
SHRINKING *TINKER*: STUDENTS ARE
“PERSONS” UNDER OUR CONSTITUTION—
EXCEPT WHEN THEY AREN’T

FRANK D. LOMONTE*

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INTRODUCTION

America’s public school students, it may be said, do not shed their rights to freedom of speech or expression at the schoolhouse gate¹—

* Executive Director, Student Press Law Center, Arlington, Virginia. J.D., 2000, *University of Georgia School of Law*.

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

except when they are in the classrooms or the hallways.² At least, that is the way today's revisionists would rewrite Justice Fortas's forty-year-old pronouncement in *Tinker v. Des Moines Independent Community School District*.³ *Tinker*—while still rightly recognized by many as a sweeping declaration of First Amendment rights for young people—may stand (at least in some jurisdictions) for the empty proposition that as long as the government acts somewhere in the vicinity of reasonableness, it may freely, without fear of reprisal, regulate the content of student speech.⁴

The shrinking of *Tinker* is both educationally unsound and intellectually dishonest. Those who would repeal *Tinker* by nibbles have developed a “heads-schools-win, tails-students-lose” model of jurisprudence. Under this view, the accepted rules of First Amendment analysis apply in the school setting only if those rules result in reducing individual rights.⁵ To turn Justice Brennan's sage admonition on its head, it is school discipline, not speech, that enjoys “breathing space” when the speaker is a student.⁶

The central proposition of this Article is that the school/student relationship is a distinctive one, and that student speakers on school property stand in a fundamentally different posture than do pamphleteers on the public sidewalk. This unique relationship has been recognized by the courts,⁷ but only selectively, where the

2. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (“Thus, while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”) (quoting *Tinker*, 393 U.S. at 506).

3. 393 U.S. 503 (1969).

4. See, e.g., *Muller ex rel Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (“Prior restraint of student speech in a nonpublic forum is constitutional if reasonable.”); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (finding that “school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner”) (emphasis added).

5. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 528–30 (2000) (emphasizing that federal courts have overwhelmingly ruled against students' free speech claims after *Tinker*).

6. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (reasoning that because First Amendment freedoms need “breathing space” to survive, the government may regulate such freedoms only with narrow specificity). Chief Justice Roberts wrote, in *FEC v. Wisconsin Right to Life, Inc.*, that “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.” 127 S. Ct. 2652, 2669 (2007). Ironically, *Wisconsin Right to Life* was the only case of the term in which the First Amendment claimant was the clear winner over a government adversary. Tony Mauro, *Rhetoric Aside, Most First Amendment Claimants Lose*, FIRST AMENDMENT CENTER, July 16, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=18804>.

7. The Supreme Court recognized that student speech cases must balance conflicting interests, protecting the First Amendment freedoms of students and prescribing and controlling conduct in schools. *Tinker*, 493 U.S. at 507.

uniqueness works to the disadvantage of the speaker.⁸ It is time that courts acknowledge that, because students are “captive” in school for the best hours of their day, and because students have a legally enforceable right to be on school grounds for purposes that expressly include the exchange of ideas,⁹ student speech disputes are not susceptible to analysis under the same framework that applies to picketing in a park.

It is especially vital that *Tinker* be invigorated and that school regulatory decisions be subject to meaningful review now that school officials have begun asserting, at times successfully, the authority to police entirely off-campus speech based on the rationale that the speech can enter or impact the school by means of the Internet.¹⁰ The better view is that off-campus speech is just that—off campus—

8. See *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (“Limitations on speech that would be unconstitutional outside the schoolhouse are not necessarily unconstitutional within it.”). In *Poling*, a candidate for student council president was disqualified from the election for making a rude comment about the assistant principal in his campaign speech. *Id.* at 760. The U.S. Court of Appeals for the Sixth Circuit focused on the rights of school officials, stating that they need not “surrender control of the American public school system to public school students,” and failed to discuss the importance of protecting student speech or the need for evidence of the speech’s disruptive effect. *Id.* at 762 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)) (internal quotation marks omitted). The “uniqueness” of the school setting often is invoked to justify reducing students’ constitutional rights beyond what would be tolerated in the outside world, especially where state officials invoke the need to keep order. See *Vernonia*, 515 U.S. at 653, 664–65 (upholding a requirement that student athletes submit to random drug testing because “special needs” . . . exist in the public school context”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (allowing schools to search students’ purses without probable cause); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (rejecting students’ rights to procedural due process prior to the imposition of corporal punishment); see also *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) (“[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions.”).

9. See *Tinker*, 393 U.S. at 512 (recognizing that “personal intercommunication among the students” is not merely something to be tolerated, but “an important part of the educational process”). The importance of self-expression as a component of the educational experience is better understood at the college level, and accordingly, this Article’s focus is on applications of *Tinker* at the primary and secondary school stages. See *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (observing, in a case involving faculty speech at the college level, that “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.N.Y. 1943))).

10. See *Doninger v. Niehoff*, 527 F.3d 41, 50–54 (2d Cir. 2008) (affirming district court’s refusal to grant injunction in favor of student who was disciplined for an exaggerated and coarsely worded description of her disagreement with school administrators posted on a personal blog); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 37–40 (2d Cir. 2007) (rejecting student’s First Amendment challenge to suspension imposed for his off-campus use of an instant-messaging icon depicting a cartoon version of his teacher being shot).

and that none of the rationales for expansive school authority can justifiably apply to speech off school property.¹¹ But a number of courts are accepting uncritically the proposition that the special First Amendment infirmities under which students labor on school premises during school time follow these young people everywhere they go by dint of their student status.¹² In other words, the schoolhouse gate that once cabined school authority now swings in the other direction.¹³ If it becomes accepted that *Tinker* supplies the standard for review of school regulation of students' speech on Saturday in their own bedrooms, then that standard must necessarily stand for something more than "reasonableness-minus." Otherwise, courts will have created a constitutional underclass who must graduate, or drop out, to be treated as full-fledged citizens.

I. *TINKER* AND THE EVOLUTION OF PUBLIC FORUM DOCTRINE

A. *Scope of Tinker Confuses and Splits Lower Courts*

To be clear, *Tinker* is still good law. Every Supreme Court ruling about student speech since 1969 has quoted *Tinker* as authority,¹⁴ and none has purported to overrule it.¹⁵ In the view of at least some

11. See, e.g., *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (enjoining suspension of a high school student who created a website with mock "obituaries" of his classmates, finding that, while "the intended audience was undoubtedly connected to [the high school], the speech was entirely outside of the school's supervision or control"); see also *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 702-05 (W.D. Pa. 2003) (invalidating school disciplinary policy, which purported to allow punishment of speech with no physical nexus with school, as unconstitutionally overbroad and vague); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 458-60 (W.D. Pa. 2001) (same).

12. See Mary-Rose Papandrea, *Schools Lack Authority to Punish Online Student Speech*, CITIZEN MEDIA LAW PROJECT, Nov. 13, 2008, <http://www.citmedialaw.org/blog/2008/schools-lack-authority-punish-online-student-speech> (rejecting arguments for restricting speech of minors based on their status as minors).

13. See discussion *infra* Part IV (arguing that courts have eroded students' First Amendment rights based on the special characteristics of the school environment).

14. There have been three Supreme Court cases concerning student speech in elementary, middle, and high schools since *Tinker*. In all three cases, the Court sided with the schools. See generally *Morse v. Frederick*, 127 S. Ct. 2618 (2007) ("Bong Hits 4 Jesus" banner on sidewalk); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school newspaper articles); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student government candidate's speech).

15. See Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 673-74 (2002) ("First and foremost, *Tinker* is not dead. Students still do not shed their constitutional rights at the schoolhouse gate. *Fraser* and *Kuhlmeier* have neither overruled *Tinker*, nor have they chipped away at its breadth."); Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995) ("Although these Courts have not specifically overruled *Tinker*, *Tinker*'s progeny have greatly altered the holding set forth by the Warren Court.").

federal courts today, however, *Tinker* means nothing more than that a public school may not penalize students based on the viewpoints that they espouse—unless the school decides that the discrimination serves an important purpose.¹⁶ Indeed, in the mordant words of one commentator, “under the current standard applicable to student speech, a commercial for Hostess Twinkies receives greater protection under the First Amendment than does a student’s political speech.”¹⁷ Justice Fortas’s expansive pronouncement of student First Amendment rights¹⁸ has been reduced to this miserly concession by selectively imposing on *Tinker* elements of an ill-fitting “forum analysis” framework that applies to other types of government property.¹⁹ In other words, the courts taking a reductionist view of *Tinker* appear to have “backed into” the legal analysis, attempting to reconcile *Tinker* with traditional notions of the government’s authority to regulate speech on its own property.²⁰ The Supreme Court has never fully embraced forum analysis in the student speech setting, however, and *Tinker* itself strongly suggests that the public forum doctrine is inapplicable.²¹

16. See, e.g., *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002) (holding that viewpoint neutrality requirement that applies to regulation of speech in other nonpublic-forum government property does not apply to public schools). In its most recent foray into the realm of student speech, the Supreme Court hinted, but did not squarely hold, that viewpoint discrimination could be permissible where a sufficiently important government interest is implicated. See *Morse v. Frederick*, 127 S. Ct. 2618, 2645 (2007) (Stevens, J., dissenting) (contending that majority’s view that schools may punish speech reasonably interpreted as promoting illegal drug use “invites stark viewpoint discrimination.”).

17. S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 122 (1995).

18. *Tinker*, 393 U.S. at 511 (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect . . .”).

19. “The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981). Rather, the range of permissible expression and conduct in public forums depends upon the nature and use of the public area. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”).

20. See, e.g., *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441 (5th Cir. 2001) (acknowledging that the government may regulate speech in a public school setting); see also *Mercer v. Harr*, No. H-04-3454, 2005 WL 1828581, at *5 (S.D. Tex. Aug. 2, 2005) (relating that First Amendment protection depends on the location in which the speech takes place and that student speech is subject to restriction because it takes place in a school setting).

