found 9,750 total documents citing *Tinker v. Des Moines*, 393 U.S. 503 (1969).

<sup>37</sup> See, STUDENT PRESS LAW CENTER, *LAW OF THE STUDENT PRESS* (3d ed. 2008).

<sup>38</sup> See, e.g., *Cohen v. California*, 403 U.S. 15 (1971), where the U.S. Supreme Court, citing the *Tinker* case in part, struck down as unconstitutional a man’s “disturbing the peace” conviction for wearing a jacket in the public area of a courthouse which said, “Fuck the Draft.”

free, to see us, to hear us, to share her thoughts with us, just by pushing a few buttons. That is something a 13-year-old in 1965 could only read about in a science fiction book. But today it's real. It's your world. And that's just the beginning of what is available to you" (again, that Believe-Make theme).

But while the communication tools have improved, students must actually use those tools to challenge the status quo or advocate for change. They have to be willing to stand up. And for many, the "courage barrier" is as daunting today as it was in 1965, and perhaps even more so. Today, authorities seem more prone than ever to punish students for using those communication tools if they stray beyond posting cute kitten pictures or commenting on the latest celebrity news.

### **To Tinker and Beyond**

In 1845, the 19<sup>th</sup> century educator Horace Mann, widely referred to as "The Father of American Education," wrote: "The great moral attribute of self-government cannot be born and matured in a day; and if school children are not trained to it, we only prepare ourselves for disappointment if we expect it from grown men."<sup>39</sup> The hands-on preparation of our next generation of citizens is a sentiment that *was* strongly held by the United States Supreme Court at one time. In one of its first opportunities to consider whether and to what degree the First Amendment applied on public school campuses, the Court ruled in 1943 that a Jehovah's Witness student could quietly refuse to salute the flag because it violated the teachings of his church.<sup>40</sup> In its written decision, the Court powerfully reminded school officials that the Constitution and the First Amendment were not simply sources for test questions. The Court wrote: "That [schools] 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."<sup>41</sup>

Those sentiments were again reflected in the *Tinker* decision. In the oft-quoted line from the opinion, the Court wrote that neither students nor teachers "shed their constitutional right to freedom of speech or expression

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<sup>39</sup> 4 HORACE MANN, MARY TYLER PEABODY MANN, GEORGE COMBE MANN, & FELIX PÉCANT, LIFE AND WORKS OF HORACE MANN 37 (1891); *see also*, Mike Hiestand, *The Hosty v. Carter Decision: What It Means*, STUDENT PRESS LAW CENTER (July 6, 2005), <http://www.studentpress.org/acp/trends/~law0705college.html>.

<sup>40</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>41</sup> *Id.* 637.

at the schoolhouse gate.”<sup>42</sup> The Court further stated: “In our system, state-operated schools may not be enclaves of totalitarianism.”<sup>43</sup> Writing for the majority Justice Abe Fortas declared:

School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>44</sup>

The so-called *Tinker* standard that came out of the Court’s decision reflected that sentiment. It attempted to balance the need of school authorities to maintain order against the equally compelling idea that student voices must be respected. Looking back, Justice Fortas’ words would be the high-point of legal protection for student speech in America. Nearly two decades later, by the mid-1980’s, the composition of the Supreme Court had changed and so, too, had a majority of the Justices’ beliefs regarding the value of a “hands-on” civics education. The Supreme Court in 1969 ruled that students and teachers did not shed their rights at the schoolhouse gate, but many courts two decades later—while sometimes paying lip service to *Tinker*—were literally leading the charge to replace the hallowed schoolhouse gate with the metal detectors and security cameras that now greeted Mary Beth and I at most of the schools we visited.

The contrast between *Tinker* in 1969 and the student speech cases handed down by the Burger and Rehnquist Courts, beginning in 1986, could hardly be more stark. Where *Tinker* sought to balance the needs of school officials with the rights of students, the later round of student speech cases focused on maintaining order and restoring school authority. Respect for student voices was replaced by fear of student voices. And judges, the Court made clear, should stay out of the way of principals.

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<sup>42</sup> 393 U.S. 503, 506 (1969).

<sup>43</sup> *Id.* at 511.

<sup>44</sup> *Id.* at 511.

The Court's first post-*Tinker* student speech case came out of Washington State where high school student Matthew Fraser, who was running for student body president, gave a speech before a packed school assembly laced with sexual innuendo. As a legal matter, *Fraser* was a most interesting case. Under *Tinker*, student speech was protected unless: 1) The speech invaded the rights of other students (which many lower courts equated with falling into a category of speech that was legally unprotected, such as libel or obscenity); or 2) Resulted in a serious, typically physical, disruption of normal school activities. The problem was that Fraser's speech did not really fit into either *Tinker* exception. The facts indicated that the speech did cause some hooting and hollering in the assembly hall, but no wholesale disruption. The speech also did not venture into categories then recognized as unlawful. Specifically, while the speech made sophomoric references to sex, it was not legally obscene—or even close—even under the much lesser obscenity standard for minors.

