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Mark G. Yudof

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TINKER TAILORED: GOOD FAITH, CIVILITY, AND STUDENT EXPRESSION

MARK G. YUDOF*

I am delighted to be speaking on the occasion of the 25th anniversary of *Tinker v. Des Moines Independent Community School District*.[1] I have been interested in educational policy and the law since 1969, the year after my graduation from law school, and the year in which *Tinker* was decided. For me, *Tinker* has always remained a new and interesting case. My interest is illustrated by the fact that my favorite movie is *Groundhog Day*. In the movie, Groundhog Day repeats itself over and over again until Bill Murray, who plays the main character, straightens out his life and wins the love of the character played by Andie McDowell. I feel similarly about *Tinker*; I analyze this case again and again, and eventually I should get it right. There is, however, little sign of that success thus far.

Tinker has been dramatically transformed by its progeny. There is a Biblical adage from Jeremia that states, "The fathers ate unripe grapes, and the children's teeth are set on edge . . . ."[2] This adage is applicable to the United States Supreme Court and its holdings in relation to *Tinker*. *Tinker* was one of the last cases decided by the Warren Court,[3] and I believe the case has caused considerable "gnashing of teeth" by the members of the

* Executive Vice President and Provost, University of Texas at Austin School of Law; L.L.B., University of Pennsylvania, 1968; B.A., University of Pennsylvania, 1965.

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

[2] *Jeremia* 31:29.

[3] The Warren Court spanned the years 1953-1969. The following justices participated in the 1969 *Tinker* decision: Earl Warren, Abe Fortas, Hugo L. Black, William O. Douglas, John M. Harlan, William J. Brennan, Jr., Potter Stewart, Byron R. White, and Thurgood Marshall. *See* ARNOLD S. RICE, THE WARREN COURT, 1953-1969, at IX (1987).

Burger and Rehnquist Courts. Although these Courts have not specifically overruled *Tinker*, *Tinker*'s progeny have greatly altered the holding set forth by the Warren Court.

Public schools are increasingly viewed by courts today as total institutions, devoted to the socialization of the young and to the inculcation of values and skills.[4] Students are viewed as members of the school community who must adhere to communal norms. Today, children in public schools are viewed less as the bearers of individual rights and more as the repositories of community responsibilities.[5]

Tinker established the rule that school authorities may not suppress student speech unless they can demonstrate that the suppression was necessary to avoid material and substantial interference with schoolwork or discipline.[6] The basic premise of *Tinker* is that students retain their freedom of expression in the public school environment as long as their exercise of that freedom does not unduly hinder the school's achievement of its educational mission.[7]

Most importantly, the *Tinker* decision is rights-based. Children do not forfeit their rights when they walk into the public school any more than they do when they walk out of the public school. Such rights, however, are not absolute and must be assessed according to the impact that they will have on other students and on the school itself. This balancing of interests is similar to judicial assessment of rules relating to parade permits, or

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[4] Ambach v. Norwick, 441 U.S. 68, 77 n.9 (1979) (citing R. DAWSON & K. PREWITT, POLITICAL SOCIALIZATION 158-67 (1977); R. HESS & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 162-63, 217-18 (1967)). In *Ambach*, the Supreme Court upheld a state statute forbidding public school teacher certification to any person who was not a United States citizen unless such person manifested the intention to apply for citizenship. *Ambach*, 441 U.S. at 69. The Court stressed the importance of public schools in the preparation of individuals for participation as United States citizens and in the preservation of the values of our democratic system. *Id.* at 76.

The argument is, furthermore, that a legitimate and substantial community interest exists in promoting respect for authority and for traditional social, moral, and political values. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982).

[5] *See generally* Tracy M. Lorenz, Note, *Value Training: Education or Indoctrination? A Constitutional Analysis*, 34 ARIZ. L. REV. 593 (1992) (discussing tension in education between advancing individual rights and promoting community values in public schools).

