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THE HAZELWOODING OF THE FIRST AMENDMENT: THE DEFERENCE TO AUTHORITY

ERWIN CHEMERINSKY*

In 1969, in *Tinker v. Des Moines Independent Community School District*,¹ the Supreme Court eloquently said that students do not leave their First Amendment rights at the school-house gate. The case involved two students, John and Mary Beth Tinker, who wore black armbands to school to protest the Vietnam War. When they disobeyed orders to take the armbands off they were then suspended. The Supreme Court, in a 7-2 decision, ruled in their favor. Justice Abe Fortas wrote for the Court and said that students could be punished only if their speech was actually disruptive of school activities or impeded the rights of other students.

About thirty years later, I represented a student by the name of James LaVine. He was a sophomore in Blaine, Washington, at the public school there. He was particularly fond of his English teacher. The English teacher encouraged the students to engage in creative writing; she encouraged the students to share that creative writing with her. On Friday, James gave his teacher a poem that he had written. On Sunday night, she read the poem and saw that it had some violent imagery about suicide. She became alarmed and the next day, she took it to the principal. The principal took it to the police chief, who took it to the mental health department. The police chief and the doctor at the mental health department were dismissive, saying it was sophomoric, which seemed appropriate since he was a sophomore in high school. But that did not satisfy the principal. The principal did an emergency expulsion of James LaVine, on the ground that he was a threat to himself and others. LaVine brought a lawsuit against the school

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1. 393 U.S. 503 (1969).

district and against the principal that expelled him. He never engaged in violence, he never threatened violence. The only thing he had ever done was show his high school English teacher this poem.

The United States Court of Appeals for the Ninth Circuit ruled against him.² It was a fairly liberal panel. Judge Ray Fisher, an appointee of President Clinton, said it was a close case. The court said that in a post-Columbine world, schools could not be too careful, and thus this justified the emergency expulsion. If you read the Ninth Circuit's opinion in this case, you'll search in vain for any reference to *Tinker v. Des Moines Independent Community School District*. I filed a certiorari petition to the Supreme Court, which was denied.

What happened between *Tinker* in 1969 and 2001 where the Ninth Circuit ruled against James LaVine? Certainly, part of the story is Columbine that occurred in 1999. And it did cause schools to be more aggressive in disciplining students who they perceived as a threat through violent imagery.

But I want to suggest the key thing that also occurred was the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*.³ I would suggest that case was the key step for the Supreme Court in taking a very different approach to student speech than *Tinker*. I want to suggest that I think that *Hazelwood* marks a shift to an authoritarian approach to speech in schools. And I would argue further that this authoritarian approach to the First Amendment has been carried over to other areas.

So I would like to make three points. First, I argue that *Hazelwood* marks a shift to the rejection of a speech approach and an adoption of an authoritarian approach with regards to student speech. Second, I want to talk about how this has carried over to other areas and explains a large number of First Amendment decisions from the last seven years on the Roberts Court. And third, I want to talk about why this is undesirable and why it would be far better for the Supreme Court to return to the *Tinker* approach.

2. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

3. 484 U.S. 260 (1988).

So in terms of the first point, there are two very different paradigms about speech in schools. One is the speech protective approach that *Tinker* adopted. And I do think it is important to go back to Justice Fortas' language in *Tinker*, and especially compare it to Justice Hugo Black's dissent. Justice Fortas, writing for the Court in *Tinker*, said that there had to be proof that the speech was actually disruptive of school of activities. That was not all. He said that the standard was that it has to be a *material* and *substantial* disruption of school activities to justify punishing student speech. He said that the mere potential or risk of discussion is not enough. He emphasized that there had to be an actual disruption of school activities. He said that the fact that the speech might make school officials uncomfortable is never enough to justify restricting student speech.

Justice Black wrote for the dissent and took a very different approach. He proclaimed a need for the deference to the authority of school officials. He talked about how student speech, such as *Tinker's*, was inconsistent with the functioning of schools.

If you trace what happened after *Tinker*, it is apparent that the Court shifts and adopts Justice Black's view. The speech model embodied by *Tinker* gets replaced with what I call the "authoritarian model." The authoritarian model proclaims, as Justice Black did, that there should be great deference to school officials when they punish student speech. The restrictions on speech should be allowed so long as they meet a rational basis test, they are permissible so long as they are reasonably related to a legitimate government interest.

