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ARTICLES

"WHATEVER HAPPENED TO MARY BETH TINKER"¹ AND OTHER SAGAS IN THE ACADEMIC "MARKETPLACE OF IDEAS"²

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1. The theme of this paper is taken from a well known American case decided by the Supreme Court in 1969, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). I am very grateful to the Institute of Advanced Legal Studies at the University of London, and its Director, Terrance A. Daintith, for providing me with the incentive, a talk to Fellows of the Institute in March, 1991, that resulted in this paper. I also thank my Dean, John F. O'Brien, and Board of Trustees for giving me the freedom to affiliate with the Institute, and the Universities of Cambridge, Exeter, and Edinburgh during 1991. I am especially grateful to a former research associate of mine, Peter Farber, and to my current associate, Ric Goodwill, for their many contributions to the finished article. Finally, I thank Pam Critchfield of Golden Gate for her technical assistance.

2. The concept that ideas should compete for acceptance in the public "marketplace" did not originate in America or in the U.S. Supreme Court. See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576, n.3. The idea was first expressed in Supreme Court jurisprudence by the late Justice Oliver Wendell Holmes in a dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919). Justice Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630. The concept was first applied to the field of education by a majority of the U.S. Supreme Court in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943): "[The education of] 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." *Id.* at 637. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of . . . compulsory . . . is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641.

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion

Id. at 642.

I. INTRODUCTION

In 1969, with Holmesian flourish, Justice Abe Fortas declared the rights of students and teachers in the academy: "[I]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate,"³ he wrote. That seemed a logical proposition; one that would stand the test of time. But there was a caveat that, by now, has nearly swallowed the rule: these freedoms were gain-safed only as long as their exercise did not "materially and substantially interfere"⁴ with the educational mission or disciplinary processes of the school. Justices Harlan and Black dissented in *Tinker*, suggesting that students attend school to learn, not to teach constitutional values. Today, their dissent seems grimly prophetic.

The case that is the uniform point of reference for this article is *Tinker v. Des Moines Independent Community School District*. It began in late December, 1965, when Mary Beth Tinker, age 13, her brother John 15, and 16-year-old Chris Eckhardt wore black armbands to their school to evidence opposition to the war in Vietnam.⁵ School officials were forewarned of the students' plan, and hastily adopted a policy under which any student wearing a black armband would be suspended from school until the armband was removed. When Mary Beth, John and Chris appeared at school wearing armbands, they were promptly suspended for violating this school policy.

The students' challenge to the policy reached the Supreme Court in late 1968.⁶ In February, 1969, the Court provided the constitutional framework for student exercise of First Amendment rights within a public secondary school.⁷

3. *Tinker*, 393 U.S. at 506.

4. *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

5. *Tinker*, 393 U.S. at 504.

6. The *Tinker* Court did not address the issue of "prior restraint," since the petitioners sought an injunction preventing the school authorities from disciplining those who had worn the armbands. Prior restraint has become more of an issue in post-*Tinker* cases in which school regulations have been challenged on their face. Courts in prior restraint cases have to assess the reasonableness of a school official's estimate of the likelihood of a disruption in the less-exacting light of the *Tinker* "forecast" rule.

7. With Justice Abe Fortas writing for a 7-2 majority, the Court declared that "First Amendment rights, applied in light of the special characteristics of the school environ-

Justice Fortas characterized the wearing of armbands as "akin to 'pure speech' "⁸ and found that "in order for the State

ment, are available to teachers and students." *Tinker*, 393 U.S. at 506.

8. *Id.* at 505. I have never fully grasped the legal significance, if any, of the term or activity of "pure speech" as applied by the U.S. Supreme Court in Constitutional analysis. In the twenty-five or so Supreme Court decisions that use that term, no clear definition is given, although several could be inferred. A common use, and the one used in the first case to incorporate the term, *Cox v. Louisiana*, 379 U.S. 536 (1965), is to distinguish "pure speech" from the communication of ideas by "conduct." "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as these amendments afford to those who communicate ideas by pure speech." *Id.* at 555. Hence, it was my belief that "pure speech" referred to communication that was essentially visual, a sign or symbol, such as the black armband in *Tinker*, which the Court called "akin to pure speech," but also "symbolic speech." In this sense, the "speech" relied very little on verbalization or action, or, if published, consisted of very few words. Thus, its content was in the eyes (and mind) of the beholder. The "speech" was "pure" because it was largely unaffected by intimidation, haranguing, disruptive behavior, and so forth, which often blur the line between Constitutionally-protected expression and unprotected "acts," a distinction often made in the Supreme Court's Constitutional analysis. In the oft-cited *Cox* case, "pure speech" is distinguished from "conduct such as patrolling, marching, and picketing on streets and highways." *Id.* at 555.

The same distinction appeared in *Walker v. City of Birmingham*, 388 U.S. 307 (1967) regarding a parade ordinance, and in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Apparently, the practice of Native American junior high school students wearing their hair in the style of Plains Indians was, like the armband in *Tinker*, "akin to pure speech," although in *New Rider v. Board of Educ.*, 414 U.S. 1097 (1974) it was labeled "symbolic speech." *Id.* at 1099. Nude dancing, however, was alleged to involve "expressive acts as distinct from pure speech or representation" *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring). Souter approved of the analysis employed in *United States v. O'Brien*, 391 U.S. 367 (1968), wherein conduct was contrasted with speech in the protest-burning of a draft card. In *O'Brien* the term "pure speech" was not only not used, but the protagonist's allegation that his act of defiance was "protected 'symbolic speech'" appears to have been rejected by the Court majority. *Id.* at 376. This seems at odds with the definition of "pure speech" as purely visual, which the burning of a draft card, or flag, clearly is. However, the Court was disposed in *O'Brien* to focus on a prohibited act — the destruction of government property — and not on the acts' communicative content. In a later case, *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court stated that, "O'Brien's activity involved 'conduct' rather than pure 'speech.'" *Id.* at 411. If the "visual aid" definition were correct, one would also expect "pure speech" to be mentioned in *Cohen v. California*, 403 U.S. 15 (1971), in which Cohen walked through a court-house corridor wearing a jacket with the words "Fuck the Draft" emblazoned on the back. A verbal message to be sure, but communicated in a chiefly visual way. *See id.* at 27 (Blackmun, J., dissenting). Thus, of the three cases most likely to use "pure speech" in the visual sense (*O'Brien*, *Tinker* and *Cohen*) only *Tinker* uses the term at all.

Other cases lending reinforcement to this view of "pure speech" are: *Linmark Assoc. v. Willingboro* 431 U.S. 85, 92 (1977); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 558 (1980) (which speaks of the "transcendental constitutional value [of] pure speech"). This is as much of a definition as any Supreme Court case provides. Justice Marshall apparently would label as "pure speech" a student address to a compulsory high school assembly. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 690 (1986) (Marshall, J., dissenting).

in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show [or 'forecast'] that . . . engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'⁹

This so-called "*Tinker* test," used to determine when school authorities can constitutionally interfere with student free-speech rights, was derived from two cases decided by the Fifth Circuit Court of Appeals three years earlier: *Burnside v. Byars*¹⁰

However, Supreme Court jurisprudence appears to allow two other definitions of the term "pure speech," neither of which fit my understanding and theory, or the *Tinker* analysis. I do not reject either of them, but the second would vastly expand the way in which that term has normally been used by the Court.

The first alternative definition of "pure speech" is "Speech or Debate in either House [of Congress]." U.S. CONST. art. I, § 6, cl. 1. The context in which this phrase is cited in *Gravel v. United States*, 408 U.S. 606, 625 (1972) (the Pentagon Papers case) suggests that "pure speech" is synonymous with "political speech." *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), also uses the term in the *Gravel* manner. Yet, *Gravel* seems more clearly to reference Congress in debate, as opposed to Senator Proxmire's unofficial "Golden Fleece" award. *Id.* at 126.

Another line of cases seems to define "pure speech" as the type of "political speech" the first amendment was quintessentially meant to protect. Namely, "words . . . directed at [or about] public officials and their conduct in office." *Gentile v. Nevada*, 111 S. Ct. 2720, 2724 (1991). ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct . . ."). In rather clear accord with this view are *Watts v. United States*, 394 U.S. 705 (1969), and *Rogers v. United States*, 422 U.S. 35 (1975), both involving a federal statute prohibiting and punishing verbal threats to the President's life.

Hence, it is not clear whether the *Tinker* majority uses "pure speech" in the sense of "symbolic," or visual, speech (which has fared rather well in Constitutional jurisprudence), or in the sense of "political speech," which is often limited by some sufficiently compelling, competing governmental interest. For all its lofty sound, "pure speech" does not appear to be a significant discriminator in *Tinker* and related cases.

9. *Tinker*, 393 U.S. at 509.

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion unaccompanied by any disorder or disturbance on the part of the petitioners. There is no evidence whatever of petitioners' interference, actual or nascent, with the school's work or collision with the rights of other students to be secure and let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Id. at 508.

10. 363 F.2d 744 (5th Cir. 1966). Students were suspended for wearing "freedom buttons" in violation of a school policy that prohibited "distracting and annoying conduct." The appellate court found no evidence of disruption and held the regulation to be arbitrary and capricious and an infringement of student rights of free expression. Unless speech-related activity by students on school grounds "materially and substantially in-

and *Blackwell v. Issaquena County Board of Education*.¹¹ Accepting *a priori* that the state has a compelling interest in maintaining an orderly educational system, the Fifth Circuit refused to enjoin enforcement of a school regulation, and held in *Blackwell* that students' First Amendment rights can be abridged by state officials if reasonably necessary to protect other legitimate state interests.¹² In *Burnside*, however, where no disruption was shown, the suppression of student expression was found to be "arbitrary and capricious" and therefore unconstitutional.

This foundation having been laid, the *Tinker* court merely applied the *Burnside-Blackwell* test to the facts at hand.

In the last paragraph of his opinion, Justice Fortas rephrased the *Burnside* standard by inserting the word "forecast," thereby extending the reach of *Tinker*.¹³ Once the school rule was challenged, the Court put the burden on the administration to demonstrate a constitutionally-sufficient justification to regulate student behavior. But, in determining whether school officials are justified in "forecasting" disruption, *Tinker* requires only that a court find that their anticipation of potential disorder was not unreasonable.¹⁴ It is thus more difficult for a court to find fault with a school administration when its regulation has

terfere[s] with the requirements of appropriate discipline in the operation of the school" said the court, such speech can not be prohibited. *Id.* at 749.

11. 363 F.2d 749 (5th Cir. 1966). Under facts similar to *Burnside*, the *Blackwell* court found a "complete breakdown in school discipline" resulted from the manner in which students displayed their buttons or attempted to get other students to wear them. *Id.* at 753. See also *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970).

12. *Id.* See also *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Whitney v. California*, 274 U.S. 357 (1927).

13. The *Tinker* dicta requires that the record contain "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . or the lives of others." *Tinker*, 393 U.S. at 514. Hence, school authorities would have to show *actual* disruption or some objective prospect thereof.

14. Fortas stated that:

But in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Id. at 508-509.

acted as a prior restraint,¹⁵ and precluded the anticipated disturbance from occurring.

The *Tinker* court evidently accepted the legal proposition that high schools and their students might be judged by a lower constitutional standard than the public in general with regard to First Amendment rights. In *Tinker*, the state (school) had only to demonstrate a "legitimate" interest in regulation, rather than the "compelling" interest that often must be shown in such circumstances. Not only are students not adults, but a school is not a street corner.

Justice Stewart, in his concurring opinion, reminded the Court that the First Amendment rights of children are not co-extensive with those adults: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."¹⁶

Prior to *Tinker*, and subsequently as well, the Supreme Court has frequently noted that states and school officials enjoy "comprehensive authority" to prescribe and control conduct in schools, at least when their actions are consistent with the Constitution.¹⁷ The student's interest in free expression has to be balanced against the state's interest in providing an effective public school system. State officials' latitude in formulating rules and regulations was limited only by the requirement that they be reasonably related to the maintenance of order within the system. The situations in which school officials' actions took a back seat to students' rights were rare indeed.¹⁸

15. In what is essentially dicta, Fortas addressed the broader question whether a school regulation imposing a prior restraint could be challenged on its face, prior to any violation of that rule. Outside the school environment, however, the Supreme Court has aggressively opposed regulations that act as "prior restraints." See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

16. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968)).

17. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

18. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Meyer*, 262 U.S. at 390.

But it is not for this balancing approach to allocating rights that *Tinker* is cited. Rather, it is for Justice Fortas' sweeping dicta regarding the Constitutional rights of students. "It can hardly be argued," he wrote, "that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate."¹⁹

The [Bill of Rights] protects the citizen against the state itself and all of its creatures — Boards of Education not excepted 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.²⁰

Hence, from *Tinker* onward,

[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect 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.²¹

Is this rather sweeping grant of Constitutional protection to students workable? Personally, I doubt that a school at any level could operate effectively at the threshold of "material and substantial disruption." Indeed, the dissents of Justices Harlan and Black in *Tinker* forcefully assert that position. Black wrote that "[t]he Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools. . . ' is in ultimate effect transferred to the Supreme Court."²² "[P]ublic school students [are not] sent to the schools at public expense to broadcast political or any other views to educate and inform the public. [T]axpayers send children to school . . . to learn, not

19. *Tinker*, 393 U.S. at 506.

20. *Id.* at 507 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

21. *Tinker*, 393 U.S. at 511.

22. *Id.* at 515.

teach.”²³

The twenty-year retreat from the Supreme Court's bold, but ultimately unworkable, dicta in *Tinker* is the subject of this article; the better to establish what we have learned in the process. Who was correct, Fortas or Black? Was the *Tinker* decision a “*magna carta*” for students and teachers, or did it represent something of a “high water mark” in the expansion of constitutional “rights”²⁴ for both groups, from which the U.S. Supreme Court has, by-and-large, retreated ever since? The latter, it seems to me, proved true. I submit that the *Tinker* “test” was unworkable from the start and that lower courts, perceiving it to be so, began a retreat from it, joined eventually by the U.S. Supreme Court, that left the academy profoundly confused and significantly changed.

II. THE CHANGING POLITICAL LANDSCAPE

Over twenty years have passed since the *Tinker* case was decided. In that time, well over 40 major “education law” cases have been decided by the U.S. Supreme Court; exclusive of those dealing with public school integration and public assistance to parochial schools. Cases of the last two types add significantly to that number. In the forty years *prior* to *Tinker*, the Supreme Court decided roughly ten “education law” cases.

The gradual erosion of the sweeping guarantees implied by the *Tinker* decision was neither consistent nor uninterrupted. Generally speaking, however, students and teachers have lost rights over the past twenty years. In the process, the Supreme Court has established a new Constitutional balance and new legal standards.

First, the school environment has come to be viewed as unique and somewhat fragile. Second, teachers and administrative officials have been accorded great discretion in managing

23. *Id.* at 522.

