

Is There a First Amendment in America's  
Public Schools?

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## Introduction

The United States Supreme Court under Chief Justice Earl Warren is widely considered to have been the most protective of civil rights that the nation has ever seen.<sup>1</sup> At the very end of the Warren era, the Court placed a capstone on its legacy by extending to public secondary school students free speech rights, previously non-existent for public school children, that were nearly coextensive with those enjoyed by adults. However, the promise that some saw in this development has, in recent years, proved hollow.

The case of *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), was hailed by free speech advocates as a tremendous victory for students' free speech rights, and continues to be viewed that way today.<sup>2</sup> However, in the thirty years since *Tinker* was decided, the successors to the Warren Court have progressively eroded the free speech rights of public school students.<sup>3</sup> This has been

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<sup>1</sup> See generally *The Warren Court: A Retrospective* (Bernard Schwartz ed., 1996).

<sup>2</sup> See Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U Rich. L. Rev 457, 458 (1998).

<sup>3</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

accomplished mainly by limiting the applicability of the protective *Tinker* standard. While it would be an exaggeration to suggest that the First Amendment has been reduced, in the school context, to a "mere platitude,"<sup>4</sup> it is nonetheless true that public schools students' speech has become susceptible to exactly the kind of suppression that the First Amendment was designed to prohibit, and that the *Tinker* decision had promised to vindicate.

Part I of this paper will trace the Supreme Court's evolution of the right to free speech in public schools from *Tinker* through the present day. Part II will describe the tortured analysis that courts must go through to properly apply the law as it currently stands, focusing on lower court decisions in recent years. Finally, Part III will suggest bringing public school speech doctrine back in line with the original promise of *Tinker*, thereby simplifying the rules under which school administrators and students operate and providing greater protection of student discourse.

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<sup>4</sup> *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

## I. The History of Free Speech Doctrine in Public Schools

Prior to 1969, public school administrators, due to the uniqueness of the public school setting in which the teaching of children, including the teaching of values, was the paramount concern, enjoyed plenary power to control nearly all aspects of student conduct, including speech.<sup>5</sup> *Tinker* changed that. Recognizing that public secondary schools were the place where students should first begin to engage in the type of discourse that forms the most basic foundation of our democracy, the Court extended students' free speech rights to nearly equal those of adults.<sup>6</sup>

The case before the Court was a quintessential political speech case. The Tinker family was active in protesting the war in Vietnam. Siblings John and Mary Beth Tinker, with the support of their parents, decided to show their opposition to the war by wearing black armbands to their schools. Officials in the Des Moines Independent School District became aware of their plan, and quickly drafted a rule prohibiting the wearing of the armbands.

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<sup>5</sup> See David L. Dagley, Ph.D., *Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools*, 123 Ed. Law Rep. 1 (1998).

<sup>6</sup> *Tinker*, 393 U.S. 503.

In a memorandum explaining the reasons for the decision, school officials cited the controversial nature of the message that the youngsters wished to convey, and their desire to keep such controversy out of the schools so that students could focus on learning.<sup>7</sup> The Court found this rationale insufficient to support the suspension of the students. The Court began by coining the oft-quoted phrase that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>8</sup> It then went on to determine that the school had violated the First Amendment by suppressing student speech without a showing by the school that the speech at issue would "materially and substantially interfere with the requirements of appropriate school discipline."<sup>9</sup> Under this test, a school has the burden of showing evidence that such a disturbance is likely, for the Court made clear that "undifferentiated fear or apprehension of disturbance" would not suffice to support a speech restriction.<sup>10</sup>

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<sup>7</sup> Id. at 509 (fn. 3).

<sup>8</sup> Id. at 506.

<sup>9</sup> Id. at 509.

<sup>10</sup> Id. at 508.

