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## Symposium: No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision

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# Symposium: No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision

## Abstract

The Supreme Court's decision in *Tinker v. Des Moines Independent Community School District* forty years ago did for the ideal of expressive freedom in America's public schools what *Brown v. Board of Education* did for the ideal of racial equality. It made a core value of the Bill of Rights spring to life for young people facing authoritarian treatment at the hands of adult officials running their school systems. By privileging the right of students to engage in passionate political communication over the school's interest in maintaining discipline or the community's interest in maintaining pro-war consensus, the *Tinker* decision was a decisive victory for what Robert Post has called 'democracy' values over 'management' and 'community' values within a key institutional setting. For its dramatic infusion of democratic speech values into a classic authoritarian relationship - that between powerful adults and powerless children in an institutional setting - the *Tinker* decision was remarkable at its inception. But the true First Amendment meaning of the decision travels well beyond the schoolhouse gate and has yet to be recognized, much less realized.

The *Tinker* formula, which protects speech that does not substantially disrupt functional operations or violate the rights of other participants, harmonizes the managerial power of democratic government to accomplish its ends through social institutions with the cross-cutting sovereign freedom of democratic citizens to speak inside these institutions. *Tinker* is the 'inside' speech correlate to the 'outside' speech principle of *Brandenburg v. Ohio*, which protects all speech in the street (or elsewhere in society outside of specific institutional contexts), that is not likely (or intended) to 'incit[e] . . . imminent lawless action.' But the striking implications of the *Tinker* formula remain vastly unrealized. The freedom to speak in most social institutions is not the default standard suspended in rare and extreme cases but rather a weak and secondary value regularly subordinated to the foreground interests of authority, property, hierarchy, punishment and retribution, militarism, social order, political stability, and commercial profit.

We can see how the constitutional right of free speech is constantly balanced into oblivion against weighty social interests by the way that the school cases themselves have unfolded since *Tinker* was decided. Part II of this Article examines the roots and meaning of the powerful libertarian doctrine of *Tinker* and then canvasses how the doctrine has been eroded (much like the egalitarian vision of *Brown*) by the sharp undertow of sympathy for authoritarian structure on the Burger, Rehnquist, and Roberts Courts. The conservative Court has carved out major exceptions to *Tinker* in the interests of social conformity, sexual prudishness, protection of sensitive adults' feelings, and promotion of ideological unity for drug prohibition. Part III explores how a traveling *Tinker* principle differs from the illiberal doctrines of speech regulation and suppression that govern other institutional settings, focusing illustratively on the public sector workplace and the military. Part IV concludes by arguing that the current weakness of the *Tinker* commitment undermines democratic progress both in public schools and in other public institutions. The way to renew the momentum of the decision is to shift rhetorical emphasis from the more manipulable 'material and substantial interference' prong of the *Tinker* standard to the 'invasion of the rights of others' prong. Although consideration of the former has tended to subsume the latter, my hope is that doctrinal focus on concrete individual rights at stake will liberate courts from a tendency to validate abstract invocations of state interests as justifying censorship.

## Keywords

*Tinker*, First Amendment, Freedom of Speech

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# NO ENCLAVES OF TOTALITARIANISM: THE TRIUMPH AND UNREALIZED PROMISE OF THE *TINKER* DECISION

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*“Democracy begins in conversation.”*

John Dewey<sup>1</sup>

## I. INTRODUCTION

The Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*<sup>2</sup> did for the ideal of expressive freedom in America’s public schools what *Brown v. Board of Education*<sup>3</sup> did for the ideal of racial equality. It made a core value of the Bill of Rights

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This Article is dedicated to the grown-up Mary Beth Tinker, whose passion for freedom, justice, and peace remains exemplary, and to Tabitha Claire Raskin, who was sent to detention for courageously objecting to “silent lunch” on behalf of all of her classmates.

1. JAMES T. FARRELL ET AL., *DIALOGUE ON JOHN DEWEY* 58 (Corliss Lamont ed., 1959).

2. 393 U.S. 503 (1969).

3. 347 U.S. 483 (1954).

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spring to life for young people facing authoritarian treatment at the hands of adult officials running their school systems.<sup>4</sup> By privileging the right of students to engage in passionate political communication over the school's interest in maintaining discipline or the community's interest in maintaining pro-war consensus, the *Tinker* decision was a decisive victory for what Robert Post has called "democracy" values over "management" and "community" values within a key institutional setting.<sup>5</sup>

For its dramatic infusion of democratic speech values into a classic authoritarian relationship—that between powerful adults and powerless children in an institutional setting—the *Tinker* decision was remarkable at its inception.<sup>6</sup> But the true First Amendment meaning of the decision travels well beyond the schoolhouse gate and has yet to be recognized, much less realized.

When Justice Fortas, writing for the majority, upheld thirteen-year-old Mary Beth Tinker's First Amendment right to wear a black antiwar armband to school, he found that schools may not be "enclaves of totalitarianism"<sup>7</sup> and declared institutional censorship of student expression invalid unless a school can demonstrate that the speech causes a "substantial disruption of or material interference with"<sup>8</sup> the educational process or "impinge[s] upon the rights of other students."<sup>9</sup> This strict standard for reviewing censorship within the public school, our paradigm social institution, implies that *other* public institutions must similarly incorporate the norms of robust dissent and free dialogue into their own operations.

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4. Indeed, Kristi Bowman's excellent contribution to this symposium demonstrates that, in our history, the struggle for freedom of speech for students has been organically intertwined with the struggle for racial justice at school. See Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129 (2009).

5. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 1–2 (1995) ("Three distinct forms of social order are especially relevant to understanding our constitutional law. I call these community, management, and democracy. . . . [O]ne might say that law creates community when it seeks authoritatively to interpret and enforce shared mores and norms; it is managerial when it organizes social life instrumentally to achieve specific objectives; and it fosters democracy by establishing the social arrangements that carry for us the meaning of collective self-determination.").

6. *Tinker*, 393 U.S. at 511 ("School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

7. *Id.* at 511.

8. *Id.* at 514.

9. *Id.* at 509.

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To be more precise, if freedom of expression is the default presumption at school, which is addressed to the intellectual upbringing of *children*, surely social institutions governing *adults*—the university, the workplace (public and private), the military, the prison, the election campaign process and political debate, the shopping center—must also respect the freedom of speech of citizen-participants unless such exercise would thwart the basic purposes and functions of the institution. The *Tinker* formula, which protects speech that does not substantially disrupt functional operations or violate the rights of other participants,<sup>10</sup> harmonizes the managerial power of democratic government to accomplish its ends through social institutions with the cross-cutting sovereign freedom of democratic citizens to speak *inside* these institutions. *Tinker* is the “inside” speech correlate to the “outside” speech principle of *Brandenburg v. Ohio*,<sup>11</sup> which protects all speech in the street (or elsewhere in society outside of specific institutional contexts), that is not likely (or intended) to “incit[e] . . . imminent lawless action.”<sup>12</sup>

But the striking implications of the *Tinker* formula remain vastly unrealized. The freedom to speak in most social institutions is not the default standard suspended in rare and extreme cases but rather a weak and secondary value regularly subordinated to the foreground interests of authority, property, hierarchy, punishment and retribution, militarism, social order, political stability, and commercial profit.<sup>13</sup>

We can see how the constitutional right of free speech is constantly balanced into oblivion against weighty social interests by the way that the school cases themselves have unfolded since *Tinker* was decided. Part II of this Article thus examines the roots and meaning of the powerful libertarian doctrine of *Tinker* and then canvasses how the doctrine has been eroded (much like the egalitarian vision of *Brown*)

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10. *Id.* at 513 (holding that a student “may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others” (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (alteration in the original)).