While the Court may have had trouble figuring out how to classify Matthew Fraser's campaign speech, there was one thing the majority Justices knew for sure: They did not like it. And they were intent on making sure that the law provided school officials sufficient leeway to stop it. So, if the new, more conservative Supreme Court majority wanted to uphold Fraser's punishment, which it very much did, it was faced with a conundrum: *Tinker* would not really do it, so they could either throw *Tinker* out or modify the traditional protections afforded by the 1969 case. They chose the latter. In addition to allowing school officials to censor (and punish) students for engaging in speech that was unlawful or disruptive, after *Fraser* school officials could also ban and discipline students for engaging in speech that was "vulgar," "indecent," "profane," "lewd" and "plainly offensive," words that—unlike "obscenity"—were simply adjectives, not legal terms, and words that the Court made no effort to define for future students and judges or limit for administrators.

Many saw *Fraser* as a blip; an odd case about "sex talk," that hot button topic that has long given American society fits, particularly in the educational setting. It was not clear at the time, but *Fraser* was more than that. It became the new model for addressing student speech cases, and the start of a consistent retreat from *Tinker*'s high-water mark of protecting students' speech rights, a change made crystal clear two years later in a decision out of Hazelwood East High School.

### ***Hazelwood*: The Shared Values of a Civilized Social Order?**

The Supreme Court is famously selective in choosing which cases it will hear. Unlike mandatory appeals to an intermediate tribunal, such as the federal court of appeals, the Supreme Court gets to pick and choose what cases it will take. According to the U.S. Supreme Court's official webpage: "The Court receives approximately 10,000 petitions for a writ of certiorari each year. The Court grants and hears oral argument in about 75-80 cases," meaning that it currently hears just 0.75-0.8% of the cases filed for appeal.<sup>45</sup>

Because so relatively few cases are heard by the Court, there are certain things the Court tends to look for when picking and choosing cases. For example, sometimes the Court will take a case simply because--as the ultimate arbiter--they feel it is important. Those cases are rare, such as the Court's involvement in *U.S. v. Nixon*,<sup>46</sup> where the Court played a key role in the Watergate scandal and limiting presidential power. Or *Bush v. Gore*,<sup>47</sup> where the Court resolved the dispute surrounding the 2000 presidential election. And sometimes the Court will take a case if the justices feel a lower court has blatantly ignored or misinterpreted the law. Traditionally, however, the most common reason the Supreme Court takes a case is to resolve a conflict in the law between lower courts, particularly between two courts of appeal. In such cases, like a parent stepping in to stop two squabbling kids, somebody has to make a decision to restore peace and provide guidance going forward.

In deciding to review *Hazelwood School District v. Kuhlmeier*,<sup>48</sup> which involved censorship of a high school student newspaper, none of these three factors were present. In fact, nearly an entire generation of students had gone through the nation's public schools since the Court's 1969 decision in *Tinker*, and the law seemed to be evolving gradually and without much fanfare. *Tinker* worked well as a legal standard, and it worked well in practice, appropriately balancing students' essential rights of free speech with the legitimate interests of school officials in maintaining school safety and order.

There had been some predictable bumps in this evolution, for example, uncertainty over what exactly constituted a "material and substantial" disruption. But these were the types of judicial refinements to the Court's

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<sup>45</sup> *Frequently Asked Questions*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/faq.aspx#faqgi9> (last modified December 18, 2014).

<sup>46</sup> 418 U.S. 683 (1974).

<sup>47</sup> 531 U.S. 98 (2000).

<sup>48</sup> 484 U.S. 260 (1988).

broad articulation of a legal standard commonly resolved in lower courts. There did not seem to be any wholesale confusion about the *Tinker* standard generally, nor any pressing need for the law to be clarified or adjusted at the highest judicial level. Instead, the Court appears to have made its decision to take the *Hazelwood* case based on a fourth factor: They wanted to.

In the spring of 1983, students on the staff of the *Spectrum* student newspaper at Hazelwood East High School, outside St. Louis, Missouri, prepared a two-page center-spread of stories focusing on some of the issues facing teenagers. The day before it was scheduled for printing, the principal previewed the center-spread and objected to two of the stories it contained: One, about teenage pregnancy, which included interviews with a sex education specialist and the school nurse, and the personal accounts of three unnamed Hazelwood East students who described their own experiences as pregnant teenagers; and another story, about the impact of parents' divorce on children, containing quotes from students whose lives had been touched by divorce. While two trained publication advisers had approved the stories, the principal censored the entire spread, claiming the topics were "too sensitive" and "inappropriate" for a high school newspaper.

An extended legal battle followed. Relying on the Supreme Court's *Tinker* decision, a U.S. Court of Appeals ruled that the principal acted illegally in censoring the newspaper. Citing *Tinker*, the court found the case clear: The article was legal and non-disruptive. So it was, indeed, a surprise to most when the United States Supreme Court agreed to hear the case.

On January 13, 1988, the High Court handed down its decision, and by a five-to-three vote, upheld the school's censorship. The decision contrasted sharply with previous rulings on student press rights. While it actually began by reaffirming *Tinker's* holding that the First Amendment protects students, the Court went on to say that the *Tinker* standard itself did not apply to the facts of this case. *Tinker*, the Court clarified, involved *independent* student speech created by students on their own time, using their own resources. This case, the Court felt, was different.