Thus, the Court seemed to be applying the core principles of the First Amendment. Since it was merely controversy that the school sought to avoid, the suppression could not stand. The Court thus vindicated the idea of schools as a place where students learn not only facts and concepts, but also how to engage in the intellectual discourse that is essential to the proper functioning of a democracy.<sup>11</sup>

Conspicuously absent from the Court's analysis was any attempt to characterize the school as a particular type of forum. Such characterizations would later become central to much of the Court's free speech jurisprudence, in schools and elsewhere.<sup>12</sup> However, while the Court did not employ terms such as "public forum," which have become staples of the modern First Amendment lexicon, it was clear that certain unique features of the school setting were important to its holding. Thus, although school officials could not suppress the students' speech on the facts that actually came before the Court, they could have done so if they had presented evidence that a "substantial and

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<sup>11</sup> See Doni Gewirtzman "Make Your Own Kind of Music": Queer Student Groups and the First Amendment, 86 Calif. L. Rev. 1131, 1136 (1998).

<sup>12</sup> See, e.g. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

material disruption" of the school environment was likely. This would not have been true in an adult setting. In such a setting, a "content-based" speech restriction like the ban on armbands would only have survived if it were "narrowly tailored" to serve a "compelling government interest."<sup>13</sup>

7 | Thus, even as the Court seemed to be fully vindicating students' free speech rights it created, though perhaps unwittingly and in dicta, the opening through which opponents of students' rights would drive the wedge of government regulation in the coming decades. As noted, the *Tinker* opinion applied the First Amendment "in light of the special characteristics of the school environment."<sup>14</sup> This language would become important in later cases.

The school environment is, of course, unique in more than one way. Two unique features of the school environment have played a central role in determining how the First Amendment would apply there. The *Tinker* Court itself was most concerned with schools as an incubator for democracy, where students began to learn about public

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<sup>13</sup> Id. at 45.

<sup>14</sup> *Tinker*, 393 U.S. at 506.

discourse.<sup>15</sup> However, later courts would focus on that fact that students were not adult citizens, and that school officials needed to be given broad powers to control the school environment in order to accomplish their mission of molding young citizens. They would even turn the "incubator of democracy" rationale on its head, reasoning that students needed to be taught not only to engage in discourse, but what not to say when doing so. For example, when the Court purported to apply *Tinker* while upholding a school district's power to discipline a student for the content of a speech given in a school assembly, it bolstered that holding with the observation that the constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings."<sup>16</sup>

More important, the Court's "material and substantial interference" test, in and of itself, represented a significant departure from traditional First Amendment jurisprudence in two ways. First, the test makes no reference to the kind of speech restriction that the school seeks to impose. Thus, while it would seem to be a highly

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<sup>15</sup> Id. at 511.

<sup>16</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

protective test when applied to a content-neutral speech regulation, it appears that the same test applies even to a content-based or viewpoint based restriction, and it has been applied in this way to uphold school speech restrictions that appeared viewpoint based.<sup>17</sup> In contrast, in the adult world a viewpoint-based speech restriction is absolutely unacceptable, even in a non-public forum where government power to regulate speech is at its zenith.<sup>18</sup>

Second, by focusing on whether the speech at issue would adversely affect the mission of the school, the *Tinker* test gave rise to a line of cases that would establish lower standards for types of speech that appear particularly likely to interfere with a school's educational mission. It is to these cases that we now turn.

In 1982, the Court applied the *Tinker* test in *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*<sup>19</sup> to strike down a school district's decision to remove certain books from its library system. Paraphrasing the central *Tinker* holding, the *Pico* dissent stated that a

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<sup>17</sup> See, e.g., *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989).

<sup>18</sup> See Gewirtzman, *supra* note 11, at 1141.

<sup>19</sup> 457 U.S. 853 (1982).

school district may not "prohibit a student from expressing certain views, so long as that expression does not disrupt the educational process."<sup>20</sup> The qualifying phrase that concludes this sentence was central to the *Pico* plurality's holding that the censorship by the Island Trees school board had violated the First Amendment. A crucial fact in that case was that the school board had removed books not from a class reading list but merely from library shelves, where no student would be required to read them. As the court emphasized:

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed unfettered discretion to "transmit community values" through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. *Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values.* But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.<sup>21</sup>

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<sup>20</sup> 457 U.S. at 886 (emphasis added).