21. *Tinker*, 393 U.S. at 512–13 (evaluating student speech based on whether it “materially and substantially” interferes with school operations, regardless of whether the speech is communicated in a classroom, cafeteria or playing field).

Where *Tinker* applies, it places a weighty burden on school officials to justify prohibiting or punishing student speech.²² Censorship will pass constitutional muster only if the speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”²³ The question today is, where—if anywhere—will *Tinker* apply? The question has visibly confounded the federal courts,²⁴ as one recently observed: “Courts at all levels have demonstrated confusion as to the scope of *Tinker’s* holding . . . Courts disagree . . . as to the broader question of whether the legal standard in *Tinker* is applicable more generally to all regulation of student speech and not simply speech that expresses a particularized view.”²⁵

Most courts continue to recognize *Tinker* as supplying the default standard under which regulation of student expression is to be judged unless the facts fit one of the relatively narrow exceptions carved out by the Supreme Court.²⁶ At least three U.S. circuit courts of appeal, however, have indicated that they will require the government to satisfy the *Tinker* standard only in the relatively rare instance when a regulation discriminates based on the speaker’s viewpoint.²⁷ Where there is no viewpoint discrimination, these circuits evaluate censorship under a more government-friendly

22. “[M]ere desire to avoid . . . discomfort and unpleasantness” is not sufficient to justify prohibiting student speech. *Id.* at 509. School officials must provide evidence to support regulating the speech. *Id.*

23. *Id.* at 513.

24. Compare *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) (refusing to apply the dictionary definition of “offensive” to images on student’s t-shirt because doing so would give *Tinker* “no real effect”), and *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (finding that, under *Tinker*, non-school-sponsored material cannot be regulated on the basis of undifferentiated fear), with *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (allowing school officials to exercise editorial control over student speech as long as their actions are reasonably related to pedagogical concerns of civility, rudeness, and bad taste).

25. *Bar-Navon v. Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007).

26. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–14 (3d Cir. 2001) (explaining categories recognized by the Supreme Court as exceptions to *Tinker* and concluding “[s]peech falling outside of these categories is subject to *Tinker’s* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others”); see also *Guiles*, 461 F.3d at 325 (“[F]or all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.”); *Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 740 (N.D. Ind. 2005) (collecting cases and concluding that eight circuits have embraced the view that *Tinker* supplies the default standard under which all student speech cases are to be judged, though erroneously including Fifth Circuit in that enumeration).

27. See *infra* note 28 and accompanying text (describing the Ninth, Sixth, and Fifth Circuits as applying *Tinker* only when school regulations are not viewpoint neutral).

reasonableness standard.²⁸ Some courts have eroded the *Tinker* doctrine even further, holding that the demanding *Tinker* standard limits the government's censorship discretion only if the censorship targets a disfavored *political* viewpoint,²⁹ and that even other viewpoint discrimination—discrimination that is almost never tolerated when the speaker is an adult—receives more deferential review.³⁰

Disagreement over the scope of *Tinker* is not mere academic curiosity. If *Tinker* means what it says, then the state may not declare entire topics off-limits for discussion at school, with the possible exception of speech in a “curricular” medium that is paid for and directed by the school.³¹ If *Tinker* means only what the reductionists believe, then its proscriptions will be easily gamed by savvy rule makers who categorically ban—under the cloak of “viewpoint neutrality”—whatever subject matter or mode of communication makes them uncomfortable.³²

28. See *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431–32 (9th Cir. 2008) (“*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny”); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391–93 (6th Cir. 2005) (holding that the appropriate standard for evaluating expressive conduct—in this case, a middle school student’s style of dress—in the school setting is a relaxed version of the intermediate-scrutiny standard set forth in *United States v. O’Brien*, 391 U.S. 367 (1968)); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442 (5th Cir. 2001) (limiting application of *Tinker* to “school regulations directed at specific student viewpoints,” and holding that the *O’Brien* test—which it described as functionally equivalent to a reasonable time, place, and manner inquiry—applied in First Amendment challenges to school dress code); see also *Mercer v. Harr*, No. H-04-3454, 2005 WL 1828581, at *6 (S.D. Tex. Aug. 2, 2005) (deciding that *Fraser*, not *Tinker*, applied to a prohibition on a middle-school student’s T-shirt containing a pun on the word “dam”). The Ninth Circuit’s recent pronouncement in *Jacobs* appears irreconcilably at odds with past circuit precedent in which *Tinker* was regarded as the standard for all speech not falling within a few narrow exceptions recognized by the Supreme Court. See, e.g., *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 768 (9th Cir. 2006) (declaring that *Tinker* is the catch-all standard for evaluating students’ First Amendment claims); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (same).

29. See *Guiles*, 461 F.3d at 326 (“It is not entirely clear whether *Tinker*’s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination.”).

30. See, e.g., *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 625 (E.D. Pa. 2008) (characterizing *Tinker* as a political speech case, and refusing to afford First Amendment protection to a student’s T-shirt message about “hunting” terrorists because “there is no constitutionally protected political message”).

31. See discussion of “curricular” speech *supra* notes 23–26 and accompanying text.

32. See *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) (noting the possible manipulability of the nature and scope of an “educational mission,” and the subsequent potential for speech repression). The standards in this area are especially susceptible to manipulation because the concepts of “viewpoint” versus “content” discrimination are so malleable. See *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 630 (2d Cir. 2005) (observing, in case challenging school’s

B. Mechanics of the Public Forum Doctrine

Under the public forum doctrine, speech on government property (such as a park) or over a government-owned conduit (such as public television airwaves) is entitled to varying levels of protection based on the nature and qualities of the forum.³³ The Supreme Court has recognized three types of government property: (1) the traditional public forum, (2) the limited (or designated) public forum, and (3) the nonpublic forum.³⁴

In a public forum, the government may limit speech and impose content-based exclusions only by showing that the limitations are narrowly drawn to achieve a compelling government interest.³⁵ Government may enforce content-neutral regulations of the time, place, or manner of expression even in a public forum, but only if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication.³⁶ In a limited public forum, the government is bound by the same rules as in the general all-purpose public forum.³⁷ However, the government may limit the purpose of the forum by restricting its use to certain groups only³⁸ or to expression on certain

refusal to allow student's religious-themed poster to be displayed in a hallway, that "drawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which traditionally has been prohibited *even* in non-public fora, is, to say the least, a problematic endeavor.") (emphasis in original).

33. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (considering the constitutionality of an ordinance prohibiting picketing before or about any residence or dwelling); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ruling on speech and noisemaking adjacent to a school); *Cameron v. Johnson*, 390 U.S. 611 (1968) (evaluating speech and expression in front of a courthouse); *Brown v. Louisiana*, 383 U.S. 131 (1966) (distinguishing between a silent vigil from a noisy demonstration in a public library).

34. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (explaining the level of scrutiny that courts are to apply to regulations of speech depending on characteristics of the forum).

35. A content-based regulation is subjected to strict scrutiny and presumed unconstitutional unless proven valid. *United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008). To survive strict scrutiny analysis, a statute must (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest. See *id.* (holding that a statute banning material that depicts animal cruelty fails strict scrutiny under the above test).

36. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

37. See *Perry*, 460 U.S. at 46 (explaining that, in limited public forums, limitations based on content must be justified by compelling governmental interests).

38. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (discussing religious groups' use of a limited public forum).

subjects only.³⁹ A bulletin board on a college campus that is open only to student organizations might be the archetypal limited public forum. In either a traditional or a limited public forum, content-based regulation of expression is permitted only if the regulator can survive strict scrutiny by showing that the regulation is narrowly tailored to achieve a compelling government interest.⁴⁰

Government-owned property falling in neither of these categories is a nonpublic forum. Here, in addition to time, place, and manner restrictions, the government may restrict the use of a nonpublic forum to its intended purposes, as long as any restriction on speech is reasonable and not an effort to suppress a disfavored viewpoint.⁴¹ Regulators may exclude entirely a speaker who wishes to espouse a topic that is outside the purposes for which the nonpublic forum exists.⁴²

In deciding what constitutes the “forum”—i.e., whether it is the entire premises, like “the park,” or some subset of the premises, like a bandshell—courts will look to the scope and function of the access the speaker is requesting.⁴³ How thinly a court elects to slice the forum often determines the outcome of the First Amendment analysis. For example, while the public outdoor areas of a college campus are likely a public forum (either by tradition or by designation), it has been held that the campaign finance system for student elections is a nonpublic sub-forum that exists within the confines of campus.⁴⁴

The principle that the government has only narrowly limited authority to regulate the messages of speakers on public property traces back to Justice Roberts’s 1939 declaration in *Hague v. Committee*

39. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (distinguishing content discrimination and viewpoint discrimination).

40. *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007).

41. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981).

42. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that the government did not violate the First Amendment by excluding legal defense and political advocacy organizations from participation in a federally administered charitable giving campaign for federal employees).

43. *Id.* at 801.

44. *Flint*, 488 F.3d at 831–32. For an illustration of how defining the boundaries of the forum can be decisive in the context of school speech, see *Henery ex rel. Henery v. City of St. Charles*, 200 F.3d 1128 (8th Cir. 1999). In *Henery*, the court rejected the First Amendment claim of a student disciplined for handing out condoms in a hallway as part of his student government campaign as the “safe” candidate. *Id.* at 1131. The court determined that the campaign, not the hallway, was the “forum,” and—because the campaign was open only to registered candidates and the content of campaign materials was heavily regulated—readily concluded that the forum was nonpublic. *Id.* at 1133.

for *Industrial Organization*.⁴⁵ Justice Roberts proclaimed that streets and parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁴⁶ In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,⁴⁷ the Court set forth its most detailed depiction of the three forum categories and the level of protection that speech will receive in each.⁴⁸ In that case, the Court confronted a dispute between two competing unions—the incumbent and the challenger—over access to teacher mailboxes in an Indiana school district.⁴⁹ The Court rejected the upstart’s contention that the First Amendment required the school to allow all would-be speakers to access the mailboxes on equal terms: “[O]n government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used.”⁵⁰

II. HAZELWOOD AND THE ROLE OF PUBLIC FORUM ANALYSIS IN STUDENT SPEECH CASES

In *Hazelwood School District v. Kuhlmeier*,⁵¹ the Supreme Court dealt with a First Amendment challenge to a high school principal’s decision to redact editorial content from a student newspaper that was produced as part of the school’s journalism curriculum.⁵² The principal testified that he instructed the printer to remove a two-page spread of student-authored stories about family and social issues because he believed that a story about teen pregnancy failed to effectively disguise the identities of teens who agreed to speak anonymously, and that a story about divorce contained potentially defamatory allegations about an absentee father who was not given an opportunity to respond.⁵³

45. 307 U.S. 496 (1939).