11. 395 U.S. 444 (1969).

12. *Id.* at 447 (striking down the Ohio Criminal Syndicalism Statute, which criminalized advocacy of violence to effect political and economic change).

13. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding that school officials retained the right to censor student speech in high school newspapers for any reasonable pedagogical purpose). See generally BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* (2007) (criticizing employers’ broad discretion to fire workers for engaging in free speech that makes the employer uncomfortable even when the speech is unrelated to the employee’s job).

by the sharp undertow of sympathy for authoritarian structure on the Burger, Rehnquist, and Roberts Courts. The conservative Court has carved out major exceptions to *Tinker* in the interests of social conformity, sexual prudishness, protection of sensitive adults' feelings, and promotion of ideological unity for drug prohibition.<sup>14</sup> Part III explores how a traveling *Tinker* principle differs from the illiberal doctrines of speech regulation and suppression that govern other institutional settings, focusing illustratively on the public sector workplace and the military. Part IV concludes by arguing that the current weakness of the *Tinker* commitment undermines democratic progress both in public schools and in other public institutions. The way to renew the momentum of the decision is to shift rhetorical emphasis from the more manipulable "material and substantial interference" prong of the *Tinker* standard to the "invasion of the rights of others" prong.<sup>15</sup> Although consideration of the former has tended to subsume the latter, my hope is that doctrinal focus on concrete individual rights at stake will liberate courts from a tendency to validate abstract invocations of state interests as justifying censorship.

## II. EDUCATION FOR DEMOCRACY: THE TRIUMPH OF *TINKER*

The *Tinker* decision marked an historic triumph for intellectual freedom at school. Justice Abe Fortas insisted that the case could not be decided simply by roping off institutions of public education from the force field of the Bill of Rights. He wrote: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>16</sup>

In addressing this threshold question of the constitutional status of people entering public schools, Justice Fortas fortunately did not write on a blank blackboard. For even before *Tinker* gave students the right to speak their conscience at school, another great wartime school speech decision, *West Virginia State Board of Education v. Barnette*,<sup>17</sup> had given them the right not to have to speak *against*

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14. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that the school district did not violate a student's First Amendment rights when it suspended him for using lewd language during a school assembly, given that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); see also *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007) (holding that a high school principal did not violate a student's right to free speech when she confiscated his "BONG HiTS 4 JESUS" banner at an off-campus, school-sanctioned event).

15. *Tinker*, 393 U.S. at 511, 513.

16. *Id.* at 506.

17. 319 U.S. 624 (1943).

conscience at school. This decision created the framework for *Tinker* by establishing the First Amendment rights of students at school as an important component of democratic freedom under the Constitution.<sup>18</sup>

The Barnette children were Jehovah's Witnesses who refused for religious reasons to pledge allegiance to the flag at school.<sup>19</sup> It took unknown courage for them to sit it out in small-town West Virginia in the middle of World War II. The Supreme Court in *Minersville School District v. Gobitis*<sup>20</sup> had just three years prior rejected a First Amendment attack on the pledge salute, and Witnesses across the country were facing official reprisals and vigilante harassment for their refusal to join in.<sup>21</sup>

But Justice Robert Jackson came to their aid, writing the Supreme Court's first great student rights decision and, in the process, defining the anti-authoritarian premises of American democracy with more clarity than any Supreme Court justice had ever done. Taken seriously, his words make the First Amendment the guardian of the people's sovereignty over both their own minds and their own government:

There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.<sup>22</sup>

If public opinion controls government, the Free Speech Clause operates like a secular anti-establishment clause, heading off at every turn establishment of political and ideological orthodoxy. The citizenry must be sovereign over its own consciousness. In Justice

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18. *Id.* at 642 (invalidating a West Virginia Board of Education resolution requiring all school children to salute the American flag and recite the Pledge of Allegiance as a violation of the First Amendment).

19. *Id.* at 629 (explaining that Jehovah's Witnesses refuse to salute the flag because they consider it a "graven image," whose worship is proscribed in *Exodus* 20:4-5).

20. 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

21. For a fascinating and important discussion of how the Court reversed itself and moved from the authoritarian premises of *Gobitis* to the libertarian premises of *Barnette* in three years during World War II—with a crucial push from President Franklin D. Roosevelt—see Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 382 (2008) (arguing that Roosevelt placed rhetorical pressure on the Court to change its mind as freedom of conscience, thought, and worship were essential to defining the American position in the war against Nazism and fascism).

22. *Barnette*, 319 U.S. at 641.

Jackson's now immortal words: "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."<sup>23</sup> Thus, in democracy, the citizen occupies the highest office in the land, and public officials are public *servants* who cannot dictate political dogma to their masters: the people. This framing sets the table for understanding the presumptive sovereign free speech rights of the people as they move, work and act in every social institution.

Yet as important as *Barnette* was, it was *Tinker* that actually proclaimed the right of America's children to speak out at school. After all, the Jehovah's Witnesses were religionists minding their own business and wanted only to be left alone; they were playing defense. But angelic-looking Mary Beth Tinker was an outspoken American rebel from the heartland, a precocious free spirit directly challenging in wartime the authority of the President, the military-industrial complex, and her school principal, who had gotten wind of her protest and hastily promulgated a rule banning black armbands.<sup>24</sup> But Mary Beth, joined by her brother John and their friend Chris Eckhardt, insisted on expressing solidarity for Senator Robert Kennedy's call for a Christmas truce in Vietnam.<sup>25</sup> Defiant, she wore her black armband to school on December 16, 1965, making it to third period before she was sent down the hall.<sup>26</sup> She refused to remove the armband and was suspended.<sup>27</sup> Her family received death threats and had red paint splashed on their front door.<sup>28</sup> But the Tinkers hung tough and, with the help of the American Civil Liberties Union, took their case to the Supreme Court.

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23. *Id.* at 642.

24. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (stating that, upon learning of petitioners' plans to wear black armbands from December 16 through New Year's Day to publicize their objection to the Vietnam War, the principals of the Des Moines schools met and instituted a ban on armbands on December 14).

25. Mary Beth Tinker, *I Could Not Sit By and Watch This Happening* (May 6, 1992), available at [http://www.rightsmatter.org/multimedia/personal\\_stories/mary\\_beth\\_tinker.html](http://www.rightsmatter.org/multimedia/personal_stories/mary_beth_tinker.html).

26. *Id.* ("After lunch I went to algebra and my teacher was waiting at the door. He told me to go to the office. At the office, I was suspended and went home.")

27. *Tinker*, 393 U.S. at 504 (stating that the students, who were suspended until they agreed to remove their armbands, only returned to school after the planned period for wearing armbands had expired—New Year's Day).

28. Alice Ollstein, *Off the Cuff: First Amendment Activist Mary Beth Tinker*, OBERLIN REV., May 9, 2008, [http://www.oberlin.edu/cgi-bin/cgiwrap/ocreview/20080509.php?a=n\\_off\\_the&sec=news](http://www.oberlin.edu/cgi-bin/cgiwrap/ocreview/20080509.php?a=n_off_the&sec=news) (describing the community's reaction to Tinker's protest and subsequent lawsuit).