The year before *Hazelwood*, there was *Bethel School District v. Fraser*.⁴ This involved a student in a school assembly, Matthew Fraser, giving a speech that was filled with sexual innuendo. The speech actually had no profanities. It was only a two-minute speech. Nonetheless, the student got disciplined—suspended from school for a few days, and he was kept from speaking at his graduation as scheduled. The Supreme Court ruled in favor of the school. The Supreme Court, in its rhetoric, seemed to adhere to the *Tinker* standard. The majority opinion talked

4. 478 U.S. 675 (1986).

about how Fraser's speech was disruptive in the school. Students, when they went to the next classes, were still talking about Fraser's speech, and some of the students might have been embarrassed by Fraser's speech.

But it is hard to see how this was consistent with *Tinker*. Fraser gave a two-minute speech. It had no profanities; it had sexual innuendo. This was a case of great deference to school authorities. There was no substantial or material impairment to the function of the school. It did not impede the rights of any other students.

What was implicit in *Bethel* becomes explicit in *Hazelwood School District v. Kuhlmeier*. Of course that is the focus of this Symposium. Justice Byron White in the majority opinion specifically used the words of the rational basis test. He said that the reason why the school would prevail was because its action was reasonably related to a legitimate purpose. That, of course, is the classic phrasing of the rational basis review.

It is interesting that in the years between *Hazelwood School District v. Kuhlmeier* and *Morse v. Frederick*⁵ in 2007, there was not a major Supreme Court decision about student speech. There were certainly many petitions for certiorari, including mine in the *LaVine* case.

And then we have *Morse v. Frederick*. The Olympic torch was going through Juneau, Alaska. The school released some of its students to stand on the sidewalk and watch it go past. A student and some friends unfolded a banner that said "BONG HiTS 4 JESUS."⁶ Here, I agree with what Justice David Souter said at oral argument, I have no idea what that means. The student said it was a nonsense message. The principal thought that it was a message to encourage illegal drug use. She confiscated the banner; she suspended Frederick from school. The Supreme Court, 5-4, in an opinion by Chief Justice John Roberts, ruled in favor of the principal. The Court said that the government has an important interest in discouraging illegal drug use, so it can punish speech that it perceives as encouraging illegal drug use.

5. 551 U.S. 393 (2007).

6. *Id.* at 397.

There is no way to reconcile this with *Tinker*. Frederick's banner did not in anyway cause a disruption of school activities. It did not impede the rights of any other student. This was rational basis review to the extreme. As Justice John Paul Stevens pointed out in his dissenting opinion, it is hard to believe that any student in the school, the smartest or the slowest, would be more likely to use illegal drugs just because of the banner that Frederick held up.

I think the post-*Tinker* cases that I just referred to indicate that across the board, when it comes to school regulation of student speech, it is rational basis review. *Tinker's* approach remains in name only. It has not been overruled, but whatever the nature of school regulation of student speech, the school is likely to win, so long as it meets rational basis review. Across the board, there is this great judicial deference to school authorities. And it is certainly the way that lower courts have perceived it. I could spend the rest of my remaining time giving you examples of lower court decisions, across a whole range of areas of regulations of student speech, that give deference to school authorities.

I will mention a few. I already talked about *LaVine v. Blaine School District*. The student got expelled just for showing the English teacher the poem. I could mention the Seventh Circuit's case, *Baxter v. Vigo County School District*,⁷ where students came to school with a t-shirt that depicted three administrators being inebriated. The students got suspended from school for that, and the Seventh Circuit upheld the punishment. I think that this is a case that is so much like *Tinker*. It was a t-shirt rather than an armband, but there was no material or substantial disruption to the school activities. It did not impede the rights of other students. Why did they get suspended? Because it made the school officials feel uncomfortable. But *Tinker* had specifically said that students cannot be disciplined just because they make school officials feel uncomfortable.

But the case that I think might be one of the extremes of a lower court deferring to school authorities was an Eighth Circuit case from not quite a decade ago, *Doe v. Pulaski County Special*

7. 26 F.3d 728 (7th Cir. 1994).

School District.⁸ This involved a student in Missouri. He was in eighth grade, and his eighth grade girlfriend had broken up with him. So he wrote a short story that described doing violence to the girl. He had the good sense to put it under his bed and show it to no one. A friend came, grabbed it from under the bed, saw it, and ultimately gave it to the girl's parents, who took it to the principal, and the student author got suspended from school. This was for speech that was not publicly uttered; it was not expressed in the school. It was a short story, under his bed. And the Eighth Circuit said that he could be suspended for it.

These cases embody the tremendous judicial deference to the authority of school officials. Since *Tinker*, the Court has shifted to the authoritarian model that Justice Black expressed in his dissent, not the speech-protective model that Justice Fortas took for the majority in *Tinker*.