46. *Id.* at 515; see Monica Marikian, Note, *The Forbes Decision: Has the Court Closed the Public Forum on Candidate Speech?*, 29 SETON HALL L. REV. 1069, 1078 (1999) (tracing origin of public forum doctrine to *Hague*).

47. 460 U.S. 37 (1983).

48. *Id.* at 45–46.

49. *Id.* at 41–42.

50. *Id.* at 55.

51. 484 U.S. 260 (1988).

52. *Id.* at 260.

53. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev’d*, 484 U.S. 260 (1988). As a point of historical fact, the allegations about the absentee father had been made anonymous in a later version of the story that the principal did not see. *Id.*

Although there was no contention that the articles were materially and substantially disruptive to the operation of the school, the Court held that *Tinker* was not the applicable standard for this particular type of student speech, and that the school could justify overriding students' editorial decisions by pointing to any justification "reasonably related to legitimate pedagogical concerns."⁵⁴ Accordingly, the principal's decision did not violate the student journalists' First Amendment rights.⁵⁵

Because *Hazelwood* has been the source of so much subsequent confusion,⁵⁶ it is important to examine exactly what the Court did and did not rely on in making its determination. The Court began by observing that schools are not traditional public forums that have historically been used for purposes of assembly and communication among citizens.⁵⁷ Consequently, a school could qualify as a public forum only if it had been held open "for indiscriminate use by the general public, or by some segment of the public, such as student organizations."⁵⁸

Having made that general observation, the Court went on to categorize student speech as either independent speech or curricular, school-affiliated speech, and to recognize different standards for each:

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical

54. *Hazelwood*, 484 U.S. at 261, 273.

55. *See id.* at 274–76 (finding a principal's concerns over student and parent anonymity sufficiently legitimate and reasonable to allow the principal to regulate school-sponsored speech).

56. *See* Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 749 (2009) ("The inconsistent analysis of student newspaper and yearbook cases is only the visible tip of the iceberg. Courts and judges struggle with and debate the applicability of the *Hazelwood* standard in myriad contexts and employ diverse criteria in doing so."); *see also* Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protects Free Expression on Public Campuses, Lessons From the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 495 and n.115 (2001) (observing that "[t]he vast majority of notes, comments, and reviews following *Hazelwood* criticized the decision for its reasoning or its breadth," and collecting critical commentator reviews).

57. *Hazelwood*, 484 U.S. at 267 (*citing* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

58. *Id.* at 261.

productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum⁵⁹

The *Hazelwood* Court concluded that the speech of student journalists in the *Spectrum* newspaper was curricular because it was supervised by a teacher, prepared as part of a journalism course, and generally reviewed by administrators before publication (discounting evidence that the school's officially declared policy was to maintain the paper as a student-run public forum).⁶⁰ Accordingly, as "part of the school curriculum," the students' work could be censored on a lesser showing than that demanded by *Tinker*.⁶¹

Notably, had the Court understood *Tinker* to be about nothing more than viewpoint discrimination, *Hazelwood* could have been effortlessly decided within the *Tinker* framework, rather than requiring a deviation from it. Viewpoint was not the issue in *Hazelwood*.⁶² The principal testified that his primary concern was for the privacy interests of those identified (or identifiable) in the stories, and that his secondary concern was that the *subject matter*—not the students' view of it—was too mature for young audiences.⁶³

Because the conclusive fact in *Hazelwood* was not the status of the forum but the risk that, in the Court's view, student journalists' speech could be confused with the official voice of the school, *Hazelwood* may not even be a "forum" case at all.⁶⁴ Rather, *Hazelwood* is better understood as a case about "government speech," and when the government speaks, it is permitted to discriminate based on viewpoint (e.g., to instruct a government employee to espouse the administration's position only when testifying at a congressional hearing).⁶⁵ In no event can *Hazelwood* defensibly be read as a full

59. *Id.* at 270–71.

60. *Id.* at 268.

61. *Id.* at 271.

62. The school defendants in *Hazelwood* accepted as a given that viewpoint neutrality was required, and argued instead that their decision to censor the newspaper pages was reasonable and viewpoint-neutral. Alexis Zouhary, Note, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227, 2242–43 (2008).

63. *Hazelwood*, 484 U.S. at 260 (noting that the newspaper articles concerned divorce and student pregnancy).

64. *Id.* at 271 (explaining that as regards school sponsored activities, schools have the authority to "exercise greater control" over speech in this arena to, among other things, prevent the speaker's view from being mistakenly seen as that of the school's).

65. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (holding that the government may lawfully make funding decisions based on viewpoint when it is the

retreat from *Tinker's* core holding that, as long as the expression is not disruptive, a student may express himself wherever he goes on campus throughout the school day.⁶⁶

Hazelwood has created decades of needless confusion because subsequent courts have interpreted it as an invitation to impose forum doctrine in a place it does not belong.⁶⁷ As discussed *infra*, forum analysis makes sense where there is a location or a communicative vehicle over which government must control access for reasons of crowding or of message confusion; as the Court observed in *Cox v. New Hampshire*,⁶⁸ government must have leeway to allocate parade permits “to prevent confusion by overlapping parades or processions, [and] to secure convenient use of the streets by other travelers.”⁶⁹ If government determines that it cannot effectively regulate use of the forum applying reasonable time, place, and manner restrictions, then it can close the forum.⁷⁰ But the analysis makes much less sense in a venue where “message overload” is not an issue—i.e., the hallway of a school, or the pages of a student newspaper. The general public is forbidden from wandering school hallways or serving on the staff of the student paper, and there is no scarcity of space that would cause official school messages to be crowded out by student messages.⁷¹

Careless application of *Hazelwood* can short-circuit the forum analysis, because the Court declared that “schools” are not public forums—even though the Court went on to conclude that the

government that is the speaker). For the view that *Hazelwood* is best understood as a “government speech” case, and a critique of the way the government speech doctrine has worked in practice in post-*Hazelwood* cases, see generally Nicole B. Casarez, *The Student Press, the Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1 (2008).

66. *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

67. See Casarez, *supra* note 65, at 17 (commenting that the *Hazelwood* opinion’s “imprecise reasoning” has resulted in certain lower courts mistakenly placing the decision in the category of public forum doctrine rather than government speech analysis).

68. 312 U.S. 569 (1941).

69. *Id.* at 576 (internal citations omitted) (quotation marks omitted).

70. See *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (stating that the government may close a forum at will, or limit forum use or access to specific topics or groups, but it may not exercise viewpoint discrimination); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (holding that even if it creates a limited public forum, agency is free to close it in good faith so long as closure is not pretext for unlawful viewpoint discrimination).

71. Thus, in reality, and in opposition to the Court’s view in *Hazelwood*, it is unlikely that student speech in school hallways or in a school newspaper would be seen by an outside observer—if it is seen at all—as bearing the “the imprimatur of the school.”

relevant forum was not “the school” at all, but rather the newspaper.⁷² Because the *Hazelwood* Court went on to consider the forum status of the newspaper, the Court plainly did not believe it was sufficient to stop its analysis at the building level.⁷³ Yet that has not stopped subsequent courts from relying on the (arguably dicta) observation in *Hazelwood* as to the forum status of schools.⁷⁴ Still others have taken *Hazelwood* as an invitation to narrow *Tinker*’s protection by declaring that virtually any vehicle for communication within (or associated with) the school is a “curricular” or a “non-forum” vehicle, such that censors need surmount only the lower *Hazelwood* hurdle.⁷⁵ These carve-outs have included school walls,⁷⁶ fences,⁷⁷ hallways,⁷⁸ and classrooms,⁷⁹ suggesting that expression anywhere other than on the

72. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (“The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”) (quoting *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939)).

73. See *id.* at 270 (noting that the record gives no indication that school policy or practice was aimed at providing students free reign over the use of the Spectrum newspaper) (quoting *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 47 (1983)).

74. See, e.g., *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (summarily holding, without inquiry into uses of the property or of what portion of the property the speaker sought to access, that a junior high school is not a public forum, so a school regulation banning distribution of written materials primarily prepared by non-students would be upheld as reasonable).

75. See, e.g., *Henery ex rel. Henery v. City of St. Charles*, 200 F.3d 1128, 1133 (8th Cir. 1999) (student government election campaign is a non-public forum to which *Tinker* level of protection is inapplicable); *Corder v. Lewis Palmer Sch. Dist.*, 568 F. Supp. 2d 1237, 1245 (D. Colo. 2008) (student’s address to graduating class was “school sponsored” speech, and administrators could legitimately censor religious references under mere reasonableness standard).

76. See *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 630 (2d Cir. 2005) (applying *Hazelwood* rather than *Tinker* standard to school’s censorship of religious elements in kindergarten student’s artwork hung as part of hallway display); compare *Kiesinger v. Mexico Academy & Cent. Sch.*, 437 F.Supp.2d 182, 190-91, 193 (N.D.N.Y. 2006) (finding that school created a limited public forum by permitting students and community members to install commemorative inscribed bricks in a walkway for school fundraising purposes, with considerable individual leeway on the content of inscriptions, but going on to find that – despite forum status – *Hazelwood* rather than *Tinker* level of protection applied, because of school’s “obligation to ensure that its physical premises are suitable for the purpose they exist to serve”).

