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# Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools

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# Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools

Erwin Chemerinsky\*

*The Supreme Court's recent decision in Morse v. Frederick continues a pattern of judicial unwillingness to protect student speech. A key flaw in the Court's approach is in failing to draw a distinction between government control over the curriculum (and even student speech in curricular activities) and student speech outside the school's curriculum. Deference to school officials is appropriate in the former, but not in the latter. Unfortunately, the Court's approach, as reflected in its last few decisions concerning student speech, has been uncritical deference to schools and far too little protection of student speech.*

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Courts in recent years have provided little protection for student speech, least of all when it is involved in curricular activities.<sup>1</sup> But the distinction between “curricular” and “non-curricular” makes little sense when the speech is a school newspaper, and the censorship has nothing to do with course instruction. Instead, courts should focus on whether the government’s choices about speech are in the curricular

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<sup>1</sup> In other words, a sensible approach can be drawn between the need for deference to school officials when regulating speech in curricular activities, but much less deference when it is student speech outside curricular areas.

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or non-curricular context. Courts should accord schools great deference in deciding their curriculum, but should be very protective of student speech in the non-curricular realm.

My proposed approach, unlike the Court's analysis, gives great weight to the importance of free speech in schools. All of the values of freedom of expression exist in educational institutions. Indeed, protecting freedom of speech advances a core goal of school education: teaching students about the Constitution and their rights. At the very least, there is dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech.

Almost forty years ago, in *Tinker v. Des Moines Independent Community School District*,<sup>2</sup> the Supreme Court articulated a standard for balancing the free speech rights of students with the educational mission of schools. The Court held that the government could punish student speech only if there was a showing that the expression was actually disruptive of school activities.<sup>3</sup> In the four decades since *Tinker*, the Court has abandoned this approach, especially as to curricular activities. The current approach emphasizes great deference to school officials. I believe that it is time to return to the *Tinker* approach, though I think that the Court's recent decision in *Morse v. Frederick*<sup>4</sup> certainly indicates that it is unlikely to do so.<sup>5</sup>

To be clear, in the curricular context, schools can regulate and evaluate student speech when it relates directly to the curriculum and education. For example, teachers can punish students for talking out of turn or disrupting class with speech that is irrelevant to the discussion. Likewise, teachers, of course, can evaluate student work and give grades based on its content and quality. But these are not the issues usually presented in student speech cases and certainly were not the facts of the leading Supreme Court cases dealing with student speech.

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<sup>2</sup> 393 U.S. 503 (1969).

<sup>3</sup> *Id.* at 514.

<sup>4</sup> 127 S. Ct. 2618 (2007).

<sup>5</sup> *Id.* at 2621 (holding that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"). However, in a concurring opinion, Justice Alito (joined by Justice Kennedy) argued that *Morse* reaffirmed and was consistent with *Tinker*. *Id.* at 2636-37 (Alito, J., concurring). But on careful analysis *Morse* is quite different from *Tinker*. In *Tinker*, the Supreme Court said that the government may punish student speech only if it is actually disruptive of school activity. There was no suggestion of such disruption in *Morse*. The Court's decision in *Morse* expressed the need for great deference to school authorities when they punish student speech. *Tinker* emphatically rejected such deference.

Part I of this Article describes the Supreme Court's abandonment of free speech principles in cases involving the regulation of student speech. Part II argues that student speech is fundamentally different from school or government speech. School choices concerning the actual curriculum are government speech and not vulnerable to First Amendment challenges. The flaw is that the Court uses the First Amendment rationale that governs government speech to justify restricting student speech. There is a critical distinction between the government as speaker in setting the curriculum and the government as regulator in punishing student speech. Finally, Part III criticizes the Court's approach and argues for much more robust protection for student speech in public elementary and secondary schools. I urge a return to the *Tinker* standard: non-curricular student speech should be punishable in schools only if it is actually disruptive of school activities.

Ultimately, this Article suggests a framework for analyzing free speech issues in the school context. Decisions concerning the content of curriculum are government speech, and so there needs to be great judicial deference. But school officials should only censor or punish student speech if there is proof that the expression actually disrupts school activities.