The second thing that I want to talk about is what I would call how *Hazelwood* has spread across other areas of the First Amendment. What I might say and make into a verb, "the *Hazelwooding* of the First Amendment." I want to argue to you that the great deal of what the Roberts Court has done can be explained by this deference to authoritarian institutions. I will compare two sets of cases, and I will put four cases on each side. Four are where the Roberts Court has been very speech protective, and four are where the Roberts Court has ruled against speech interests. What I am going to argue is that what explains the latter set of cases is great judicial deference to authoritarian institutions, like schools, prisons, military, and so on.

Think of some recent cases of the Roberts Court that have been protective of speech. *United States v. Stevens*⁹ involves a federal law that made it a federal crime for a person to sell, distribute, or even possess depictions of animal cruelty. The Supreme Court, 8-1, declared that law unconstitutional, as violating the First Amendment. Chief Justice Roberts wrote for the Court and only Justice Samuel Alito dissented. Chief Justice Roberts explained that there are narrow categories of unprotected speech,

8. 306 F.3d 616 (8th Cir. 2002).

9. ___ U.S. ___, 130 S. Ct. 1577 (2010).

and that the Court was loath to create new categories of unprotected speech. Violence is not one of the categories of unprotected speech, and thus the federal law, however well intentioned, was unconstitutional.

My second example is *Snyder v. Phelps*.¹⁰ This involved a church out of Topeka, Kansas, the Westboro Baptist Church, that makes it a practice of going to funerals of those who died in military service. Matthew Snyder died in military service in Iraq. The members of the Westboro Baptist Church, led by Fred and Margie Phelps, went to the funeral in Maryland. They asked a local police officer where they could stand, and the officer pointed to an area about 1000 feet away from the funeral. Before the funeral, the protestors chanted and sang. During the funeral they were silent, but held signs with deeply offensive messages—gay, anti-lesbian messages that were quite vile. That night on the news, Matthew's father, Albert Snyder, saw footage where he could read the signs, and was deeply offended. He sued for intentional infliction of emotional distress and invasion of privacy. The jury awarded him \$10 million in damages. The Supreme Court overturned the judgment. Once more, Chief Justice Roberts wrote for the Court. Again, only Justice Alito dissented. And I think what this case stands for is that in general, the government cannot punish speech or hold it liable, just because it is offensive, even deeply offensive. The Supreme Court has said that there is a First Amendment right to burn an American flag as a form of political protest, even though many are offended by it. The Court has said there is a right to burn a cross, unless it is with the intent to threaten, even though, given its vile history, it can cause great emotional distress.

My third example is a case from June 2011, *Brown v. Entertainment Merchants*.¹¹ This case involves a California law that made it a crime to sell or rent violent video games to minors under eighteen without parental consent. The Supreme Court, 7-2, declared this law unconstitutional. Justice Antonin Scalia wrote the opinion for a five-person majority. He talked about the speech rights of children. He talked about video games as being protected

10. ___ U.S. ___, 131 S. Ct. 1207 (2011).

11. ___ U.S. ___, 131 S. Ct. 2729 (2011).

as speech. He used strict scrutiny, and declared the law unconstitutional.

I will give one more example in this set, *United States v. Alvarez*.¹² It involves the federal Stolen Valor Act, a law that makes it a federal crime for a person to falsely claim the receipt of military honors or decorations. The law as written, is very broad. It does not have an intent requirement. If a person made a mistake and said "I won the Purple Heart," but it was actually the Medal of Honor, that would violate the law. The law does not require that the lie be publically uttered. If somebody, say on a date to impress, lied about receiving a Medal of Honor, that would violate the law. Even satire or fiction would violate the law. If you remember the movie, *Forest Gump*, it would violate the statute. The Supreme Court, in a 6-3 decision, declared the law unconstitutional. The government had said that false speech does not add to the marketplace of ideas, so it is inherently without First Amendment protection. But six of the Justices rejected that argument. Four used strict scrutiny, two used intermediate scrutiny, but all of these six declared the law unconstitutional.

Not that long ago, I did a program with Ken Starr, who is now the President of Baylor University. And he pointed to these cases as saying that this is the most free speech Court in American history. And I would say, that I think in some realms, he is right. But not when we talk about other cases that would indicate a Court that is not at all pro free speech.