77. See *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1213 (11th Cir. 2004) (ruling that students’ religious expression in mural painted to beautify temporary construction fence on school grounds was not entitled to *Tinker* level of protection, because it was supervised by school employees under school content standards).

78. See *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008) (declining to apply *Tinker* standard to school’s refusal to allow distribution of religious literature in hallways); see also discussion *infra* notes 161–168 (discussing *M.A.L.*).

79. See *Denoyer v. Merinelli*, No. 92-2080, 1993 WL 477030 (6th Cir. Nov. 18, 1993) (unpublished) (holding that deferential *Hazelwood* standard, not *Tinker*, applied to second-grader’s challenge to school directive that forbade her from

student's physical person—i.e., a *Tinker* arm-band—may no longer be *Tinker* speech.

III. PUBLIC FORUM DOCTRINE SHOULD NOT CONSTRAIN *TINKER*'S REACH

The notion that *Tinker* is merely a viewpoint-discrimination case, and that schools have broad latitude to regulate the content of student speech so long as they avoid (or compellingly justify) viewpoint discrimination—a position that the Ninth Circuit recently embraced in a reversal of its prior interpretation of *Tinker*⁸⁰—is both unnecessary and dangerous. Such a constricted view of *Tinker* is inconsistent with the Supreme Court's approach in *Tinker* and with later Supreme Court student speech cases applying *Tinker*.⁸¹ Moreover, it risks vesting inappropriately broad enforcement discretion in school officials who have too often exhibited willingness to use their censorship discretion to censor benign editorial content that they consider too critical of the school or too controversial for their comfort.⁸²

A. *The Text and Setting of Tinker*

Tinker did not “discover” the concept of First Amendment rights for students during the school day. Before the landmark 1969 ruling, the clearest articulation of the scope of student rights came in the context of a “compelled speech” case, *West Virginia Board of Education v. Barnette*,⁸³ in which the Supreme Court ruled that students could not be compelled to forsake their religious opposition to swearing allegiance to the American flag.⁸⁴ School officials claimed that the

showing videotape of her church choir performance during school show-and-tell period, and interpreting *Hazelwood* to say “that a school may reasonably regulate student expression within the closed forum of a classroom without violating the First Amendment's guarantee of free expression”).

80. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431–32 (9th Cir. 2008) (expounding that *Tinker* is silent on how analysis of viewpoint- and content-neutral regulation of student speech should be analyzed, and therefore, allowing for a “different level of scrutiny” than that employed in *Bethel*, *Hazelwood*, or *Tinker*, where viewpoint- and content-neutral regulations were at issue).

81. See *infra* Part III.B (discussing the Court's subsequent applications of *Tinker*).

82. See Casarez, *supra* note 65, at 27–30 (describing how school administrators have abused the discretion they obtained under *Hazelwood* and censored lawful, non-disruptive content—including, in one instance, an editorial urging tolerance for gay and lesbian students—and have stripped newspapers of public-forum status in retaliation for disfavored editorial content).

83. 319 U.S. 624 (1943).

84. *Id.* at 642 (holding that board of education's resolution mandating students salute and pledge to the American flag in order to attend public school violated constitutional freedoms of speech and worship).

State's interest in promoting "national unity" overrode the rights of the individual students to refuse to recite the Pledge of Allegiance.⁸⁵ The Court resoundingly rejected the State's argument and found that the students' First Amendment rights encompassed the right to stay silent in the face of government compulsion: "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 or force citizens to confess by word or act their faith therein."⁸⁶

The facts and holding of *Tinker* are well-known and bear only the briefest of summaries. The case was brought by three Iowa public-school students who were suspended for a silent protest in which they wore black armbands to school in support of a ceasefire between the United States and North Vietnam.⁸⁷ The Supreme Court held that the students' protest was close to "pure" speech, was entitled to the protection of the First Amendment even on school grounds during the school day, and could not be punished absent a showing that the school's action was "necessary to avoid material and substantial interference with schoolwork or discipline."⁸⁸ Significantly, nowhere did the Court indicate any distinction between the right to engage in protest based on the geographic location in the school (and the evidence developed below indicated that the students wore the armbands throughout school, both inside and outside of the classroom).⁸⁹

Courts taking the restrictive view of *Tinker* put decisive weight on two considerations: first, that *Tinker* used the phrase "viewpoint" in describing the challenged regulation, and second, that *Tinker* referenced the school's invidious motive—to avoid unwelcome protests of the Vietnam war—in assessing the propriety of the ban.⁹⁰

85. *Id.* at 632 n.12.

86. *Id.* at 642. The Court directly confronted the school's contention that schoolchildren occupy a lesser First Amendment status that must yield to the state's paramount interest in instilling fundamental values: "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." *Id.* at 637.

87. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

88. *Id.* at 511.

89. Indeed, the Court hypothesized that "[i]f a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it *anywhere on school property* except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students." *Id.* at 513 (emphasis added).

90. *See, e.g., Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 879–80 (1982) (Blackmun, J., concurring) (referencing *Tinker* for the proposition that a school may not excise books from its library because it disagrees

The Court patently detected the school's hostility to the students' antiwar message, and did speak in terms of the suppression of an opinion:

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.⁹¹

But elsewhere, the Court explicitly stated that the First Amendment would equally prohibit a regulation "forbidding discussion of the Vietnam conflict," just as it would forbid expressing opposition to the war.⁹² Plainly, the *Tinker* Court would have struck down content discrimination—a rule against discussion of the war—as readily as viewpoint discrimination.

Tinker did not confine its recognition of student rights to instances in which speech regulations single out only certain viewpoints. The Court was using a broader paintbrush than that:

Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁹³

The strongest evidence that *Tinker* did not limit students' rights to the extent of the officially approved expressive uses of school property—the heart of forum analysis—appears in the Court's approving citation to *Hammond v. South Carolina State College*.⁹⁴ In *Hammond*, students at a state college challenged their suspensions for violating a prohibition on celebrating, parading, or demonstrating anywhere on campus without a permit.⁹⁵ The college characterized the regulation as no more than a reasonable time, place, and manner restriction, but the Court disagreed, holding that public assembly to

with the opinions contained therein, and noting that an unpopular *viewpoint* alone is not sufficient to justify such a removal).

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

92. *Id.* at 513.

93. *Id.* at 511.

94. *Id.* at 512 n.6 (citing *Hammond v. S.C. State Coll.*, 272 F. Supp. 947 (D.C.S.C. 1967)).

95. *Hammond*, 272 F. Supp. at 948.

obtain redress from government officials was not inconsistent with the purposes and uses of a college campus.⁹⁶ *Tinker* characterized the holding of *Hammond* this way: “[A] school is not like a hospital or a jail enclosure It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property.”⁹⁷ If the “dedication to specific uses” of school property does not circumscribe students’ right of expression on the property, then the forum status of the property cannot be the controlling inquiry.⁹⁸

The Court’s discussion of the school’s motivation for enacting the armband regulation, while illuminating, does not as a matter of law establish that the regulation was viewpoint-discriminatory. Under the analysis set forth by the Court in *Hill v. Colorado*,⁹⁹ the fact that an “enactment was motivated by the conduct of the partisans on one side of a debate” does not make it a viewpoint-based regulation.¹⁰⁰ Rather, courts will require some evidence that the regulation actually was applied in a discriminatory manner—e.g., in *Tinker*, that armbands signifying support for continued involvement in Vietnam were tolerated. And no such evidence appeared in *Tinker*; indeed, the Court’s review of the evidence discerned that the school wanted to discourage *any* kind of protest on general principle, not merely antiwar protests.¹⁰¹

The phrase “viewpoint discrimination” did not, at the time of *Tinker*, carry the loaded connotation in a forum analysis that it does today. It is error to assign decisive significance retrospectively to the pre-*Perry Education* Court’s use of this term. But even though the *Tinker* Court could not have foreseen the contours of the three-tiered public forum analysis formalized in *Perry Education*,¹⁰² the Court was

96. *Id.* at 951.

97. *Tinker*, 393 U.S. at 512 n.6.

98. *See Hammond*, 272 F. Supp. at 950–51 (noting the Court’s earlier acknowledgement that peaceful assembly at a government institution constitutes First Amendment expression in its “pristine form,” and asserting that a state college campus is open to the college’s students for a like purpose) (citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

99. 530 U.S. 703 (2000).

100. *Id.* at 724.

101. *See Tinker*, 393 U.S. at 509 n.3 (pointing out that school authorities were not concerned with the specific disruption that might occur because of the armbands, but rather expressed a more general position that demonstrations should not occur at schools).

102. *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 44–45 (1983) (explaining that the level of First Amendment protection afforded to speech depends on the character of the public property at issue).

aware of the concept of public property as a forum for free expression, which had been recognized some thirty years earlier and referenced repeatedly thereafter.¹⁰³ Yet the Court elected not to decide the case in view of the historical communicative (or non-communicative) uses of school property, and instead focused on the status of the speakers—“persons’ under our Constitution”—and on the necessity that students be able to exchange ideas in furtherance of their education.¹⁰⁴ To suggest that *Tinker* did not apply public forum analysis because that analysis was not “invented” until the 1980s would be errant revisionism; *Tinker* is much less a case about the status of property than it is a case about the status of the speakers.¹⁰⁵

B. Supreme Court Applications of *Tinker*

1. Bethel School District No. 403 v. Fraser

The Supreme Court’s post-*Tinker* student speech cases give no indication that the Court believes that a forum analysis is always required or decisive. The most persuasive of these is *Bethel School District No. 403 v. Fraser*,¹⁰⁶ a case decided just three years after the Court set forth its detailed exposition of the public forum doctrine in *Perry Education*. In *Fraser*, Washington high school student Matthew Fraser challenged the school’s authority to discipline him for the content of his candidate nominating speech at a student assembly, in which he used a string of double-entendres in an attempt at humor.¹⁰⁷ The evidence showed that the students attending the assembly were not unusually disorderly, that no student complained afterward, and that, according to one teacher’s testimony, the “disruption” was limited to devoting the first ten minutes of a class period to students’ discussion of the speech.¹⁰⁸ Both the trial court and the U.S. Court of Appeals for the Ninth Circuit ruled in the student’s favor, applying

103. See *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

104. See *Tinker*, 393 U.S. at 511–12.

105. See Casarez, *supra* note 65, at 11 (noting the *Tinker* Court’s recognition that students do not lose their constitutional right to free expression simply because of “their status as participants” in a public establishment).