At stake in *Tinker*, according to the school district, was nothing less than every school principal's power to maintain order against the anarchy threatened by children exercising political speech rights.<sup>29</sup> The argument, again in Robert Post's terms, depended on the assertion of official state "management" interests over the discursive and interactive values of "democracy."<sup>30</sup>

But Justice Fortas perceived the infinitely elastic nature of this argument and declared that schools can never censor out of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>31</sup> Rather, a school seeking to censor must show that a student's speech will "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school,"<sup>32</sup> which means "material[] disrupt[ion of] classwork or . . . substantial disorder or invasion of the rights of others."<sup>33</sup> This standard creates the "inside" correlate to the "outside" principle of *Brandenburg v. Ohio*, which was decided also by the Court in 1969 and protects all speech in the street (or elsewhere in the society outside of specific institutional contexts) that is not intended and likely to "incit[e] . . . imminent lawless action."<sup>34</sup> The decisions are congruent since the larger society can repress speech only if it seriously and imminently threatens the legal order itself, and an institution within society can repress speech only if it seriously and imminently threatens the essential functions of the institution as set forth in law and policy.

Needless to say, Mary Beth's principal asserted that her black armband was disruptive. But Justice Fortas found that, under the First Amendment, schools may not simply equate dissent with disruption. "In our system," he wrote, "state-operated schools may not be enclaves of totalitarianism," and "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.*"<sup>35</sup> Rather, a school must have

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29. Brief for Respondents at 33, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (No. 21), 1968 WL 112603 ("No one can accurately judge what might have happened if the school administration had not acted so swiftly. There have been enough other similar demonstrations in schools, particularly in the colleges, that the Court can take judicial notice of the fact that the consequences could have been serious if the demonstration had not been stopped almost before it got started.").

30. See POST, *supra* note 5, at 1-2.

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

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

33. *Id.* at 513.

34. 395 U.S. 444, 447 (1969).

35. *Tinker*, 393 U.S. at 511 (emphasis added).

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a compelling reason for silencing students, and “undifferentiated fear or apprehension of disturbance” can never be “enough to overcome the right to freedom of expression.”<sup>36</sup>

Significantly, the Court’s sweeping analysis advanced not only a constitutional theory of democratic rights but a democratic theory of education. Mary Beth was not to be the “closed-circuit” recipient of information drilled into her mind by the school board. As a student, she must be treated as an active and responsive participant in the learning process. Education is not something that the school system does *to* the student. It is what takes place when the community forms and investigates different facets of the world. Each student has something precious to offer the rest of the class and “intercommunication among the students” is not only “inevitable” but “an important part of the educational process.”<sup>37</sup> Indeed, the free exchange of thoughts and feelings among students “is not confined to the supervised and ordained discussion which takes place in the classroom,” but spills over to the whole school day, including athletic, extracurricular, and informal events.<sup>38</sup> This analysis suggests that Mary Beth could not be punished either for something controversial she said in class discussion, or for something she said in the interstices of the official school day when students are enjoying “free time.”

This subtle rendering of the school experience in democratic society closely resembles the thinking of John Dewey, who argued that students learn equally from the “formal” curriculum and the “informal” curriculum generated in the nooks and crannies of the school day, where banter, jokes, talk of current events, laughter, gossip, interaction with teachers, and the full play of social life acquaint students with cultural values and political ideas.<sup>39</sup>

Far from disrupting the overall educational process, Mary Beth’s silent but spirited protest enriched it. A good teacher would have noted her armband and moved on or even picked up on it to teach about anything from war powers to post-World War II American foreign policy, to free speech itself. But there was no constitutional

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36. *Id.* at 508.

37. *Id.* at 512.

38. *Id.*

39. See JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 26, 212 (1922) (arguing that informal education “gives a clew to the understanding of the subject matter of formal or deliberate instruction” and that “[t]he development within the young of the attitudes and dispositions necessary to the continuous and progressive life of a society cannot take place by direct conveyance of beliefs, emotions, and knowledge. It takes place through the intermediary of the environment.”).

reason to fear her expression because there is no educational reason to fear blurring the boundaries between school and the outside world. The boundaries are porous and, as Dewey put it, “learning in school should be continuous with that out of school.”<sup>40</sup> Rather than punishing Mary Beth’s activism, the school ought to have welcomed it. Dewey wrote: “A progressive society counts individual variations as precious since it finds in them the means of its own growth.”<sup>41</sup> The important thing is not that all students agree or even that they all feel comfortable at all times, but rather that they all feel empowered to think, act and speak for themselves: “[a]ll education which develops power to share effectively in social life is moral.”<sup>42</sup> Mary Beth’s principal and teacher lacked the proper sense of *democratic improvisation* in the learning process.

In following decades, the awesome libertarian spirit of *Tinker* helped move the Court to forbid the removal of books from school libraries for political reasons<sup>43</sup> and to protect the free speech rights of religious groups obtaining equal access to school facilities after hours.<sup>44</sup> It also began to shift attitudes about student speech in lower courts and many school systems and prompted some states, like Arkansas, to codify the *Tinker* standard in state law.<sup>45</sup>

#### A. *The Undertow of Institutional Authoritarianism*

But the Court’s hard turn to the right over the years caused it to reverse course in significant ways. It has carved out meaty exceptions to the *Tinker* rule, authorizing school censorship in the context of “lewd and indecent” student speech (*Bethel School District No. 403 v. Fraser*);<sup>46</sup> in the context of any “school-sponsored” student speech in newspapers, yearbooks, assemblies, theater productions, and other outlets that “the public might reasonably perceive to bear the imprimatur of the school” (*Hazelwood School District v. Kuhlmeier*);<sup>47</sup> and, most recently, in the case of student speech that might be

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40. *Id.* at 416.

41. *Id.* at 357.

42. *Id.* at 418.

43. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (invalidating the removal of books from a public school library based on a hit-list of putatively vulgar and offensive works).

44. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (holding the school district’s exclusion of certain church groups from using school facilities constituted viewpoint discrimination).

45. *E.g.*, ARK. CODE ANN. § 6-18-1204 (2007).

46. 478 U.S. 675 (1986).

47. 484 U.S. 260, 271 (1988).

“reasonably viewed as promoting illegal drug use” (*Morse v. Frederick*).<sup>48</sup>

The reasoning of the majority decisions in these cases is embarrassingly literal-minded. In *Fraser*, the Court drew up the lewd and indecent speech exception to uphold suspension and other discipline of a mischievous student at Bethel High School in Pierce County, Washington, who gave a nominating speech for a fellow student running for student government based on—surprise, surprise!—a sophomoric sexual metaphor. He said, “I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.”<sup>49</sup> Surely the teacher supervising might have rolled his or her eyes and spoken disapprovingly of wasting the opportunity on such a vacuous statement. But suspension—for what? Are not Shakespeare’s plays—*The Taming of the Shrew* and *Twelfth Night* come quickly to mind—filled with sexual metaphors, sneaky double entendres, and bawdy insinuations? Of course, the teenaged culprit was no Shakespeare in his little riff, but surely a nimble principal could have told Fraser publically to channel his rudimentary comic instincts into literature rather than politics, where such speeches do not fare very well. This would have been a fair, stern, and educationally meaningful intervention.

But the principal ordered, and the Court affirmed, Fraser’s suspension and other punishment.<sup>50</sup> If the Court had to go in that direction, Justice William Brennan, in his concurring opinion, offered the right way to justify it. There was no reason to carve out a separate category for lewd and indecent speech, he argued, since Fraser’s speech had arguably “substantially disrupted” the school’s pedagogical mission to teach mature public advocacy.<sup>51</sup> At the very most, then, *Tinker* should have been applied, not shoved aside.