[6] *Tinker*, 393 U.S. at 509. In *Tinker*, high school students were suspended for wearing black armbands in school to protest the Vietnam War. *Id.* at 504. The Court weighed the students' First Amendment rights to free speech against the school's interest in prescribing and controlling conduct in schools. *Id.* at 507. The Court held that such freedom of expression, in the absence of a material interference with the school's work or with the rights of other students, is constitutionally protected. *Id.* at 511.

[7] *Id.*; *see also* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 213 (1983).

protests in front of the Pentagon, a courthouse, or some other public building. Such rules restrict the freedoms of association and assembly[8] and are assessed according to the particular context in which they are asserted.

Tinker employed a mixed fact-law rule.[9] I have always thought this rule rendered *Tinker*'s application treacherous, difficult, and unpredictable. When I was a law professor, I used to ask my students the following questions: What constitutes a disruption? How much disruption will outweigh the assertion of the right? How are these interests balanced? Is this rule, with its emphasis on identifying disruption in schools, a rule at all, or is it just an invitation to judges to assert their personal ideologies and persuasions? These, however, are not the only issues to address. I believe that it is as important, or perhaps more important, to determine what constitutes the ongoing work of an institution as it is to determine what can disrupt the routines of an institution.

Writing for the majority in *Tinker*, Justice Fortas stated that the work of the school is indirectly and inextricably linked with the definition of disruption.[10] Justice Fortas said that the *Tinker* children were silent and orderly, and that there was no evidence of material and substantial disruption or interference with schoolwork or discipline.[11] Although a few hostile remarks were directed at the *Tinker* children outside of the classroom, there were no threats made or acts of violence committed on the school premises.[12] For Justice Fortas, the work of the school is defined narrowly. Teachers, for example, present materials in class, assign readings, initiate discussions, hold study periods, and oversee projects. School authorities fail to satisfy the substantial disruption test when: (1) the student's speech does not interfere with, or is unlikely to interfere with, the school's direct teaching activities; (2) the communication from the teacher to the students or from the students back to the teacher is in a structured

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[8] *See, e.g.*, Healy v. James, 408 U.S. 169, 184 (1972) (holding that college has legitimate interest in preventing disruption on campus although "heavy burden" rests on college to justify any such restraints); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (holding that state action which curtails freedom to associate is subject to closest scrutiny), *enforced*, 360 U.S. 240 (1959).

[9] *Tinker*, 393 U.S. at 509. "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. When this speech materially and substantially interferes with the discipline or operations of the school, however, the school officials' actions in suppressing student speech may be justified. *Id.* at 509.

[10] *Id.* at 512-13.

[11] *Id.* at 508.

[12] *Tinker*, 393 U.S. at 508.

setting; and (3) there is no violence or threat of violence.[13] For the *Tinker* majority, the work of the school is its formal curriculum and its ability to pursue this curriculum in each classroom. The *Tinker* children did not drown out their teachers, nor did they prevent anyone from responding. The children's protest was passive and largely silent.

There are, however, other ways to define the mission of the public school. For another interpretation, one may turn to Justice Black's dissent, one of his most intemperate opinions. Justice Black concluded that the *Tinker* children did disrupt the school.[14] This conclusion, however, was premised on his interpretation of the school's mission. Justice Black stated:

> While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war [sic].[15]

To Justice Black, the public school's educational mission is not limited to the formal curriculum or to the presentations by teachers and students. Rather, the whole school enterprise is an instrument of socialization, an instrument for teaching about discipline and disciplinary rules, and about the authority structure within that school.[16] In other words, Justice Black believed that all the interactions that take place in school are part of the school's curricular and socializing mission.

The school, in Justice Black's view, is a limited community, established by the State, defined by elected officials, governed by administrators and teachers, and peopled by students.[17] Justice Black believed that, in *Tinker*, the school officials' action was appropriate. The *Tinker* children sought to convey ideas within the school that the school itself had not accepted as within the scope of its curriculum, and the students were, or might reasonably have been, distracted from their assigned classwork and from the institutional routines. "[P]ublic school

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[13] *Id.* at 512-13.

[14] *Id.* at 517-18 (Black, J., dissenting) ("Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons . . . .").