106. 478 U.S. 675 (1986).

107. *Id.* at 677–78.

108. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1359–60 (9th Cir. 1985).

Tinker.¹⁰⁹ The Ninth Circuit rejected the school district's argument that the school had a heightened interest in regulating the content of Fraser's speech because, as part of an on-campus assembly, it was functionally a part of the curriculum: "The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program."¹¹⁰ Although the circuit court did not conduct a detailed inquiry into the forum status of either the physical forum (the auditorium) or the metaphysical forum (the assembly), the court characterized Fraser's speech as occurring in "an open forum for students to express their political views."¹¹¹

The Supreme Court reversed.¹¹² The Court did not address the Ninth Circuit's classification of the event as an "open forum," and indeed, Chief Justice Burger's majority opinion did not use the term "forum" at all.¹¹³ Rather, the majority emphasized the "captive" nature of the audience and the interest of the school in disowning the speaker's message:

A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.¹¹⁴

Concurring in the result, Justice Brennan wrote separately to emphasize that the unique setting of the assembly heightened the state's interest, and that a different setting—even elsewhere in the school—might have yielded a different outcome:

To my mind, the most that can be said about respondent's speech—and all that need be said—is that in light of the discretion school officials have to teach high school students how to conduct

109. *See id.* at 1358 (summarizing that the district court judge held for Fraser in a declaratory judgment that the School District had transgressed on Fraser's First and Fourteenth Amendment rights); *id.* at 1359 (explaining that similar to *Tinker*, the school district here was unable to meet its burden of showing how Fraser's speech "substantially disrupted or materially interfered" with the educational mission of the school).

110. *Id.* at 1364.

111. "To their credit, Bethel High School officials created an open forum for students to express their political views; when they did so, they implicated the fundamental right of participation in the process of self-government, albeit a student government." *Id.* at 1365.

112. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

113. *Id.*

114. *Id.* at 685–86.

civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits.¹¹⁵

If the revisionist view of *Tinker* were correct, then (just as is true of *Hazelwood*), *Fraser* would have been an easily decided (and quite possibly unanimously decided) case, as there is no basis to contend that Fraser was penalized for his viewpoint.¹¹⁶ That the Court carved out an exception to *Tinker*, rather than straightforwardly applying *Tinker* to reach the same outcome, strongly evidences that the Court did not view *Tinker* as supplying the standard only in cases of viewpoint discrimination.¹¹⁷

2. *Morse v. Frederick*

The Court's most recent pronouncement on student speech came just in 2007, in the case of *Morse v. Frederick*.¹¹⁸ In *Morse*, a 5-4 majority of the Court held that a school did not violate the First Amendment in punishing a student who, at a public gathering during school hours where teachers provided supervision, stood directly across from the school and displayed a banner ("Bong Hits 4 Jesus") that the student later claimed was a nonsensical ploy for attention.¹¹⁹ Writing for the majority, Chief Justice Roberts expressly rejected the argument that *Morse* "[wa]s not a school speech case," noting that the events "occurred during normal school hours" and at an activity "sanctioned" by the school (attendance at the torch relay for the 2002 Winter Olympic Games).¹²⁰

The *Morse* Court did not conduct a forum inquiry, and had it done so, the outcome would necessarily have been different. Joseph Frederick was standing on a public sidewalk, the prototypical public forum,¹²¹ and he did no more than display a sign; there is no evidence

115. *Id.* at 687-88 (Brennan, J., concurring).

116. *See id.* at 685 (majority opinion) (stating that unlike *Tinker*, this case did not deal with a political viewpoint).

117. Some courts have placed undue weight on the observation that the penalties imposed in *Fraser* were "unrelated to any political viewpoint" as opposed to those imposed in *Tinker*. *Id.* at 685. But *Fraser* did not purport to offer a substitute standard under which all cases other than viewpoint-discrimination cases were to be analyzed, and even *Tinker* revisionists have generally recognized *Fraser* as confined to its unusual factual situation. *See, e.g.,* Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442 (5th Cir. 2001) (describing the *Fraser* category of speech as that which "involves lewd, vulgar, obscene, or plainly offensive speech").

118. 127 S. Ct. 2618 (2007).

119. *Id.* at 2622.

120. *Id.* at 2624.

121. *See supra* note 103 and accompanying text (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

that he obstructed the flow of pedestrian traffic or otherwise engaged in conduct inconsistent with a public forum (nor was his punishment based on anything other than the content of his speech).¹²² Were Joseph Frederick not enrolled in school, no government authority could have punished what he did; indeed, no government authority could have punished a far more blatant, unambiguous message (“Hey kids, go smoke pot at school!”) by an adult speaker based solely on the impact the message might have on schoolchildren.¹²³ Although forum doctrine is about government control over its own property, and though Juneau-Douglas High School did not own the sidewalk, Frederick’s student status overrode his rights as a citizen speaking in a public forum.¹²⁴ Once again, heads means Juneau-Douglas High School wins, tails means Joseph Frederick loses.

In sum, the Court has dealt directly with student speech in a school setting three times since *Tinker* and has mentioned forum analysis in only one of those cases: *Hazelwood* (and even there, the decision did not primarily rely on that forum theory).¹²⁵ In no case has the Court justified its refusal to apply *Tinker*’s standard by holding that *Tinker* is inapplicable to nonpolitical speech or to a viewpoint-neutral restriction on speech. If the revisionist view of *Tinker* is correct, then *Tinker* means that government can always enforce reasonable viewpoint-neutral speech restrictions on schools, which is already the lowest recognized level of First Amendment protection.¹²⁶ Moreover, these restrictions must be viewed in light of the special characteristics of school, meaning something *less* than the lowest recognized level of protection. If that sliver is all that exists of *Tinker*, it could not possibly have been necessary to recognize additional (*Fraser/Hazelwood/Morse*) exceptions.¹²⁷

122. See *Morse*, 127 S. Ct. at 2622 (noting that, in fact, other students were becoming rambunctious and causing a disruption).

123. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (stating that the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”).

124. See *Morse*, 127 S. Ct. at 2627 (arguing that while students have constitutional rights, those rights can be restricted while they are in a school setting).

125. In *Hazelwood*, the Court argued that the principal could have deleted the articles because of “the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

126. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981) (allowing the government to impose on public speech reasonable time, place, and manner restrictions).

127. See discussion *infra* Part IV (discussing ways in which *Tinker* has been interpreted through revisionist theories).

C. *Basic Principles of Individual Liberty*

Fifty years ago, the Supreme Court struck down a Georgia city ordinance requiring anyone who solicited for membership in a union or other organization to first obtain a permit from the mayor and city council, who were empowered to grant or deny permit requests based on considering “the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens.”¹²⁸ The Court unanimously found the ordinance repugnant to the First Amendment, because it failed to provide any curb on the city’s discretion to grant or deny a permit based on the speaker’s viewpoint:

It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms [that] the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.¹²⁹

Outside the school setting, then, it is well-established that a regulation vesting unchecked latitude in government officials is facially violative of the First Amendment.¹³⁰ Yet when the speaker is a student, courts often do not merely tolerate, but promote fuzzy-edged standards that neither provide objective criteria to constrain enforcement discretion nor give the speaker clear notice of what conduct is prohibited.¹³¹

Because clarity is an important virtue in differentiating protected from unprotected speech, the notion that only “political speech” enjoys full-strength *Tinker* protection is untenable in the school environment.¹³² There is a vast quantity of everyday speech that is not strictly “political” in the way that we customarily understand the term, yet is worthy of protection. Student grievances about discomforts at school—unsanitary restrooms, unhealthy food options or nonfunctional computers in the library—undeniably have value, and so long as they are delivered in a non-disruptive manner, there is no

128. *Staub v. City of Baxley*, 355 U.S. 313, 316 (1958).

129. *Id.* at 322.

130. *Id.*

131. See discussion *supra* notes 120–124 and accompanying text (explaining why the Court in *Morse* had such difficulty in determining which prior school speech case to apply).

132. For instance, a school district in Arkansas recently argued, unsuccessfully, that a dispute over the school’s dress code was not sufficiently “political” to fall within the ambit of *Tinker*. *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008). For further discussion, see *infra* note 155 and accompanying text.

justification for denying such comments the protected status they would enjoy if uttered by an adult.¹³³ We should avoid a construction of *Tinker* that requires confounding line-drawing exercises about what qualifies as “political” speech in a setting in which even a complaint about food, restrooms, or computers might carry larger public-policy implications.¹³⁴

Where school control over student speech is concerned, the risks of an erroneous decision are manifestly lopsided. If the school errs on the side of too much speech, then some audience members will be forced to tolerate a message that may annoy them. If the school errs on the side of too little speech, then a student who has done nothing wrong may be suspended from school and falsely branded a delinquent.¹³⁵

IV. THE “SPECIAL CHARACTERISTICS” OF THE SCHOOL ENVIRONMENT

Neither a public school nor any of its major component parts (hallways, classrooms, and so forth) qualify as a traditional or designated public forum under the classic standard in which a space has been held open for “indiscriminate” public use.¹³⁶ Yet, for

133. Cf. *infra* note 169 and accompanying text (discussing ways in which courts have interpreted nonpolitical speech cases with students).