24. It is popular for civil libertarians to talk in terms of legal “rights,” and the right-privilege distinction in U.S. law. See *Cafeteria Workers Union v. McElroy*, 367 U.S. 886 (1961). However, as the rest of the paper will show, the value of a legal “interest” depends very much upon how it is balanced against threats to its enjoyment in the eyes of a court majority.

the academy, particularly as regards academic decisionmaking, and their decisions are accorded the utmost respect by courts of law. Third, public school students are usually "captive audiences" in the school environment, and do not enjoy the full rights of the public in general. Fourth, students may be entitled to some "process" to avoid arbitrary and capricious decisions by state officials, but far less process than is received by others faced with a similar exercise of state power. Fifth, younger children have fewer rights than older students. Sixth, school officials have near-absolute and unreviewable control over activities which are considered part of their curricular or pedagogical responsibilities.

The year 1969, however, seemed like a propitious time for a sweeping affirmation of the Constitutional rights of youth, and the proper functioning of the intellectual marketplace. The public-service legacy of recently-slain President John F. Kennedy had captured the hearts and minds of many Americans; the country's horizons seemed unlimited. The most sweeping civil rights bill in U.S. history had just been passed; education legislation and funding was pyramiding toward the Education Amendments of 1972;²⁵ youth was finding its voice and feeling its power, and adults were growing more aware and respectful of it; and the Vietnam War had yet to deflate American self-confidence. In short, the times were economically, politically and legally expansive. Everything seemed possible, given time, money and political will. Justice Fortas' dicta simply followed suit.

But times did change, and significantly so. The Vietnam War opened political divisions that grew violent. The overblown promises of salvation through education failed to produce the expected return. Recession hit the U.S. economy and it lost hegemony in world markets. We as a people became less enchanted with liberalism and idealism, and became more fiscally and politically conservative. And so did Supreme Court judgments regarding student and teacher rights.

25. Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, especially 42 U.S.C. §§ 1971-74 (1988); Pub. L. 92-318, June 23, 1972.

III. STUDENT AND TEACHER RIGHTS

In cases prior to *Tinker*, the U.S. Supreme Court established that students, teachers and others had Constitutional rights in the academic environment.²⁶ The majority of those early cases, however, dealt with the rights of adults or educational institutions.²⁷ It was not until 1943, in the case of *West Virginia State Board of Education v. Barnette*, that the rights of students were squarely addressed by the Court. In *Barnette*, Justice Jackson delivered a bold opinion, favoring the right to free expression in the educational setting. He held that students may refuse to salute the flag when doing so would conflict with their religious beliefs.²⁸

In 1967, *Keyishian* had protected teachers against forced "loyalty oaths." *Pickering*, in 1968, gave teachers the same speech rights that other citizens enjoyed outside the classroom. These decisions, however, also involved adults, not students. Finally, in 1969, came *Tinker*.

A thicket has grown up around the dicta of Justice Fortas, as different federal circuit courts have sought to apply the seemingly simple standard of his brief, flamboyant opinion. Federal courts have had to adapt the *Tinker* "forecast" rule to a myriad of circumstances that arose in the school environment. As a re-

26. In 1819, the U.S. Supreme Court decided the Dartmouth College Case 17 U.S. (4 Wheaton) 518 (1819), in which Chief Justice John Marshall upheld the rights of private colleges by holding that New Hampshire could not unilaterally modify the charter establishing Dartmouth College. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held that the due process clause of the fourteenth amendment prevented states from forbidding the teaching of foreign languages to young pupils. Statutes of this sort, stated the Court, interfere with the liberty rights of parents, students and teachers. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) upheld the right of parochial elementary and secondary schools to offer alternatives to public schooling as a "free exercise" of religion.

27. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

28. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — *Board 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." *Barnette*, 319 U.S. at 637. By the time *Tinker* was decided, the U.S. Supreme Court had already recognized teacher's rights of expression. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (loyalty oaths); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (a teacher's right of free expression outside of the classroom is equal to other citizens', unless his statements are reckless, knowingly false and an impediment to school operations).

sult, *Tinker*, as interpreted by lower courts, only faintly resembles *Tinker* as written.

The most significant and widely-cited of the post-*Tinker* cases are *Eisner v. Stamford Board of Education*²⁹ and *Shanley v. Northeast Independent School District*.³⁰ Both cases dealt with prior restraint of printed student material.³¹ In *Eisner*, the students challenged a school regulation requiring prior approval of printed or written matter intended for distribution on school grounds. This regulation provided that no material could be distributed "which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others."³² The Second Circuit Court of Appeals agreed that the school policy failed to meet the standards established in *Freedman v. Maryland*,³³ but rejected the petitioner's argument that *Near* precluded any prior review by public officials. Rather, the court held that *Near*, read in the light of *Times Film Corp.* and *Freedman*, allowed for prior restraint under appropriate circumstances. The *Eisner* court found that the Constitution did not forbid a properly-drawn and applied school regulation, requiring submission of all material to school authorities before its distribution on campus.³⁴

29. 440 F.2d 803 (2nd Cir. 1971).

30. 462 F.2d 960 (5th Cir. 1972).

31. Regulations imposing prior restraints typically involve not spoken or symbolic speech, but written or printed material that its proponents distribute to a large audience. The seminal case on this subject is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), in which prior restraints were viewed as presumably unconstitutional. However, in *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), the Court stated for the first time that prior restraints (on publications and films) are not necessarily unconstitutional under all circumstances.

32. *Eisner*, 440 F.2d at 805.

33. 380 U.S. 51 (1965) (holding a motion picture censorship statute unconstitutional). The Court held that prior restraint must take place under procedural safeguards designed to obviate the dangers of government censorship. Those safeguards were: (1) the burden rests with the state to show that the film is unprotected expression; (2) an administrative decision to bar projection of the film is not final, but serves only to preserve the *status quo* for a brief, fixed period; during which (3) the procedure must provide for prompt judicial review before final restraint is imposed. *See id.* at 58-59.

34. *Eisner*, 440 F.2d at 807-11; *cf.* *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."; *Tinker*, 393 U.S. at 507: "[The] Court has repeatedly emphasized the need for affirming the comprehensive authority of

The Second Circuit followed the broad contours of *Tinker*, however, by holding that the school regulation could not be overbroad or vague.³⁵ The regulation was strengthened by the fact that it did not authorize punishment, but only required prior submission, and applied only to students on school property. The policy was defective, however, in that it lacked a procedure and time frame under which the review was to be conducted.³⁶ Although it referenced the three requirements of *Freedman*, the *Eisner* court did not feel that *Freedman* had to be strictly followed in the context of a public secondary school. Hence, while students were gainsafed certain communicative rights by *Tinker*, *Eisner* might cause them to leave some of those rights at the school gate. Is not a student, or anyone, likely to alter his message if he knows it is subject to prior review?

In *Shanley*, three high school seniors were suspended for distributing a newspaper of their own creation near, but outside, school grounds. The Fifth Circuit elected to address the broader Constitutional issue that is implicit in any attempt by school officials to limit student expression, rather than resolve the narrower issue presented: the power of school officials to reach off-campus student speech. No doubt, the court took its impetus from the fact that the school board insisted that its policy was Constitutional on both its face and as applied to the offending students. Decided just three years after *Tinker*, *Shanley* provides a more complete picture of the constitutional parameters of prior restraint of student speech.

Taking note of the uniqueness of the secondary school setting, the *Shanley* court asserted the now-familiar need for a constitutional analysis tailored to that situation: "the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints *more restrictive than* those constraints that can normally limit First Amendment freedoms."³⁷ The *Tinker* court also had recognized that public schools were special environments, but its "material and sub-

the States and of school officials . . . to prescribe and control conduct in the schools."

35. See also *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

36. It did not specify what constituted "distribution," nor to whom and how the material was to be submitted. Neither did the rule prescribe a definite and brief period within which the review process would be completed. *Eisner*, 440 F.2d at 810-11.

37. *Shanley*, 462 F.2d at 969 (emphasis added).

stantial disruption" test would not insulate them much from the hurley-burley of the public "marketplace of ideas." Not so in *Shanley*. The *Shanley* court found nothing unconstitutional *per se* about a requirement that students submit materials to the administration prior to its distribution on school grounds. "As long as the regulation for prior approval does not operate to stifle the content of any student publication in an unconstitutional manner and is not unreasonably complex or onerous, the requirement of prior approval would more closely approximate simply a regulation of speech and not a prior restraint."³⁸

The Seventh Circuit, by contrast, hewed closer to the *Tinker* line:

The . . . editorial imputing a 'sick mind' to the dean reflects a disrespectful and tasteless attitude toward authority. Yet does that imputation . . . without more, justify a 'forecast' of substantial disruption or material interference with the school policies or invade the rights of others? We think not [M]ere expressions of [the students'] feelings with which [school officials] do not wish to contend is not the showing required by the *Tinker* test³⁹

Whenever the school administration can demonstrate, as *Tinker* required, a reasonable cause to believe that the expression would result in material and substantial interference with legitimate school activities or with the rights of others,⁴⁰ the *Shanley* court seemed to approve the schools' general oversight of student communications, so long as there were certain safeguards. These might constitute time, place, or manner regula-

38. *Id.*

39. *Scoville v. Board of Educ.*, 425 F.2d 10, 14 (7th Cir. 1970) (alteration in original) (citations omitted).

40. We do not here delimit the categories of materials for which a high school administration may exercise a reasonable prior restraint of content to only those materials obscene, libelous, or inflammatory, for we realize that specific problems will require individual and specific judgments We do conclude, however, that the school board's burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory.

Shanley, 462 F.2d at 971.

tions that equitably balance the interests of students and the school. This is a far cry, however, from the jealous First Amendment protection afforded in *Tinker* on campus or in the classroom.

In the end, the *Shanley* court found two reasons to strike down the school regulation. First, the rule (as it stood) was overbroad in that it subjected *all* student written expression to a prior restraint, without regard to the time, place, and manner of its distribution. And the regulation contained no standards to guide the reviewing authority when deciding whether or not to approve a given student publication for distribution. Second, the regulation violated students due process rights in that it lacked any procedure by which they were to submit materials, and it failed to establish a brief and definite time for review. Finally, it did not contain any method to appeal the school's decision.

The *Eisner* and *Shanley* courts seemed to recognize that once school boards put appropriate procedures in place, officials could review and prohibit certain types of student expression which, in *their* objective judgment, were likely to disrupt school affairs.

Of course, these cases dealt with student publications on or near school grounds. The *Tinker* principle should have even more vitality away from school, where the institutional mission is less likely to be affected. In *Thomas v. Board of Education, Granville Central School District*,⁴¹ for example, the Second Circuit ruled that a school board is powerless to punish a student for publishing and distributing an underground newspaper away from school premises. "When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression" ⁴²

Moreover, whereas *Tinker* leaves the impression that all non-disruptive (and one assumes non-illegal) speech is protected, later cases not only provided for review of content, but

41. 607 F.2d 1043 (2nd Cir. 1979).

42. *Id.* at 1052.

also *suppression* of legal content. In *F.C.C. v. Pacifica Foundation*,⁴³ the Supreme Court recognized, once again, a distinction between the First Amendment rights of school children and adults, but this time in a more public forum.

In *Pacifica Foundation*, the decisive factor was the 2 p.m. radio broadcast of George Carlin's "seven dirty words" monologue. According to Judge Newman, concurring in *Thomas*, "[i]f the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds [T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."⁴⁴ Admittedly, there were factors in *Pacifica* that were not present in *Thomas*, such as the fact that the airwaves are licensed and heavily regulated, a radio listener is something of a "captive," and such a listener could be immature and surprised by Carlin's broadcast. Even if the *Pacifica* holding is viewed as approving a time, place, and manner regulation, it is more easily applied to children and schools than it is to adults and other public buildings, such as courthouses.

In another revealing case, *Trachtman v. Anker*,⁴⁵ the student editor of a school paper was refused permission to conduct a sex survey because school officials felt that many students would be psychologically harmed if confronted by the questions on the survey form. The district court ruled that the school officials' claims of potential emotional damage were unconvincing. But its judgment was reversed on appeal.

The Second Circuit held that the evenly-balanced trial record established a sufficient basis for the school board's belief that distribution of the questionnaire would result in harm to students throughout the school population. The *Trachtman* court thus extended *Tinker*'s concern for "invasion of the rights of others" to psychological harms as well as physical interferences. And who better to identify these hard-to-prove, prospec-

43. 438 U.S. 726 (1978).

44. *Thomas*, 607 F.2d at 1057. In *Cohen v. California*, 403 U.S. 15 (1971), the Court stated that "certain kinds of otherwise permissible speech [need not be] . . . tolerated in certain places." *Id.* at 19.

45. 563 F.2d 512 (2nd Cir. 1977).

tive harms than professional educators? Certainly not federal judges, it seems.

These two Second Circuit decisions indicate the extent to which *Tinker* can be enlarged, but also eviscerated, by well-meaning judges. When Justice Fortas announced the "material and substantial disruption" test, he surely was not contemplating the effect that indecent language, or a sex questionnaire, might have on another student. After all, were not students to develop their citizenship skills in a robust exchange, protected by the First Amendment right up to the threshold of actual or imminent disruption?

Thus did the minor caveat of *Tinker*, rather than its central theme, accord school officials a powerful weapon; a weapon made more potent by a great deal of judicially-mandated latitude for official discretion.

Tinker was the easy case — there simply *was* no "disorder." It is not always so simple to discern the prospect or extent of potential disruption. If a balancing test is to be used, and that is generally the central issue in Constitutional litigation, will it favor students (*Tinker*), school officials (*Trachtman*), or be totally neutral? Should school authorities be held to a high standard of proof of disruption or potential disruption, or can on-campus expression be entirely prohibited if the reviewer is able to demonstrate some ground to believe that the exercise of expression would be potentially harmful to some students?

As *Tinker*'s promises grew increasingly dilute, only those situations that offered no evidence for a reasonable assessment of potential harm would cause an appellate court to enjoin enforcement of the school board's ban on expression. The posture of courts today seems to be one of substantial deference to school authority, and a disinclination to impose a judicial veto on matters of school discipline where there is any rational basis for the decisions of the school authorities.

What lies in the future? Certainly, the level of disturbance that would support an abridgement of student rights has been judicially lowered since *Tinker* was decided. There is a danger that school officials, with near-unbridled discretion to forbid lan-

guage they regard as inappropriate, may "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."⁴⁶ This is especially true if "indecent" language forms a part of student criticism of school policies or authorities, as is often the case.

If all off-campus publication contains criticism of school officials, especially if indecent, the prospect of its eventual distribution and impact within the institution increases. If the "indecent language" holdings are grafted onto *Tinker*, it seems certain that future courts will find that school officials may prohibit and punish on campus—and perhaps off-campus as well—any speech or publication that is *offensive* or *threatens* disruption, and probably preview it as well.⁴⁷

Of course, the academy has grown into a vastly more complicated (and arguably *dangerous*) place since *Tinker* was decided. School children, already maturing more quickly than might be conducive to "citizenship training," are bombarded with all sorts of "real life" messages, some of them terribly violent, narcissistic and overtly material. The muted, balanced "citizenship training" of schools, if any, can become completely lost

46. *Cohen*, 403 U.S. at 26.