#### I. THE ABANDONMENT OF FREE SPEECH PROTECTION IN SCHOOLS

The key Supreme Court case distinguishing between speech in curricular as opposed to non-curricular areas was *Hazelwood School District v. Kuhlmeier*.<sup>6</sup> A journalism class, with approval from the faculty advisor, was going to produce a school newspaper containing stories about students' experience with pregnancy and divorce.<sup>7</sup> While the articles discussed student experiences, none referenced specific student names.<sup>8</sup> The principal decided to publish the newspaper without these articles.<sup>9</sup> The principal believed that the article on pregnancy discussed sexual activity and birth control in a manner inappropriate for some of the younger students at the school.<sup>10</sup> Additionally, the principal was concerned that the anonymous students in the article on pregnancy might be identified from other

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<sup>6</sup> 484 U.S. 260 (1988).

<sup>7</sup> No students' names were included in the article on pregnancy, and one name was mentioned in the article on divorce, although the name had been deleted after the paper had been forwarded to the principal for review. *Id.* at 263.

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

<sup>9</sup> *Id.* at 264.

<sup>10</sup> *Id.* at 263.

aspects of the article.<sup>11</sup> Furthermore, the principal believed that the parents identified in the article about divorce should have had the opportunity to respond to the article's contents.<sup>12</sup> Three former student members of the school newspaper sued, contending that school officials had violated their First Amendment rights.<sup>13</sup>

The Supreme Court upheld the principal's decision and rejected the former students' First Amendment challenge. At the outset, Justice White, writing for the Court, quoted *Tinker*: "Students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"<sup>14</sup> But he then added, quoting *Bethel School District No. 403 v. Fraser*,<sup>15</sup> the "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'"<sup>16</sup> Most significantly, Justice White then quoted the declaration in *Bethel*: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>17</sup>

Justice White concluded the school newspaper was a nonpublic forum and as a result "school officials were entitled to regulate the content[ ] of [the school newspaper] in any reasonable manner."<sup>18</sup> In other words, only rational basis review applied. The Court emphasized the ability of schools to control curricular decisions, such as the content of school newspapers published as part of journalism classes.<sup>19</sup> Justice White wrote:

The question whether the *First Amendment* requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The

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<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.* at 504.

<sup>14</sup> *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>15</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>16</sup> *Hazelwood*, 484 U.S. at 266. (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

<sup>17</sup> *Id.* at 267 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

<sup>18</sup> *Id.* at 270.

<sup>19</sup> *See id.* at 271.

latter question concerns educators' authority over 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>20</sup>

The Court stated, in this context, schools have broad authority to regulate student speech. Justice White wrote:

Educators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.<sup>21</sup>

Justice White concluded that the students' First Amendment claim should be denied because the school's action was reasonable.<sup>22</sup> Justice White emphasized that the judiciary must defer to school officials: "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>23</sup>

The Supreme Court has had only one student speech case since *Hazelwood*. In *Morse v. Frederick*,<sup>24</sup> the connection of the student speech to the curricular decisions of the school was even more attenuated. *Hazelwood* involved a newspaper produced as part of a high school journalism class. In *Morse*, the speech was outside the school, though during school hours. When the Olympic torch came through Juneau, Alaska, a high school released its students from class to watch.<sup>25</sup> As the torchbearer passed by, Joseph Frederick and his friends, students at the high school, unfurled a banner with the inscription, "BONG HiTS 4 JESUS."<sup>26</sup> Deborah Morse, the principal, immediately demanded that the students take down the banner. Frederick, however, refused.<sup>27</sup> Morse, believing that the banner

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<sup>20</sup> *Id.* at 270-71.

<sup>21</sup> *Id.* at 271.

<sup>22</sup> *Id.* at 272.

<sup>23</sup> *Id.* at 273.

<sup>24</sup> 127 S. Ct. 2618 (2007).

<sup>25</sup> *Id.* at 2622.

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

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

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encouraged drug use, confiscated it, and suspended Frederick.<sup>28</sup> The Court held that the First Amendment was not violated when Frederick was subsequently punished for displaying the banner.<sup>29</sup>

In an opinion by Chief Justice John Roberts, the Court said that the principal could reasonably interpret the banner as encouraging illegal drug use and that schools have an important interest in stopping such speech.<sup>30</sup> Chief Justice Roberts stressed that this was an official school activity and that deference to the schools is appropriate in this context.<sup>31</sup> He wrote:

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use.<sup>32</sup>

In other words, *Morse* takes the *Hazelwood* distinction between curricular and non-curricular and finds that deference to school officials should extend to all official school activities.