134. See, e.g., *Metromedia v. City of San Diego*, 453 U.S. 490, 536 (1981) (Brennan, J., concurring) (remarking on the difficulty in entrusting discretion to government agencies to distinguish between political and commercial speech on billboards by stating that “[i]n individual cases, this distinction is anything but clear”).

135. A student’s inability to obtain timely and meaningful review of an errant disciplinary decision is yet another reason that the law must tightly constrain schools’ ability to punish speech. Under the Supreme Court’s due process jurisprudence, a student may be suspended for a meaningful amount of class time—by a principal who serves as accuser, judge and jury—with no more “process” than an informal conversation. See, e.g., *C.B. v. Driscoll*, 82 F.3d 383, 385-88 (11th Cir. 1996) (holding that only “extremely limited” process must accompany a school disciplinary suspension, and affirming two nine-day suspensions where students received “rudimentary” notice and hearing); *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1080 (5th Cir. 1984) (affirming ten-day suspension where student was afforded opportunity for two “informal give-and-take sessions” with school principal).

136. The notion that the public’s ability to use the property must be “indiscriminate” to create a forum may connote anarchy, but in fact, it is possible to create a public forum even where the government retains a gatekeeper function over the use of the property. The Federal Equal Access Act (“EAA”), which requires public secondary schools to make their facilities available on equal and nondiscriminatory terms to all student groups, applies to any school property that is a “limited open forum.” 20 U.S.C. § 4071 *et seq.* The EAA provides that “[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.” 20 U.S.C. § 4071(b) (2006). Virtually every public school in America makes space available for student-led organizations to engage in communicative activity, whether it is the Chess Club, the Latin Club, or the Bible Study Club, and school officials do not (and in some instance, cannot) supervise the messages being conveyed. See, e.g., *Bd. of Educ. v.*

student speakers, schools do not fit the classic conception of a nonpublic forum.¹³⁷ Students routinely use the space for communication that neither furthers the core business of teaching nor is attributable to the school, yet that communication is essential both for individual social interaction and for a fully realized education.¹³⁸ Once again, Justice Fortas in *Tinker* says it best:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.¹³⁹

To emphasize, *Tinker* expressly recognizes that schools are “dedicated . . . [to] personal intercommunication” by students.¹⁴⁰ And we know that when property is “dedicated” to communicative purposes, a forum is created.¹⁴¹

Courts have had no difficulty deviating from the rules of forum analysis when bending the rules is necessary to uphold a school’s exercise of authority. The U.S. Court of Appeals for the Tenth Circuit’s opinion in *Fleming v. Jefferson County School District*¹⁴² is perhaps the epitome of the double-standard case in which only those rules of forum analysis that work to the disadvantage of students apply. In *Fleming*, the court rejected the First Amendment challenge of students whose school refused to display overtly religious messages on tiles to be hung in a school hallway in commemoration of school shooting victims.¹⁴³ The court first determined that *Hazelwood*, not *Tinker*, provided the proper standard because the messages on the tiles could be attributed to the school.¹⁴⁴ The court went on to say

Mergens, 496 U.S. 226 (1990) (holding that a school violated the EEA when it refused a meeting of the student Bible Club because the school had created a limited open forum). In light of the extraordinary amount of unsupervised communicative activity being conducted on school grounds daily, it is an oversimplification to declare that “schools” as a whole are nonpublic forums with respect to all speakers.

137. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 n.6 (1969) (explaining that schools are not to be deemed as purely private property).

138. See *id.* at 512–13 (referring to student speech and conduct in the cafeteria, recess and other places outside the classroom).

139. *Id.* at 512.

140. *Id.*

141. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–49 (1983) (detailing the difference between a private and public forum and their importance in history).

142. 298 F.3d 918 (10th Cir. 2002).

143. See *id.* at 934 (holding that the restrictions on the tile project were reasonably related to pedagogical concerns and therefore valid).

144. See *id.* at 924 (determining that *Hazelwood* applied because there was a clear intent to create a public forum).

that, unlike on other government premises, viewpoint discrimination is permissible in schools:

[W]e conclude that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech. If *Hazelwood* required viewpoint neutrality, then it would essentially provide the same analysis as under a traditional nonpublic forum case: the restriction must be reasonable in light of its purpose (a legitimate pedagogical concern) and must be viewpoint neutral In light of the Court's emphasis on the 'special characteristics of the school environment,' . . . and the deference to be accorded to school administrators about pedagogical interests, it would make no sense to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.¹⁴⁵

In other words, *Hazelwood's* leap that schools are nonpublic forums, suggesting that students are entitled to no more than the lowest recognized level of First Amendment protection, was not a sufficient withdrawal of rights for the Tenth Circuit. Having stripped students of all other First Amendment armoring, the court denuded them by withdrawing protection against viewpoint discrimination as well.¹⁴⁶

If we acknowledge that the forum doctrine is an untidy fit with the distinctive needs and qualities of schools, then we should do so forthrightly and not apply only as much of the forum doctrine as is needed to produce the desired school-friendly outcome.

When a court refers to the "special" qualities of the school environment, it almost invariably telegraphs that the student is about to lose, because of the extraordinary deference that is afforded to administrators in managing school affairs and the relatively low value afforded to the speech of young people.¹⁴⁷ But the "uniqueness" of the school environment cuts two ways. A school is unlike any other

145. *Id.* at 926.

146. *Fleming's* conclusion is not a necessary—or especially logical—extension of *Hazelwood*. The "special characteristics" of school are more naturally taken into consideration not by stripping away the requirement of viewpoint neutrality, but by factoring the school setting into the reasonableness analysis (*i.e.*, did the government act reasonably in light of the special characteristics of school). See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be *reasonable in light of the purpose of the property.*") (emphasis added).

147. See, *e.g.*, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001) (finding no First Amendment violation in a school's expulsion of a student with troubled personal history who showed his teacher a violent poem, even though he was diagnosed as not dangerous). The court in *LaVine* stated "[w]e review . . . with deference, schools' decisions in connection with the safety of their students even when freedom of expression is involved School officials have a difficult task in balancing safety concerns against chilling free expression." *Id.* at 992.

forum because it is government property in which one class of speaker (students) is legally compelled to be there and another class of speaker (the outside world) has no right of entry unless admitted at the school's discretion.¹⁴⁸ An adult who is told that she may not distribute her leaflets in the lobby of the courthouse can immediately step outside to the sidewalk and enjoy the freedom of an open forum; a schoolchild has no such option. Indeed, not only is a student's presence in school compulsory, but students have a legally cognizable interest in attending school that cannot be taken away without due process.¹⁴⁹

The school setting is further unlike any adult-world forum because courts have indicated that the relative importance of the student speaker's interest will increase with age.¹⁵⁰ Again, this factor has nothing to do with management of the forum space or with its qualities as a place of expression; rather, it goes to the subjective value that society places on the quality of speech measured against the school's interest in good order.¹⁵¹ In no other context does the law vary the strength of the First Amendment interest based on valuation of the merit of the speaker's contribution.¹⁵² No court

148. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1085 (2008) ("In most decisions, the Supreme Court seems to understand that compulsory attendance laws make it difficult to swallow the argument that school officials are simply acting in loco parentis and therefore outside the Constitution."); see also Chad Allred, *Guarding the Treasure: Protection of Student Religious Speech in the Classroom*, 22 SEATTLE U. L. REV. 741, 776-77 (1999) (discussing the concept of the plight of the "captive speaker" in the context of religious expression and compulsory school attendance).

149. See *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010 (7th Cir. 2002) ("Having provided for the right to education, [the state] may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.") (internal quotation marks omitted) (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

150. See, e.g., *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) (stating, in case concerning an elementary school student's speech protesting animal cruelty, "at a certain point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here. Where that point falls is subject to reasonable debate."). See generally Ann Hassenpflug, *The Limits of Freedom of Speech for Students in Grades PK-8*, 198 ED. LAW REP. 383 (2005) (detailing ways in which courts have ruled regarding student speech and arguing that school personnel should be aware of such case law before determining what is acceptable and non-acceptable student speech); Jennifer L. Specht, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006) (arguing that the nature of elementary schools requires a different standard of analysis than that found in *Tinker*).

151. See *Muller ex rel Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) (claiming that the Supreme Court sees age as a critical factor in determining student speech cases).

152. See Specht, *supra* note 150, at 1324 (commenting that nowhere in the Constitution does it say that children have different free speech rights than adults).

would seriously entertain the notion that a high-school dropout who is unregistered to vote has a lesser First Amendment right to speak on the public plaza than does a political science professor.

As *Tinker* recognized, schools are *sui generis*.¹⁵³ Implicit in the concept of a nonpublic forum is the notion that the forum may be closed to any speech not essential to furthering government business.¹⁵⁴ But an entire school cannot be declared a no-speech zone in which students are subject to punishment for expressing *anything*.¹⁵⁵ A school in which students may not use lunch hour to discuss their weekend social plans or last night's World Series game is no longer a school but a maximum-security penitentiary. And even the *Morse* Court would not abide a school's banning all non-curricular conversation as a means of making sure that nothing controversial or upsetting is said.¹⁵⁶ Yet that is what nonpublic forum status necessarily implies—that any speech defined by the government as not necessary to further the purpose to which the forum is committed can be prohibited or punished.¹⁵⁷

153. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (stating that the problems with these cases are determining where students' First Amendment rights collide with the rules of school authorities).

154. See, e.g., *Atlanta Journal & Constitution v. City of Atlanta Dept. of Aviation*, 322 F.3d 1298, 1306 (11th Cir. 2003)_(en banc) (“[I]n a nonpublic forum, the [government] may properly restrict exercise of expression that is inconsistent with the intended use or function of that property through reasonable, viewpoint-neutral regulations.”).

155. The Court said as much in a 1972 case applying *Tinker* to protests on a sidewalk adjacent to school grounds: “*Tinker* made clear that school property may not be declared off limits for expressive activity by students” *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). Judge Bye made this point effectively in his concurrence in *Bowman v. White*, questioning how the open areas of a public university campus could be regarded as anything other than a traditional public forum, since any lesser status implied that the forum could be closed: “Once a space is deemed something other than a traditional public forum, even if an unlimited designated public forum, the government is free to redesignate the space to limit further expressive conduct or to prohibit it completely. . . . This is a concept inconsistent with our basic understandings of a public university.” 444 F.3d 967, 987–88 (8th Cir. 2006) (Bye, J., concurring).