47. It is a general, if over-simplified, principle of Constitutional analysis that the victory of one position or party over another often depends upon the Constitutional "test" used by the court. Thus, an exacting test can create a burden for the defending party so great that it is virtually impossible to meet, or it can be so modest that it is easily met. As a general rule, state interference with a "fundamental right" (such as the first amendment rights of free speech and press) invites "strict scrutiny" from the court, which means the regulation is presumably illegal, and is very difficult for the state to justify, unless the state has a "compelling" reason for its action. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). A mid-level of court scrutiny is reserved for the protection of "important" rights which the state must have a "substantial" justification in order to regulate. This degree of scrutiny is more common to equal protection cases, for example involving sex discrimination, than to first amendment cases. See *Craig v. Boren*, 429 U.S. 190 (1976). The least searching degree of scrutiny in Constitutional analysis is "rational basis." It is the standard generally applied to the states' "health and welfare" regulations. They are presumably valid if the state can show a "reasonable basis" for the regulation. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). "Time, place and manner" regulations, since they neither prohibit nor punish speech and press altogether, but simply regulate it in a content-neutral way, are normally given this lowest degree of scrutiny: Are they reasonable? However, outright bans of speech and press, or regulation based on the content of the message, is generally subjected to "strict scrutiny."

It is instructive, therefore, in terms of the "value" placed on student speech and press, that *Tinker* applied the mid-range Constitutional test of "substantial" basis, and not the higher, "compelling" governmental interest test. See *supra* note 9 and accompanying text.

in the process, particularly if it receives no reinforcement outside the school environment. Conversely, secondary school students may simply be making a plea for adult guidance, testing authority simply to establish limits and boundaries that society sometimes seems to lack and that may no longer be provided at home.

In the twenty years since *Tinker*, other Justices ascended the high bench; Justices Powell, Rehnquist, Stevens and O'Connor, and Chief Justice Burger, appeared less eager than Justices Fortas, Brennan, Douglas and Marshall, and Chief Justice Warren, to recognize and extend civil liberties, and would even support curtailing student rights.⁴⁸ Hence, schools have regained some of their authority, but at the expense of both teachers and students, especially minor students.

Just one example of this is the refusal of the U.S. Supreme Court to extend Constitutional rights to students and teachers at *private* schools under the rubric of "public function" or "co-venturing."

IV. THE DEMISE OF THE "PUBLIC FUNCTION" DOCTRINE

Many legal analysts expected, indeed probably hoped,⁴⁹ that a legal theory known as the "public function" doctrine⁵⁰ might be used to extend Constitutional guarantees to students and

48. This contraction of "rights" was evident elsewhere, in cases involving school integration and job discrimination, for example. See *Brown v. Board of Educ.* (I), 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); cf. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); cf. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

49. See Robert M. O'Neil, *Private Universities and Public Law*, 19 *BUFF. L. REV.* 155 (1969-70); THOMAS C. FISCHER, *The Decline and Fall of an Artificial Distinction, in HIGHER EDUCATION: THE LAW AND INDIVIDUAL RIGHTS AND RESPONSIBILITIES*, pp. 27-39, (D.P. Young ed., 1971).

50. Portions of the U.S. Constitution, and particularly the bill of rights, protect individuals from over-regulation by government, often called "state action." The term "public function" refers to certain activities, the performance of which are "traditionally associated with sovereign governments, and which are operated almost exclusively by government entities." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 457 (4th ed. 1991). The argument is made that whenever a *private* entity undertakes these "public functions," that individual or entity ought to be subject to the same Constitutional limitations as would be imposed upon the state, if it were the "actor." See *id.*

teachers at private schools. After all, this theory was used to extend free speech rights to persons in a privately operated "company town."⁵¹ *Marsh*, the case that gave the "public function" approach its original vitality, challenged the restrictions enforced in a small town in Alabama by its private corporate-owner. Agents of the corporation had posted notices in the town's stores prohibiting vending and solicitation without written permission. A Jehovah's Witness claimed that the rule could not be constitutionally-applied to her distribution of religious literature. The Supreme Court balanced the property rights of the corporate owner against the free press and religion rights of the complainant, and held that the latter occupied a "preferred position."⁵² The Court found that the "'business block' serve[d] as the community shopping center and is freely accessible [to everyone] The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitution[]" ⁵³ Thus, it came to be thought that private actors that conducted "public" functions, like schooling, might be brought under the constraints of the Constitution.

A slightly different legal approach was adopted, but to a similar end, in *Burton v. Wilmington Parking Authority*,⁵⁴ this time to guarantee black citizens equal access to a "private" restaurant. The restaurant leased a portion of a government-financed parking structure through an agreement with the city parking authority. The Supreme Court found that a mutually-beneficial ("symbiotic") relationship existed between the government operators of the garage and the restaurant, such that the discriminatory acts of the restaurant were not immunized from constitutional restraints as being wholly private.⁵⁵ The notion seemed to be that, where government and private actors co-ventured, "state action" might be found.⁵⁶

51. *Marsh v. Alabama*, 326 U.S. 501 (1946).

52. *Id.* at 509.

53. *Id.* at 508.

54. 365 U.S. 715 (1961).

55. *See id.* at 723-26. "[T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." *Id.* at 723-24.

56. State action has been defined as "state participation through any arrangement, management, funds or property." *Cooper v. Aaron* 358 U.S. 1, 4 (1958). This definition is probably too general and sweeping for today's Supreme Court jurisprudence. *See*

Both the *Marsh* and *Burton* decisions contributed to the legal notion that all schools (public and private) were either so infused with public interest or received support from the government that they should be equally subject to Constitutional restraints. Are not schools the best environment in which to inculcate democratic values and respect for the rule of law? Are they not the places we expect to promote unfettered inquiry to produce better citizens?

The theory is an inviting one, and was quite possibly the best way the Court had in 1961 to reach the discriminatory behavior it sought to prevent. Today, the government either uses its Interstate Commerce power⁵⁷ or attaches conditions to the offer or grant of a variety of public support to private schools.⁵⁸ However, due to its enormous potential, the "public function" theory lived on in the hopes of school rights activists until it was conclusively settled in the 1982 U.S. Supreme Court case, *Rendell-Baker v. Kohn*.⁵⁹

In truth, these "state action" or "public function" victories involved a matter of degree from the beginning.⁶⁰ Clearly, the government's right to regulate "private" behavior could only go so far before it interfered with other "rights," also protected by the Constitution. This was so even when a "public function" was performed, or the state had a hand in regulating the private action; perhaps even a *considerable* hand in doing so.⁶¹

It was a group of cases decided in the early 1970's, sometimes referred to as the "shopping center" cases, that most severely eroded the "public function" doctrine and foretold its eventual demise in *Rendell-Baker*.

The first of the shopping center cases, *Amalgamated Food*

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) *infra* note 59 and related text.

57. 42 U.S.C. § 2000(a) (1988).

58. 42 U.S.C. § 2000(d) (1988). See *Grove City College v. Bell*, 465 U.S. 555 (1984).

59. 457 U.S. 830 (1982).

60. It depends upon a "degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

61. See *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967); *cf. Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

Employees Union v. Logan Valley Plaza,⁶² followed the *Marsh* "public function" precedent⁶³ by allowing peaceful union picketers to exercise their First Amendment rights in the pick-up area of a non-union supermarket in a private shopping center near Altoona, Pennsylvania.⁶⁴ The second of the cases, however, took a more restrictive view.

In *Lloyd Corp. v. Tanner*,⁶⁵ the U.S. Supreme Court held, in a five to four decision, that the orderly hand-billing of draft and war protestors could be excluded from the public areas of a privately-owned shopping center. Although generally open to the public, these areas were not so "dedicated" to public use as to permit handbilling *unrelated* to the shopping center's operations, held the Court majority.⁶⁶ Justice Marshall, who wrote the majority opinion in *Logan Valley*, clung to his previous view regarding public function, and was joined by Justices Brennan, Douglas and Stewart in dissent. The "public function" theory was clearly losing ground, even as the size of the shopping centers increased.⁶⁷

The final case, *Hudgens v. NLRB*,⁶⁸ flatly reversed *Logan Valley* and adopted the anti-"public function" First Amendment posture of *Lloyd Corp.*⁶⁹ This time, only two Justices (Marshall and Brennan) dissented.⁷⁰

The rule emerging from the shopping center cases was applied to the field of education in *Rendell-Baker v. Kohn*, wherein the U.S. Supreme Court held that a disgruntled vocational counselor and teachers at a private special-needs school could be dismissed by its director without violating their First (free speech) and Fourteenth (due process) Amendment rights. This was so notwithstanding the fact that the school performed

62. 391 U.S. 308 (1968).

63. *Id.* at 316-19.

64. *Id.* at 324-25.

65. 407 U.S. 551 (1972).

66. *Id.* at 568-70.

67. *See id.* at 571-86 (Marshall, J., dissenting).

68. 424 U.S. 507 (1976).

69. *Id.* at 518-21.

70. *See id.* at 525-43. Note, however, that the free speech rights the dissenters argued for under the U.S. Constitution, have been found to exist, in limited and specific situations, in state constitutions. *See, e.g.,* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, (1980); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83 (1983).

a statutorily-mandated "public function," and relied on public funds for at least ninety percent of its operating budget. Apparently, the "public function" theory has lost all of its former force, and the public/private co-venturing approach rises to the level of "state action"⁷¹ only if the private action was "compelled or . . . influenced by [the state]."⁷² At least this is so unless some other federal legislation regulates *private* conduct.⁷³

Occasionally, there arises a factual circumstance in which "the state has so insinuated itself with the . . . [private actor] as to be considered a joint participant in the offending actions."⁷⁴ One such situation arose in the discipline of *students* at a private school for maladjusted youths, because the state had involuntarily placed most of them there. Cases of this sort are increasingly rare.

Thus did *Rendell-Baker* expunge the final ray of hope that "public function" analysis could be used to leverage civil rights into private schools, even those that owed their very existence to government. Indeed, the Supreme Court's latest pronouncement on this subject strikes a judicious balance between individual and governmental interests in a *state-operated*, "nonpublic forum" (a port authority air terminal): In *International Society for Krishna Consciousness v. Lee*,⁷⁵ the Society's adherents were allowed to proselytize in the general public interior areas of air

71. To support a 42 U.S.C. § 1983 civil rights suit, the dismissal had to have been made "under color of law." "[O]ur holdings have made clear that the relevant question is not simply whether a private group is serving a 'public function.' We have held that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" That a private entity performs a function which serves the public does not make this act state action. *Rendell-Baker*, 457 U.S. at 842 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

72. *Id.* at 841. "The school . . . is not fundamentally different from many private corporations whose business depends primarily on [government] contracts . . ." *Id.* at 840-41.

73. *Id.* at 837-38.

74. *Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir. 1982) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)). In *Milonas*, the allegedly "private" actions were the disciplining of students, many of whom were involuntarily placed in the school's care by juvenile courts and other state agencies, pursuant to "detailed contracts," and under "extensive state regulation." Thus, there was a sufficiently close nexus between the state's sending boys to the school, and the conduct of the school authorities, so that it was taken "under color of law." 42 U.S.C. § 1983 (1988). *Cf.* *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

75. 112 S. Ct. 2701 (1992).

terminals, but not to solicit funds. This was so because the facility was "dedicated" to another function than communication, and thus "limitations on expressive activity . . . need only be *reasonable* to survive."⁷⁶ If that is so, then the same standard would doubtless apply to public schools; likewise "dedicated" to a specialized public function (education).

One last thing might be said before closing this section on the application of individual rights and guarantees to private schools, and that is that the government can regulate private undertakings (including schools), and has, under its Interstate Commerce power,⁷⁷ or as a condition to a grant of government largesse.⁷⁸ Title VII of the Civil Rights Act of 1964 is an example of the former approach.⁷⁹ Title IX of the Educational Amendments of 1972,⁸⁰ the Education for All Handicapped Children Act of 1975,⁸¹ and the conditions attached to federal guarantees of student loans are examples of the latter.⁸² However, these obligations apply to private schools only if they are drawn within the terms of the legislation, or if schools accept the public funding offered. The rights conferred on individuals are limited to the express terms of the act, so that many schools, teachers, students and activities may be left uncovered in the private sector, unlike 42 U.S.C. § 1983, which covers *every* civil rights violation "under color" of law, federal, state *and* local.

V. ACCESS TO INFORMATION/STATE-CONTROLLED MESSAGES

Passing beyond those cases in which "state action" is garbled or lacking, we address a long line of cases in which the "actor" is a public school board, official or teacher, as in *Tinker*. In these cases (the remainder of this article addresses mostly this type), the issue is not whether the Constitution applies, but

76. *Id.* at 2702 (emphasis added).

77. U.S. CONST. art. I, § 8, cl. 3; *Katzenbach v. McClung*, 379 U.S. 294 (1964).

78. See *Grove City College v. Bell*, 465 U.S. 555 (1984); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

79. 42 U.S.C. § 2000 (1988).

80. 20 U.S.C. §§ 1681-1688 (1988).

81. 20 U.S.C. § 1413 (1988).

82. 20 U.S.C. §§ 1088-1099 (1988), especially § 1094. See also, e.g., B. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845.

rather to what degree an individual's interest is protected against a competing state interest.⁸³ Thus, most of these cases pit the interest of the state in an educated, responsible and productive citizenry against an individual's right to act as he or she chooses, even if that behavior limits or thwarts the state's design. Obviously, there is some merit to both sides of the argument, and courts are drawn into the dispute as neutral "referees" and line-drawers. The line drawn between the two competing interests makes all the difference, of course, and, as we have seen, the line is not always drawn predictably. Moreover, a divided court will often offer some support to both sides of the argument, giving each hope for the future, regardless of where the line is drawn in the instant case.

The tension between these competing "rights" and interests is amply illustrated by a modest, but important, group of cases that I refer to as the "book-burning" cases.⁸⁴ The conflict in these cases takes essentially two forms. The school may decide that, for moral or pedagogical reasons, certain materials do not belong, or that certain lessons ought not to be taught, in the school environment. Hence, they seek to remove or restrict them. Alternatively, either students or their parents object to school materials or lessons and seek to alter or eliminate them.⁸⁵

The best example to date in U.S. Supreme Court jurisprudence is *Board of Education v. Pico*,⁸⁶ involving the question whether the school board has the authority to remove certain books from the school library. The Supreme Court first gave a nod in the direction of the school's prerogative, stating that "local school boards have broad discretion in the management of school affairs" Then it recognized the competing Constitutional rights of students, parents and teachers, stating that "[this discretion] must be exercised in a manner that comports

83. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the "free exercise" (of religion) rights of the Amish to educate their children as they thought best were pitted against the state policy of compulsory secondary school education.