The Court majority believed that school officials should have greater authority to control school-sponsored student expression, and the Court created a new First Amendment standard. Judges must now permit school censorship, the Court said, when officials show their actions were "reasonably related to legitimate pedagogical concerns."<sup>49</sup> In other words,

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<sup>49</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 261 (1988).

only when the censorship has “no valid educational purpose” should a court intervene to protect student rights.<sup>50</sup> The problem: What exactly is a reasonable educational justification for censorship?

The Court gave some examples in its decision of what might fit within the standard it had created. Unfortunately, rather than clarifying such vague language, the examples only made matters worse. Henceforth, the Court declared, school officials could censor material that the officials themselves deemed: “ungrammatical,” “poorly written,” “inadequately researched,” “biased or prejudiced,” “vulgar or profane” or “unsuitable for immature audiences.”<sup>51</sup> The Court said that school officials could also censor speech that would associate the school with “any position other than neutrality on matters of political controversy.”<sup>52</sup> Finally, there is my personal favorite: Otherwise lawful student speech could now be censored, the United States Supreme Court said, where school officials felt it promoted “conduct otherwise inconsistent with the ‘shared values of a civilized social order.’”<sup>53</sup>

It is the sort of rule we would probably expect to see in North Korean high schools. But today it is also the free speech guidepost for public high schools in North Carolina and North Dakota. It is the law of our land. This is the new civics education lesson.

To say the least, these terms are exceedingly difficult to define as a legal standard.<sup>54</sup> With *Hazelwood*, the Court had taken a huge chunk of

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<sup>50</sup> One of the things I like to point out to those I speak with is that *Hazelwood*'s “new” legal standard for student speech — allowing government officials to censor speech when their actions were “reasonably related to legitimate pedagogical concerns” — actually was not new (other than its application to students.) A year before, in 1987, the Court handed down another First Amendment case. The issue: What free speech rights do prisoners have? The answer: Prison officials can censor prison speech when it is “reasonably related to legitimate *penalogical* concerns.” *Turner v. Safley*, 482 U.S. 78 (1987). As I tell students, it is good to know the source of your rights.

<sup>51</sup> *Hazelwood*, 484 U.S. at 271.

<sup>52</sup> *Id.* at 271.

<sup>53</sup> *Id.* at 285.

<sup>54</sup> While the Court's new student speech standard shocked many in the First Amendment community, the papers of Supreme Court Justice Thurgood Marshall, published after his death, revealed the outcome could have been even worse. Justice Byron White's first draft of what would become the majority opinion in *Hazelwood* showed that he would have allowed school officials to censor school-sponsored student expression unless the reason for doing so was “wholly arbitrary.” White indicated that the only time a school official's censorship would violate a student's First Amendment rights was “when school officials g[a]ve no reason whatsoever for refusing to disseminate facially permissible student speech.” In a Nov. 20, 1987, letter to White, Justice John Paul Stevens wrote that although he was in “substantial agreement” with White's opinion, he was “troubled by the ‘wholly arbitrary’ standard . . . [and found] the use of that term in a First Amendment

high school student speech—most student newspapers, yearbooks, radio and TV stations, student Web sites hosted on a school server--anything that might be classified as “school-sponsored”—and effectively thrown out any meaningful balance between students’ rights and administrative powers of censorship.

An entire generation of students has now gone from kindergarten through high school (and some now even into college<sup>55</sup>) under a regime of *Hazelwood* censorship. And the trend to silence young voices continues, as several courts have extended the authority of school officials to control and punish not only school-sponsored student speech, but also independent student speech that occurs off school grounds, after school hours, using private resources--an area that had traditionally been left to parents (or in worse cases, law enforcement officials) to regulate.

Most recently, in 2007, the Supreme Court once again expanded the reach of administrative authority by creating an entirely new category of speech that school officials could punish. In *Morse v. Frederick* (better known to many as the "Bong Hits 4 Jesus" case), the Court upheld the authority of school officials to suspend an 18-year-old Alaskan high school senior for holding up a banner on a public sidewalk across the street from the high school as the Olympic torch passed through downtown Juneau.<sup>56</sup> The Court conceded that the banner was not “school-sponsored.” However, because students were permitted to leave class to watch the torch relay, the Court said the event fell into a new category of student speech subject to administrative oversight, which it now labeled “school-sanctioned.”<sup>57</sup> That meant the student’s nonsensical banner, which the Court found advocated illegal drug use, was subject to administrative censorship.<sup>58</sup>

Unfortunately for students, a downtown Juneau street was not the only new boundary crossed when the Court handed down the *Morse* opinion. Rather than just pretending to once again affirm the *Tinker* decision in one breath, while gutting it with more exceptions in the next, *Morse* marked the first time a sitting Supreme Court justice explicitly called for *Tinker*’s reversal: Justice Clarence Thomas wrote:

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case . . . somewhat jarring.” “Justice Marshall’s papers reveal details of *Hazelwood* decision,” *SPLC Report*, Fall 1993, p. 19.

<sup>55</sup> See *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), which ruled that college newspapers could be subject to the same amount of school control allowed for high school newspapers. “*Hazelwood*,” the court wrote, “provides our starting point.” *Id.* at 734.

<sup>56</sup> 551 U.S. 393 (2007).