<sup>21</sup> *Id.* at 869 (emphases added).

The Court thus indicated that had the books at issue been a part of the curriculum, so that the students had no choice about whether to read them, the outcome might well have been different. Despite the concurrence's observation that the enforcement of intellectual orthodoxy was not within a school's legitimate mission,<sup>22</sup> the *Pico* decision nonetheless left open that possibility that, within the classroom, such actions might withstand constitutional scrutiny.

Lest there be any doubt that the result might have been different on only slightly different facts, the plurality took care to give a nod to the authority of school officials to control the values that would be taught in the schools:

We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."<sup>23</sup>

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<sup>22</sup> Id. at 876 (Blackmun, J., concurring).

<sup>23</sup> Id. at 864.

Apparently, the censorship could not stand only because the clash between the community's values and the offending books was not direct enough.

The country did not have to wait long for a sufficiently direct conflict to come before the Court. Such an occasion arose a mere four years later in *Bethel Sch. Dist. No. 403 v. Fraser*.<sup>24</sup> There, a student had given a speech at a school assembly where he used graphic sexual metaphors in nominating a colleague for a student government position.<sup>25</sup> The assembled students' reaction ranged from hooting to lewd gesturing to bewilderment.<sup>26</sup> The school had determined that the student needed to be punished for intentionally causing such a ruckus, and accordingly suspended him for three days.<sup>27</sup>

The *Bethel* decision, which upheld the school's actions, stands as the most enigmatic in the Court's recent line of cases dealing with the First Amendment rights of public secondary school students. Some have suggested that it marks out a separate category for analysis, applicable when

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<sup>24</sup> 478 U.S. 675 (1986).

<sup>25</sup> *Id.* at 677.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 678.

students engage in speech that is "lewd and indecent."<sup>28</sup> Even the members of the Supreme Court itself disagreed, a mere eighteen months later, as to whether *Bethel* had merely upheld the school's actions because they satisfied the exacting *Tinker* test or had instead created an entirely different, if heretofore somewhat undefined, mode of analysis.<sup>29</sup>

Whether they marked out a new mode of analysis or merely guided the application of the *Tinker* standard, two facts clearly led the *Bethel* court to its ultimate result. First, although the nominating speech that Matthew Fraser gave was certainly, as the Court of Appeals for the Ninth Circuit had observed, political, his use of sexual metaphor in that speech was not.<sup>30</sup> Although the school could not have censored a traditionally political message, the Court found that the school was well within its mission in excising "vulgar and offensive"<sup>31</sup> terms from student discourse in

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<sup>28</sup> See, e.g., *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 529 (9th Cir.1992).; Gewirtzman, *supra* note 11, at 1138 (quoting *Bethel*, 478 U.S. at 685-86).

<sup>29</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), where the majority at page 272, footnote 4, and the dissent at page 282 directly disagreed as to whether *Bethel* had been a straightforward application of *Tinker*.

<sup>30</sup> See *Bethel*, 478 U.S. at 680.

<sup>31</sup> *Id.* at 683.

order to teach the students "essential lessons of civil, mature conduct."<sup>32</sup> Thus, the "incubator of democracy" function of the schools was held, in *Bethel*, to require not only the active practice of rudimentary political discourse but also the excising from that discourse of speech that the schools and the courts deemed unseemly.

Second, it was clear that Matthew Fraser enjoyed less freedom than he otherwise would have had because he gave his speech in an assembly at which student attendance was mandatory. Once again ignoring the traditional public forum analysis, the Court determined that in such a forum the school had more, rather than less authority regulate speech in order to protect the "unsuspecting audience of teenage students"<sup>33</sup> from "a sexually explicit monologue,"<sup>34</sup> and also to "dissociate itself"<sup>35</sup> from the speech.