All in all, the *Fraser* case was not a catastrophe, but heavy frontal damage was inflicted on *Tinker* in the *Hazelwood* decision. There, Principal Robert Reynolds censored two articles, written by students for their school newspaper and approved by the teacher of the journalism class.<sup>52</sup> One article concerned the impact of parental divorce on students and the other was about the problem of teen pregnancy as seen through the experiences of three pregnant

48. 127 S. Ct. 2618, 2625 (2007).

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

50. *Id.* at 685 (majority opinion).

51. *Id.* at 688 (Brennan, J., concurring).

52. *Hazelwood*, 484 U.S. at 262.

students.<sup>53</sup> Under *Tinker* and *Fraser*, the articles were plainly protected speech and neither disruptive, lewd nor indecent. Indeed, they were written in a mature and thoughtful way about serious problems much on the mind of the student body. But the principal thought that the discussions of sex and birth control in the latter story were “inappropriate for some of the younger students”<sup>54</sup> and that the former story was unbalanced and might invite controversy.<sup>55</sup>

The Court majority found that, while *Tinker* governs the voluntary independent speech of students, greater latitude must be granted to educators to exercise “editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>56</sup> It promptly found Reynold’s censorship of the newspaper articles reasonable and not based on viewpoint discrimination.<sup>57</sup> This decision prepares young journalists to be not only edited by editors but squelched by puritans in power.

The dissenting justices—William Brennan, Thurgood Marshall, and Harry Blackmun—rallied around the forsaken virtues of *Tinker*, observing that the school’s journalism class had itself committed to publishing all articles that do not “materially and substantially interfere with the requirements of appropriate discipline.”<sup>58</sup> (It is indeed instructive to observe that this school, doubtless like many others, quickly embraced and adopted the intuitive free speech formula of *Tinker* after the decision was handed down.)

The dissenters insisted that mere political disagreement between students and administration should never be sufficient grounds for censoring speech in a school publication.<sup>59</sup> After all, principals do not own their schools and school publications belong to the school community itself, which is governed as a state actor by the First Amendment.

Of course, educators can require students to learn the contents of a course, but this truism is “the essence of the *Tinker* test, not an excuse to abandon it,” as the dissenters insisted.<sup>60</sup> They agreed that high schools do not have to publish student articles that are “ungrammatical, poorly written, inadequately researched, biased or

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53. *Id.* at 263.

54. *Id.*

55. *Id.*

56. *Id.* at 273.

57. *Id.* at 274.

58. *Id.* at 278.

59. *Id.* at 280 (Brennan, J., dissenting).

60. *Id.* at 283.

prejudiced”<sup>61</sup> but pointed out that “we need not abandon *Tinker* to reach that conclusion; we need only apply it.”<sup>62</sup> What is crucial is that school officials cannot act as political “‘thought police[,]’ stifling discussion of all but state-approved topics and advocacy of all but the official position.”<sup>63</sup> If the school principal found fault with the articles about teen pregnancy and the meaning of divorce for kids, he had every right in the final analysis to print an institutional disclaimer or publish opposing views. But he chose to censor instead.

The *Hazelwood* decision silently revived the old private property-based conception of speech rights on public lands, which defined the pre-history of the modern First Amendment. Before the landmark “public forum” cases of the 1930s, like *Schneider v. Irvington*<sup>64</sup> and *Hague v. Committee for Industrial Organization*,<sup>65</sup> declared that the people must have free access to streets, sidewalks, and parks to engage in speech and protest, the constitutional doctrine held that managers of public property were like private property owners. In 1897, the Supreme Court in *Davis v. Massachusetts*<sup>66</sup> had ruled that the officers of a municipal corporation, such as Boston, could arbitrarily exclude disfavored speech from public areas like Boston Common.<sup>67</sup> Mayors were treated like owners and bosses. Under *Hazelwood*, principals enjoy much of the same kind of unbridled power. Formally, they cannot discriminate against speech based on political viewpoint, but in reality, they enjoy awesome sway to regulate political communication.

After *Hazelwood*, the Court’s 2007 decision in *Morse* seemed depressingly predictable, as the Court again exfoliated vast acres of free expression to kill the mosquito of adolescent humor. The student culprit in the case, Joseph Frederick, was a high school senior in Juneau, Alaska, who used the occasion of the Olympic torch relay to make a bid for national television coverage by unfurling a banner bearing the phrase “BONG HiTS 4 JESUS.”<sup>68</sup> The majority upheld his

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61. *Id.*

62. *Id.* at 283–84.

63. *Id.* at 285–86.

64. 308 U.S. 147, 162 (1939) (rejecting the argument that the city’s interest in keeping streets clean overrides an individual’s right to hand literature to those who would receive it).

65. 307 U.S. 496, 515–16 (1939) (stating that a citizen’s right to use streets and parks for communication of views regarding national issues may be regulated but not abridged or denied).

66. 167 U.S. 43 (1897).

67. *Id.* at 47.

68. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

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ten-day suspension based on a new doctrine, withdrawing First Amendment protection for speech advocating illegal drug use.<sup>69</sup>

It is tempting to dismiss the importance of a case based on such frivolous events but Stevens's lucid dissenting opinion points out the dramatic change effected by the majority in the *Morse* decision. By approving "stark" efforts to suppress one side of the national debate about drugs, the new exception to *Tinker* discards the Court's prior commitment to maintaining official viewpoint neutrality at school.<sup>70</sup> Furthermore, the Court dropped *Tinker's* understanding that a censoring school must show an *imminent* substantial disruption. Frederick's "nonsense message"<sup>71</sup> posed no threat of any kind, much less a threat of immediate substantial disruption. The likely effect of his silly slogan was plainly nothing. As Stevens memorably put it: "Most students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it."<sup>72</sup>

The broader consequence, Stevens observed, is a severe chill placed on student speech questioning the war on drugs.<sup>73</sup> This is a chill we can ill afford, he pointed out, as free debate was the catalyst for changing the disastrous policies of the Vietnam War and—even more on point—Prohibition.<sup>74</sup> Given the mounting costs and casualties of drug prohibition, Stevens warned against "silencing opponents of the war on drugs" and stated that, in "the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment."<sup>75</sup> Here Stevens identified the freedom to dissent at school with the freedom to dissent in the society at large. It is a linkage that we must insist upon not only because of the central symbolic importance of school to understanding the broader dynamics of participation in society, but because school is the training ground for actual citizenship.

The staged retreat of the Court from *Tinker* has restored the presumptive power of school authorities to censor, placing student free speech rights in a straitjacket. The combined effect of the *Fraser*, *Hazelwood*, and *Morse* decisions is to give schools censoring authority when student speech is arguably sexual, indecent or inappropriate in nature; when it risks offending any parents or any students; when it

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69. *Id.* at 2629.

70. *Id.* at 2645 (Stevens, J., dissenting).

71. *Id.* at 2649.

72. *Id.*

73. *Id.* at 2651.

74. *Id.* at 2650–51.

75. *Id.* at 2651.

seemingly implicates the name or authority of the school or one of its activities; and when it is even jokingly questioning or non-judgmental of drug prohibition or other prevailing social or legal taboos.