I have mentioned one of them already—*Morse v. Frederick*—where the student got suspended from school just for holding up a banner with a nonsense slogan. Or what about a case that was mentioned this morning, *Garcetti v. Ceballos*?¹³ *Garcetti v. Ceballos* involved an assistant district attorney from Los Angeles County, Richard Ceballos. He believed that a witness in one of his cases, a deputy sheriff, was lying. He did some investigation, and it affirmed his suspicions. He wrote a memo in the file saying that. His supervisor told him to soften the tone of the memo, and he refused. He gave it to the defense lawyer, believing he was required to do so

12. ___ U.S. ___, 132 S. Ct. 2537 (2012).

13. 547 U.S. 410 (2006).

under *Brady v. Maryland*.¹⁴ He said as a result of doing so, he was removed from his supervisory position and transferred to a less desirable location. He sued on the grounds that this violated his free speech rights. The Supreme Court ruled, 5-4, that the speech of government employees on the job is not protected by the First Amendment. Justice Anthony Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts, Justice Scalia, Justice Clarence Thomas, and Justice Alito. Of course those are the same five Justices who were so speech protective in the context of say *Citizens United v. Federal Election Commission*.¹⁵ Now there were many things that the Supreme Court could have said, but what they did was take the position most antithetical to freedom of expression. The Court held there is no First Amendment protection for the speech of government employees on the job within the scope of their duties. That is hardly a decision from a free speech Court.

Another example from the Roberts Court is *Beard v. Banks*.¹⁶ This involves a Pennsylvania prison regulation that prisoners—at the most top security institutions—have no access to printed materials, not books, not magazines, not even family photographs. The question was whether this violates the First Amendment. The prison's claim was that by taking away all printed materials in these top security institutions, they give the inmates an incentive for good behavior to move to less speech-restrictive environments. But this is a complete deprivation of speech for inmates. The Supreme Court has always said that the government can only take away those rights that need to be removed for the purpose of incarceration. Taking away all books, all magazines—even family photographs—is inconsistent with the First Amendment. The Supreme Court though said that it had to defer to prison officials, and thus upheld the regulation.

One more Roberts era case in this set is *Rumsfeld v. FAIR*.¹⁷ Almost every law school has a policy that it won't allow any

14. 373 U.S. 83 (1963).

15. 558 U.S. 310 (2010).

16. 548 U.S. 521 (2006).

17. 547 U.S. 47 (2006).

employer to use career service facilities if it is an employer that discriminates based on race, gender, religion, sexual orientation, and so on. So almost every law school refused to allow military recruiters to use law school career service facilities during the time where the military refused to allow gays and lesbians to serve. Congress passed the Solomon Amendment that said that if any law school refused to allow military recruiters to use law school career service facilities, that law school would lose all federal funds. The United States Court of Appeals for the Third Circuit declared this unconstitutional.¹⁸ The Third Circuit said that this was compelled speech for the law schools; it was compelled association in violation of the First Amendment. The Supreme Court reversed, and Chief Justice Roberts' majority opinion spoke explicitly of the need for the great deference to Congress when it comes to matters of regulating the military.

Well what do these four cases share in common? All involve great deference to authoritarian institutions. My students always chuckle when I group schools together with prisons, and the military, and now government employment. And yet, that is how the Supreme Court is treating these institutions. All of these are regarded by the Supreme Court as authoritarian institutions. It was about schools in *Morse v. Frederick*, or employment in *Garcetti v. Ceballos*, or prisons in *Beard v. Banks*, or the military in *FAIR v. Rumsfeld*. And the protective free speech Court vanishes. Instead, it is a Court that professes the need for great deference to the authority of the government. The same deference that is expressed in *Hazelwood v. Kuhlmeier*. It is exactly the same rational basis test that is used there is now carried over to these other areas of First Amendment law as well. So yes, the Roberts Court is sometimes a free speech Court. But, there is a major exception when authoritarian institutions, like schools, are involved.

Third and finally, I want to argue that this deference is undesirable. In the area of schools, it would be desirable to turn back to what the Supreme Court said in *Tinker v. Des Moines Independent Community School District*—that student speech

18. *Forum for Academic & Inst'l Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

should be punished only if there is substantial and material actual disruption of school activities, or if the speech impedes the rights of other students. But I think in these other areas of authoritarian institutions as well, the Court should follow the free speech model that it is so adamant about in the cases that I described like *Snyder v. Phelps*, or *Brown v. Entertainment Merchants*, or *United States v. Alvarez*.

I have several reasons for coming to this conclusion. One emphasizes the need for judicial protection for speech in authoritarian institutions. I think it is the nature of authoritarian institutions to not be sensitive to speech interests, and often to be hostile to them. The primary responsibility of principals is to run the school in an efficient manner. The primary responsibility of those who run prisons is to do the same with regard to those institutions. Being sensitive to speech interests is never among the top priorities of those who are running such institutions. In fact, there is a problem in giving people great authority—they will often use it, and use it unfairly. So it is not at all surprising to me that so many of the speech cases involve principals or teachers disciplining speech because it makes them uncomfortable. Sometimes they are disciplining speech just because it is critical of the principal or the teachers. Or maybe just speech that is a message that they do not like.