84. These cases bear no resemblance to Ray Bradbury's *FARENHEIT* 451.

85. N. Lichtenstein, *Children, the Schools, and the Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F. L. REV. 91 (1985); M. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984); T. van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

86. 457 U.S. 853 (1982).

with the transcendent imperatives of the First Amendment."⁸⁷ In the end, the Court remanded the case for a trial on the merits, after suggesting a "formula" by which to judge whether the removal of books from a school library was Constitutional or not: "[If the school board] intend[s] by their removal decision to deny . . . access to ideas with which [persons] disagree[], and if this intent [is] the decisive factor in the . . . decision, then [the school board has] exercised [its] discretion in violation of the Constitution."⁸⁸ Thus, the apparent arbiter of constitutionality is whether the school board's action is directed at removing from student purview information already nominally judged suitable and available. Public attention is far more focused on an act of removal, and therefore the "intent" behind it, than it would be on the more common act of selecting books for the library collection (or designing curriculum) in the first place. If restraint is to be exercised, arguably the latter situations are the places to exercise it. Removal of the offending books might be accomplished in the ordinary course of "culling" the collection, and not at the behest of some bowdlerizing board member or parent.⁸⁹

In *Grove v. Mead School*, a Ninth Circuit case, a parent complained that the school board's refusal to remove a book from a curricular reading assignment violated both his child's right to "free exercise" of religion and the constitutional prohibition against the state's "establishment" of religion, contained in the First Amendment.⁹⁰ The line between a school system's traditional role in inculcating morals and social responsibility in students and the promotion of partisan Christian religiosity is, indeed, a fine one;⁹¹ but it is one that has favored the generally-benign judgment of school officials in all but the most extreme cases.⁹²

A much more subtle case, however, is now seeking Supreme

87. *Id.* at 863-64.

88. *Id.* at 871.

89. *Pico*, 457 U.S. at 861-62 and 870-71; see also *Grove v. Mead Sch. Dist.*, 753 F.2d 1528 (9th Cir. 1985).

90. *Mead Sch. Dist.*, 753 F.2d at 1533-34.

91. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) society's legitimate interest in general public education was forced to give way to the peculiarities of a well-established religion (Amish).

92. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980).

Court review.⁹³ In that case, the school itself objected to a fifth-grade teacher's keeping a copy of the Bible and other religious books on his cluttered desk, and reading it silently during periods set aside for individual activity.

A similar restriction on the free flow of information was applied to teachers in *Perry Education Association v. Perry Local Educators' Assn.*⁹⁴ Rival teacher unions squabbled over access rights to an intraschool mail system and teacher mailboxes, as a representation election approached. One union was given exclusive access rights to the system by virtue of its existing collective-bargaining agreement, while the other union challenged that agreement as violative of its First and Fourteenth Amendment rights. The Supreme Court found no such violation, holding that "[t]he differential access provided [to the mail system and mailboxes was] reasonable because it was wholly consistent with [the school] District's legitimate interest in 'preserving [school] property . . . for the use to which it is lawfully dedicated'".⁹⁵ "Nowhere have we suggested," said the Court, "that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited purposes."⁹⁶

That may be true, for a public school is not as freely accessible as, say, a public park or sidewalk. Nevertheless, did not the Supreme Court say in *Tinker* that rights were to be preserved unless their exercise was "materially and substantively [disruptive]"? The mailboxes undoubtedly served as a conduit for important "political" information, useful to the teachers in making important political choices. Allowing equal access to them is, at best, a minor inconvenience to school operations. Notwithstanding, the balance was struck in favor of school prerogatives and comfort, not the limits of the Constitutional rights enshrined in *Tinker*.

93. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 2791 (1992).

94. 460 U.S. 37 (1983).

95. *Id.* at 50. Obviously, schools are "dedicated" principally to the process of learning. But that ought to include communications with and between teachers about the terms of their employment contract.

96. *Id.* at 44 (citing *Grayned v. City of Rockford*, 408 U.S. 194, 117-18 (1972)).

In *Bethel School District v. Fraser*,⁹⁷ the Supreme Court took a quantum leap forward in its protectionist jurisprudence, ostensibly shielding minors from offensive, rather than *obscene*, speech.⁹⁸ In *Bethel*, *Tinker*'s protections were not extended to a student who gave to a high school assembly a speech that contained thinly-veiled sexual references.⁹⁹ The Supreme Court held that the First Amendment did not protect Fraser's suggestive speech, nor prevent the School District from disciplining him. The Court distinguished *Tinker*, stating that Fraser's speech was "unrelated to any political viewpoint,"¹⁰⁰ although it was made in the context of a student election campaign.

It would have made more sense if the Court had fastened upon the "captive and immature" audience, or the potential for "disruption," to justify the school's restriction.¹⁰¹ However, the facts of *Bethel* would not seem to make out a better case for the latter than would the facts of *Tinker*. Hence, the Court majority stated simply: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission."¹⁰² That may be true, but where was there any proof of this prospect? Is it possible that school authorities overreacted to innocent, if immature, "acting out," simply to keep the academy non-controversial (and bland)?

97. 478 U.S. 675 (1986).

98. *Cf. Ginsburg v. New York*, 390 U.S. 629 (1968); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) both of which could easily be justified as time, place and manner regulations, not outright prohibitions. There are other factual peculiarities, as well, that distinguish these cases from the circumstances and dicta of *Tinker*.

99. With nearly 600 fellow students in attendance, Matthew Fraser delivered a speech nominating another student for student elective office:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice president — he'll never come between you and the best our high school can be.

478 U.S. at 687 (Brennan, J., concurring).

100. *Bethel*, 478 U.S. at 685.

101. *Pacifica Found.*, 438 U.S. at 749-50.

102. *Bethel*, 478 U.S. at 685.

Thus, the Supreme Court drew the line, once again, in favor of school authorities, giving them the power to regulate student behavior on "moral" grounds, although the innuendo the speech contained was probably common in discourse among teenage students, and (depending upon which Justice you believe) there was no disruption.

This case epitomizes the choice confronting the Court after *Tinker*; restoring the compromised authority of school administrators, or protecting students' and teachers' new-found liberties. As we are learning, the line redrawing almost universally favored the school.

There is yet another "free communication" issue of the *Bethel* sort that has recently bedeviled schools, and that is so-called "hate speech".¹⁰³ The U.S. Supreme Court confronted its first "hate speech" case in its 1991-1992 term, *R.A.V. v. City of St. Paul, Minnesota*, but not in the educational setting.¹⁰⁴ The problem of regulating such speech in the public marketplace is different, of course, from its regulation in schools, where "socialization" is one of the "lessons" taught. But that should not be achieved at the expense of personal opinions and individualism.

This is not the first time the Supreme Court has addressed purposefully anti-social speech and acts, of course. In two recent well-known cases, the Court held that there is a potential speech interest to protect in the burning of a draft card,¹⁰⁵ or our nation's flag.¹⁰⁶ They have held that there should be similar protection for anti-social expressions of "viewpoint," as in *R.A.V.*, unless it is shown that the action or response thereto presents a threat to the public that government has a right to regulate at

103. This usually takes the form of shouted slogans or graffiti, but sometimes appears in legitimate student newspapers (e.g. the *Dartmouth Review*) as a statement of opinion or belief. Generally, the message is intentionally and overtly hostile to some segment of the school population, and purposely demeans and vilifies it, often with the intent, and result, of causing hostile, and equally-caustic reaction. Hate speech is anti-social in both form and intent, but otherwise a legitimate (and generally protected) form of political expression. The disruption it causes, or is likely to cause, is entirely different, and can be dealt with under *Tinker's* caveat.

104. 112 S. Ct. 2538 (1992).

105. *United States v. O'Brien*, 391 U.S. 367 (1968).

106. *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 110 S. Ct. 2404 (1990).

the expense of the speaker's "liberty."¹⁰⁷ Such circumstances are not easy to demonstrate. This is so even if the speaker or actor is deliberately provocative; like a neo-Nazi march through a predominantly Jewish neighborhood.¹⁰⁸

Although the Supreme Court declined to hold the St. Paul "hate speech" ordinance "overbroad,"¹⁰⁹ it had no difficulty finding the ordinance "facially unconstitutional."¹¹⁰ This was so despite the construction the Minnesota Supreme Court gave the statute,¹¹¹ limiting it to "fighting words."¹¹² That construction, far from giving the government the authority to punish the polarizing effects of "hate speech," shrank its authority to those situations in which it would have a clear right to proscribe or punish otherwise protected speech or acts not because of their content, but on the legal grounds of trespass, assault, property damage and so forth. Thus, the peculiar class of speech that the statute was passed to address, "hate speech," may continue unpunished (except in the more extreme forms noted) until and unless it is perceived to have a greater negative social impact than now appears to be the case, or the speech is given lower "value" in the hierarchy of Constitutional protection.¹¹³

In the public sphere, then, we are left with Justice Brandeis' formulation of some years ago: "If there be time . . . to avert the evil [of falsehood] by the process of education, the remedy to be applied is *more speech*, not enforced silence. Only an emergency can justify repression."¹¹⁴ This solution does not appear to be

107. *R.A.V.*, 112 S. Ct. at 2548. In the *O'Brien* case, such an interest was found. It was the government's interest in the maintenance of an orderly selective service system. In other cases, reason could be found if the speech or act (or more often reaction to it) threatens to "[incite] imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or the speaker's acts constitute "fighting words," that is, they have a "direct tendency to cause acts of violence by the person to whom [they are] . . . addressed." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

108. In the mid-1970's, a neo-Nazi group sought to march through a predominantly Jewish neighborhood in Skokie, Illinois. The march touched a national nerve and sparked debate over the scope of first amendment rights. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

109. *R.A.V.*, 112 S. Ct. at 2542. *Broaderick v. Oklahoma*, 413 U.S. 601 (1973).

110. *R.A.V.*, 112 S. Ct. at 2547.

111. *Id.* at 2542; *cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

112. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

113. *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

114. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added).

the one envisioned by *St. Paul*, or by academic institutions that have passed similar "hate speech" codes. Rather, they want to regulate the speaker in the interests of a normative society; expressly rejecting the Court's protection for provocative "speech" in *Tinker*.

Of course, there is always the remote prospect that the Supreme Court, or a majority of its members, will feel that "hate speech" is such a threat to society that First Amendment protections ought to be relaxed in order to permit its regulation. Even if that view never prevails, it does not mean that the *R.A.V.* analysis will be applied to schools' attempts to regulate similar speech "on campus."¹¹⁵

After all, the *R.A.V.* case only addressed a *criminal* ordinance that forbade and punished a form of political speech in the *public* marketplace of ideas. This whole article is meant to demonstrate how schools have been treated differently in the balancing of individual and institutional prerogatives. Thus, I cannot share the view of some that the *R.A.V.* decision necessarily represents a "death knell for [school] speech codes" or "turns most . . . [existing] codes into hamburger."¹¹⁶

Intolerance and confrontation seem to have been increasing recently on campus and, as inculcators of morals, ethics and values, educators have a legitimate reason to encourage positive social behavior within the school environment and to punish that which threatens the intellectual community, in terms of its peace, of course, but possibly its "mission" as well. *Tinker* recognized this; and *Bethel School* applied it to speech that was "offensive to . . . modesty and decency."¹¹⁷ After all, school codes of behavior are not criminal statutes, and educators are not police. Moreover, courts of law generally give educators wide discretionary latitude to regulate the school environment; much more than would be given civil authority to regulate the public marketplace. A content-based regulation poses some problems to be sure, but the Supreme Court has not rejected them utterly,

115. Cf. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

116. *The Chronicle of Higher Education*, July 1, 1992, at 1 and accompanying story at A19.

117. *Bethel*, 478 U.S. at 678-79.

particularly where the welfare of youth is involved.¹¹⁸ While the latitude granted to school officials will probably be greater in the case of primary and secondary schools than colleges and universities, a thoughtfully justified and drawn (and *locally*-enforced) "hate speech" regulation might be permitted on campus — particularly those polarized or threatened by factional ferment — in ways that would never be permitted in *St. Paul*.

Although Justice Brandeis favored "education" to "repression," some schools are just as likely to pursue the latter method, particularly if they are either completely committed to their role of inculcating civility in their students,¹¹⁹ or the problem of "incendiary speech" is severe in that school environment.¹²⁰

VI. SCHOOL REGULATION OF "STUDENT NEWSPAPERS"

Few other areas of so-called "school law" have evoked so much litigation as student publications, in a variety of forms.¹²¹ Admittedly, a number of the early cases involved college and not secondary-school newspapers,¹²² but *Tinker* (although it involved "free speech") gave no reason to believe that students' free press rights were not equally implicated.¹²³

The majority of these cases, whether they arise at secondary or post-secondary institutions, involve student newspapers that receive some support from the institution. As a general rule,

118. See *Ginsberg v. New York*, 390 U.S. 629 (1968); *New York v. Ferber*, 458 U.S. 747 (1982).

119. See generally *Bethel*, 478 U.S. at 675.

120. *Guzick v. Drebus*, 431 F.2d 594 (6th Cir.), *cert. denied*, 401 U.S. 948 (1970).

121. J. DUSCHA & T.C. FISCHER, *THE CAMPUS PRESS: FREEDOM AND RESPONSIBILITY*, American Ass'n of State Colleges & Univs., D.C., 1973.

122. See, e.g., *Dickey v. Alabama State Bd. of Ed.*, 273 F. Supp. 613 (M.D. Ala. 1967); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Channing Club v. Board of Regents*, 317 F. Supp. 688 (N.D. Tex. 1979); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Trujillo v. Love*, 322 F. Supp. 1266 (D.Colo. 1971); *Joyner v. Whiting*, 341 F. Supp. 1244 (M.D. N.C. 1972), *rev'd*, 477 F.2d 456 (4th Cir. 1973).

123. The first amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law . . . abridging the freedom . . . of the press" This prohibition is extended, through the fourteenth amendment to the Constitution, to state efforts to control the press. *Gitlow v. New York*, 268 U.S. 652 (1925).

cases do not involve "house organs," however.¹²⁴ Two secondary-school cases decided in 1977, *Gambino v. Fairfax County School Board*¹²⁵ and *Trachtman v. Anker*,¹²⁶ set the stage for an eventual U.S. Supreme Court ruling. It would be ten years before that decision finally came, in *Hazelwood School District v. Kuhlmeier*.¹²⁷ When it did, the Court took a position that eroded the "guarantees" of *Tinker* even further. The *Gambino* and *Trachtman* cases presented the polar positions from which the Supreme Court chose in *Hazelwood*.