These various blows against *Tinker* have led to accelerating censorship of school newspapers, yearbooks, magazines, and theatrical productions around the country, as well as stepped up discipline of students who inject “inappropriate” language into the school environment.<sup>76</sup> Many administrators now view themselves like private shopping mall owners, most of whom (depending on which state they operate in) get to control who says what, when and where on their premises.<sup>77</sup> Of course, even when *Tinker* was riding high, its sweeping message did not penetrate all public schools, and its spirit was often honored in the breach. Constitutional literacy exists at alarmingly low levels in the country, and, despite the noble and intensifying efforts of the Marshall-Brennan Constitutional Literacy Project and the long-standing work of Street Law,<sup>78</sup> precious few high school students know what their First Amendment rights are, much less how to fight for them or where to go for help. (Despite *Engel v.*

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76. The Student Press Law Center website has meticulously documented the growing threat to student free speech and free press in the wake of these decisions. For a continuing roundup of the fallout, see <http://www.splc.org>.

77. The Supreme Court found in *Hudgens v. NLRB*, 424 U.S. 507, 519–21 (1976), that citizens in shopping malls have no First Amendment right to engage in political speech, confining to its narrow facts the Court’s libertarian holding in *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the Court held that privately owned “company towns” must permit First Amendment activity if they have invited the public onto the property. *Marsh*, 326 U.S. at 509.

Several state courts have found free speech rights under state constitutional law for citizens to petition and proselytize in shopping centers. See, e.g., *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994) (finding, however, that shopping centers may set “reasonable conditions” for such activity). For a discussion of the fascinating line of shopping mall cases, see JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VERSUS THE AMERICAN PEOPLE* 174–79 (2003).

78. The Marshall-Brennan Constitutional Literacy Project, headquartered at American University’s Washington College of Law and founded in 1999, now operates at numerous law schools, including Arizona State University Law School, Drexel Law School, Howard Law School, Northeastern Law School, Rutgers Law School, UC Berkeley Law School, the University of Louisville Law School, the University of Oregon Law School, the University of Pennsylvania Law School, Southern Law School, and Yale Law School. With the indispensable help of Mary Beth Tinker herself, the Project sends law students who have done well in constitutional law into public high schools to teach a full-blown semester-long course in “constitutional literacy,” focused on all of the Supreme Court decisions that affect students directly, beginning with the *Tinker* case. The Street Law Program, which was launched in 1972 at Georgetown University to teach high school students about their criminal procedure rights in dealing with police and the criminal justice system, also has a presence on many campuses.



*Vitale*,<sup>79</sup> *Lee v. Weisman*,<sup>80</sup> and other cases rejecting official prayer in school contexts, I still frequently meet students who have been asked to pray together at school, on the football field, or at graduation.)

Yet *Tinker* is still good law within its chiseled-down space. If its judicial enemies have managed to place it in a straitjacket, they have failed to give it the guillotine, and it has probably reached entrenched and iconic cultural status, something like *Miranda v. Arizona*,<sup>81</sup> such that a direct overruling is unlikely.<sup>82</sup> Of course, this does not mean that there are not jurists and academics still calling for its head. In his startlingly atavistic concurring opinion in *Morse*, Justice Clarence Thomas unabashedly tried to refute the idea that students have First Amendment rights and cited approvingly cases from the nineteenth and twentieth centuries in which state courts upheld severe discipline, including corporal punishment, against students simply for speaking against their masters.<sup>83</sup> One case he invoked, *Wooster v. Sunderland*,<sup>84</sup> was a California appeals decision affirming expulsion of a student for criticizing unsafe conditions at his school that added up to what he saw as a significant fire hazard.<sup>85</sup>

Nonetheless, the irony is that, while *Tinker* has been battered internally in the field of education, its core meaning is more compelling and relevant than ever outside of the school context. Although *Tinker*'s wings have been clipped, the erosion of speech rights in other institutional contexts means that now is precisely the time for the *Tinker* principle to take flight.

### III. ENCLAVES OF FREEDOM: THE PROMISE OF *TINKER*

There is a vigorous academic and judicial discourse about the extent to which First Amendment protection should differ according to the institutional context in which speech takes place.<sup>86</sup> The

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79. 370 U.S. 421, 424 (1962) (finding that the New York school system's compelled recitation of the Regent's Prayer was wholly inconsistent with the Establishment Clause).

80. 505 U.S. 577, 595–96 (1992) (rejecting the state's argument that a prayer at graduation was permissible because individuals may choose not to attend).

81. 396 U.S. 868 (1969).

82. See *Dickerson v. United States*, 530 U.S. 428, 430 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.>").

83. *Morse v. Frederick*, 127 S. Ct. 2618, 2630–33 (2007).

84. 148 P. 959 (Cal. Dist. Ct. App. 1915).

85. *Id.* at 960–61.

86. Compare Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1264 (2005) (criticizing current doctrine as "institutionally oblivious" and inattentive to the concrete social and institutional contexts that should determine proper speech rules), with Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First*

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Supreme Court has derived many different tests regarding the protection of speech in various institutions, all of them balancing the presumptively compelling interests of the institution—the public employer, the military, the prison, the corporation, for example—against the reduced speech interests of the citizen now operating in a specific subordinate social role in the institution—the public employee, the soldier, the prisoner, or the consumer/worker, to take several important cases. These balancing tests tilt heavily against individual speech from the start and almost always defeat the individual’s claim against institutional censorship and control.

A. *Public Employees Speaking Out*

The *Tinker* analysis cuts through the morass of specific institutional speech tests and sets straight the frameworks of analysis which are so slanted and distorted. If we think about the common occurrence of a public employee speaking against this or that government policy and then being disciplined for it, the *Tinker* analysis offers a clean solution. If the public employee is outside of the work context and objects to a public policy, even one developed by the government agency or office she works for, the speech cannot be sanctioned because the employee is a complete rights-bearing citizen, whose political speech receives full and equal First Amendment protection. The government should have no more power to retaliate against that employee-citizen than a school has to retaliate against a student who, from an off-campus location, criticizes his or her school.

The trickier case is the public employee whose at-work political speech or policy critique is considered offensive or disruptive by her employer and is punished for it. Here, the *Tinker* analysis reminds us

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*Amendment Doctrine*, 54 UCLA L. REV. 1635, 1639 (2007) (pointing out that Schauer ignores the fact that courts actually “tailor too much” in certain institutions, chiefly schools, workplaces and prisons; rejecting arguments for institutional doctrinal tailoring based on theories of individual waiver or the costs of risk and error; and arguing for an intermediate level of scrutiny in these settings). The most authoritative treatment of the subject is Robert Post’s lucid work *Constitutional Domains*, which argues that the law partitions “the social world among different forms of social order,” which he calls management, community and democracy, in order to regulate behavior and that First Amendment jurisprudence “divides social life into” these “discrete domains” as well. POST, *supra* note 5, at 2–3. However, the helpful image of law partitioning social life into different domains may be overdrawn when it comes to specific institutions since these categories may be more usefully seen as competing values *within* institutions that appear and reappear in different proportions in different contexts. A school is neither just a managerial instrument of public policy nor just a manifestation of community values nor just a domain of collective and individual democracy, but a mixture of all three. The genius of *Tinker* was to find that the democratic imperative could not be obviated unless it actually thwarted the other two values.