<sup>57</sup> *Id.* at 396.

<sup>58</sup> *Id.*

In light of the history of American public education, it cannot seriously be suggested that the First Amendment “freedom of speech” encompasses a student’s right to speak in public schools . . . . In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.<sup>59</sup>

### Going Forward: Armbands 2.0

The right to speak out, to share the ideas that are important to you, and to say what you need to say is a fundamental human right. That is, it is one we possess, and are fully responsible for, as human beings for no other reason than we are human. The fundamental right to speak is not dependent on the First Amendment, the whims of state lawmakers or school boards, law enforcement officials, or even one’s parents.<sup>60</sup> It’s time to remind our next generation of this essential truth.

Legal protections for free speech, including the First Amendment, exist to formally limit the authority of government officials to interfere with a human being’s speech rights, except in extraordinary circumstances. While I worked for more than two decades as a lawyer to support and protect the legal rights of student journalists, and remain a passionate believer in the potential of journalism education,<sup>61</sup> a legal system that

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<sup>59</sup> *Id.* at 419 (Thomas, J., concurring).

<sup>60</sup> *What’s at Stake*, ACLU, <https://www.aclu.org/issues/free-speech> (last visited May 8, 2015).

<sup>61</sup> As I once told a gathering: “When a program is allowed to flourish, when it is supported, when necessary resources are made available, when top journalism students are recognized and praised for their efforts instead of being hauled down to the office and berated for a column that dared question the school’s new parking policy, when a principal has scouted for a qualified and committed high school journalism adviser with close to the same energy used to recruit the football coach and then lets that professional adviser do his or her job, that’s where you see the magic of journalism. I don’t know about you, but I don’t see principals on the sidelines telling a coach what play he has to run or in a chemistry class demanding that a particular experiment be conducted. That teacher and that coach are professionals after all, many with years of specialized experience in their fields and the principal wisely defers to their expertise. Why does the same not hold true for seasoned journalism teachers? Why does it seem that nearly every principal in America thinks they are qualified to “edit” the student newspaper and yearbook?” We saw plenty of “good journalism” on the *Tinker* Tour. Some, such as the program at North Central High School in Indianapolis, where we met the Journalism Education Association’s principal of the year, Evans Brannigan III certainly shows what is possible. When most school officials see what good student media can be — full of

allows a government official to ban a student's speech simply by pronouncing it "poorly written" or "inconsistent with the shared values of a civilized social order" has failed that student, and the next generation of human beings. I owe it to my two daughters—and we owe it to all young people—to quit pretending otherwise. When the Emperor has no clothes, it is important to say so.

The truth is the First Amendment effectively no longer exists in many schools. For too many young people, the wonderful, shiny stuff they learn about free speech and democracy does not really track outside their textbooks. For them, the Constitution has become, as Supreme Court Justice William Brennan warned in his *Hazelwood* dissent, simply an old piece of "parchment preserved under glass."<sup>62</sup>

Regrettably, the clamp-down on student speech in schools comes at a time when, more than ever, we need new voices and new ways of looking at how we live in our world. Fortunately, there are alternatives. At least for now, the *Tinker* decision, as our starting point, can still offer significant protection for independent and off-campus speech. And for young people in 2015, that's a lot of speech.

If Mary Beth changed her world by wearing a simple cloth armband, it is important to remind young people today that they have communication tools in the palm of their hands that she could scarcely have imagined as a 13-year-old in 1965. And these are tools, it seems, that most 13-year-olds today seem to know, almost instinctively, how to use, even if they do not always use them perfectly.<sup>63</sup> Or with what some might feel is the "appropriate" gravitas.<sup>64</sup>

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student-initiated, meticulously researched, balanced, timely, creative, informative, visually attractive, well-written stories — as professional educators, they will be able to look beyond their interest in "controlling the message" and see the academic results that they have long and publicly proclaimed they are after. Student journalism is where critical thinking and clear expression — the expressed goals of education — come together. *Good* student journalism *will* make a believer out of any educator who pays more than lip-service to his or her title.

<sup>62</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 290 (1988) (Brennan, J., dissenting), quoting *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 972 (5<sup>th</sup> Cir. 1972).

<sup>63</sup> In fact, studies have found that the brains of young people are different. Today's students are digital natives, profoundly changed by the impact of technology and the new media since birth. Although it is still unclear exactly how these changes are reflected in the human brain, clearly the way that young people are communicating and using their brains is different than previous generations. See, Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON, 1 (Vol. 5, October 2001), <http://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf> ("Today's

It is widely recognized that “the use of social media for social justice has evolved as one of the primary tools individuals and organizations leverage as a means to collectively affect social change.”<sup>65</sup> Among the most profound impacts of the Internet Revolution is that the new speech tools of social media are empowering student and community voices everywhere, including citizens at the local level, to participate in free speech, assembly, and increasingly efficient and effective petitioning of government for a redress of grievances. This movement is organic and adaptive, with students and other protesters using social media tools to find new ways around increasingly menacing government barriers.<sup>66</sup>