[15] *Id.* at 518 (Black, J., dissenting).

[16] *Id.* at 524-25 (Black, J., dissenting) ("School discipline . . . is an integral and important part of training our children to be good citizens—to be better citizens."); *see* Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984).

[17] *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

students [are not] sent to the schools at public expense to broadcast political or any other views to educate and inform the public."[18] The original idea of schools—which Justice Black found attractive—was that children had not yet reached a point of experience and wisdom that would enable them to teach their elders. According to Justice Black, students are in school to learn, but they have few free-standing rights.[19]

If Justice Black's opinion was something of a polemic, the dissenting opinion of Justice Harlan, in *Tinker*, was both more restrained and more lucid. Justice Harlan simply stated that, although public school authorities are not exempt from constitutional requirements with respect to freedom of expression, they have wide discretion when carrying out their responsibilities.[20] For Justice Harlan, the question in each case is whether the suppression of student speech is motivated by legitimate school concerns or by prejudice. In Justice Harlan's view only efforts to suppress the unpopular point of view or to do something other than to educate render the exercise of school authority over student speech unconstitutional.[21] Justice Harlan, after reviewing the record of *Tinker*, found that the school officials acted in good faith.[22] The question of good faith, however, like the question of disruption, is only intelligible with a prior understanding of the scope of the school's mission or purpose. Justice Harlan never addressed the issue of disruption, nor did he write about the good faith forecast of disruption.

My view is that Justice Harlan largely accepted Justice Black's broader definition of education, which dictates that the whole school is the curriculum. School administrators cross constitutional boundaries only when they fail to promote learning; this occurs any time they do something other than educate, administrate, or teach. The courts can overturn a decision made by school authorities regarding student speech only when school officials try to suppress speech for the sole reason that they dislike or disagree with the ideas within the speech.

Reviewing Justice Harlan's view of education with regard to balancing the rights of students and the authority of officials is important because there is some risk of going back to the future. The progeny of *Tinker* seem to be gravitating back toward Justice Harlan's original broad view of

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[18] *Id.* (Black, J., dissenting).

[19] *Id.* at 523-24 (Black, J., dissenting) ("[P]ublic schools . . . are operated to give students an opportunity to learn, to talk politics by active speech, or by 'symbolic speech.'").

[20] *Id.* at 526 (Harlan, J., dissenting) ("[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions.").

[21] *Id.* (Harlan, J., dissenting).

[22] *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).

education set forth in his dissent 25 years ago. The importance of this dissent illustrates the ability of dissenting opinions to gain judicial converts over generations. Justice Harlan's dissent is becoming more powerful, not only through a broader conceptualization of the educational mission, but also through a redefinition of the rules governing a school community, particularly with respect to civility. Community members must have a baseline understanding of the ground rules for discourse. I see an articulation of these community ground rules in a number of cases that followed *Tinker*.

The first major case to redefine *Tinker* was *Board of Education, Island Trees Union Free School District v. Pico*,[23] decided in 1982. In this case, Pico challenged the school administration's decision to remove particular books from the school library.[24] The plurality opinion, written by Justice Brennan, stated that there are limits on the State's power to control the library and the classroom.[25] Citing *Ambach v. Norwick*,[26] however, Justice Brennan also acknowledged the importance of public schools' obligation both to prepare individuals for active citizenship and to inculcate students with fundamental values.[27]

The Court then reaffirmed the student rights analysis set forth in *Tinker*. The problem that Justice Brennan confronted in this case was reconciling the rights concept of *Tinker* with the broad definition of the public schools' inculcation role. Justice Brennan addressed this conflict by defining a student's right to receive information and have access to books in a library.[28] In my judgment, however, this application of a right to know in the context of public schooling is not coherent. Justice Brennan himself indicated the invalidity of this distinction when he limited the standard. He then asserted that if the school officials were motivated to remove books because they were not educationally suitable or because they were pervasively vulgar, then the removal would be constitutional.[29] If, however, the removal was motivated by partisan political concerns or by

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[23] 457 U.S. 853 (1982).