Gambino involved an article submitted for publication in *The Farm News*, a student newspaper published by a public school in Fairfax, Virginia. The principal reviewed the contents of the article, entitled "Sexually Active Students Fail to Use Contraceptives," and found that certain portions violated school policy and should therefore be deleted. The principal agreed, however, that the remainder of the article (a survey of student attitudes toward contraception) could be published. The student editors brought suit, claiming that the whole article should be printed. The federal district court agreed, and enjoined the school from interfering with the publication of the article.¹²⁸ The Fourth Circuit affirmed, agreeing with the lower court that the School Board had established *The Farm News* as a "public forum for student expression," and hence "the general power of the Board to regulate course content [did] not apply."¹²⁹

Trachtman also involved a school official's pre-publication disapproval of a student article. The principal of Stuyvestant High School in New York City prohibited student staff members of the school newspaper, *The Stuyvestant Voice*, from distributing a sex questionnaire to fellow students and publishing the results in the newspaper. The Second Circuit found that "school authorities did not act *unreasonably* in deciding that the proposed questionnaire should not be distributed" on school property. This is a far cry from the "compelling state interest" test

124. See DUSHA & FISCHER, *supra* note 121, at pp. 59-71; *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 262-66 (1988).

125. 564 F.2d 157 (4th Cir. 1977).

126. 563 F.2d 512 (2nd Cir. 1977).

127. 484 U.S. 260 (1988).

128. 429 F. Supp. 731 (E.D. Va. 1977).

129. *Gambino*, 564 F.2d at 158 (emphasis added).

ordinarily used. The fact that "harmful consequences *might* result to students" if the questionnaire were distributed and the results published, was found by the court to be a *substantial* basis for restraint, within the "forecast" requirements of *Tinker*.¹³⁰ Thus, the standard of judicial review was garbled, but clearly lower than that ordinarily applied to censorship.

Hence, the U.S. Supreme Court had a clear choice when the *Hazelwood* case came along. Indeed, that case might be said to fall into that category (curriculum-based publications) excepted by the Fourth Circuit in the *Gambino* decision.

Hazelwood involved a school newspaper known as the *Spectrum*. The high school principal, to whom page proofs of the newspaper were routinely given for review prior to publication, objected to the contents of two articles scheduled to appear in the Spring issue.¹³¹ Without fully consulting the journalism advisor, or developing adequate facts, the principal decided to delete the two pages on which the objectionable stories were due to appear.¹³²

In a bare majority opinion authored by Justice White, the Court upheld the authority of the principal to regulate the content of a newspaper that it found was "school-sponsored" and "part of the curriculum." The principal had this authority, the majority felt, because the *Spectrum* was not a traditional public forum.¹³³ The Court held that, since public schools "do not possess all of the attributes of streets, parks and other traditional public forums" they must "by policy or by practice" be opened before "indiscriminate use by the general public" would be al-

130. *Trachtman*, 563 F.2d at 519-20 (emphasis added).

131. One of the stories described three students' experience with pregnancy, while the other discussed a divorce and its impact on a student attending the school. With respect to the article on teenage pregnancy, the principal believed that the references to sexual activity and birth control were "inappropriate." He was also concerned that, although the girls' names were not used in the article, their identities might be deduced from the text. The principal also believed that the parents referenced in the divorce story "should have been given an opportunity to respond to [certain remarks contained in the article] . . . or to consent to their publication." *Hazelwood*, 484 U.S. at 263.

132. The deleted pages also contained articles on teenage marriage, runaways, and juvenile delinquents, and a general article on teenage pregnancy.

133. The Court rejected the Eighth Circuit's view that the *Spectrum* was a public forum because it was "intended to be and operated as a conduit for student viewpoint." *Hazelwood*, 484 U.S. at 265-70.

lowed. The Supreme Court majority found no "intent [by school officials] to open the pages of the *Spectrum* to 'indiscriminate use' by its student reporters and editors, or by the student body generally." Instead they "reserve[d] the forum for its intended purpose," as a "supervised learning experience for journalism students." Accordingly, the Court distinguished *Tinker* and held that "school officials were entitled to regulate the contents of [the] *Spectrum* in any *reasonable* manner."¹³⁴

There is no discussion in *Tinker* about the school opening its venue to student discourse. Nor did the *Tinker* "forecast" rule use a "reasonableness" standard. Rather, the school was presumed to be open to *student* expression (the general public is a red herring) until and unless school authorities can establish a "substantial" reason for closing it to such discourse. The needs of the curriculum, of course, are one such reason. But that would apply, even if Hazelwood School qualified as such, to only a *limited* number of student newspapers.

The Court found that, unlike *Tinker*, which involved individual "student speech," *Hazelwood* involved "[a] school-sponsored publication[] . . . [an] expressive activit[y] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Therefore, "[e]ducators are entitled to exercise greater control [over this form of expression and] . . . do not offend the First Amendment by exercising editorial control over [its] style and content . . . so long as their actions are reasonably related to legitimate pedagogical concerns."¹³⁵ This is an ambiguous standard, because most school newspapers *do* bear the school's "imprimatur" in some way, but most are *not* curriculum-related, at least in any formal manner.

The Supreme Court thus expressly rejected the Eighth Circuit's application of the *Tinker* standard to *Hazelwood*, for the lower court had found "no evidence in the record that the principal could have reasonably *forecast* that the censored articles or

134. *Hazelwood*, 484 U.S. at 267-70 (emphasis added).

135. These "legitimate" concerns include "assur[ing] 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." *Id.* at 271-73.

any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school."¹³⁶ This difference of legal perspective may be made compatible, if *Hazelwood* is limited to its special facts.

There is no real dispute that the *Spectrum* was published as part of a curricular offering (ie. Journalism II class). There is no real doubt in my mind, and indeed I predicted some years ago, that academic institutions have near full control over academic and curricular vehicles, what I then called "house organs."¹³⁷ If narrowly construed, the holding in *Hazelwood* is compatible with that legal view, and does no great damage to *Tinker*'s principles, except for refusing to expand them. The *Hazelwood* dicta is another matter. It suggests that school officials can not only exercise considerable control over "lessons," even if somewhat extra-curricular, but also act as "thought police," protecting students from "material that may be inappropriate to their level of maturity," or which might be "erroneously attributed to the school."¹³⁸ The former of these positions was purposely limited by *Tinker*, and the latter can be accomplished by much less intrusive means than the censorship practiced in *Hazelwood*.

If *Tinker*'s goal was to allow into the school "marketplace of ideas" all information that would not cause disruption, or interfere with the school's proper mission, was not the *Hazelwood* School principal a bit ham-fisted in his attempt to censor the articles? The principal testified that he had no objection to the other material due to appear on the pages that contained the censored articles. Yet, rather than deleting just the objectionable stories, the principal deleted both pages in their entirety. He did not even explore with his journalism instructor other ways to balance the interests of students and school.

The dissent, authored by Justice Brennan and joined by Justices Marshall and Blackmun, suggested that the school could have published a disclaimer, or "issue[d] its own response clarifying the official position on the matter and explaining why the student position is wrong." Said they: "*Tinker* teaches us that the state educator's undeniable, and undeniably vital, man-

136. *Hazelwood*, 484 U.S. at 265 (emphasis added).

137. DUSCHA & FISCHER, *supra* note 121.

138. *Hazelwood*, 484 U.S. at 271.

date to inculcate moral and political values is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."¹³⁹ The dissenters felt the majority opinion illustrated "how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."¹⁴⁰

Simply put, the lesson of *Tinker* seems to be that students possess, even at school, all those Constitutional rights that school officials cannot justify taking away; whereas *Hazelwood* reverses the equation, and accords to students only those rights that school administrators allow. This would be less threatening to students' budding Constitutional rights if *Hazelwood* was limited to curriculum-related matters, which seemed to be the majority's central premise. The narrow factual circumstances of *Hazelwood* are likely to be ignored or quickly forgotten, whereas the substantial grant of authority to school officials is likely to endure; indeed grow.¹⁴¹

Two other recent Supreme Court cases deserve at least some mention, due to their somewhat contradictory outcomes respecting the Constitutional rights of student authors. In one, *Papish v. Board of Curators of the University of Missouri*,¹⁴² the Supreme Court refused to allow the University's dismissal of a graduate student for distribution on school grounds of an "underground" newspaper, the *Free Press*, which contained materials that allegedly violated a University rule against "indecent conduct or speech."¹⁴³ The case involved a university and not a high school, of course, and the lower courts held the material to be "obscene" (which it was not). Moreover, it is possible that schools could set a stricter standard for on-campus communica-

139. *Id.* at 285-86 (Brennan, J., dissenting).

140. *Id.* at 288.

141. Immediately upon the heels of the *Hazelwood* decision, local newspapers carried stories of several incidences of attempted school censorship of student newspapers that were *not* part of the curriculum. See *Student Editors Brace for Censor's Hand*, BOSTON GLOBE, Sept. 14, 1988, at 28; *Paper Gets F from Some Medfield Teachers*, BOSTON GLOBE, Apr. 7, 1989, at 17; cf. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

142. 410 U.S. 667 (1973) (per curiam).

143. *Id.* The front cover of the paper displayed a cartoon depicting club-wielding policemen raping the Statue of Liberty and the Goddess of Justice. Articles elsewhere in the paper contained offensive or indecent language.

tions than could be set in the public marketplace, in the interest of "decency."¹⁴⁴ In a terse *per curiam* opinion, however, the Supreme Court reversed the lower courts, stating: "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."¹⁴⁵ The Supreme Court's protection of the student's right in *Papish* cannot be fully explained by the fact that the newspaper was not school-supported (although the facts of *Papish* are closer to *Tinker* than *Hazelwood*); nor that the student audience was more mature and less captive than that in *Hazelwood*, since a large number of teenagers were involved. Rather, the messages of Ms. Papish were legitimate expression in the academy, as was Ms. Tinker's, and were not likely to upset a media-saturated teenager of today.

The second case, *Zurcher v. Stanford Daily*,¹⁴⁶ also involving a university, took just the opposite approach. In *Zurcher*, a college newspaper's office was searched, pursuant to a valid warrant, by police officers looking chiefly for photographic evidence of a violent collision between students occupying a campus building and police officers sent to remove them. In the course of the search, "photographic laboratories, filing cabinets, desks and wastepaper baskets were searched." Although "[l]ocked drawers and rooms were not opened . . . [t]he officers apparently had [an] opportunity to read notes and correspondence during the search"¹⁴⁷ Thus, the search, even if warranted by a magistrate, approximated a "fishing expedition," and far exceeded the scope of a search of a general-circulation newspaper that a court is likely to permit, although no such case has been reviewed by the Supreme Court.¹⁴⁸ While the Supreme Court precedent denying news-reporters a general Constitutional privilege against revealing their confidential sources to a grand jury investigating criminal conduct¹⁴⁹ is cited as a justification for the *Zurcher* outcome, the *Branzburg* case is surgically-precise in its analysis and application when compared to the cavalier dismissal of the Stan-

144. *Id.* at 669

145. *Id.* at 671.

146. 436 U.S. 547 (1978).

147. *Id.* at 551.

148. *Id.* at 577 (Stevens, J., dissenting).

149. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

ford Daily's concerns in *Zurcher*.¹⁵⁰

VII. DUE PROCESS/CHIEFLY ACADEMIC

At least since the 5th Circuit Court of Appeals decided *Dixon v. Alabama State Board of Education*,¹⁵¹ the rights of students to a certain degree of process (allegedly that "due" them) prior to their dismissal from public institutions for disciplinary infractions has been fairly well established.¹⁵² The process guidelines prerequisite to faculty dismissals go somewhat further back in U.S. Supreme Court jurisprudence.¹⁵³ Some schools have granted students and teachers more process than is required by the Constitution. This extra degree of protection, if legally guaranteed in school literature, such as a catalogue, a student or faculty "handbook" of rules and regulations, or in a dormitory contract, are entitlements conferred by *contract*, rather than by the Constitution, just as process protections, if any, are generally guaranteed by contract at private schools.¹⁵⁴

In any event, this area of school law is so well covered in the literature,¹⁵⁵ and generally so well known and enforced by school officials, that there is little purpose served in repeating it here.

Far less well explored is the process due to students dis-

150. *Zurcher*, 436 U.S. at 563-66; cf. *Zurcher*, 436 U.S. at 573-74 (Stewart, J., dissenting).

151. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). As do many authors, I trace the modern legal tradition of procedural due process for students in disciplinary proceedings to *Dixon* which, for its time, was a thoughtful and constructive opinion.

152. I explored this subject in a fairly comprehensive "White Paper" for the American Association of State Colleges and Universities in 1970, entitled *Due Process in the Student-Institutional Relationship*, AASCU Studies, ERIC Clearinghouse, Washington, D.C., 1970. That study influenced *The Report of the President's Commission on Campus Unrest*, U.S. G.P.O. (1970). See also WILLIAM VAN ALSTYNE, *Procedural Due Process and State University Students*, 10 UCLA L. REV. 368 (1963); *Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975).

153. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). All of these cases were decided before *Goss v. Lopez*, 419 U.S. 565 (1975), the first *student* due process decision by the U.S. Supreme Court.

154. See generally FISCHER, *supra* note 152 at 4-5.

155. See, e.g., MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 333-82 (3d ed. 1992); H.C. HUDGINS, JR., & RICHARD S. VACCA, *LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS* 311-45, (3d ed. 1991).

missed for academic reasons. Perhaps this is because the U.S. Supreme Court has been loathe to recognize a clear Constitutional "right" in such situations.¹⁵⁶ The jurisprudence also is not nearly as rich as that involving disciplinary due process. The Court's first decision in this field did not come until 1978: *Board of Curators v. Horowitz*.¹⁵⁷ Two more decisions followed swiftly on its heels; *Board of Regents of the University of the State of New York v. Tomanio*,¹⁵⁸ and *Regents of the University of Michigan v. Ewing*.¹⁵⁹

The first, *Horowitz*, the so-called "dirty fingernails" case,¹⁶⁰ set a fair, and perhaps even generous, standard of process, prior to the academic dismissal of a probationary medical school student in her last year of study. Although the outcome may seem harsh, the student involved was given ample notice of her academic deficiencies, a second opportunity to prove herself to an impartial non-faculty panel (loosely characterized by the Court as an "appeal"), and was measured by an objective, even democratic, standard of performance.¹⁶¹ In that respect, all members of the Court felt that the school gave Ms. Horowitz all of the process to which she was entitled. That said, however, the majority raised the question whether Ms. Horowitz had any *legal* interest (liberty or property) in her further education, to which a due process right might attach.¹⁶² "Assuming," but not deciding, that she did, the Court noted that:

156. None of the reported cases are generous to the student, but, as a general rule, they require *some* process and consistency from the school in its dealing with allegedly academically-deficient students. The latest case, however, *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), not only gave the student very little process, the university was relieved of the consistency standard as well.

157. In *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the Court noted that [m]isconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals.

Id. at 87-88 n.4 (citing *Mahavongsanan v. Hall*, 529 F.2d 448, 449-50 (5th Cir. 1976)).

158. 446 U.S. 478 (1980).

159. 474 U.S. 214 (1985).

160. The moniker derives from the failure of the medical school student to pass her clinical requirements, in part for a lack of concern for personal hygiene, including dirt under her fingernails.