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students think and process information fundamentally differently from their predecessors. These differences go far further and deeper than most educators suspect or realize. ‘Different kinds of experiences lead to different brain structures’ says Dr. Bruce D. Perry of Baylor College of Medicine . . . it is very likely that our students’ brains have physically changed – and are different from ours – as a result of how they grew up”); Sherry Turkle, *The Flight From Conversation*, N.Y. TIMES (April 21, 2012) <http://www.nytimes.com/2012/04/22/opinion/sunday/the-flight-from-conversation.html?pagewanted=all> (“the little devices most of us carry around are so powerful that they change not only what we do, but also who we are”); Steven Pinker, *Mind Over Mass Media*, N.Y. TIMES (June 10, 2010), [http://www.nytimes.com/2010/06/11/opinion/11Pinker.html?\\_r=0](http://www.nytimes.com/2010/06/11/opinion/11Pinker.html?_r=0) (“The new media have caught on for a reason. Knowledge is increasing exponentially; human brainpower and waking hours are not. Fortunately, the Internet and information technologies are helping us manage, search and retrieve our collective intellectual output at different scales, from Twitter and previews to e-books and online encyclopedias. Far from making us stupid, these technologies are the only things that will keep us smart”). Beyond the purely physical changes, some believe the differences exhibited by young people may signal a larger shift in how humans live in the world. See, e.g., Stefanie Miller, *The Indigo Child*, SPIRIT LIBRARY (March 10, 2012), available at: <http://spiritlibrary.com/stefanie-miller-a-magical-world/the-indigo-child>. But see Valerie Strauss, *Is technology changing our brains?* WASH. POST (July 5, 2010) (“The cognitive system is flexible and adaptive, sure, but it’s not that adaptive . . . the answer to ‘Is technology changing our brains?’ is a simple ‘no’ or at least, not in any substantial way”).

<sup>64</sup> While this article was going to press, the Internet exploded with “The Dress” (or “Dressgate” as some called it), a photo of a blue and black (or white and gold) dress that became popular on the evening of February 26, 2015, and quickly went viral, logging more than 10 million Tweets during the first week and spreading over new and traditional media. See *The Dress (viral phenomenon)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_dress\\_\(viral\\_phenomenon\)](http://en.wikipedia.org/wiki/The_dress_(viral_phenomenon)) (last updated June 8, 2015). While a weird discussion over dress colors might not change the world, the episode was just the latest to clearly demonstrate the staggering potential of the Internet to focus attention. These lessons are not being lost.

<sup>65</sup> Stacy A. Smith, *If Dr. Martin Luther King, Jr. Had a Twitter Account: A Look at Collective Action, Social Media, and Social Change*, 12 SEATTLE J. FOR SOC. JUST. 165, 167 (2013).

<sup>66</sup> Recently, for example, protestors in Washington, DC, employing tactics used by

Internet-based electronic media allows anyone to be a virtual witness to events. The credibility and impact of an eyewitness-recorded video is hard to deny.<sup>67</sup> YouTube videos, for example, are being used to move mass audiences to push for justice, as with the recent protests in the United States over police brutality,<sup>68</sup> or the viral video viewed over 30 million times in 48 hours calling for the arrest of Joseph Kony the leader of the “Lord’s Resistance Army” (LRA) responsible for the forced recruitment of child soldiers in Uganda.<sup>69</sup>

These tools are powerful and unprecedented. In the hands of skilled users with a resonate message they can change the world. Indeed, some see the social media “as one of the drivers of a developing global civil society: a project of international community beyond the nation state”<sup>70</sup> creating an international, if unofficial, standard of justice that may supersede what has been tolerated locally.

The new speech tools are not, however, limited to dramatic international issues of social justice. There is, for example, a growing movement rejecting corporate produced mass testing of students, with objections ranging from educational concerns to charges of corporate profiteering.<sup>71</sup> Standardized testing was, in fact, the top complaint we

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student protestors overseas, took to Twitter to provide the locations and subway train stops for protestors to exit and assemble at the last minute to prevent the advance erection of police barriers impeding protests. *See also*, Michael J. Fitzpatrick, *The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections*, 43 SETON HALL L. REV. 799, 799 (2013) (“Social networks enable flash mobbers to instantaneously communicate with one another, thereby empowering participants to immediately change venue, or, in some instances, evade authorities”).

<sup>67</sup> *See*, Daniel Joyce, *Media Witnesses: Human Rights in an Age of Digital Media*, 8 INTERCULTURAL HUM. RTS. L. REV. 231, 238 (2013) (describing the use of social media to act as a virtual witness to human rights events and the role of evidentiary, moral, and remedial witnessing with social media).

<sup>68</sup> *Week In Review: Police Body Cameras, Ride Sharing, Gambling*, 90.9 WBUR (December 5, 2014) <http://radioboston.wbur.org/2014/12/05/police-ride-gambling> (“Jaidyn Walker, 3, of Atlanta, takes part in a die-in, in White Plains, N.Y., on Friday, Dec. 5, 2014. About 65 demonstrators laid down as if dead on a street corner to protest the chokehold death of Eric Garner at the hands of New York City police”).

<sup>69</sup> *Id.*

<sup>70</sup> Daniel Joyce, *Media Witnesses: Human Rights in an Age of Digital Media*, 8 INTERCULTURAL HUM. RTS. L. REV. 231, 273 (2013).