These two concerns, along with a third, soon motivated the Court to carve out an undeniably separate category of analysis. Eighteen months after *Bethel*, the Court issued

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<sup>32</sup> Id.

<sup>33</sup> Id. at 685.

<sup>34</sup> Id.

<sup>35</sup> Id.

its decision in *Hazelwood Sch. Dist. v. Kuhlmeier*.<sup>36</sup> The issue in *Hazelwood* was whether a school principal had violated the constitution by excising from a school newspaper two articles dealing with, respectively, divorce and teen pregnancy.<sup>37</sup> The Court was careful, even in its initial statement of the issue, to specify that its ruling was specific to censorship of "a high school newspaper produced as part of the school's journalism curriculum."<sup>38</sup>

Seizing upon the fact that the paper had been produced for credit and under the active supervision of a teacher, the Court clearly stated that constitutional standards would differ from *Tinker* when the activity in which the speech occurred was "school-sponsored."<sup>39</sup> The Court gave three separate justifications for this ruling. Two of these concerns were the need to avoid exposing students to material inappropriate for their age and level of maturity<sup>40</sup>

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<sup>36</sup> 484 U.S. 260 (1988).

<sup>37</sup> *Id.* at 262.

<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> *Id.* at 273.

<sup>40</sup> *Id.* at 271.

and the need to dissociate the school from the message that the students put forth.<sup>41</sup>

These correspond to the two categories discussed above in connection with *Bethel*, and do not appear unique to the school setting. Indeed, any time a citizen gives a speech from the steps of a state capitol building, which is undeniably a public forum, there is some danger that people in the audience might mistakenly think that the state has placed its imprimatur on the content of the speech. Likewise, there is always a danger that there might be children in the audience, and that they might hear the speaker, perhaps whipped into a political fervor, say something that their parents would prefer that they not hear. Such are the dangers of the First Amendment. These dangers are no greater in schools than in many other settings.

The third concern of the *Hazelwood* Court, and the only one directly related to the newspaper's status as a curricular activity, was the school's need to assure "that participants learn whatever lessons the activity is designed to teach."<sup>42</sup> This observation fits squarely into the Court's

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<sup>41</sup> Id.

<sup>42</sup> Id.

traditional First Amendment jurisprudence, which has often held that speech could be restricted, even on government property that would normally be a public forum, if allowing speech in that place would be inconsistent with the public function of the property. Thus:

In recent years, the Supreme Court has applied the logic of the limited public forum doctrine to permit the government to restrict speech on public sidewalks outside post offices, public schools, and polling places. In these cases the Court holds that speech on public sidewalks may be prohibited if it is "incompatible" with the government's chosen activity in the forum.<sup>43</sup>

However, the Court allowed the new standard to be applied not only when the speech at issue occurs in a curricular context, but any time that speech is "school-sponsored,"<sup>44</sup> creating the possibility that restrictions will be allowed even where the school's curricular function is not directly threatened. In such a context, under *Hazelwood*, the Constitution merely requires that a speech restriction be "reasonably related to legitimate pedagogical concerns."<sup>45</sup>

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<sup>43</sup> Steven G. Gey, Reopening the Public Forum from Sidewalks to Cyberspace, 58 Ohio St. L.J. 1535, 1537 (1998).

<sup>44</sup> Id. at 273.

<sup>45</sup> Id.

Before creating this new category of speech, the *Hazelwood* Court, for the first time in this line of cases, explicitly engaged in a public forum analysis.<sup>46</sup> However, it was not at all clear why the Court did so. The Court walked, or rather trotted, through a traditional forum inquiry, finding that "school officials did not evince 'either by policy or by practice' any intent to open the pages of the [newspaper] to 'indiscriminate use by its student reporters and editors, or by the student body generally,'"<sup>47</sup> and had therefore not created a public forum. According to the Court, this finding alone was sufficient to bring the case out from under the *Tinker* standard.<sup>48</sup> This holding seems odd, given that the *Tinker* had not relied in any way on the public forum doctrine to support the rule it announced. The "material and substantial disruption" standard did not flow from any alleged intent of school officials to open a forum for discourse. If such an inquiry had been necessary, there can be little doubt that the *Tinker* Court would have found no such intent. Rather, the *Tinker* standard flowed from certain immutable

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<sup>46</sup> Id. at 267-270.