[24] *Id.* at 855-56.

[25] *Id.* at 861.

[26] 441 U.S. 68 (1979). In *Ambach*, the Court upheld the states' authority to deny teaching positions to resident aliens who were eligible for United States citizenship, but who refused to seek naturalization. *Id.* at 79-80. In arriving at this conclusion, Justice Powell, writing for the majority, determined that "teaching in public schools constitutes a governmental function . . . 'that go[es] to the heart of representative government.'" *Id.* at 75-76 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

[27] *Pico*, 457 U.S. at 864 (citing Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[28] *Pico*, 457 U.S. at 867; *see* Yudof, *supra* note 16, at 542.

[29] *Pico*, 457 U.S. at 871.

the desire to suppress only certain types of ideas, then the removal would be unconstitutional.[30]

The problem with Justice Brennan's rationale is that it indicates that there are both good and bad reasons to remove books from the library. In either instance, however, the right to know has been violated because the book has been removed. For example, consider a book written by former member of the Ku Klux Klan, David Duke.[31] In one scenario, the book is excised from the library for poor grammar, and in another, it is excised because it is ideologically repugnant. In either scenario, regardless of the reason for its removal, the same book is gone.

The *Pico* decision is important for several reasons. First, the standard for removing books is virtually identical to that set forth in Justice Harlan's dissenting opinion in *Tinker*.[32] The Court must answer the following questions: Why were the books removed? Were they removed for pedagogical or educational reasons? Were they removed for ideological or partisan reasons? Were they removed for some other prejudicial reason outside of the school's mission? This subjective test is similar to the test set forth by Justice Harlan. The primary concern of the subjective test depends on questions like what is ultra vires and what is good faith.

A second concern is that the references to vulgarity make it clear that, in the special public school community, administrators may promote civility of discourse, whether in class or in the library. In other words, the educational mission encompasses socialization and civility. This assertion deals with a separate issue involving the relationship between an educational community and civility of discourse. As Justice Blackmun stated:

> I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a 'right to receive' [information]. . . . [I]f schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination *between* ideas are improper. . . . The school is designed to, and inevitably will, inculcate ways of thought and outlooks . . . .[33]

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[30] *Id.*

[31] *See* David Maraniss, *Duke's Obsession: White Supremacy with a Plan*, WASH. POST, Nov. 10, 1991, at A1. David Duke, former leader of the Knights of the Ku Klux Klan, is well known for white supremacist views and racism.

[32] *Compare* Board of Educ. v. Pico, 457 U.S. 853 (1982) (discussing freedom of students to receive information and authority of officials to limit that right) *with* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (discussing students' freedom of speech and expression and authority of school officials to suppress freedom).

[33] *Pico*, 457 U.S. at 878-79 (Blackmun, J., concurring) (footnote omitted).

I believe that this view sets forth a narrow principle. School officials must be able to choose one book over another without judicial interference. School officials should have the discretion to decide whether one book as compared to another is more relevant, better written, or less lewd. Thus, according to Justice Blackmun, if school authorities are not playing ideological favorites, removal should be permitted.[34]

Pico evolved from *Tinker*, but technically the rule of good faith and reasonable relationship to the pedagogical mission articulated by Justice Harlan's dissent has only been applied in a context where the school is promulgating its own messages. In other words, although the rule has been applied to the library, the classroom, and other school forums, it has not yet been applied to the personal speech of individual students.[35]

Four years later, the Supreme Court decided *Bethel School District v. Fraser*.[36] *Fraser* centered around a young man, Matthew Fraser, who nominated a fellow student for office by making a speech that was filled with sexual innuendo.[37] Fraser was suspended for three days for delivering this speech and violating a school disciplinary rule.[38] Chief Justice Burger, writing the opinion for the Supreme Court, upheld the suspension.[39]

Chief Justice Burger began his exegesis by purporting to apply *Tinker*, but he barely addressed the disruption test. The *Fraser* decision represents the gnashing of the teeth while the *Tinker* decision represents the unripe grapes. Justice Burger emphasized that Fraser's discourse was not political speech,[40] but, rather, profane speech[41] used at a school activity[42] that students were required to attend in order to elect student officers.[43]

The holding in *Fraser* is difficult to understand when viewed in light

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[34] *Id.* at 879-80 (Blackmun, J., concurring).