156. See *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (declining to extend *Fraser* to permit schools to prohibit or punish any speech that administrators subjectively deem “offensive”); see *id.* at 2637 (Alito, J., concurring) (rejecting argument that schools should be allowed to restrict speech that is inconsistent with the “educational mission” of the school, because such a standard “would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed”).

157. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–49 (1983) (acknowledging the government's power to regulate nonpublic forums such as schools to the exclusion of everything incompatible with those schools' lawful mission); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1098 (9th Cir. 2003) (discussing a lower standard of constitutional scrutiny once a government forum is determined as nonpublic).

The “compelled speech” line of cases, such as *Barnette*, further illustrate the uniqueness of speech in the school setting. Government’s ability to compel speech is amplified in a custodial setting with an imbalance of power.¹⁵⁸ It would be curious indeed to say that a child cannot be punished for declining to stand for the Pledge of Allegiance but can—because schools may be closed to all but the government’s speech—be punished for saying, “No, ma’am, I refuse.”

The ability of government to entirely restrain as well as punish speech in the school setting counsels in favor of meaningful constraints on state authority. Outside the schoolhouse gate, the prior restraint of speech is the most noxious and disfavored of all government speech regulations.¹⁵⁹ (For instance, government may not enjoin the utterance of defamatory speech, but may enforce a judgment penalizing defamation once uttered.) *Tinker* and its progeny, however, do not differentiate between the ability to restrain speech and the ability to punish it—indeed, the regulation at issue in *Tinker* was itself a prior restraint.¹⁶⁰ It is precisely because government may not merely penalize student speech it regards as wayward, but may prevent the speech from ever being heard, that the special characteristics of the school environment require extra solicitude for the rights of the youngest speakers.

V. THE DANGEROUS HASTE TO CONSTRICT *TINKER*

A. *Some Recent Applications Read Tinker Nearly Out of Existence*

Relying on the *Hazelwood* declaration that schools are not public forums, a number of recent school-speech decisions apply a mere

158. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 630–31 (1943) (discussing the State’s ability to compel school attendance and control what is taught in public schools).

159. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (stating the generally accepted view that the “chief purpose” of First Amendment’s guarantee of a free press was “to prevent previous restraints upon publication”).

160. The student-plaintiffs in *Hazelwood* argued that the *Tinker* standard permitted only after-the-fact punishment of speech and did not permit prior restraint of speech based on a forecast of disruption. While siding with the students on other grounds—which were reversed by the Supreme Court—the Eighth Circuit rejected the punishment/prior restraint distinction in the scholastic setting: “We think the better view . . . is that the *Tinker* standards are to be applied whenever administrators can reasonably predict that the content of a student publication will violate the *Tinker* standard.” *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1374 n.5 (8th Cir. 1988), *rev’d*, 484 U.S. 260 (1988); see *Muller ex rel Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (“Prior restraint of student speech in a nonpublic forum is constitutional if reasonable.”).

reasonableness standard to speech even when it is not *Hazelwood* speech (i.e., when it is plainly the message of the individual student rather than that of the school, speech that *Hazelwood* would definitely relegate to *Tinker*). Emblematic of these revisionist rulings is the U.S. Court of Appeals for the Sixth Circuit's 2008 decision in *M.A.L. v. Kinsland*.¹⁶¹ In *M.A.L.*, a middle school student was prevented from distributing religious literature in the hallways of his school during breaks between classes and was told that any distribution would have to be limited to designated bulletin boards and the cafeteria.¹⁶² The school conceded that the leafleting would cause no disruption, and thus could not be prohibited or punished under *Tinker*, but argued for a more deferential standard of review because the regulation was not viewpoint-discriminatory.¹⁶³ The Sixth Circuit agreed.¹⁶⁴

The appeals court observed that the school hallways were neither a traditional public forum, nor had they been opened for "indiscriminate use" as a designated public forum.¹⁶⁵ The court concluded that, in a nonpublic forum, the school could regulate the time, place, and manner of the student's literature distribution without satisfying *Tinker*:

[T]his case is not governed by the heightened "material and substantial interference" standard articulated by the Supreme Court in *Tinker*. . . . The key difference between *Tinker* and the instant case is that the school officials in *Tinker* sought to silence the student because of the particular viewpoint he expressed, while the Jefferson school authorities have merely sought to regulate the time, place, and manner of [the plaintiff's] speech irrespective of its content or his viewpoint.¹⁶⁶

Whatever one thinks of the resolution of the student's request in *M.A.L.*, it is difficult to see much daylight between the wearing of a black armband in the hallway and the distribution of a leaflet in the hallway. Each is very nearly "pure" speech, as opposed to a "mixed" communicative act in which the conduct portion may be severably regulated.¹⁶⁷ Unless *Tinker* truly does apply only in cases in which a facially neutral regulation is infected by an invidious hostility to a viewpoint—or unless we are prepared to say that Mary Beth Tinker

161. 543 F.3d 841 (6th Cir. 2008).

162. *Id.* at 845.

163. *Id.* at 846.

164. *Id.* at 850.

165. *Id.* at 847.

166. *Id.* at 849.

167. *See infra* text accompanying notes 192–193 (acknowledging that schools may regulate activities that are not purely expressive).

would today have to remove her black armband while traversing the hallways—nondisruptive leafleting would appear very close to the heart of what the Court envisioned as protected under *Tinker*'s "material and substantial disruption" standard.¹⁶⁸

In a subset of cases, courts have gone even further toward narrowing *Tinker*'s application by confining the rule only to political speech of the sort in which the *Tinker* plaintiffs engaged. As one district court described its limited view of the *Tinker* standard:

To prohibit political speech of the kind addressed in *Tinker* . . . the school had to demonstrate more justification than merely a desire to 'avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.' . . . The type of speech involved in *Tinker* is political speech. In the instant case, the speech is not political; rather, it was vulgar and offensive statement ascribed to the school principal. Therefore, we must look further into the case law to determine the standard we must use.¹⁶⁹

The most audacious assault on *Tinker* came in the recent case of an Arkansas school that disciplined three students for peacefully protesting a school dress-code regulation by wearing black armbands modeled on those worn by the *Tinker* plaintiffs.¹⁷⁰ The school system took the position not merely that *Tinker* protects only political speech, but that *Tinker* protects only speech about national rather than local political issues—effectively, that *Tinker* is facial precedent only.¹⁷¹ The U.S. Court of Appeals for the Eighth Circuit declined the invitation to write *Tinker* into irrelevancy: "Whether student speech protests national foreign policy or local school board policy is not constitutionally significant," the court held in siding with the students.¹⁷² With the Supreme Court's recent denial of certiorari in *Watson Chapel School District v. Lowery*,¹⁷³ the courts may at long last

168. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid *material and substantial interference* with schoolwork or discipline, is not constitutionally permissible.") (emphasis added).

169. *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *4 (M.D. Pa. Sept. 11, 2008) (citing *Tinker*, 393 U.S. at 509); see *Porter v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576, 586 (M.D. La. 2004) (denying First Amendment protection to a student's cartoon drawing of school burning down: "It can hardly be said that [the student's] drawing was a political expression which is protected by the First Amendment. Thus, [the student's] drawing is not entitled to First Amendment protection under a pure-*Tinker* standard.").

170. *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1526 (2009).

171. *Id.* at 759–60.

172. *Id.* at 760.

173. 129 S. Ct. 1526. Certiorari was denied March 2, 2009. *Id.*

have established a minimum below which *Tinker* may not be further reduced.

B. Online Speech Raises Tinker's Stakes

The constriction of *Tinker* comes at a time when robust and clearly defined limits on government authority are urgently needed. Having won extraordinary deference from the courts in their management of speech on school grounds,¹⁷⁴ some schools are now taking the position—emboldened in part by *Morse*—that speech is punishable even off-campus merely upon a showing of some “effect” on-campus, even if that effect is shy of actual disruption.¹⁷⁵

Until recently, the clear majority view—and still arguably the better view—has been that off-campus speech by students (with the exception of speech at school-related events, as in *Morse*) stands on the same footing as speech by any other citizen, so long as the student does not physically disseminate the speech on campus.¹⁷⁶ Other courts, however, have permitted schools to discipline speech created entirely off-campus using entirely private time and resources, provided that the speech has a “disruptive” impact on campus (thus satisfying *Tinker*).¹⁷⁷ These courts view online speech as punishable under standards analogous to that governing on-campus speech,

174. “It long has been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings.” *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005); *see also Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (“Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted. We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them.”).

175. *See, e.g., J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *6 (M.D. Pa. Sept. 11, 2008) (coining a new standard, in a case involving middle school student’s off-campus social networking page that harshly ridiculed her principal, that speech created outside of school premises or events is punishable if it qualifies as “vulgar, lewd, and potentially illegal speech that had an effect on campus”).

176. *See cases cited supra* note 11 (discussing courts’ treatment of school punishment of off-campus student speech). *See generally* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 269–70 (2001) (arguing *Tinker*, *Fraser*, and *Hazelwood* should not control the analysis of school regulation of students’ home website activities).