<sup>47</sup> Id. at 270.

<sup>48</sup> Id.

characteristics that all public schools shared. The *Hazelwood* Court could have distinguished the case before it from *Tinker* based solely on the curricular context in which the controversy arose. By engaging in an apparently irrelevant public forum inquiry, the Court at once both damaged its own credibility and signaled to school officials nationwide its willingness to strain to uphold speech restrictions.

## II. Lower Courts' Struggles in the Post-Hazelwood Era

That a unique area of constitutional analysis would give rise to a certain degree of confusion is not surprising. Indeed, it is inevitable that, if for no other reason than factual variations, it will sometimes be difficult to predict trends in the outcome of cases based on a new set of precedents. To expect a new rule to produce absolute predictability would be hopelessly naïve. But to hope for predictability in *which rule will be applied* is not only reasonable but appropriate, if one hopes for rule by law rather than by judicial whim. Recent lower court decisions on student speech in public secondary schools do

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not inspire confidence that *Tinker* and its progeny have created a useable framework.

For example, *Hazelwood's* command that its "reasonableness" standard be applied to all speech that is "school-sponsored" has allowed courts an alarming degree of discretion in defining the boundaries of school sponsorship. Thus, the Ninth Circuit, in a case following close on the heels of *Hazelwood*, found that school officials would censor a student newspaper that was *not* part of the school's curriculum with same impunity that the principal in *Hazelwood* had enjoyed.<sup>49</sup> The same circuit, four years later, refused to apply *Hazelwood* to allow suppression of political messages on buttons worn by students, noting that the buttons obviously did not bear the imprimatur of the school.<sup>50</sup> Yet the Seventh Circuit has recently treated *Hazelwood* as if it has supplanted *Tinker* altogether. According to the ruling in *Muller v. Jefferson Lighthouse Sch.*<sup>51</sup>, in any case where no public forum has been created, "[t]he Court's test now is whether the restrictions are

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<sup>49</sup> Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988).

<sup>50</sup> Chandler v. McMinnville School Dist., 978 F.2d 524 (9th Cir.1992).

<sup>51</sup> 98 F.3d 1530 (7th Cir. 1996).

'reasonably related to legitimate pedagogical concerns,'<sup>52</sup> apparently regardless of any question of school sponsorship.

Confusion is even worse with regard to the proper role of public forum analysis. As noted above, the *Muller* court thought that the public forum question was the only one necessary to determine which test applied.<sup>53</sup> It is unclear, however, what test the court would have applied if it had answered the public forum question in the negative.

Prediction becomes even more hazardous if one happens to land in the district court for the district of Colorado. There, in rulings just two years apart, the court reached diametrically opposed and intellectually puzzling results. In the first case, the court made no inquiry into the public forum question in striking down a school policy regulating the distribution of non-curriculum materials, relying on the fact that *Tinker* had made no such inquiry.<sup>54</sup> In fact, there appeared to be no public forum. Such a finding would, of course, have given school officials broad discretion to regulate. Just two years, later, however, in a factually similar case, the court upheld a prohibition on the

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<sup>52</sup> *Id.* at 1537-38.

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

<sup>54</sup> *Rivera v. East Otero School Dist.*, 721 F.Supp. 1189 (D.Colo.1989).

distribution of a religiously themed student newspaper, on the basis that the school's hallways were a non-public forum.<sup>55</sup> Whether the question was even relevant would be much clearer if it were apparent why the *Hazelwood* Court asked it. Because this is not apparent, courts apparently believe that they can make up their own rules on when to engage in this potentially crucial inquiry.