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that the public employee is still—irreducibly and commendably—a citizen, a member of the broader sovereign community empowered and invited to contribute to public discourse. The employee’s supervisors cannot punish her simply because they are made to feel “uncomfortable” or defensive by her speech. That is the pointed message of *Tinker*: a citizen’s speech may not be suppressed by an institution out of a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>87</sup> The public employer that seeks to censor must rather show, according to the *Tinker* framework, that the employee’s speech will “materially and substantially” interfere with the work of the government agency or invade “the rights of others.”<sup>88</sup>

In essence, the employee can be punished for her speech only if it literally keeps her from doing her job or thwarts the operations of the institution. Thus, a uniformed police officer cannot walk off duty to go make speeches at public rallies about sexism on the police force. This is not because she is forbidden to have opinions about the police force, but rather because she is needed, and contractually obligated, at that point to be at work. But surely she should be able to use her day off to go make such a speech (in plain clothes), even if her superiors disagree with it. Similarly, if she writes an internal office memorandum about why she thinks a particular police action violated the constitutional rights of suspects, her superiors do not have to follow her advice to dismiss charges, but surely they cannot retaliate against her for expressing, in professional good faith, a different point of view. The institution’s mission must integrate flexibly the principles of democratic dialogue and internal dissent that flow from the First Amendment, and an “undifferentiated fear or apprehension of disturbance” can never be “enough to overcome the right to freedom of expression.”<sup>89</sup>

When we compare this *Tinker*-informed approach to actual First Amendment doctrine controlling the field of public employee speech, we find the latter seriously deficient and disappointing. The most recent Supreme Court decision, *Garcetti v. Ceballos*,<sup>90</sup> involved a deputy district attorney who wrote an office disposition memorandum expressing grave reservations about falsehoods contained in a police affidavit that was used to obtain a criminal

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87. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

88. *Id.* at 513.

89. *Id.* at 508.

90. 547 U.S. 410 (2006).

search warrant.<sup>91</sup> In the memorandum, he recommended dismissal of the case.<sup>92</sup> For his strong position, the employee suffered a series of retaliatory adverse job actions.<sup>93</sup> When he sued, the United States Court of Appeals for the Ninth Circuit upheld his claim, finding that the subject matter of his memorandum was “inherently a matter of public concern”<sup>94</sup> within the meaning of the Court’s prior decision in *Pickering v. Board of Education*.<sup>95</sup> Having determined that the memo met the public-concern criterion, the Ninth Circuit balanced Ceballos’s speech interests against the District Attorney’s interest in punishing it.<sup>96</sup> It decided in Ceballos’s favor because the District Attorney “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office” as a consequence of the position he took in the memo.<sup>97</sup> The managers simply disapproved of what he was saying. Under *Tinker*, this is an easy and intuitive result.

But the Supreme Court majority, with Justice Anthony Kennedy writing, promptly reversed. It determined first that Ceballos was not speaking as a citizen on public matters.<sup>98</sup> If he had been, even that fact would not have been dispositive according to the Court because it found that public employees speaking as citizens on public matters still have to face “those speech restrictions that are necessary for their employers to operate efficiently and effectively,”<sup>99</sup> a loose standard that swallows up a lot of what should be absolutely protected political speech in civil society.

In any event, Justice Kennedy found that Ceballos was speaking only as an employee executing his public duties, not as a citizen on a public issue, and “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate

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91. *Id.* at 414.

92. *Id.*

93. *See id.* at 415 (describing alleged retaliations such as position reassignment, transfer to another courthouse, and denial of promotion).

94. *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004), *rev’d*, 547 U.S. 410 (2006).

95. 391 U.S. 563 (1968).

96. *See Ceballos*, 361 F.3d at 1173 (applying a two-step test derived from the Supreme Court’s holdings in *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). The two-step test first asks whether the speech involves a matter of public concern and, if so, whether the interests in allowing the expression outweigh the government’s interests “in promoting workplace efficiency and avoiding workplace disruption.” *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001).

97. *Id.* at 1180.

98. *Garcetti*, 547 U.S. at 421.

99. *Id.* at 419.

their communications from employer discipline.”<sup>100</sup> The majority thus bifurcated the analysis, finding that public employees speaking as citizens have some measure of rights left to be balanced against the public employer’s interest but that public employees speaking in the line of duty have none whatsoever and can presumptively be punished for their views.<sup>101</sup>

This whole approach capsizes *Tinker*. After all, Justice Fortas’s opinion began by declaring that neither students nor teachers shed their First Amendment rights at the schoolhouse gate, thereby implying that those rights exist in full for students and teachers *before* they enter the schoolhouse gate. Justice Fortas never would have implied, much less found, that a student outside of school must have his First Amendment rights subjected to “those speech restrictions that are necessary” for his school “to operate efficiently and effectively,” a giant and dangerously plastic standard.<sup>102</sup> Indeed, at that point, students or public employees would have their First Amendment rights subjected to a statist balancing operation wherever and whenever they speak on public things. According to this approach, students and (especially) teachers would be shedding their First Amendment rights before they ever get to school.

More to the point, the basic meaning of the *Tinker* decision was that a student at school is still a citizen clothed with constitutional rights that she does not surrender simply because she is in a learning relationship with teachers paid by the government. Yet, Justice Kennedy essentially finds that a public employee *does* shed his First Amendment rights entering the gates of the government workplace. That cannot be right; it confuses the legitimate expectations that the government has in getting employees to do their work with the citizen-employee’s total sacrifice of the free speech rights constitutive of democratic citizenship. Surely it is legitimate to prevent a math teacher from using class time to propagandize against the president of the school board or of the United States because class time (except perhaps for a few minutes of “warm-up”) is for discussion of class material. But a math teacher should never be punished for speaking outside of school, or within school in an appropriate context, in a way that is critical of government authority. For example, a teacher who objects at a staff meeting to a new course schedule cannot be punished simply for disagreeing with the principal. Yet, according to Justice Kennedy, even if the positions she takes are in the line of duty,

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100. *Id.* at 421.

101. *Id.*

102. *Id.* at 419.

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are in good faith, and threaten no institutional disruption, her employer can still punish her for dissenting simply because she is acting as an “employee” and not a “citizen.” This is workplace authoritarianism pure and simple.

The majority’s interpretation undermines the breadth and complexity of democratic citizenship. The word “employee” defines one of the crucial roles played by most every democratic citizen, not a category of disembodied servants outside of the processes of constitutional sovereignty and government. As Justice Stevens observes in dissent, “public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.”<sup>103</sup>

In his dissenting opinion in *Ceballos*, Justice Souter also makes this crucial point, but the standard that he offers for deciding whether work-related speech is protected by the First Amendment is itself exceedingly stingy towards expression and seems makeshift and unprincipled. He argues that the government can punish an employee’s speech unless the employee (1) “speaks on a matter of unusual importance,” and (2) “satisfies high standards of responsibility in the way he does it.”<sup>104</sup> He suggests that “only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor.”<sup>105</sup>

This puzzling standard creates content-based hurdles for the employee to clear and shifts the burden back to her to show that she has acted in an *extremely responsible* way to talk about *unusually important* things. Even if we knew what these words meant, the standard itself fundamentally betrays the First Amendment, whose coverage, we know from *Tinker*, properly extends to *any* topic or subject and which allows *anyone* to take *any* position they want. If a public employee is meeting all her professional responsibilities and getting her job done, by what right does the state punish her for her views and demand that she make an extraordinary justification for them?

The only issue that should be in play is this: whether the employee’s “civic” speech at work is either preventing her from completing her basic work assignments and duties, or is fundamentally thwarting the ability of the agency, as a whole, to

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103. *Id.* at 427 (Stevens, J., dissenting).

104. *Id.* at 435 (Souter, J., dissenting).