This is not the first case to draw this distinction. In *Bethel* — which Chief Justice Roberts expressly invokes and relies upon in *Morse* — the Court upheld the punishment of a student for giving a speech nominating another student for a position in student government, which was filled with sexual innuendo, at a school assembly.<sup>33</sup> The school suspended the student for a few days and kept him from speaking at his graduation as scheduled.<sup>34</sup> The Court upheld the punishment and emphasized the need for judicial deference to educational institutions.<sup>35</sup>

Chief Justice Burger, writing for the majority in *Bethel*, emphasized not the need for protecting student speech, but the need for regulating it.<sup>36</sup> He began by stressing the importance of schools in

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<sup>28</sup> *Id.* at 2622-23.

<sup>29</sup> *Id.* at 2622.

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

<sup>31</sup> *Id.* at 2624.

<sup>32</sup> *Id.* at 2629.

<sup>33</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986).

<sup>34</sup> *Id.* at 678.

<sup>35</sup> *Id.* at 683.

<sup>36</sup> *See id.* at 683.

“inculcat[ing]” the “habits and manners of civility,”<sup>37</sup> and then declared: “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>38</sup> He concluded:

A high school assembly or classroom is no place for a sexually explicit monologue . . . . [I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the “fundamental values” of public school education.<sup>39</sup>

Most significantly, Chief Justice Burger’s majority opinion proclaimed the need for judicial deference to the authority and expertise of school officials. He stated: “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”<sup>40</sup> In fact, Chief Justice Burger concluded his majority opinion by quoting with approval Justice Black’s dissenting opinion in *Tinker*: “I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”<sup>41</sup>

Thus, the Supreme Court’s decisions over the last forty years since *Tinker* have been clear: there is great deference to school officials in regulating student speech in official school activities. There is no requirement that the speech actually disrupt school activities or that there be any proof that the speech actually causes any harm. *Tinker* has never been expressly overruled, but it has been tremendously undermined. As Mark Yudof stated: “Although these [later decisions] have not specifically overruled *Tinker* [sic], *Tinker*’s [sic] progeny have greatly altered the holding set forth by the Warren Court.”<sup>42</sup> In fact, some lower courts have even questioned whether *Tinker* survives at all.<sup>43</sup>

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<sup>37</sup> *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 685-86.

<sup>40</sup> *Id.* at 683.

<sup>41</sup> *Id.* at 686 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

<sup>42</sup> Mark Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 *ST. JOHN’S L. REV.* 365, 366 (1995).

<sup>43</sup> *Cf. Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (stating that Supreme Court has “cast some doubt on the extent to which students retain free speech rights in the school setting”).

## II. RESTORING THE FIRST AMENDMENT IN EDUCATIONAL INSTITUTIONS

There is a distinction to be drawn between speech in curricular as opposed to non-curricular matters in schools. The key — which the Supreme Court and often lower courts ignore — is whether it is school speech as opposed to student speech. Schools need broad latitude in what they choose to teach students. Any choice as to the content of the curriculum involves subject matter and even viewpoint discrimination by the school. There is no basis for a First Amendment challenge to these choices by school officials. But the ability of schools to decide what to teach students in classes does not then carry over to allow the school to regulate student speech.

There has not been a Supreme Court case concerning First Amendment challenges to curricular decisions by a school. The closest the Court has come to this issue was in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, which considered the ability of a school library to remove books because they were deemed “objectionable.”<sup>44</sup> In this case, the Court stated that the “First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.”<sup>45</sup> The Court explained that the First Amendment protects a right to receive information, and that the “special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.”<sup>46</sup> The Court held that whether removal of books from school libraries violated the First Amendment depends upon the motivation behind the government’s actions. The Court explained:

If [the government] *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution . . . . On the other hand, . . . an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar.<sup>47</sup>

The Court remanded the case for a determination of this issue.

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<sup>44</sup> 457 U.S. 853, 856 (1982).

<sup>45</sup> *Id.* at 866.

<sup>46</sup> *Id.* at 868.

<sup>47</sup> *Id.* at 871 (footnote omitted).