177. *See, e.g., Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (“With respect to school officials’ authority to discipline a student’s expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker*”); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (applying *Tinker* standard to student’s off-campus MySpace page ridiculing his principal, and finding that evidence of discussion of the page among students did not equate to a substantial disruption of school).

either because the speech itself is capable of being heard or seen on campus, or because the effects of speech “targeting” a school audience will inevitably reach the campus.¹⁷⁸

Consider what is at risk if, as school attorneys are maintaining, schools may regulate online speech—wherever and whenever it is created—under the standard supplied by *Tinker*, and if *Tinker* means no more than the reductionists’ construct of a check on viewpoint (or political viewpoint) discrimination. If that is the law, then there may be no constitutional impediment to a school policy declaring entire topics—e.g., opinions (positive or negative) about teachers or administrators—off-limits for students to discuss, even when they are at home using e-mail, sending text messages, or posting on social networking pages.¹⁷⁹

Schools, and the judges sympathetic to those schools, have no difficulty abandoning forum analysis when students are speaking from their own homes using non-school communication tools, where First Amendment protection should be highest.¹⁸⁰ Here again, the speaker’s status as a student is treated as meaningful only because it may be used as an infirmity, subjecting the speaker to punishment beyond what could occur in the adult world. In this way, schools have succeeded in persuading some courts that geography is not the test for the reach of their disciplinary authority and that the lesser degree of First Amendment protection that students enjoy when speaking in a campus venue follows them no matter where they speak.¹⁸¹ Yet forum analysis is about nothing but control over the space (whether physical or metaphysical) in which speech takes place.¹⁸² Yet again, the unbeatable “heads-I-win, tails-you-lose” mode of analysis prevails: the source of schools’ authority to regulate speech derives from the forum status of the speaker’s location—except when it does not.

178. See, e.g., *Layshock*, 496 F. Supp. 2d at 600 (focusing on a causal link between the student’s off-campus activities and its impact on the school environment).

179. See *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (giving the government wide discretion in regulating speech in nonpublic forums so long as a particular viewpoint is not the target of the regulation); Papandrea, *supra* note 148, at 1054–56 (discussing courts’ increasing willingness to defer to school administrators’ determinations regarding student speech, while also taking an expansive view of *Tinker*, applying it even to students’ off-campus speech).

180. See, e.g., *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *6 (M.D. Pa. Sept. 11, 2008) (focusing on the on-campus effect of the plaintiff’s at-home Internet activities and finding it permissible for school authorities to punish her for it).

181. Papandrea, *supra* note 148, at 1059–65.

182. See *Perry Education*, 460 U.S. at 45–46 (evaluating the government’s ability to regulate speech in a certain venue based on the level of control of public access it exerts on that venue).

C. *Student Speech Has Value Worth Protecting*

From the perspective of the adult world, it is tempting to ask why school administrators should not be entitled to every benefit of the doubt, and why students' First Amendment rights should not come with training wheels. Once more, the "special characteristics of the school environment" cut both ways.¹⁸³ If it is the job of schools not merely to teach geometry and chemistry but to teach good citizenship—which the opponents of student speech readily accept when "citizenship" is equated with "obedience"¹⁸⁴—then respect for diversity of opinions and free speech are essential components of a public education. The impressionability of young audience members frequently is cited to justify giving the government a freer hand to protect listeners against "adult" content,¹⁸⁵ but it is debatable whether young people's welfare is threatened more by exposure to naughty words than by devaluation of the First Amendment. As Justice Jackson memorably phrased it in *Barnette*: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."¹⁸⁶ More recently, Judge Ilana Rovner of the U.S. Court of Appeals for the Seventh Circuit eloquently defended the value of student speech in a case in which the majority opinion denigrated the "modest" contribution that "kids" can make to the public dialogue:

Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women's rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact. . . . To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults . . . is contrary to the values of the First Amendment.¹⁸⁷

183. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

184. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (describing role of schools as "teaching students the boundaries of socially appropriate behavior").

185. Sean M. SeLegue, Comment, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919, 944 (1991) ("In the high school context . . . the Court has upheld restrictions on public speech designed to protect impressionable students and to inculcate appropriate standards of behavior.").

186. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

187. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 677–78 (7th Cir. 2008) (Rovner, J., concurring).

Young people may not have a sophisticated understanding of constitutional law, but they have a well-developed sense of what is fair and unfair. When students discern that the Constitution is malleable and that courts will bend the rules in favor of the authorities, their respect for authority inevitably is corroded.

As Judge Rovner observed, student speech has value not merely as an exercise in inculcating respect for constitutional values, but for the content of the speech itself.¹⁸⁸ The crumbling of established news media organizations¹⁸⁹ only heightens the urgency that students be able to communicate about problems at school, both to each other and to adults who are in a position to help. We can no longer take for granted that professional media outlets will be sufficiently funded and staffed to vigilantly monitor schools and to supply policymakers and the voting public with essential information about how schools are succeeding and how they are falling short. Adults stand to become increasingly reliant on students to sound the alarm when “temporary” trailer classrooms become permanent, when gangs terrorize campuses, or when coaches mistreat their players. If we permit administrators to muzzle student whistleblowers,¹⁹⁰ we imperil students’ well-being and that of their schools.

D. *Tinker Provides a Clear, Workable Standard*

If forum analysis does not supply the standard, and if schools are *sui generis*, then what standard does apply? Many courts have no difficulty concluding that the standard remains *Tinker*’s “substantial disruption” rule everywhere in school that is not subject to *Hazelwood* or the relatively narrow confines of *Fraser* and *Morse*.¹⁹¹

188. *Id.*

189. See Howard Kurtz, *Under Weight of Its Mistakes, Newspaper Industry Staggers*, WASH. POST, March 1, 2009, at A4 (describing the closure of Denver’s *Rocky Mountain News* and cost-cutting measures throughout the debt-saddled newspaper industry); David Olinger, *Ad Losses Send Industry into a Tailspin*, DENVER POST, Dec. 5, 2008, at A21 (documenting loss of more than 14,000 newspaper jobs during 2008 and prediction that some major cities could be left with no daily newspapers as media companies default on debt).

190. See, e.g., Seth Slabaugh, *School Newspaper Finds Asbestos*, MUNCIE STAR-PRESS, April 18, 2009, at B1 (describing how high school journalism teacher was told she could be fired, and a fellow teacher reported being “interrogated and bullied,” after students published story alleging deficiencies in school’s asbestos abatement program).

191. See *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (concluding that *Tinker* should be applied for all student speech cases, with an exception only for those cases in which *Hazelwood* or *Fraser* is found to apply); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–14 (3d Cir. 2001) (same); see also *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 645–46 (D.N.J. 2007) (applying *Tinker* and finding that wearing buttons protesting a school’s dress code with the image of saluting “Hitler Youth” members were protected speech).

Tinker provides flexibility in light of the school environment when schools are dealing with expressive or mixed conduct—conduct that has elements of expression but that can legitimately be regulated for its non-speech qualities.¹⁹² For instance, *Tinker* recognizes that “the length of skirts or the type of clothing . . . hair style, or deportment” might be entitled to lesser solicitude.¹⁹³ But when the conduct is close to being “pure” speech, as were the *Tinker* children’s armbands, then schools face an appropriately rigorous burden in justifying censorship.¹⁹⁴ *Tinker* thus provides school officials with sufficient leeway when speech has the greatest potential to threaten the orderly operation of school—when it is intertwined with demonstrative behavior—and stiffens most resolutely when it is most apparent that the government’s target is the message and not the method of delivery.¹⁹⁵

CONCLUSION

There are few bright lines in the law of student speech. No matter which direction the law takes, there will be blurry zones in which the decisive consideration will be society’s conception of the character of the school environment, and whether its socialization function is to teach inquisitiveness or conformity. It should be honestly admitted that the crabbed view of *Tinker*, moored to a literalist (yet strangely selective) view of forum doctrine, is a view driven by policy and not compelled by precedent. And courts and practitioners should recognize that there is an at least equally valid view that is truer to Justice Brennan’s admonition that speakers, not regulators, are entitled to guess incorrectly without penalty where the indistinct boundaries of the First Amendment are concerned.¹⁹⁶

The shrinking of *Tinker* to a “reasonableness-minus” standard means, effectively, that speech enjoys no greater protection than chewing gum or skateboarding on the sidewalk, and arguably less. The government never is allowed to act arbitrarily or to make

192. The Supreme Court has defined expressive conduct as that which indicates an intent to convey a message and which the audience is very likely to understand as conveying a message, even if the message might be understood by different listeners in different ways. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection . . .”).

193. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969).

194. *Id.* at 508–09.

195. *Saxe*, 240 F.3d at 211–12.

196. See *supra* note 6 and accompanying text (outlining the development of First Amendment jurisprudence and a judicial presumption in favor of permitting rather than censoring speech).

irrational classifications in its enforcement of rules, and a person who has been singled out for arbitrary enforcement action can always bring a reasonableness challenge under the Due Process or Equal Protection Clauses. If speech is to occupy its rightful paramount place in the hierarchy of protected rights, then it must enjoy some refuge beyond a diluted variation of the most deferential standard known to constitutional law.

To afford broad shelter to student speech, even that which has marginal civic importance, is not to say that schools must sit back and do nothing in the face of speech that is uncivil or offensive. School officials can educate, counsel, or referee disputes; report misconduct to parents; or request parental conferences—all without depriving students of any protected right.¹⁹⁷ It is only when the school employs the coercive authority of the state—whether to suppress speech or punish in its aftermath—that the First Amendment is implicated.

If schools are correct in insisting that their jurisdiction extends to off-campus speech that technology enables to reach the school, then this “wired” generation of young people—and those to follow—will be more vulnerable than ever to the punitive authority of the government for what they express. And if *Tinker* is to supply the default standard by which all exercise of school censorship authority is measured, then *Tinker* must be a muscular check on state authority that is equal to the weight it will increasingly be asked to bear.

197. Justice Brennan made this point in his *Hazelwood* dissent, responding to the majority’s contention that censorship of the student newspaper’s contents was necessary to disassociate the school from controversial subject matter to which the school did not wish to lend its imprimatur: “Dissociative means short of censorship are available to the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting). These means include, specifically, educating the audience about the difference between school speech and individual speech, which, after all, is the purpose of school; *see also Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (Easterbrook, J.) (striking down school policy against distribution of religious literature that students could mistake for literature sponsored or endorsed by the school: “Public belief that the government *is* partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school’s proper response is to educate the audience rather than squelch the speaker.”).