105. *Id.*

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accomplish its democratically validated institutional goals and mission. Short of either of those difficult proofs, the state must accept the individual expression of employees as a cost—and in truth, what is often more likely, a great benefit—of having a public workplace in a pluralist democracy.

For his part, Justice Breyer, in dissent, just mixes further vagueness into the discussion. He suggests that a court can protect a public employee's speech only if it "(1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties," and then the court also finds an "augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."<sup>106</sup> This language, which is vague and circular, also falls dramatically short of the lucid *Tinker* standard.

The irony here is that, because public school teachers are themselves public employees, they now have fewer rights to object to school policy in an office memo than their own students theoretically have to object to it in a leaflet they bring to school. A teacher can be reprimanded and disciplined for going through channels to register dissent about school policy, while a student cannot be retaliated against at all for speaking or writing against it. The paradox flows out of the abandonment of *Tinker's* elevation of democratic values over managerial ones. While students have still not (entirely) shed their First Amendment rights at the schoolhouse gate, teachers mostly have.

#### B. *Soldiers at Work and Citizens on Base*

The weakness of speech protections for public employees is only compounded and magnified when the employees involved are members of our armed services. One observer approvingly notes the consistent "judicial deference to government authorities" shown by the Supreme Court in military speech cases, an extreme deference that "has been justified on the grounds that the Constitution entrusts the regulation of the military to the Legislative and Executive branches."<sup>107</sup> Of course, this constitutional fact should be no more destructive of the free speech rights of soldiers than should the fact that the Constitution entrusts regulation of schools to state and local governments destroy the free speech claims of students. Indeed, it is

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106. *Id.* at 449–50 (Breyer, J., dissenting).

107. John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 306 (1998).

one thing for society to fully entrust the management of a public function to a particular agency, quite another to entrust to it the simultaneous defense of constitutional liberties within.

Indeed, this claim about essentially unreviewable institutional prerogatives is precisely the argument for complete deference to local school authorities and principals that Justice Frankfurter made unsuccessfully in dissent in *West Virginia State Board of Education v. Barnette*<sup>108</sup> and Justice Black made unsuccessfully in dissent in *Tinker*.<sup>109</sup> Both arguments were rejected by the Court's majority, which did not understand constitutional liberty to be a presumptive threat to bureaucratic efficiency. In a democratic society, bureaucratic efficiency must be defined in a way that incorporates democratic liberty as public purposes are being implemented. All of our social institutions may be derived from, and regulated by, legislative and executive power, but that fact does not displace the continuing force of the Bill of Rights. Agencies implementing our laws do not judge their own cases and are not left to their own devices in protecting constitutional rights and values along the way. It bears reminding: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>110</sup>

Yet, Supreme Court jurisprudence has been so lopsided on soldier free speech claims that judicial review is in fact purely academic in this field. As Captain John Carr notes, "the military may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy."<sup>111</sup> That is, it can do so essentially whenever it wants.

The vast doctrinal justifications for censorship leave our service members quite exposed indeed when it comes to their First Amendment rights. To be sure, no one thinks that the First Amendment is completely irrelevant to military cases,<sup>112</sup> but the Supreme Court has repeatedly found that it applies with extremely diluted force.

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108. 319 U.S. 624, 667–68 (Frankfurter, J., dissenting).

109. 393 U.S. 503, 523 (Black, J., dissenting).

110. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

111. Carr, *supra* note 107, at 306.

112. Even in *Goldman v. Weinberger*, which rejected a Jewish service member's claim to wear a yarmulke against a military rule banning headdress, the Court grudgingly acknowledged that the difficult requirements of "military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment." 475 U.S. 503, 507 (1986).



Consider a leading case, *Parker v. Levy*,<sup>113</sup> to see how a *Tinker*-inflected standard would compare to the Court's actual approach. Parker was an army captain and chief of dermatology at Fort Jackson in South Carolina, who made a number of statements critical of the Vietnam War to enlisted personnel at the Army hospital in the course of his work.<sup>114</sup> The Army pressed charges, and he was convicted by a court-martial of violating three different Articles of the Uniform Code of Military Justice, including Article 133, which proscribes any "conduct unbecoming an officer and a gentleman," and Article 134, which forbids "all disorders and neglects to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces."<sup>115</sup> He was dismissed, subjected to forfeiture, and sentenced to three years of hard labor.<sup>116</sup> The Third Circuit reversed his convictions on the grounds that these provisions were unconstitutionally vague as applied to his statements.<sup>117</sup> Surely this is right: how could he reasonably have known that his anti-war statements would run afoul of the "officer and a gentleman" and "good order and discipline" clauses?

But there is, of course, a more fundamental problem at work. Even had notice been given, the *Tinker* standard suggests that the Army should not be able to punish him for making political statements about the Vietnam War unless the speech threatens a "substantial and material disruption" of the war effort, which was not alleged, or frustration of his specific assignment (successful operation of the dermatology service), which also was not alleged. He cannot be punished simply for disagreeing with the government or the war or because his speech made superiors feel uncomfortable or vaguely apprehensive that it would somehow undermine military morale or the war effort.

Yet, the Supreme Court, in a sweeping opinion by Justice Rehnquist, reversed and reinstated Parker's criminal convictions, invoking the specialized nature of military life and its differences from civilian life and insisting upon the "different purposes of the

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113. 417 U.S. 733 (1974).

114. *Id.* at 736–37. Parker accused the United States of waging a racist war that non-white military personnel should avoid supporting. *Id.* He described the actions of Special Forces personnel as deceptive and accused them of killing innocent women and children. *Id.*

115. *Id.* at 738 nn.3–4.

116. *Id.*

117. *See id.* at 740 (referencing the holding in *Levy v. Parker*, 478 F.2d 772, 793 (3d Cir. 1973), and reversing the conviction on the grounds that Articles 133 and 134 of the Uniform Code of Military Justice are unconstitutional).

two communities.”<sup>118</sup> While soldiers “enjoy many of the same rights” as civilians do, Justice Rehnquist argued, they do not possess “the same autonomy” because their “function is to carry out the policies” of their “civilian superiors.”<sup>119</sup> Justice Rehnquist stated that the “different character of the military community and of the military mission,” rooted in the “fundamental necessity for obedience” and “necessity for imposition of discipline,” justifies the overriding of free speech rights within the military.<sup>120</sup> In other words, the armed services must, at all times, be a total authoritarian institution where soldiers operate in a command system that excludes their identity as citizens of a constitutional democracy.

In *Greer v. Spock*,<sup>121</sup> this command-and-control paradigm even squelched the rights of civilians to make political connections to soldiers and to engage in political speech on military bases. In that 1976 case arising from the 1972 presidential election, People’s Party presidential candidate Dr. Benjamin Spock and his running mate Julius Hobson notified Fort Dix of their intention to enter the fifty-five square mile army reservation to meet with service personnel and pass out campaign literature.<sup>122</sup> They were denied permission to enter the base, even the public areas like roads and parks.<sup>123</sup> Spock won injunctive relief from the Third Circuit, but the Supreme Court reversed, ruling that it is “the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,”<sup>124</sup> and that “it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.”<sup>125</sup>

This decision presupposes that a social institution, at least a military one, can have only one purpose and that all other purposes are, by definition, incompatible. It would be as if the *Tinker* Court had decided that “the primary business of public education is to impart official curricular materials to students, and it is consequently the business of a school to train students, not to provide a public forum.” This approach not only elevates the “management” function

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118. *Id.* at 751.