<sup>71</sup> *See*, Diane Ravitch, *Standardized Testing Undermines Teaching*, NATIONAL PUBLIC RADIO (April 28, 2011), <http://www.npr.org/2011/04/28/135142895/ravitch-standardized-testing-undermines-teaching>. *See also*, Diane Ravitch, *What Matters More Than Test Scores*, HUFFINGTON POST (Oct. 10, 2014), [http://www.huffingtonpost.com/diane-ravitch/american-education-testing\\_b\\_5991988.html](http://www.huffingtonpost.com/diane-ravitch/american-education-testing_b_5991988.html).

heard during the Tinker Tour, from students and teachers at almost every stop. In Colorado over 5,000 students refused to take standardized tests they did not believe served the best interests of students or teachers, and they used social media to communicate their message.<sup>72</sup> In Rhode Island, student “zombies,” tracked by social media, showed up at the state capital to protest standardized testing.<sup>73</sup> A non-profit organization created a Facebook page titled “Parents & Kids Against Standardized Testing” to coordinate national efforts to oppose testing policies.<sup>74</sup> A national revolt may be emerging against standardized testing with students, parents, and educators using social media as a primary forum for communication and assembly.<sup>75</sup>

Of course, the new speech tools, by themselves, are no panacea. Social media activism, or “slacktivism” as it has been called by some, has been criticized as a diversion from real social change. Malcolm Gladwell is a prominent skeptic of the importance of social media in progressive social and political change. He argues that real social change is brought about by high-risk meaningful activism, pointing to a number of famous examples: The 1960s sit-ins by black college students in Greensboro, North Carolina; the year-long Montgomery bus boycott organized by Martin Luther King, Jr. in 1955 and 1956; and Australia’s indigenous “Freedom Ride” and the “Green Bans” in the 1960s and 1970s. He argues that “liking” something on Facebook, or re-tweeting a story, requires little effort, yet those actions might lull the protagonists into thinking they are doing something meaningful.<sup>76</sup>

Advocates of the use of social media acknowledge that information with no action is of limited value in bringing about real change, but assert that information is the first essential step toward action, and that Internet

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<sup>72</sup> Jenny Brundin, *Thousands of students protest Colorado standardized tests*, COLORADO PUBLIC RADIO (November 13, 2014), <http://www.cpr.org/news/story/thousands-students-protest-colorado-standardized-tests#sthash.9fmt71hv.dpuf> See also, *CMAS Protest*, YOUTUBE (Nov. 8, 2014), <https://www.youtube.com/watch?v=38zAfVOu1tw> (student produced Youtube video protesting state mandated testing without student input).

<sup>73</sup> See, *Providence Students Protesting for Graduation Eligibility*, YOUTUBE (February 13, 2013), <https://www.youtube.com/watch?v=rHfI8hE7sJY#t=14>.

<sup>74</sup> See, *Parents & Kids Against Standardized Testing*, FACEBOOK, <https://www.facebook.com/pages/Parents-Kids-Against-Standardized-Testing/117479641627357> (last visited May 7, 2015).

<sup>75</sup> See, e.g., Gina Jordan, *Anti-Testing Groups Help Students Opt Out Of Florida Standardized Assessments*, STATE IMPACT (Dec. 1, 2014), <http://stateimpact.npr.org/florida/2014/12/01/anti-testing-groups-help-students-opt-out-of-florida-standardized-assessments/>.

<sup>76</sup> Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 150 (2012).

based social media is the strongest medium yet devised for rapid or instant communication with vast numbers of citizen activists.<sup>77</sup>

Both sides make a valid point: The new speech tools are just that—tools. And like any tool, they are only as helpful to the task as the person using them.

### **The Role of Educators**

Using the new communication “super-tools” requires super-users, empowered and trained to use them effectively and responsibly. Unfortunately, many educators have responded by either burying their heads in denial of changing digital media realities or coming out swinging in a futile attempt to stop them. Rather than embracing the potential of digital media and fostering an environment that encourages its constructive use, school officials’ reactions too often are driven by ignorance, misunderstanding, and fear. Speakers are disciplined, devices are banned and confiscated, and supportive teachers are silenced or fired.

It is time to try something different: Instead of educators fearing and censoring young people and their new speech tools, it is time to look to our education system for leadership in helping young people use these new tools constructively and effectively. Young people grew up online. While school administrators may not understand or like it, the Internet is where young people now live much of their lives, and we do them a disservice by trying to change or deny their reality.

The gap between the world of education and the world students actually live in was demonstrated to us from the beginning of the Tinker Tour. In March 2013, we did a “test run” of the Tour at the Washington Journalism Education Association’s state conference. The keynote speaker at the event was Seattle-based Shauna Causey, a self-described “social media fanatic” and a pioneer in using the new speech tools to create and support social change. She spoke to a packed gymnasium of high school student journalists and began her speech by trying to get a feel for her audience. She said she assumed all of them were, of course, using Twitter to promote their news stories and other content, a standard industry practice, but wanted to talk with them about some other, lesser-known social media strategies.

The audience reaction made it clear she had assumed wrongly. Clearly surprised, Causey asked for a show of hands. “How many of you are regularly Tweeting out your stories?” she asked. In the audience of

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<sup>77</sup> *Id.*, at 152.

several hundred teenage journalists, maybe a dozen students raised their hands, most of them from one school. She then asked about other social media tools and saw the same dozen hands or less.