The Court's decision in *Pico* makes clear that the government has "broad discretion in the management of school affairs," particularly in selecting curriculum.<sup>48</sup> There is no First Amendment basis for objecting to the government's choices in its curriculum because the government expresses a particular viewpoint. Inevitably, curricula will reflect the views of the government. Curriculum is government speech, and there is no First Amendment basis for objecting when the government chooses to speak (unless it violates a specific limitation, such as the Establishment Clause of the First Amendment). The Fifth Circuit best summarized this principle when it declared: "The government undoubtedly has the authority to control its own message when it speaks or advocates a position it believes is in the public interest."<sup>49</sup>

The Supreme Court repeatedly has emphasized that the government may speak and that there is no basis for a First Amendment claim objecting to the government's expressive choices.<sup>50</sup> For example, in *Rust v. Sullivan*, the Court considered whether the government was engaged in impermissible viewpoint discrimination when it prohibited recipients of federal funds from giving abortion-related advice.<sup>51</sup> The Court rejected the First Amendment challenge and declared:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>52</sup>

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court applied this principle directly to the education context and held for the government on the following basis: "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."<sup>53</sup>

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<sup>48</sup> *Id.* at 863-64.

<sup>49</sup> *Chiras v. Miller*, 432 F.3d 606, 612 (5th Cir. 2005).

<sup>50</sup> *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (stating that generic advertising funded by targeted assessment on beef producers was "government speech," not susceptible to First Amendment compelled-subsidy challenge).

<sup>51</sup> 500 U.S. 173, 177 (1991).

<sup>52</sup> *Id.* at 193.

<sup>53</sup> 515 U.S. 819, 833 (1995).

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In other cases as well, the Court has been emphatic that when the government is speaking as to matters of curriculum there is absolutely no basis for a First Amendment challenge. For instance, in *Arkansas Education Television Communication v. Forbes*, the Court upheld the ability of a government-owned television station to limit a public debate to candidates from major parties.<sup>54</sup> The Court explained:

Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of . . . discretion.<sup>55</sup>

The error in the Court's student speech decisions is in failing to draw a distinction between the speech of the government institution and the speech of the students. From this perspective, *Morse* and for that matter *Tinker*, are clearly not government speech. *Hazelwood*, though, is a harder case because it involves a newspaper published by the school, though written by the students. In the government speech cases described in *Forbes*,<sup>56</sup> *Rust*,<sup>57</sup> and *Rosenberger*,<sup>58</sup> the government is not regulating the speech of those outside the government — it is just choosing the message that it wants to adopt. But in the student newspaper context, like *Hazelwood*, it is very much the government regulating the speech of others.

Thus, the First Amendment status of student speech in student newspapers cannot be resolved by the distinction between government and private speech or even by labeling the newspaper a non-public forum (as the Court did in *Hazelwood*). It is fundamentally different from traditional non-public forums in that it is

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<sup>54</sup> 523 U.S. 666, 669 (1998).

<sup>55</sup> *Id.* at 674 (emphasis added).

<sup>56</sup> *Id.* at 669 (concerning speech and programming content of state-owned public television station).

<sup>57</sup> *Rust v. Sullivan*, 500 U.S. 173, 177 (concerning Department of Health and Human Services regulations which limit ability of Title X fund recipients to engage in abortion-related activities).

<sup>58</sup> *Rosenberger*, 515 U.S. at 822-23 (relating to state university's decision to fund printing costs of certain student publications).

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a place created for speech purposes. A newspaper, unlike say a military base<sup>59</sup> or an airport,<sup>60</sup> exists for speech purposes.

The treatment of student newspapers must depend on the basis for the government regulation. If it is a choice related to the curricular mission of student newspapers, there must be great deference to the government. For example, if the journalism teacher chooses not to publish an article because of a quality judgment about it or its writing, judicial deference is necessary. But that, of course, was not what occurred in *Hazelwood*. In that case, the journalism teacher approved the articles. Once the paper was at the printer, the principal ordered that articles be omitted because he thought that high school students should not read about teenage pregnancy or the effects of divorce. This had nothing to do with curricular decisions. Arguably, it is a decision about education, and from that perspective it is quite troubling.