119. *Id.*

120. *Id.* at 758.

121. 424 U.S. 828 (1976).

122. *Id.* at 832.

123. *See id.* at 833 n.3 (describing the denial of Spock and Hobson’s request and relying on Fort Dix Regulations 210-26 and 210-27, which prohibit political speeches and the distribution of literature without prior approval).

124. *See id.* at 838 (quoting *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

125. *Id.*

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over “democracy,” in Post’s terms,<sup>126</sup> but extinguishes democracy entirely from the picture, depriving citizens of their rightful portion of continuing democratic sovereignty. As Justice Brennan says in dissent, the majority decision makes clear that “there is no longer room, under any circumstance, for the unapproved exercise of public expression on a military base.”<sup>127</sup>

But why not? The appearance of the world’s leading pediatrician and other anti-war activists on the base should be no more presumptively disruptive of military functioning than the appearance to speak of Members of Congress and other routine guests on military bases. Even if uninvited guests appear to pass out literature in a common area or the sidewalk, all of the soldiers remain subject to their military duties and orders. At the very least, Dr. Spock and company should be allowed on the public portions of the base to engage in political discussion until there is a real threat of material disruption of military preparedness and training. An “undifferentiated fear or apprehension of disturbance”<sup>128</sup> should never be enough to defeat the free speech rights of citizens and, in this case, acting on such fear looks like naked political censorship. The people who defend democracy with arms should be able to enjoy democracy unless the two goals become incompatible.

However, we see that the *Tinker* standard has not touched the whole system of speech regulation in the armed services. Soldiers, like public employees more generally, have fewer rights of expressive dissent than students do in school. And citizens who seek to go on military bases in fact shed their First Amendment rights in the process.

Of course, this brief, suggestive canvass barely scratches the surface of the repressive doctrines controlling expression in the public workplace and the military, much less other social institutions like the private workplace and the prison. But the general point holds. *Tinker* remains the beacon of expressive freedom in institutional life and the most lucid and robust standard for protecting democratic liberty over the long haul against the incessant and totalizing claims of entrenched institutional power. It is the freedom-centered reasoning of *Tinker* that holds promise for preventing the institutions that flow out of government from dissolving into partitioned and gated “enclaves of totalitarianism.”<sup>129</sup>

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126. See *supra* note 5 and accompanying text.

127. *Greer*, 424 U.S. at 851 (Brennan, J., dissenting).

128. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

129. *Id.* at 511.

## IV. DEMOCRATIC DISRUPTION AND THE RIGHTS OF OTHERS

In public schools today, *Tinker* is as conceptually relevant as it ever was. All across the country, schools are struggling with the proper treatment of irreverent student expression. Moreover, the advent of the Internet means that a whole new generation of issues has grown up around official efforts to punish off-campus student speech on web sites that gossip about student life or disparage school officials or teachers.<sup>130</sup> In these cases, which have not made it to the Supreme Court yet, the lower courts seem clear that the only speech on students' private web sites punishable by schools is that which threatens actual harm to other members of the community or otherwise substantially disrupts the educational process.<sup>131</sup> *Tinker* thus not only makes schools internally safe for democratic freedom but provides the surest guidance to school officials on how to proceed in disentangling fair criticism and personal opinion uttered off campus from those true threats made to members of the learning community.

Handled properly, the Internet age could usher in a new birth of student freedom of expression. Given that web sites are radically free and off-limits to official control in all but the most extreme cases, shrewd officials might think twice before using their handy *Hazelwood-Fraser-Morse* powers at school to censor student expression and drive it off campus into the wild world of cybertalk, where teachers, coaches, and school mentors have no sway at all. It will benefit everyone if educators resist the urge to censor and instead engage students in serious intellectual and political dialogue at school, testing their youthful dogmas and probing their provisional certainties, teasing out their valuable and provocative insights, and helping them trim away that which is unfair, sleazy, or irresponsible. This is the path of true education, which is to say the path of true freedom. It is a path many schools have already chosen. It is indeed the path of *Tinker*.

The *Tinker* standard, of course, has two parts. The student may not be punished for speech unless it threatens a "substantial disruption of or material interference with"<sup>132</sup> the educational process or "impinge[s] upon the rights of other students."<sup>133</sup> The vitality of the standard depends upon the courts treating "substantial disruption" in

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130. See generally David J. Fryman, Note, *When the Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 557 (2009) (explaining efforts to apply or modify prevailing student speech case law to address issues arising out of the use of the Internet for student expression).

131. See *id.* at 571–85 (summarizing varying approaches in federal case law to student speech on the Internet).

132. *Tinker*, 393 U.S. at 514.

133. *Id.* at 509.

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a serious and liberty-protective way. Indeed, it was key to the *Tinker* decision itself that the Court saw Mary Beth's black armband intervention into school discussion not as a disruptive threat to the educational process, but as a stimulating enrichment of it. But much of the judicial controversy in interpreting and applying *Tinker* necessarily focuses on what is disruptive and what is not. The "rights of others" prong has been mostly ignored or implicitly assimilated into the "disruption" analysis.

But the future progress of the *Tinker* standard may turn on our capacity to shift emphasis and see how the rights of others should in fact be the principal object of our examination. Mary Beth's black armband did not threaten anyone else's rights unless we make the mistake that her principal did by assuming that students (or people generally) have the right not to be offended or upset by someone else's speech. That is not a right that appears anywhere in the Constitution, and it is plainly not a right compatible with the First Amendment. On the other hand, students do have a right under state and federal law to an education, so Mary Beth's speech would lose its protection at the point at which it becomes so oppressive, discordant and pervasive that no one else can learn: an anti-war filibuster in French class or racist tirade in English would be good examples. Short of that kind of showing, the right to speak must be integrated into the fabric of the educational process itself. The *Barnette* and *Tinker* decisions instruct that this is not only an essential safeguard against social authoritarianism but the source of democratic renewal.

Similarly, if we think about Ceballos's memorandum, nothing in it remotely interfered with anyone else's rights. On the contrary, its whole purpose was to see that a criminal defendant's constitutional rights were fairly *enforced*. The rights of no one in the District Attorney's office were threatened at all. To be sure, his superiors had the right to reject his advice, *as they did*, and had no obligation to accept his perspective on things. But controversy and disagreement are in the nature of policy discussion and contestation in the institutional life of a democratic society. It is hard to see how Ceballos's speech can become a lawful basis for discipline unless we treat the mysterious will of the bureaucracy itself as sacrosanct and unchallengeable.

Even in the more difficult case of soldiers' free speech in the military, a focus on the rights of others is fundamentally illuminating. When Dr. Parker expressed his deep scepticism about the Vietnam War at the military hospital, others might have disagreed with him or

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even been offended by his position, but no one's rights were violated in any way. Perhaps the interests of the state were, in some distant and remote way, troubled by his anti-war activism, but if that is the constitutional basis for discipline, the state should have to make a far more compelling showing that there was an actual material and substantial disruption; the "undifferentiated fear or apprehension of disturbance" should never be enough to justify censorship and punishment of speech by citizens.

In the final analysis, *Tinker* furnishes to us a provocative challenge and a standing invitation. It challenges us to make the promise of democratic freedom real in all of society's institutions, even those most determined to operate as "enclaves of totalitarianism." And it invites us to actually carve out space, at least in the interstices and margins of all of our social institutions, for citizens to speak and to hear one another, to engage in the unending and pervasive conversation that defines and constitutes political democracy.