Likewise, the nearly inscrutable *Bethel* decision has proven to be as enigmatic for courts as for commentators. For example, the Sixth Circuit relied on *Bethel* and *Hazelwood* to strike down student speech in another case involving a speech at a school assembly, *Poling v. Murphy*.<sup>56</sup> There the student, Dean Poling, had not engaged in lewd speech, which many courts and commentators believed was the key to the *Bethel* decision. Instead, this student's sin was to give a student council campaign speech where he directly criticized the school's administration. This prompted the school to declare him ineligible for student council and earned him a suspension.<sup>57</sup> The court did not pretend that the

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<sup>55</sup> *Hemry by Hemry v. School Bd.*, 760 F.Supp. 856 (D.Colo.1991).

<sup>56</sup> 872 F.2d 757 (6th Cir. 1989).

<sup>57</sup> His classmates struck back at the school by electing Poling senior class president.

speech had been lewd, although it was apparently influenced by the fact that, in the court's view, "it was not irrational, to say the least, for the school authorities to take offense."<sup>58</sup> And as long as they were not acting irrationally, the court was satisfied, because, in the court's view, *Hazelwood* governed.<sup>59</sup> The school assembly in *Poling* was, in the court's view, indistinguishable from the school newspaper in *Hazelwood*.<sup>60</sup> The court did not inquire as to why the Supreme Court had not found it necessary to articulate the *Hazelwood* standard in *Bethel*, which preceded *Hazelwood* by a mere eighteen months. If the application of *Hazelwood* had been appropriate in *Poling*, one would think that the land's highest court would have applied it when presented with nearly identical facts in *Bethel*. The Sixth Circuit apparently did not find this anomaly troubling.

The district court for the district of Massachussetts took *Bethel* a step beyond its own terms. Finding that *Bethel* controlled all cases of lewd student speech, the court relied on it to uphold a restriction on the wearing of

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<sup>58</sup> Id. at 763.

<sup>59</sup> Id. at 764.

<sup>60</sup> Id.

lewd t-shirts even though the shirts, unlike Matthew Fraser's speech, had caused no disruption at all.<sup>61</sup>

The key for the district court for the district of Idaho was not lewdness, but falseness. In 1987, it upheld a suspension of a student for wearing a t-shirt depicting school administrators in a drunken stupor.<sup>62</sup> Without making a finding that the t-shirt was lewd, or indeed that it fell into any category of speech that justified the application of a standard different from *Tinker*, the court proceeded to apply *Bethel*. Since *Tinker's* avowed goal, the fostering of a "robust exchange of ideas" could "only occur in a civilized context,"<sup>63</sup> the court apparently believed that *Bethel* would support not only restrictions on lewd speech, but on any speech that school officials deemed not "civilized." In other words, students could say anything they wanted, so long as school officials liked it.

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<sup>61</sup> *Pyle v. School Committee of South Hadley*, 861 F.Supp. 157 (D.Mass.1994).

<sup>62</sup> *Gano v. School Dist. No. 411*, 674 F.Supp. 796 (D.Idaho 1987).

<sup>63</sup> *Id.* at 798.

### III. The Court Should Return to a Single Standard- The Tinker Standard.

The confusion that now surrounds courts' application of the modern free speech rules in public secondary school settings is so great that one commentator has seen fit to create a "checklist" to guide school officials through the labyrinth.<sup>64</sup> Given this situation, and given that the plethora of possible modes of analysis has allowed lower courts to pick and choose standards in a result-oriented manner, as described above, it would be best for the Supreme Court to return to the application of a single standard.

As so often happens in law and in other fields, the Court's first instinct on this topic was its best. The correct standard to clear up the current confusion is the one created in *Tinker*. A faithful application of *Tinker* makes public forum analysis unnecessary. This is because *Tinker* itself already accounts for the unique characteristics of the school environment in much the same way as other "mission-based"<sup>65</sup> modes of analysis. Student speech at school should be tolerated so long as the speech

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<sup>64</sup> Perry A. Zirkel, *Censoring or Censuring Student Speech: A Checklist*, 121 Ed. Law Rep. 477 (1997)

<sup>65</sup> See Gewirtzman, *supra* note 11.

is consistent with the school's effective functioning as a school, just as speech on a sidewalk must be tolerated so long as pedestrians can still walk unobstructed.