The need for judicial protection of speech in authoritarian institutions also comes from the fact that it is unlikely that the political process will provide protection for speech in these institutions. It is not likely that Congress or state legislatures will act to expand the free speech rights of prisoners, or those in the military, or for that matter, students in schools. If we go back to the rationale of the *Carolene Products* footnote,¹⁹ that we especially

19. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the

need judicial protections where the political process cannot be trusted because it is a fundamental right, it is here that courts are essential to protect speech in authoritarian institutions.

A second reason why I think the Court is wrong is because of the value of speech in these institutions. I think there is a tremendous benefit to the kind of speech that I described that is being suppressed. *Hazelwood* is focusing on the articles in the newspaper that the principal refused to allow to be published. One of the articles was about three girls in the school who had become pregnant. The article by no means glorified teenage pregnancy. Quite the contrary, they lamented their choices. Pseudonyms were used so as to protect privacy. Another article that was suppressed by the principal involved the teenagers whose parents were divorced, talking about their experiences. Again, steps were taken to use initials and pseudonyms to not invade privacy. At the time the principal suppressed the articles, he said that his reason for doing so was that they were inappropriate for the younger students in the schools. Later the school invented other rationales and came up with this notion of non-public forums and the like, but at the time in *Hazelwood*, the principal suppressed the stories because of this notion that it just was not appropriate for younger students. I am the parent of four children. I cannot think of anything more appropriate for teenagers to see than articles that were meant to lament the consequences of unprotected sexual activity. The idea that a principal can say, "no, I think this is inappropriate for those students," is not only inconsistent with *Tinker*, but inconsistent with what the First Amendment is about. This is exactly what the First Amendment should be about safeguarding. Or take the example of

Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. *Nixon v. Herndon*, supra; *Nixon v. Condon*, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.") (internal citations omitted).

Garcetti v. Ceballos. The result of this decision is that the whistleblower who works for the government, and within the context of the government exposes wrongdoing, has no First Amendment protection. The teacher who exposes wrongdoing on the part of the principal to the school board, and then the teacher gets fired, has no First Amendment protection.

About twelve years ago, I did a study of the Los Angeles police department after the Rampart Scandal came out. I interviewed between seventy-five and one hundred police officers for this, and I learned a new phrase: "Freeway Therapy." Officers told me that if they exposed wrongdoing by other officers to their superiors, they would then be transferred to the precinct furthest away from where they lived. Hence, in Los Angeles, its being called "Freeway Therapy." The officers told me that if they reported misconduct by other officers, they were fearful that no one would be there to protect their backs when it was needed. So isn't this a circumstance where we most need First Amendment protection? I think that *Garcetti v. Ceballos* believes not.

Finally, I think that the *Tinker* standard is right. The authoritarian standard approach should be rejected because suppression of speech inherently sends an undesirable message. Justice Fortas in the *Tinker* case said how can we teach students that free speech is important if we don't protect their speech in the context of schools? And then once we make schools authoritarian institutions for purposes of speech, that will then send a message that will make schools authoritarian institutions for other purposes as well. So then it is not surprising that following *Hazelwood*, the Supreme Court has said that there can be random drug testing of students who participate in extra curricular activities, because it is all part of deferring to the authority of the school. The message that is contained in *Hazelwood* and the other cases is about this great deference to the authority of schools. And I think it is a message that is inherently undesirable.

It is undesirable too, because it is unnecessary. *Tinker* does not create absolute protection for speech rights in schools. *Tinker* creates a standard that says that student speech can be punished only if there is a material and substantial actual disruption of school or it is impeding the rights of other students. We can certainly argue

over specific cases and how it is to be applied. But the idea that there needs to be some degree of deference to school officials does not mean that there has to be the abdication of free speech as with what we saw with *Hazelwood* and the other cases I have discussed with you this afternoon.

I have no doubt that the school officials in *Hazelwood* and in the other cases I have discussed, were acting for the best intentions. Yet, I conclude by reminding you of the words of the late Justice Louis Brandeis, where he said:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.²⁰

He said that people born to freedom will resist the tyranny of despots. He said the insidious threat to liberty will come from well-meaning people with zeal with little understanding of what the Constitution is about. And I think that is reflected in so many of the cases discussed this afternoon.

20. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).