Schools have long claimed that they have an important mission of inculcating in students a knowledge of, and respect for, the principles of the Constitution. For example, in *Ambach v. Norwich*, the Court upheld the ability of schools to exclude non-citizens from holding teaching positions.<sup>61</sup> The Court said that teachers are integral to self-government because they are responsible for inculcating democratic values in youth.<sup>62</sup> The Court explained that “a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.”<sup>63</sup>

From this perspective *Hazelwood*, and also cases like *Bethel* and *Morse*, are troubling because they do not recognize the important role of the First Amendment in the context of schools. When schools censor or punish student speech, it is antithetical to teaching the importance of speech. All of the traditional values of protecting speech, apply just as much in schools as in any other context. This, of course, is not to say that all student speech is protected under all circumstances. But nor is all speech protected under all circumstances outside of the school context. Affording deference to school officials in regulating speech related to curricular decisions is important because it gives schools great latitude to control the education of students. But speech outside of

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<sup>59</sup> See *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that military bases are non-public forums).

<sup>60</sup> See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (holding that airports are non-public forums).

<sup>61</sup> 441 U.S. 68, 80-81 (1979).

<sup>62</sup> *Id.* at 79.

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

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curricular decisions, as in *Tinker*, *Bethel*, *Hazelwood*, and *Morse*, warrants far less deference to school officials.

The response to this is that all decisions by school officials concern the education of students and thus courts should defer to school regulation of student speech. But this argument leaves no role for freedom of speech in schools. It also assumes that just because a principal asserts that something is done for educational reasons, courts must step aside and accept that conclusion. There is a clear difference between the government choosing the curriculum it will teach and the government deciding that it does not like a certain message, such as a banner that the principal interprets as encouraging illegal drug use. The latter raises the traditional First Amendment concern of the government controlling the content of messages by speakers. This poses an inherently different constitutional question than when the government is choosing what it wants to have taught in a particular part of the curriculum.

### III. THE STANDARD FOR REGULATING STUDENT SPEECH

Almost forty years ago, in *Tinker*, the Supreme Court articulated a standard for when schools can punish student speech. *Tinker* is a desirable standard because it preserves the ability of schools to punish speech that disrupts the educational process while protecting student expression that is not disruptive. Unfortunately, the Court has since abandoned *Tinker*, as most recently and strongly evidenced in *Morse*. In *Tinker*, three high school students chose to wear armbands to protest the Vietnam War.<sup>64</sup> The school suspended them for doing so.<sup>65</sup> The Supreme Court, in a 7–2 decision, ruled in favor of the students' free speech rights and against the school's.

Justice Fortas wrote the opinion for the majority and expressed three important themes concerning students' rights that constitute the speech protective model. First, students retain constitutional rights within schools.<sup>66</sup> After his famous declaration that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>67</sup> Fortas states: "This has been the unmistakable holding of this Court for almost 50 [sic] years."<sup>68</sup> After a long string of citations to many prior Supreme Court rulings, Justice

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<sup>64</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 506.

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

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

Fortas quotes Justice Robert Jackson's eloquent opinion from *West Virginia State Board of Education v. Barnette*<sup>69</sup>:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>70</sup>

Later in his majority opinion, Justice Fortas returns to this theme and powerfully proclaims the free speech rights of students. Fortas declares:

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.<sup>71</sup>

Like Justice Jackson in *Barnette*, Justice Fortas stressed that freedom of speech is especially important in schools. He quoted an earlier opinion from Justice Brennan declaring: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the ‘marketplace of ideas.’”<sup>72</sup>

Justice Fortas concluded his opinion by returning to this theme and again forcefully expressed the need to protect student speech:

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<sup>69</sup> 319 U.S. 624 (1943).

<sup>70</sup> *Tinker*, 393 U.S. at 507 (quoting *W. Va. State Bd. of Educ.*, 319 U.S. at 637).

<sup>71</sup> *Id.* at 511.

<sup>72</sup> *Id.* at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

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Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.<sup>73</sup>

The expression of support for student speech in *Tinker* is much deeper than its single, most famous sentence. A core theme is that the First Amendment protects student speech, and safeguarding such expression advances the First Amendment's central purposes. Justice Fortas regards safeguarding speech as a crucial part of educating students about the Constitution, rather than as a practice in tension with the schools' mission.