161. *Horowitz*, 435 U.S. at 82-92.

162. *Id.* at 84.

The ultimate decision to dismiss [Ms. Horowitz] . . . was careful and deliberate . . . [and that there was a] significant difference [for due process purposes] between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct . . . [F]ar less stringent procedural requirements [are necessary] in the case of an academic dismissal.¹⁶³

Since the principal *disciplinary* due process case, *Goss v. Lopez*, required only an informal give-and-take between student and administrator (although that case involved a short-term suspension),¹⁶⁴ it is difficult to imagine what "less" the student threatened with academic dismissal is entitled to.

Indeed, the *Horowitz* Court majority concludes that students facing *academic* dismissal may be Constitutionally "due" little or no process, that courts of law are ill-equipped to make such judgments, and should exercise "care and restraint" before interposing themselves in school academic processes, at least when there is no evidence of arbitrary or capricious conduct¹⁶⁵ by the school.¹⁶⁶

The second case, *Tomanio*, is not nearly as generous as regards process as was *Horowitz*, although the "academic" judgment seems equally well-supported on its facts. Ms. Tomanio's civil rights claim under 42 U.S.C. § 1983 could, and did, turn entirely on whether it was time-barred in federal court. The substance of her claim, however (addressed by some members of the court), raised the question whether an unlicensed chiropractor, who had failed to pass a New York licensing examination after seven attempts, was Constitutionally-guaranteed a hearing of some sort before her written request for a waiver of the examination requirement was rejected by the University board. The *Tomanio* majority did not address the merits of the case, it being unnecessary to their decision. Justice Stevens, concurring in

163. *Id.* at 85-86.

164. 419 U.S. 565, 582 (1975).

165. This is the least-probing judicial standard of review of public administrative decision-making. The court's review inquires not whether the decision made was the best or correct one, but only whether it could not be reasonably supported by the facts. Thus, it is virtually impossible to prove that the decision was objectively *wrong*.

166. *Horowitz*, 435 U.S. at 87-92; cf. *Horowitz*, 435 U.S. at 97-108 (Marshall, J., dissenting).

the result, and Justices Brennan and Marshall, dissenting, however, felt *some* process was due,¹⁶⁷ notwithstanding the fact that New York's statutory scheme placed waiver requests "in the *discretion* of the Board of Regents."¹⁶⁸ On the facts, this discretion did not appear to have been abused, although the whole purpose of a hearing is to determine whether there was official abuse of discretion or not. Nothing, however, in the jurisprudence of academic due process (or disciplinary due process, in many cases) guarantees a face-to-face hearing with the decision-maker.¹⁶⁹

The most recent case, *Ewing*, is, from a factual perspective, no more compelling than the other two. The Supreme Court's prompt and unanimous dispatch of the case may reflect a growing impatience on its part with the whole genre. Once again, the Supreme Court did not conclude that voluntarily-enrolled students in public college academic programs had any property interest in their continued enrollment or graduation. Instead, the Supreme Court assumed, without deciding, that Mr. Ewing did. Then they unanimously held that Mr. Ewing's dismissal from a six-year undergraduate-plus-medical degree program (Inteflex) was legally justified, since he failed, at the end of his fourth year of study, five of seven subjects on a two-day written test administered by the National Board of Medical Examiners.¹⁷⁰

The Court was probably justified in concluding that a pamphlet, entitled *On Becoming a Doctor*, was more descriptive than contractual when it suggested that failing students were "provided [an opportunity] to make up the failure in a second exam,"¹⁷¹ and that Mr. Ewing had been given an ample opportunity to plead his case in person before University authorities.¹⁷² This does not fully justify, however, the University's deviation from its own written representations and past practices.¹⁷³ The

167. *Tomanio*, 446 U.S. at 492-99.

168. *Id.* at 494 (emphasis added).

169. *Id.*

170. *Ewing*, 474 U.S. at 215-22.

171. *Id.* at 219.

172. *Id.* at 216-17.

173. Not only did the brochure memorialize the commitment of the school to allow retesting, history revealed that, of the 32 students who had failed Part I of the exam, including 7 Inteflex students, *all* were allowed to retake the test at least once. *Id.* at 219. "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Id.* at 221.

only justification can be — since schools ought to be bound by their voluntary commitments, whether Constitutional or contractual — that the school's decision was not arbitrary.¹⁷⁴ Rather, according to the Court, it “was made conscientiously and with careful deliberation, based on an evaluation of Ewing's academic career.”¹⁷⁵ In the opinion of the unanimous Court, judges who review “genuinely academic” decisions, “should show great respect for the faculty's professional judgment.”¹⁷⁶

Hence, the Supreme Court has unflinchingly taken the position that academic decisions are not nearly as “adversarial” as disciplinary actions, and that academic decisions require expertise that the Court generally does not possess. Moreover, the Court is predisposed to assume that the academic decision-maker has acted fairly, and not on the basis of any malevolent motive. Consequently, the Court has, for the most part, refused to inject itself into academic decisionmaking.

Thus, except for the seemingly modest retreat in academic process from *Horowitz* to *Ewing*, it would be false to say that students have lost any great degree of constitutional protection from academic decisions since *Tinker*; they never had much in the first place.

Whereas some due process *is* accorded in disciplinary proceedings,¹⁷⁷ even that modest amount of process has been eroded.¹⁷⁸ In its opinions, the Supreme Court appears to countenance school officials' impatience with affording “process” in every action they take. The Court has elected to leave the question of process more in the hands of school officials, except in extreme cases.

174. Ewing received the lowest failing grade ever earned on Part I of the NBME in Michigan's program. *Ewing*, 474 U.S. at 216.

175. *Id.* at 225.

176. *Id.* at 225 (quoting *Board of Curators v. Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring)).

177. *Goss v. Lopez*, 419 U.S. 565 (1975) (school administrators are required to provide minimum requirements of notice and hearing prior to a ten-day suspension).

178. *Ingraham v. Wright*, 430 U.S. 651 (1977) (teacher and principal need only exercise normal prudence and restraint when deciding to administer corporal punishment for disciplinary purposes); *see also*, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (two-day loss of rights for delivering lewd speech to school assembly).

The last two areas upon which I wish to touch are religion and search and seizure in public schools.

VIII. FREE EXERCISE AND ESTABLISHMENT OF RELIGION¹⁷⁹

A long line of well-known cases, beginning with *Lemon v. Kurtzman*,¹⁸⁰ has established the circumstances in which grants of public largess to *private* (mostly parochial) schools would "establish" religion, thereby violating the First Amendment. Far less attention has been given to the question whether the *refusal* to bestow equal public largess on private schools, or to grant religiously-conscious students and teachers certain freedoms in public schools, inhibits the "free exercise" of religion (also guaranteed by the First Amendment).

In one of its earlier school cases, *West Virginia State Board of Education v. Barnette*, the U.S. Supreme court held (during war time) that schools could not force their students to salute the nation's flag, thereby compelling a belief in the country.¹⁸¹ In later cases the Court forbade forced prayer,¹⁸² refused to allow the posting of the Ten Commandments in classrooms,¹⁸³ and struck down a state statute that required the teaching of "crea-

179. The first amendment states in relevant part: "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof. U.S. CONST. amend. I. One commentator has paraphrased the Supreme Court's jurisprudence regarding the establishment clause as follows:

The free exercise clause means that a person may believe what he wishes. He may believe in his God or no God, and government may not interfere with that belief. The establishment clause means that government is neutral in matters of religion. It does not favor one religion over another, many religions over some, or all religions over none. It does not promote one religious activity over another nor does it compel participation in a religious activity.

HUDGINS & VACCA, *supra* note 155 at 399.

180. 403 U.S. 602 (1971). State statutes providing state aid to church-related elementary and secondary schools violate the Constitutionally-required separation of church and state: the so-called "wall of separation."

181. 319 U.S. 624, 642 (1943). "If there is any fixed star in our constellation, it is that no official, high or petty, can describe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"

182. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (although students could be excused therefrom upon their parents' written request).

183. *Stone v. Graham*, 449 U.S. 39 (1980).

tion-science" to balance Darwinism.¹⁸⁴

Only *Wisconsin v. Yoder* recognized a right to the "free exercise" of religion, when it held that "the First and Fourteenth Amendments prevent the state from compelling [the parents of Amish children] to cause their children to attend formal high school to age 16."¹⁸⁵ But this was a "parental rights" case, not a "minors' rights case" and it did not involve the right to "free exercise" in school. This difference in the enforcement of the establishment and free-exercise clauses caused some Justices to opine that the Court's aggressive exclusion of religion from public schools represented not "neutrality," but "hostility" towards it.¹⁸⁶

It was not until the passage of the Equal Access Act in 1984,¹⁸⁷ that minor school children were given a free exercise right to pursue their religious interests, along with other secular interests, in public schools. The Act only applied to schools that accepted federal funds and created a "limited public forum."¹⁸⁸

Board of Education of the Westside Community Schools v. Mergens,¹⁸⁹ decided by the U.S. Supreme Court in 1990, addressed the application of the Equal Access Act ("the Act") to Westside's refusal to allow a student religious group, the Christian Bible Study Club, permission to meet on school premises

184. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

185. 406 U.S. 205, 234 (1972).

186. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 84-85, 106-107 (1985) (comparing opinions written separately by O'Connor, concurring, Burger, dissenting, Rehnquist, J.J., dissenting).

187. 20 U.S.C. §§ 4071-4074 (1984). The Act's legislative history indicates that it was passed to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities." S. REP. NO. 357, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2306, 2349.

188. It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited public forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1988). A "limited public forum" meant that the school recognized or sponsored student activities that were not related to the curriculum.

189. 496 U.S. 226 (1990).

during non-instructional time. The Court held that once a federally-funded public secondary school created a "limited open forum," it could not deny access to or discriminate against any "noncurriculum related student group" based on the religious, political, or philosophical content of the students' message.¹⁹⁰ A majority of the Court found that the Act did not violate the Establishment Clause of the First Amendment, since it did not "favor" religion *per se*, but only put all non-curricular clubs on an equal footing. Thus, it was a "free speech" entitlement, like *Tinker*.

The only type of student organization that appeared to need this type of Congressional assistance was a religious group, and if the *object* of the legislation was to assist those groups, even to gain equal access, it would violate the first "prong" of the so-called *Lemon* test, and be unconstitutional.¹⁹¹ Recognizing this problem with the much-used, but now dated, *Lemon* test, a plurality of the Court, led by Justice O'Connor, argued for a more flexible "endorsement" test to measure "establishment" clause violations, and required the school to provide access to the religious student group.¹⁹²

190. *Id.* The Court examined closely the Act's use of the terms "noncurriculum related student group," and "limited open forum." Justice O'Connor, writing for the majority, suggested a broad interpretation of "noncurriculum" to accommodate Congress' intent that a low threshold trigger application of the Act. *Id.* at 239-40. If the Court narrowly defined those groups that are directly related to the school's curriculum, it would ensure that schools could not attempt to claim, as Westside did, that *all* student groups are curriculum related, and hence the Act inapplicable. *Id.* The Court then concluded that since Westside did allow such noncurriculum-based groups as the "Subsurfer" and Chess club, the school maintained a "limited open forum" under the terms of the Act.

191. This famous "test," first completely articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), provided that a public act supporting religion would violate the Constitution's prohibition against "establishment" if it violated any one of *three* "prongs," sequentially: (1) that it have a secular legislative purpose; (2) that it have a "principal" or "primary effect" that neither advances nor inhibits religion; and (3) that the state and its administration must avoid excessive government entanglement with religion. *Meek v. Pittenger*, 421 U.S. 349 (1975).

192. O'Connor's opinion upheld the lower court's application of her own "endorsement" test, a reformulation of the *Lemon* test, which she first introduced in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). This test reformulates the first two "prongs" of the *Lemon* test, by asking whether the government endorsement "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). The inquiry into the government's intent is deferential and limited, unlike the secular purpose prong of the *Lemon* test, which concerns the government's subjective intent, and the second prong which focuses on the government's objective effect. In a

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Congressional legislation concerning whether students should be allowed to pursue religious interests during noninstructional time blunted the usual scope of the Court's Constitutional analysis of this issue; namely, the tension between the Free Speech and Exercise Clauses of the First Amendment on the one hand, and its Establishment Clause on the other. The Court had been inching towards a change of posture on this difficult constitutional question for years, but chose not to use *Mergens* for that purpose. The next opportunity it had, in the Court's latest school "prayer" case, *Lee v. Weisman*,¹⁹³ the majority backed away even further.

In any event, *Mergens* seems to be a victory for students. By balancing the right of students to express themselves against the need for schools to exercise control over the educational environment, the court leaned in favor of the students. Bravo *Tinker*! However, one commentator has suggested the Court has "underestimated the potential danger of government endorsement of religious speech and provided a backdoor access for organized prayer to enter public schools."¹⁹⁴

Whether it enters through the "backdoor" or frontdoor, the issue is not "entry" but reentry. The truth is that, but for a zealous, but leaky, effort during the latter half of this century to hermetically seal public primary and secondary schools against religion, there has been a certain "tradition" of religiosity associated with American life and institutions.¹⁹⁵ The Supreme Court has already allowed for it at public ceremonies,¹⁹⁶ and in public colleges,¹⁹⁷ and now, as a result of *Mergens*, public secondary

case decided this term, many people thought a majority of the Court might finally adopt O'Connor's test, thereby supplanting the *Lemon* test. *Lee v. Weisman*, 112 S. Ct. 2649 (1992)

193. 112 S. Ct. at 2649. The lower courts enjoined the practices, applying the *Lemon* test. Twenty amici briefs were filed in the *Lee* case.

194. LEAH GALLANT MORGANSTEIN, *Board of Education of Westside Community v. Mergens: Three "R's" + Religion = Mergens*, 41 AM. UNIV. L. REV. 221, 222 (1991); see also *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531 (W.D. Wash. 1991).

195. This was recognized by the U.S. Supreme Court in *Marsh v. Chambers*, 465 U.S. 785 (1983), involving a publicly-paid chaplain who opened each session of Nebraska's legislature with a prayer. The establishment clause was not violated due to this "nation's history of religious acknowledgment."

196. *Id.*; see also *Lynch v. Donnelly*, 465 U.S. 668 (1984).

197. *Widmar v. Vincent*, 454 U.S. 263 (1981), although the right of college students to conduct religious worship services in a public school building was based chiefly on free

schools.

Lee, however, hews a little closer to the Constitutional line. Whereas the students in *Mergens* were entirely *self*-selected and engaged in an *optional* activity, *Lee* involves a public school commencement ceremony which, although not compulsory, is often not considered truly *optional*. Hence, the audience is somewhat "captive,"¹⁹⁸ and may merit protection from the ceremony's invocation and benediction which, while purposely non-denominational, still were delivered by clergy and constitute a "prayer" of sorts. Is this Constitutionally offensive?