The application of this single standard would have allowed the Court to reach the same results in the major cases that have led to the current confusion. As noted above, *Pico* applied *Tinker* to strike down the censoring of books from a school library. The Court's suggestion that the same actions would probably have been upheld in a curricular context<sup>66</sup> need not have led to the developing of a different standard, as they eventually did in *Hazelwood*. When not viewed through the distorting prism of later cases, the import of these comments in the context of the *Tinker* framework is clear and unremarkable. It is difficult to imagine anything that would interfere more "substantially and materially" with a school's educational mission than removing educators' power to choose curricular materials.

Likewise, *Bethel* need not be viewed as a departure from the *Tinker* standard. As noted above, even the Court itself was divided on whether *Bethel* had created something new or merely applied *Tinker*.<sup>67</sup> It was clear, however, that the

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<sup>66</sup> *Pico*, 457 U.S. at 869.

<sup>67</sup> See *Hazelwood*, 484 U.S. at 272-82; see also footnote 29, *supra*.

*Bethel* majority was at least aware of the need for some degree of *Tinker* analysis, as is evidenced by the Court's discussion of the fact that Matthew Fraser's speech was indeed, in the Court's view, disruptive.<sup>68</sup>

It is hardly surprising that lewd speech is more likely to be disruptive in a school setting than most other kinds of speech. This fact does not make a unique mode of judicial analysis necessary, as some courts have concluded is the import of *Bethel*. Rather, a straightforward application of the mission-based *Tinker* test will allow school officials sufficient discretion to regulate such speech to preserve the learning environment. This is because the key under *Tinker* is disruption, and lewd speech is inherently likely to be disruptive.

The *Bethel* school district appears to have recognized this fact when it adopted the regulation under which Matthew Fraser was punished. That regulation prohibited "conduct which materially and substantially interferes with the educational process."<sup>69</sup> Obviously, this rule was specifically designed to provide regulation up to the limit allowed by *Tinker*. The school saw no need to carve out lewd

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<sup>68</sup> See *Bethel*, 478 U.S. at 678.

<sup>69</sup> *Id.*

speech as a separate category. Rather, the rule merely went on to make clear that the prohibited "Tinker speech" "include[ed] the use of obscene, profane language or gestures."<sup>70</sup> The Supreme Court should take the same approach, judging regulations of lewd student speech in that same way that other regulations of student speech are judged, that is, on how likely they are to cause disruption.

Even the *Hazelwood* case, which marked the Court's sharpest departure from *Tinker*, could have reached the same result with a simple, mission-based application of *Tinker*. As the Court noted there, it was important that the journalism class at issue was "part of the school's journalism curriculum."<sup>71</sup> While this fact is undoubtedly important, it did not require that the Court mark out a separate mode of analysis for dealing with such situations. Rather, a curricular setting would nearly always give school officials greater freedom to regulate student speech under *Tinker's* mission-based test. Certainly, it was appropriate for the principal in *Hazelwood* to refuse to publish article's that did not conform to basic journalistic standards. This is true not because the articles themselves

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<sup>70</sup> Id.

<sup>71</sup> *Hazelwood*, 484 U.S. at 262.

would have caused a material and substantial disruption of the educational process, but because the *failure* to hold students to meaningful standards would have been not only a disruption of the school's educational mission, but a complete abdication of that mission. One can hardly imagine an interference with education being more "substantial and material" than a teacher's failure to teach, thereby transforming what should have been a pedagogical exercise into a student free-for-all.

Since the *Tinker* standard provides simplicity and predictability, and is flexible enough to account for all of the different kinds of problems to which student speech gives rise, the Court should return to a uniform application of that standard. In this way, the First Amendment will again have meaning for our developing citizens.