The second theme expressed throughout the opinion is schools may punish student speech only upon proof that the speech would "substantially interfere with the work of the school or impinge upon the rights of other students."<sup>74</sup> Justice Fortas explained:

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 [is] . . . 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>75</sup>

At the end of the majority opinion, Justice Fortas returned to this theme and stated government regulation of student speech is unconstitutional unless it can be "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."<sup>76</sup> Mere fear of disruption is not enough. The burden is on the school to prove the need for restricting student speech, and the standard is a stringent one — there must be proof that the speech would "materially and substantially" disrupt the school.<sup>77</sup>

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<sup>73</sup> *Id.* at 513.

<sup>74</sup> *Id.* at 509.

<sup>75</sup> *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

<sup>76</sup> *Id.* at 513.

<sup>77</sup> *Id.*

The final theme expressed in *Tinker* is the need for careful judicial review to ensure the school has met this heavy burden. Repeatedly throughout the opinion, Justice Fortas emphasized the lack of evidence to support punishing the speech. Early in the opinion, he wrote: “As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.”<sup>78</sup> Later he wrote: “There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.”<sup>79</sup> He noted only a few of the students in a school system of 18,000 wore the armbands, and “[t]here [was] no indication that the work of the schools or any class was disrupted.”<sup>80</sup>

In a crucial part of the opinion, Justice Fortas stated there must have been more than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>81</sup> He stated the district court made no finding that the speech would interfere with the schools’ activities and “our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>82</sup>

Justice Fortas concluded the majority opinion by observing: “[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”<sup>83</sup> Thus, it is not for a court to accept the claims of school officials about the need to stop the speech. The court must independently review the facts and determine whether there is sufficient evidence of significant disruptive effect to justify punishing expression.

No subsequent Supreme Court decision has followed these principles. Certainly, *Morse*, the most recent free speech case, did not use this approach. There was no evidence of any disruption of school activities as a result of Frederick holding up the banner saying, “BONG HiTS 4 JESUS.” Chief Justice Roberts did not assert that

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<sup>78</sup> *Id.* at 505.

<sup>79</sup> *Id.* at 508.

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

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

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

<sup>83</sup> *Id.* at 514.

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Frederick's banner would have the slightest effect in encouraging drug use. He could not do so. It is questionable whether students understood the banner as encouraging drug use, and even if they did, it is doubtful any would be more likely to use drugs because of it. Justice Stevens expressed this well:

This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. . . . Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.<sup>84</sup>

The Court in *Morse* adopted an approach of great deference to school officials that echoed Justice Black's dissent in *Tinker*, not the approach followed by the seven-Justice majority. Justice Black disputed the constitutional protection for students' speech. In *Tinker*, he wrote: "I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 [sic] years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.'"<sup>85</sup> Later in his dissenting opinion, Justice Black explicitly declared his view that there should be almost complete deference to the schools: "Here the Court should accord [educational institutions] the . . . right to determine for themselves to what extent free expression should be allowed in its schools."<sup>86</sup>

Chief Justice Roberts's majority opinion in *Morse* similarly expresses the need for great deference to school principals.<sup>87</sup> Although he does not go as far as Justice Thomas, who urged the express overruling of *Tinker*,<sup>88</sup> in practical reality there is not much that remains of *Tinker* under the Roberts approach of deference to schools.

#### CONCLUSION

Because *Tinker* has not been expressly overruled, it can be revived as part of the framework for analyzing speech issues in public schools. In

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<sup>84</sup> *Morse v. Frederick*, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting).

<sup>85</sup> *Tinker*, 393 U.S. at 521 (Black, J., dissenting) (quoting majority opinion).

<sup>86</sup> *Id.* at 524 (Black, J., dissenting).

<sup>87</sup> *See Morse*, 127 S. Ct. at 2629.

<sup>88</sup> *See id.* at 2636 (Thomas, J., concurring).

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this essay, I have argued that a distinction can be drawn between curricular decisions, where there needs to be great deference to schools, and regulation of student speech outside the curricular area. The latter should be governed by the *Tinker* standard — student speech should be punishable only if it is actually disruptive of school activities.

Of course, as with any distinction, there will be hard cases in deciding what is curricular as opposed to non-curricular. But focusing on whether the government is the speaker and on the underlying values of the First Amendment often should be helpful in resolving the hard cases. Also, there will need to be determinations of whether student speech is actually disruptive of school activities. But these are the right questions to focus on and will provide far more protection for First Amendment values than the Court's approach in cases like *Bethel*, *Hazelwood*, and *Morse*.