A liberal reading of the *Lemon* test might have allowed the practice to continue, for the impact of this *particular* act in the context of the larger event may render it harmless in an establishment sense.¹⁹⁹ Conversely, a majority of the Court might have finally embraced Justice O'Connor's "endorsement" test, and still find that these official acts violated it. In fact, the Supreme Court majority took neither of these positions in *Lee*.²⁰⁰

Instead, Justice Kennedy took the laboring oar and wrote a five to four decision in which Justice O'Connor joined. She also joined in separate, concurring opinions by Justices Blackmun and Souter, but wrote no opinion of her own. Perhaps this was because she finally despaired of garnering a fifth vote for her "endorsement" test, although I personally doubt this. If it were so, it would be sad indeed. For hers is an eminently fair and balanced test for an accommodation of both church *and* state.

Perhaps Justice O'Connor was preoccupied by the narrow five to four consensus she was building in an abortion case, upholding *Roe v. Wade*.²⁰¹ Or she may honestly believe (as well she might) that even ecumenical invocations and benedictions have no place in public secondary graduation ceremonies. That is, the *Lee* case may be limited to its facts, as Justice Kennedy somewhat suggests in his opinion.²⁰² After all, attending one's own

speech, and the university's attempt at content-regulation in this case.

198. *Cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

199. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

200. 112 S. Ct. at 2649.

201. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

202. *Lee*, 112 S. Ct. at 2655.

graduation ceremonies is really not a matter of choice for most students or their parents. Hence, they constitute a virtual captive, minor audience, and compelled religious acknowledgement in that setting goes beyond that approved in both *Widmar* and *Marsh*.

Whatever the situation, Justice Kennedy, with majority backing, was unequivocal in his statement that "[t]his case does not require us to revisit the difficult questions dividing us in recent cases . . . the *accommodation* by the State for the religious beliefs and practices of many of its citizens Thus we do not accept the invitation of petitioners . . . to reconsider our decision in *Lemon v. Kurtzman*."²⁰³ Hence, it would appear that *Lemon* is the operative establishment "test" for the foreseeable future — at least in "easy cases" — and, using that test, there is very little room in public school for religious "speech." How then will we deal with, for example, a university professor who occasionally refers to his religious beliefs in his lectures?²⁰⁴ Or a fifth-grade teacher who makes no secret of his Christian beliefs, albeit without overt proselytizing?²⁰⁵ Will the Supreme Court's accommodating posture in *Mergens* be ignored by lower courts,²⁰⁶ especially after *Lee*'s ringing affirmation of *Lemon*?

All told, the Supreme Court's jurisprudence in this area has become increasingly picayune, without truly succeeding in insulating public schools from religious expression. It also risks some ridicule, as resulted in its foray against "obscenity."²⁰⁷ Most importantly, it should evidence that public secondary school students are not the programmable automatons that the dicta in these cases might infer, and that they are capable of sifting and judging even "religious" messages for themselves.

203. *Id.* (emphasis added) (citations omitted).

204. *Bishop v. Delchamps*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

205. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 2791 (1992).

206. *See Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531 (W.D. Wash. 1991).

207. *New York v. Ferber*, 458 U.S. 747, 754-56 (1982).

IX. THE FOURTH AMENDMENT AND SEARCHING STUDENTS ON SCHOOL GROUNDS

The final area for discussion involves the Fourth Amendment to the U.S. Constitution, and its prohibition against unreasonable search and seizure, as applied in the academic setting. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Questions regarding what makes a search reasonable or unreasonable, whether the warrant requirement must always be met, and what constitutes probable cause, have been left to the courts to decide. A treatise would be needed to adequately address the thicket of legal precedent that has grown up around these issues — at least when applied to police enforcing the criminal law.

The study of this body of precedent by school officials would be more relevant if it was routinely applied in the school environment. However, in the only school case the U.S. Supreme Court has decided addressing that subject, *New Jersey v. T.L.O.*,²⁰⁸ the Court majority indicated that it would *not* apply that jurisprudence literally, but would make an exception in the school environment. Specifically, "probable cause" is not a rigid standard to be uniformly enforced regardless of the state entity performing the search or the purpose thereof, but a flexible requirement that may be lowered as situations demand.

Three basic principles have developed through the Supreme Court's Fourth Amendment jurisprudence and have been engrafted onto its literal language.²⁰⁹ First, the Court fashioned specific and limited exceptions to the Amendment's premise

208. 469 U.S. 325 (1985).

209. *See id.* at 355 (Brennan, J., dissenting); *Arizona v. Hicks*, 480 U.S. 321, (1987) (giving a similar, though less clear, account).

that warrantless searches are *per se* unreasonable.²¹⁰ Second, general police searches, whether conducted pursuant to a warrant or under an exception thereto, are "reasonable" if there is "probable cause" to believe that a crime has been committed or is about to be committed, and that evidence of the crime will be found in the place to be searched.²¹¹ Third, searches that are less threatening and less intrusive may be justified, absent a warrant or probable cause, by balancing the interests at stake, provided that sufficient weight is given to the individual privacy interests that are likely to be infringed.²¹² This too is a "reasonableness" standard, lacking probable cause as a rationale, and so depends upon the surrounding circumstances for its justification.

School administrators, exercising their authority to maintain security and order within schools, have often searched students and their property, generally to unearth contraband, primarily drugs. A threshold question then is whether those public officials who are conducting searches to protect and discipline their charges are, like police, subject to the prohibitions of the Fourth Amendment. The Court answered this question in the affirmative in *T.L.O.* Hence, a brief review of the principal Supreme Court cases concerning the Fourth Amendment is advisable.

The U.S. Supreme Court's decision in *Katz v. United States*²¹³ established that "the Fourth Amendment protects people, not places." Though this view departs significantly from prior Court precedent,²¹⁴ the majority opinion by Justice Stewart lacked detail. Therefore, lower courts were forced to turn to

210. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984).

211. See, e.g., *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949); *Henry v. United States*, 361 U.S. 98, 102 (1959) (announcing that an official has probable cause when he is aware of "facts and circumstances [that] warrant a prudent man into believing that the offense has been committed").

212. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 210 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968).

213. 389 U.S. 347 (1967).

214. Previous Supreme Court opinions had focused on whether a particular space was a "constitutionally protected area" and, if so, requiring that the police must "physically intrude" into this area for there to be an illegal search. See, e.g., *Silverman v. United States*, 365 U.S. 505 (1967) (addressing what constitutes a "constitutionally protected area"); *Olmstead v. United States*, 277 U.S. 438 (1928) (adding the "physical intrusion" requirement).

Justice Harlan's concurring opinion in *Katz* and what has come to be known as the "reasonable expectation of privacy" test.²¹⁵ The principal focus of attention given this test by courts and commentators has been what expectation of privacy is "reasonable" in the eyes of society.²¹⁶

Just what expectation is objectively "reasonable" on the part of the individual searched, depends upon whether the expectation of privacy is "justified" under the circumstances. Generally, an individual does not have a reasonable expectation of privacy in any object or act he holds out to the public.²¹⁷ If however, a governmental practice "significantly jeopardizes" a legitimate "sense of security," a warrant should be required.²¹⁸

215. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring)). *Terry* was the first U.S. Supreme Court case in which a majority of the Court refers to Justice Harlan's opinion as creating a "test."

Justice Harlan's explanation for the majority's position that the fourth amendment "protected people, not places" was stated thus:

My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Katz, 389 U.S. at 361 (Harlan, J., concurring). See also *California v. Ciraolo*, 476 U.S. 207 (1986) (embracing the Harlan test).

216. The actual or subjective expectation of privacy "test" might be dismissed as providing an "inadequate index of fourth amendment protection" and therefore means little apart from the second requirement. *Smith v. Maryland*, 442 U.S. 735, 741 n.5 (1979).

One commentator has examined the first part of the test and provided a lucid explanation of how courts should analyze a "subjective" determination of reasonableness: an individual "need not take extraordinary precautions against the specific way in which the state conduct[s] a surveillance. [He may, by conduct] demonstrate[] an intention to keep activities and things . . . private, and . . . not knowingly expose them to the open view of the public." Note, 60 N.Y.U. L. REV. 725, 753-54 (1985).

217. *Smith*, 442 U.S. at 742-43.

218. *United States v. White*, 401 U.S. 745 (1971) (Harlan, J., dissenting), explains this point. Harlan suggested that whether or not an individual's reliance on privacy is "justified" must be answered by "assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *Id.* at 786.

Harlan's dissent in *White* touches upon what is perhaps the driving force behind his

Another important line of Supreme Court cases, one having a more direct bearing on school searches, addresses the "probable cause" requirement as it applies to regulatory inspections.

"Probable cause" is central to the right of an individual to be *secure* from unreasonable governmental intrusions. The term itself arises in the second part of the Fourth Amendment, commonly called the warrant clause. The warrant clause makes it clear that search warrants, or arrest warrants, will not be valid unless the issuing authority (typically a court or magistrate) has been convinced that there is *probable cause* to issue them. Housing inspections, like school searches, do not usually involve police, or suspected criminal behavior, and therefore generally lack "probable cause" in any literal sense. Are routine housing, fire, and health inspections intrusive enough to fall afoul of the Fourth Amendment?

These inspections, like school searches, are generally based on public health and safety concerns. Typically, the inspections are conducted by employees of administrative agencies, whose role it is to ensure compliance with local health and safety regulations. Most inspections are routine and made in the course of periodic or geographic inspection programs, although some are made in response to specific complaints.

It is the "routine" nature of such inspections that led the Supreme Court to hold in *Camara v. Municipal Court of the City and County of San Francisco*²¹⁹ that such searches are generally "reasonable" and hence the "probable cause" required for a "warrant" — if one is insisted upon — will be met "if reasonable legislative or administrative standards for conducting an area inspection are satisfied."²²⁰

concurrence in *Katz*. Namely, the overriding importance of the word "secure" in the text of the fourth amendment. When *Katz* shifted the focus away from the "place" itself, to the relationship between the place and the "person," it may have "release[d] the Fourth Amendment . . . from the moorings of precedent" so that its scope may now be defined by the "logic of its central concepts." EDMUND W. KITCH, *KATZ v. UNITED STATES: THE LIMITS OF THE FOURTH AMENDMENT*, 1969 SUP. CT. REV. 133. Hence, an adult citizen may have a more reasonable and legitimate expectation of being secure from a police search of his home or person than minor children might from a teacher's search of their school desks or lockers.

219. 387 U.S. 523 (1967).

220. *Camara*, 387 U.S. at 538; See *v. City of Seattle*, 387 U.S. 541 (1967). In *Camara*, the Court pointed to features of housing inspections that support their inherent

Camara held that housing inspections *do* intrude "upon . . . interests protected by the Fourth Amendment"²²¹ primarily because an individual's private residence is being searched. The Court found, however, that such inspections need only be based upon a "reasonable" regulatory goal, and *not* on probable cause to believe that a *crime* has been committed, or is about to be committed, and that evidence of the crime will be found in the place to be searched.²²² In this respect, administrative probable cause is different from criminal probable cause, and a metal detector at the entrance to a school building would doubtless fall into the former category. A similar view²²³ of the "probable cause" requirement was taken in *T.L.O.*

T.L.O. involved a fourteen year-old student who was accused of violating a school policy against smoking cigarettes in the school bathroom. When the student vehemently denied the accusation, the assistant vice-principal searched her purse. He found the cigarettes he sought, but continued his quest, eventually finding paraphernalia and records indicating that the stu-

reasonableness; for example, the fact that such inspections "are neither personal in nature nor aimed at the discovery of evidence of crime, [and] involve a relatively limited invasion of the urban citizen's privacy." *Id.* at 537.

This portion of *Camara* only slightly modified the result reached in *Frank v. Maryland*, 359 U.S. 360 (1959). *Frank* held that a state health inspector need not obtain a search warrant as a prerequisite to the criminal prosecution of a householder for refusing to permit the inspector to enter his house. The Court reasoned that the inspection was only peripherally controlled by the fourth amendment, because the inspector was not searching for "evidence of criminal action." Thus, the Court held that the householder did not enjoy the full protection of the fourth amendment.

Frank had also held that a warrant issued after frequent refusals by the householder to permit the search need only be based upon "reasonableness" and dispensed with the warrant and probable cause requirements. The distinction between the *Camara* and *Frank* decisions in a petit-criminal context is a separate can of worms, beyond the scope of this article.

221. *Camara*, 387 U.S. at 534.

222. *Id.*

223. For additional cases involving "administrative" searches, see *Marshall v. Barlow's Inc.*, 429 U.S. 1347 (1978) (upholding the constitutionality, under *Camara* and *See*, of a provision in the Occupational Safety and Health Act (OSHA) which allowed warrantless entry and inspection of work places for OSHA violations); *cf.* *Michigan v. Tyler*, 436 U.S. 499, 511 (1978) (holding that official entries to investigate the cause of a fire after the fire had been extinguished did not require a warrant unless such reentries were "detached from the initial exigency"); *Michigan v. Clifford*, 464 U.S. 287 (1984) ("[I]f reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances.").

dent might be engaged in the sale of marijuana.²²⁴ The Supreme Court held that, as a public employee, the principal's actions fell within the ambit of the Fourth Amendment, and that students enjoy certain rights of privacy in the school setting. However, no warrant was required, nor was "probable cause" of the criminal sort necessary, for him to conduct his search. Rather, the Court adopted a liberal balancing test:

[T]he child's interest in privacy must be set [against] the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds [M]aintaining security and order in the schools requires a degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.²²⁵

Thus it might be suggested that the Fourth Amendment's protections were meant chiefly, although not solely, to protect persons suspected of criminal activities from being forced by over-zealous civil authorities to surrender their privacy and possessions by submitting their person or property to a search. While school officials are indisputably "state actors" and, consequently, technically subject to the Bill of Rights including the Fourth Amendment, less exacting and rigorous standards apply when they conduct a search. The distinction between the standards governing search by law enforcement officers, health officials, and those regulating searches by school officials, are justified by the teacher-student relationship and the different penalties involved. This "student . . . is under [the school's] authority and the penalty handed down by a school official is not criminal in nature."

But what of a situation that arises with increasing frequency; one in which the school official acts *in concert* with the police in conducting a search on school grounds? After all, T.L.O. was not objecting to a school disciplinary proceeding, but

224. *T.L.O.*, 469 U.S. at 328. In the context of criminal law, a "full field strip search" of the subject is technically legal if the apprehending officer has a sufficient reason to conduct a search in the first place, even though the search goes well beyond the reason for the original apprehension.

225. *T.L.O.*, 469 U.S. at 339-40.

to the use of the seized evidence in a delinquency action in Juvenile Court.²²⁶ Two cases decided in the late 1960's by a federal district court in Alabama are particularly instructive on this point.²²⁷ The U.S. Supreme Court has yet to directly address the issue.