It became a standard response during our tour when I asked the same question. Tight restrictions—and even outright bans—on social media use in schools were commonplace. Access to the Internet, even while researching news stories, was often haphazardly controlled. Many student newspapers were still published in paper-only format. Clearly, for students who live freely online the minute they leave school grounds, there was a stark—and often silly—enforced disconnect between students' lives and their educational experiences in schools.

If educators do not understand new media, and how to teach best practices, it is time to ask for help instead of defensively banning what they do not understand and hoping it disappears. It is far better, and certainly far more American, to teach young speakers how to respectfully and effectively use the tools they will spend the rest of their lives with. That's what a good education should do: Prepare students for *their* future, and get them ready to live and thrive in *their* world.

During the Tinker Tour, we talked about reversing roles to stage Social Media 101 workshops where the students could talk to their teachers and administrators about the basics of using social media. To that, you could throw in a bit of discussion about media literacy and discernment; ethics and the fundamentals of civil discourse; and some basic media law to keep everyone out of trouble, and you would have the basis for real, and useful, teaching. After such discussion, students and teachers could work together to come up with reasonable usage rules, which we learned most students actually wanted. Just like their teachers, they told us they did not want their classes disturbed by electronic beeps and classmates carrying on outside conversations.

After the Tinker Tour ended, the Hugh M. Hefner First Amendment Foundation honored Mary Beth and I with its 2014 First Amendment Award in Education. During my acceptance speech, I proposed a follow-up to the Tinker Tour—a PG-13 version—where we would not so much talk about free speech, but rather invite speakers to actually speak, to use their rights to communicate authentically, from their heart, about some of the big issues of the day, *e.g.*, government and politics; the environment; drug policy; sex; war and peace; etc. In doing so, we would help remind a shell-shocked, “Hazelwooded” generation of their power, of the inalienable right to say what they need to say.

An essential component of the campus tour would be a series of traveling workshops for students and teachers hosted by some of the

leading social media “gurus” (SMGs) of the day. That is, individuals like Shauna Causey who know and understand—and are currently using—new speech tools to effect real, profound, lasting social change. “Be, and Tweet, the Change You Wish to See” would be the sort of message we would convey. Since some of the most compelling work in social media right now is taking place outside America, I imagine many of the SMGs would come from across the world; they would put on social media workshops/demos at each campus, telling their stories and teaching/showing people their “tricks.” They would provide practical, hands-on help to overcome obstacles (and fear) so we can all move from thinking about free speech to actually speaking--and doing.

### Conclusion

Mary Beth was, and to a degree remains, a reluctant hero. Unlike the longhaired, scruffy, sometimes violent, stereotype of the antiwar protestors of the late 60’s and 70’s, Mary Beth was a cute, quiet Midwestern girl. Her antiwar stance might have been the same as those activists screaming at police on America’s college campuses and streets, but Mary Beth was not scary and her mild-mannered speech was fully compliant with The Golden Rule. Mary Beth Tinker was simply right: Everyone, including children, has a fundamental human right to free speech and the free expression of their beliefs.

In 2012, Haymarket Books published *101 Changemakers: Rebels and Radicals Who Changed U.S. History*.<sup>78</sup> Mary Beth is # 91. But as I would often say when introducing her, you will never meet a kinder, more polite rebel and radical. In her “off time” Mary Beth speaks up for the issues she cares about, including support for public education and youth empowerment. In her 60’s now, she is exactly the sort of active, engaged citizen we claim that we want and need. And that seed was planted and nurtured when she was a child.

We need to do the same today. Instead of cutting off our young rebels and radicals who have something different to say, it is high time we encouraged and supported them. We all desperately need to hear something different. Inspiration can come from any number of sources. A book can be inspiring. A trusted teacher or speaker can move us to think about the world in a different way.<sup>79</sup> Even a co-worker sharing his photos

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<sup>78</sup> CHANGEMAKERS: REBELS AND RADICALS WHO CHANGED U.S. HISTORY 101 (Michele Bolinger & Dao X Tran, eds., 2012).

<sup>79</sup> Thank you, Mr. Mergler.

from a recent vacation can provide a sudden spark, an invitation to explore or expand the way we meet the world.

Today especially, the number of potential sources of inspiration and the ease with which such connections are made and sustained is greater than ever. Instead of fruitlessly trying to build ever-bigger walls, it's time to take advantage of those connections. The problems are too big, and the wholesale changes required to fix those problems too great, to keep playing by the same old rules, and to just keep deferring to school officials or courts to tell students and others what they can or cannot say.

Part of Mary Beth's Tinker Tour stump speech included a discussion about how Einstein famously said that imagination was more important than knowledge, and how imagining a better world is the first step in creating a better world. Who, she would ask, is better at imagination than young people?

We all need to imagine a better world, to Believe-Make. And we need to remember the important role that young people have historically played, and should continue to play, as we do. Young people are, as a girl once told Mary Beth, "fresher," not tied to the status quo and doing things the way they've always been done. They see the world through new eyes and hear with new ears. And they can have important things to tell us, a truth we would do well to embrace.

**Forthcoming Issue of the *Education Law & Policy Review*****The 50<sup>th</sup> Anniversary of the Elementary and Secondary Education Act: Visions for the Future****Elizabeth DeBray, Ed. D.****Anne Elizabeth Blankenship, J.D., Ph. D.****Co-Editors-in-Chief*****Education Law & Policy Review*****Special Issue on the ESEA**

We are proud to announce a special double-issue of the *Education Law and Policy Review* (ELPR) dedicated to the 50<sup>th</sup> anniversary of the Elementary and Secondary Education Act (ESEA). The federal government became a major player in public education with the passage of the ESEA in 1965. At the time of its passage, the ESEA focused on equalizing educational opportunity by tying funding to increased protections for historically underserved student populations. Through a series of reauthorizations, the focus of the ESEA shifted from equality of educational opportunity to adequate educational outcomes. With the 50<sup>th</sup> anniversary of this landmark legislation, there is an opportunity to reconsider the direction of public education and what is possible for the future.

There has already been a rich discourse on the history of the ESEA as well as critique of the No Child Left Behind (NCLB) Act. This special double-length issue of the ELPR will focus on the future: What changes to the ESEA should Congress consider in future reauthorization? Are there better ways to structure the law's current programs? How might the conditions of aid in Title I be changed to better support equality of educational opportunity? Professors DeBray and Blankenship, Co-Editors-in-Chief for this special issue of the ELPR, have commissioned articles from the nation's leading experts on the ESEA. The authors present ideas for new policy directions and proposals for meaningful legislative change. Look for this special double-issue on the 50<sup>th</sup> anniversary of the ESEA to be published in the fall of 2015.

## **Invitation to Support the Tinker Tour**

*Mary Beth, who is a registered nurse, travels the country sharing her story and the stories of young people everywhere. In the 2013-2014 school year she was joined by First Amendment attorney Mike Hiestand, traveling to over 100 schools, colleges, universities, law schools, juvenile centers, and conferences to share the good news that the First Amendment is for kids, too. In 2015, Mary Beth is traveling again, speaking about her favorite subject, the rights of youth. So, here's to kids who keep democracy alive . . . see you along the way!*

### ***Join the Tinker Tour Team!***

Please go to [www.tinkertourusa.org](http://www.tinkertourusa.org) to join the Tinker Tour Team and support the empowerment of youth voices through First Amendment activism. You can also request a Tinker Tour visit to your school or event.

### ***Support the Tinker Tour!***

We are grateful to be a special project of the nonprofit Student Press Law Center, which helps us manage funds under its 501(c)(3) umbrella. Donations to the Tinker Tour are tax-deductible as allowed by law. And, donations are what keep this First Amendment tour rolling! Please send donations to:

Tinker Tour c/o Student Press Law Center  
1608 Rhode Island Ave. NW, Suite 211  
Washington, D.C. 20036

Or, you can go to the Student Press Law Center's website at:

<http://www.splc.org/page/donate>

At the end of the form, click "yes" to say that you would like to dedicate this gift, and then fill in "Tinker Tour." Your donation will help us make more visits to schools and provide souvenir armbands, "Color My Rights" coloring books, and First Amendment shirts for students.

Thank you!

Mary Beth and Mike

## Invitation to Support the Student Press Law Center



The Student Press Law Center is an advocate for student First Amendment rights, for freedom of online speech, and for open government on campus. The SPLC provides information, training and legal assistance at no charge to student journalists and the educators who work with them.

Since 1974, the Student Press Law Center has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to cover important issues free from censorship. The SPLC provides free legal advice and information as well as low-cost educational materials for student journalists on a wide variety of topics. In addition, the SPLC operates a formal Attorney Referral Network of approximately 150 lawyers across the country who are available to provide free legal representation to local students when necessary. Approximately 2,500 student journalists, teachers and others contact the SPLC each year from all 50 states and the District of Columbia.

The SPLC is a nonprofit, non-partisan 501(c)(3) corporation. The SPLC is headquartered in Washington, D.C. The organization is run by an executive director and a corporate board of directors composed primarily of journalism educators, journalists and attorneys. The SPLC is supported by contributions from student journalists and other interested individuals as well as donations from foundations and corporations. To make a secure online contribution using your credit card, use our online form at:

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The *Education Law Association*, established in 1954, is a national, nonprofit association offering unbiased information about current legal issues affecting education, and the rights of those involved in education, in public and private K-12 schools, universities, and colleges. Together, our professional community--including attorneys, administrators, and professors--anticipates trends in education law and supports scholarly research through high-value print and electronic publications, conferences, seminars, and forums, including a partnership with the *Education Law & Policy Review* (ELPR) and exclusive first access for ELA members to the ELPR. Member benefits also include:

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*Education Law Consortium (ELC) Including Publication of  
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Education will always remain the key to the American Dream of social and economic progress. For over two centuries enlightened Americans have understood that quality education is essential to the nation's freedom, security, prosperity, and quality of life. Further, they have recognized that it is an essential duty of each generation to provide an education for succeeding generations that will prepare them for the challenges of life, for active citizenship and self-governance in a free and just democracy, and for protecting and advancing the American Dream for all persons.

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