The *Piazzola* and *Moore* cases both arose from a search of individual dormitory rooms, in response to a "drug problem" brought to the attention of Troy State University's Dean by the Chief of Police of Troy, Alabama.²²⁸ Two state narcotic agents, accompanied by University officials, searched the rooms of Gordon Moore and Frank Piazzola "without search warrants and without their consent," and unearthed incriminating evidence.²²⁹

The difference between the two cases lies in the regulation that was violated, and the punishments sought to be imposed. Piazzola was arrested and convicted for illegal possession of marijuana,²³⁰ while Moore was "indefinitely suspended" from the school.²³¹ Each opinion seems to turn on the "purpose" of the search; upholding Moore's dismissal and setting aside Piazzola's conviction.

Because the dormitory search in *Piazzola* was "instigated and in the main executed" by the police, the district court believed that the "sole purpose" of the search was to obtain evidence in furtherance of a criminal prosecution. Searches of this sort are generally held unreasonable unless there is probable cause and a warrant, consent or exigency.²³²

226. *Id.* at 329.

227. *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 42 F.2d 284 (5th Cir. 1971).

228. *Piazzola*, 316 F. Supp. at 625. Information about the alleged "drug problem" came from "unnamed but reliable informers." *Moore*, 284 F. Supp. at 728. The use of informers by police as a source of "probable cause" opens up another can of worms that is beyond the scope of this article.

229. *Piazzola*, 316 F. Supp. at 625.

230. *Id.*

231. *Moore*, 284 F. Supp. at 727.

232. See, e.g., *Picha v. Weilgos*, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976) (holding that the probable cause standard also should apply to searches by school officials in which the police are involved). However, as a general rule, a "tag along" search (by police) is legal if the primary investigator has a sufficient legal basis for his investigation.

Moore reached the opposite result, emphasizing the significance of the stated or implied "purpose" of the search. *Moore* held that the search was *university*-initiated, pursuant to a legitimate university mission, namely, to "maintain discipline and order," and to enforce a "reasonable" campus regulation. Therefore, the "administrative" search neither required criminal probable cause nor a search warrant. The Alabama District Court was possibly a bit more solicitous of the college student's "privacy" in *Moore* than was the Supreme Court of the minor in *T.L.O.*, but not much. Both situations were viewed as somewhat "benign" when compared to police searches.

In *T.L.O.* the Supreme Court held that because of the "substantial interest" teachers and administrators had in student safety and discipline, their searches could be warrantless and need not be based on probable cause. "Rather, the legality of a search of a student should depend simply on the *reasonableness* under all the circumstances" ²³³

"Reasonableness" was to be analyzed in two stages. First, "a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either public laws or the rules of the school." ²³⁴ This is *some* "cause," to be sure, but nothing like that legally required before a police officer can conduct a warrantless search of a criminal suspect. Both are a type of "ends" test.

Second, the search will be considered "reasonably related in scope to the circumstances which justified the interference in the first place," ²³⁵ only when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." ²³⁶ This is a type of "means" test. Thus, the Supreme Court has held merely that the search must be (and it was) "reasonable" in both its objective (ends) and conduct (means); nothing more.

233. *T.L.O.*, 469 U.S. at 341 (emphasis added); cf. The standard of "reasonableness" required in *Camara*, *supra* notes 220-21 and accompanying text.

234. *T.L.O.*, 469 U.S. at 341-42 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

235. *Id.*

236. *Id.* at 342.

The standard is surely lower than that applied to police searches of criminal suspects. And it should be unless we are to make our schools into armed camps, and teachers into veteran police.

A student — at any level of schooling — also has a cognizable interest in his or her person and property that school officials ought to respect and not violate unless there is some clear threat to the academy. The principal in *T.L.O.* examined the student's purse for cigarettes. He had good cause to do so, for she was accused of violating a school rule regarding smoking. But the facts of the case suggest that *T.L.O.* was not evidently "guilty" of any criminal statute, *until* an involuntary search of her purse went further and produced evidence that she might be engaged in drug dealing. The best reason to allow this deeper, more intrusive search might be (and *was* according to the case dicta) that the school official plays a custodial role, and is interested solely in protecting this student or other students. However, one must remember that it is exactly this type of deference to discretionary state "authority" that lies at the root of the Fourth Amendment.

The Supreme Court expressly left open the question whether a school official (here, an assistant vice principal) could surpass his role as school disciplinarian and hand over the evidence he found to public prosecutors, if police officers could not have conducted the same search without violating the Fourth Amendment.²³⁷ This is the issue judiciously resolved by lower

237. The Supreme Court has upheld the right to use evidence discovered in a private search to procure a criminal conviction. *United States v. Jacobson*, 466 U.S. 109 (1984); cf. *Walter v. United States*, 447 U.S. 649 (1980). However, in these cases, the "private" discovery of contraband was not assisted or induced in any way by public authority. Although it is true that "every man" — even a private citizen — must give his evidence (with narrow exceptions) at least to grand juries, that is not to say that private actors are untainted when they collaborate with public authorities. Moreover, the investigating authority in *T.L.O.*, *Moore* and *Piazzola* was a public official, to whom the fourth amendment applies. Thus, the real differences among these cases would appear to be whether police authority induces and/or collaborates in the search, and whether the evidence is used for internal, disciplinary purposes, or for criminal prosecutions. Educators have no generalized responsibility to enforce the law, except for situations in which schools are assigned some specific monitoring function by statute. 20 U.S.C. § 1681(a) (1982); 20 U.S.C. §§ 1400-1461 (1982); 20 U.S.C. §§ 1088-1099 (1982). But even these circumstances rarely involve responsibility for enforcing public criminal laws. However, the possessor of knowledge of criminal conduct could himself be prosecuted as an "accessory after the fact" if he refuses to divulge to enforcement officials the evidence he has.

courts in *Piazzola* and *Moore*, but virtually ignored, and left unanswered, in *T.L.O.*

Also left unanswered by the *T.L.O.* Court was the question whether a student has a legitimate "expectation of privacy" in his or her locker, desk, or other school property provided the student for storage.²³⁸ Such areas are often searched, and school administrators can justly claim that lockers and dormitory rooms are school property, merely let to students for their use. This ignores the traditional privacy rights of lessees under the law, which may be surrendered only in reasonable ways and for cause.²³⁹ Why should students be treated differently?

The Fourth Amendment's guarantees are not so narrowly-framed. Theoretically they protect all citizens (including students) from the unwarranted prying of public officials (including teachers, principals and deans). Any "search or seizure" of a purse, locker, or dormitory room, without an adequate pretext

238. *T.L.O.*, 469 U.S. at 338, n.5. Cf. *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (holding that the school had a right to inspect a student's locker by virtue of having joint control over it); *People v. Overton*, 249 N.E.2d 366 (1969) (holding that school administrators have the power to consent to a police search of a student's locker). But see *State v. Engerud*, 463 A.2d 934, 943 (1983) (holding that students have an expectation of privacy in the contents of their lockers as a "home away from home . . . where the student stores the kind of personal 'effects' protected by the Fourth Amendment.")

Engerud was joined with *T.L.O.* in the New Jersey court, where both searches were found to violate the fourth amendment. The *T.L.O.* decision, however, did not mention *Engerud* except to disclaim any position on locker searches. *T.L.O.*, 469 U.S. at 337 n.5. See also *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (holding that college students had the same interest in the privacy of their dormitory rooms as any adult would have in their home, dwelling or lodging, under the fourth amendment). Neither was the *Smyth* court willing to enforce the "blanket authorization" to search, contained in the school's rental contract for dormitory rooms, at least when adult students were accused of acts that were also criminal. And why should public school lockers or desks be viewed more favorably than the item searched in *T.L.O.*: *her own purse*?

239. In the classic case, *Chapman v. United States*, 365 U.S. 610 (1961), a landlord could not consent to the search of rented premises in the absence of the tenant. Accord, *Camara v. Municipal Court*, 387 U.S. 523 (1967), involving a city housing inspector's warrantless attempt to search a leased ground floor apartment. Of particular interest is a California — not a U.S. Supreme Court — case (although it interpreted the fourth amendment) that held that a parent could not consent to a police search of his minor son's locked toolbox, and that the ensuing, warrantless search violated the minor's constitutional rights. *In re Scott K.* 595 P.2d 105 (1979); but cf. *Moore v. Troy State*, 284 F. Supp. 725, 731 (1968): "a student who lives in a [campus] dormitory . . . which he 'rents' from the school waives objection to any reasonable searches conducted pursuant to reasonable . . . [school] regulations." Thus, a renter from the school may be treated differently from other lessees; and a disciplinary search may differ from one by police, enforcing the criminal law.

ought to be forbidden. The notion that school officials act in *parens patriae*; that is, that they occupy a parent's position with respect to their child's (student's) person or possessions, does not really wash.²⁴⁰ Parents and their children are frequently confrontational, but parents' prerogatives are protected by domestic relations law. Not so the school official. He or she may have the most paternal of motives, but just as frequently may act as a surrogate for civil authority when investigating a student.

What should we make of the difference in the outcomes of *Moore* and *Piazzola*, as applied to the circumstances of *T.L.O.*? It is an oft-cited notion that school officials serve as role models, mentors and confidants, acting in the individual student's best interests or those of the entire school.

This view would make more sense if discipline was *confined to the school environment* or, in extreme cases, suspension or expulsion was used to either admonish or protect other students. In those circumstances, the school official is more constructive and less confrontational than a police officer apprehending a criminal suspect, and the ensuing school process and punishment is more remedial than punitive. However, when a school official passes the fruits of his search to prosecution authorities, or collaborates with them in conducting a search, he serves not in an educator's role, but as an "agent" of the police. At this point, any "benign" motive the official or academy may have evaporated, and the search (or consequence thereof) is converted into the type the Fourth Amendment was *meant* to regulate.²⁴¹

These "unaddressed" questions in *T.L.O.* suggest other chinks in the armor of *Tinker*. The *T.L.O.* outcome was not unexpected, however, for the general retreat from Constitutional protections for students that this article documents was paralleled by a similar withdrawal of protections for the criminally accused.²⁴²

240. See *T.L.O.*, 469 U.S. at 336; *In re Scott K.*, 595 P.2d. 105 (1979).

241. *T.L.O.*, 469 U.S. at 342, n.7. The Supreme Court limits its conclusions to "searches carried out by school authorities acting alone and on their authority," although the evidence found could be given to prosecutors and not suppressed. Hence, the Court in *T.L.O.* purports *not* to address the issue presented in *Piazzola*, namely "the appropriate standard for assessing the legality of searches conducted by school officials *in conjunction* with or at the behest of law enforcement officers." *Id.* (emphasis added).

242. *E.g.*, *United States v. Ross*, 456 U.S. 798 (1982) (holding if "probable cause"

I agree that school children are not adults, and that, in the academy, they sacrifice certain rights of autonomy. But there ought to be some satisfactory "predicate" in order to search and discipline them. For example, if there was a serious drug or violence problem at the school, and notice was given that *all* purses and bags would be searched, and metal-detectors were to be used at school entrances. This could be justified by the circumstances, without warrants or individualized suspicion, and without violating the Fourth Amendment.²⁴³

CONCLUSION

The point I seek to make here is that students in general, and especially minor students, do not remotely enjoy the freedoms that *Tinker* seemed to confer on them in 1969. Far from enjoying all the civil rights that do not "materially and substantially interfere" with the school's academic mission and need for order, students appear to enjoy only those rights that school officials elect to accord them. The Supreme Court's position has evolved (actually, devolved) so much since 1969 that *Tinker* has been rendered nearly obsolete, although never explicitly overruled.

Times have certainly changed since Mary Beth Tinker es-

justifies the search of a lawfully-stopped vehicle, it allows a warrantless search of every part of the vehicle that a magistrate could authorize by warrant, *including* areas "not in plain view"); *Segura v. United States* 468 U.S. 796 (1985) (holding that a non-consensual search that discovered drug paraphernalia "in plain view" was not invalid because of "administrative delay" in the issuance of a search warrant. The "fruit of the poisonous tree" doctrine can be overcome by an "independent source" for the discovery of the evidence); *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that the accused is not deprived of fair trial and effective assistance of counsel if the latter simply refuses to abet the accused in his perjury).

243. As nearly as the facts reveal, neither situation obtained in *T.L.O.*, although the school apparently had decided that smoking, at least in certain areas, should be punished.

The BROCKTON ENTERPRISE, (Massachusetts), on March 14, 1992, reported that police secretly installed hidden videotape cameras in a New Ipswich, N.H. high school boys room, with the principal's permission. The purpose was allegedly to eavesdrop on drug transactions, drug use and vandalism. The need for the cameras was not documented, although the local police chief said that it did lead to arrests. Neither the students, superintendent nor the school board were informed. Was there an adequate predicate for this intrusion into school privacy? How will students attending the school relate to school leadership in the future? Is the harm done likely to outweigh the good accomplished?

tablished her right to wear a black armband to school. Times changed, and with them the law.

If *Tinker* offered unprecedented, and perhaps unworkable, protections for students, today's school officials appear to have been given *too much* authority to regulate the behavior of public primary and secondary school pupils. It is almost as if Justice Black's dissenting view in *Tinker* (that "children should be seen and not heard") has become the law of the land. All this without *Tinker* being reversed, or even cited unfavorably.²⁴⁴

Does it not seem that the best answer to this inevitable ebb and flow of Constitutional interpretation — favoring first students and then teachers and schools — lies *between* the extreme positions taken first in *Tinker* and later in *Hazelwood* and *Bethel School*? While it seems quite evident that schools cannot effectively pursue their mission if forced to operate at the threshold of "material and substantial disruption," neither ought students to be cast once again as "closed circuit recipients" of what the school chooses to offer. Admittedly, schools have grown more tense and violent, but the *Tinker* formula allows school officials to take appropriate precautionary steps and disciplinary action when it is justified. The administrative actions in *T.L.O.*, *Bethel School* and *Hazelwood*, however, evidence as much desire to assert authority and avoid public embarrassment and friction, as they do to regulate schools for educational or safety reasons. Students are neither deceived nor educated by such heavy-handed regulations, and the isolation they create ill-prepares students for the prudent judgments they will eventually have to make in the public "marketplace."

I have never understood why schools did not attempt to turn various threats to their educational mission into "learning experiences" for students, the better to teach them in the *academic* "marketplace" about the collision of opinions and values that occur in the *public* marketplace, *beyond* the school and its control. In reality, these collisions are numerous and often violent. Choosing the right course can have enormous personal and societal import, but there will be no teacher to point the way; far

244. In *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), both majority and dissenting opinions cited *Tinker* as binding precedent.

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less to *dictate* it. Whether our school-educated citizenry makes a good choice in these situations depends much more upon whether teachers have inculcated in their students values of judgment and restraint, than whether the day has gone smoothly and the mathematics lesson was completed.

If the power to control student behavior is exercised to suppress student initiative, which is invariably probing and often intentionally provocative, and not to prepare students for a public marketplace that offers many options and knows few restraints, then Mary Beth will have had reason indeed to wear a black arm band.