[35] *See* Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671 (1988).

[36] 478 U.S. 675 (1986).

[37] *Id.* at 677-78.

[38] *Id.* at 685.

[39] *Fraser*, 478 U.S. at 685. The Court upheld the authority of the school board to impose sanctions on Fraser for what the Court considered lewd and indecent speech. In doing so, Justice Burger, writing the opinion of the Court, distinguished *Fraser* from *Tinker* by asserting that the penalties in *Fraser* were unrelated to political preferences. *Id.* Instead, *Fraser* held that the First Amendment in no way restricted school officials from determining lewd and vulgar speech was against school policy if such speech undermined the school's basic educational mission. Thus, the school board acted appropriately. *Id.*

[40] *Id.*

[41] *Id.*

[42] *Fraser*, 478 U.S. at 677.

[43] *Id.*

of *Tinker*. If a nominating speech for political office is not political speech, then what constitutes political speech? Though the speech may have contained profane language and improper innuendo, what could be more political than a speech nominating a candidate for elective office? In addition, there was no disruption as defined by Justice Fortas in *Tinker*.[44] Those at the assembly may have felt somewhat embarrassed, but there was no disruption. Thus, *Fraser* really has nothing to do with *Tinker*. I believe the Chief Justice established a broader view of education by including inculcation of the habits and manners of civility, and the preparation of people for citizenship, self-government, and other similar virtues among the responsibilities of the school system. Although Chief Justice Burger recognized the need to prepare students to be tolerant of others' views, he also emphasized that these fundamental values must be taught without ignoring the sensibilities of others in the school process.[45] Burger then made the following statement, which was vitally important to the evolution of his concept of the public school mission:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.[46]

This statement gives one the impression that Chief Justice Burger found Fraser to be mentally disturbed.

Once again, relate this view to the *Tinker* case and compare the breadth of the educational mission discussed by Burger. He expressly stated that the mission is not limited to the curriculum,[47] the civics class, or the books.[48] He further stated that student speech need not necessarily have any disruptive effect on the overt curriculum before the school can suppress it.[49] Instead, it is sufficient for student speech to have an indirect disruptive effect on the broader mission of the public schools as defined by Burger.[50] There is no frontal assault on *Tinker*. Though *Tinker* is blended into this analysis in a way that makes one think it is good

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[44] *See supra* notes 10-13 and accompanying text.
[45] *Fraser*, 478 U.S. at 683.
[46] *Id.*
[47] *Tinker*, 393 U.S. at 512.
[48] *Id.* at 512-13.
[49] *Id.* at 509.
[50] *Id.* at 512-13.

law, it is difficult to determine how *Tinker* applied to the situation at hand.

Two years after *Fraser*, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.[51] Much has been written about the *Hazelwood* decision and I am sure many of you have read about its holding. In *Hazelwood*, the Supreme Court decided the question of whether the principal of a public school could constitutionally exercise control over the content of a school newspaper called "Spectrum."[52] The newspaper was published by the school at public expense. The editors were members of a journalism class and received credit for their written work for the newspaper. Most key decisions were made by the faculty advisor. Because the newspaper was run by students with school support, there was a great debate concerning which group had ultimate control of the newspaper. The Court decided that the school, not the students, had control of the newspaper.[53] Justice White then stated that, if the school controlled the newspaper, it was not created as a public forum for the communication of the personal views of students.[54] Rather, the newspaper was an extension of the curriculum, serving "as a supervised learning experience for journalism students."[55] Justice White further stated that:

> 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 productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.[56]

The distinction drawn here is between the personal speech of the student and the speech attributed to the school. School administrators feared, among other things, that because the school sponsored the newspaper, anything published in the newspaper would be perceived as representing the view of the school.[57]

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

[52] *Id.* at 262.

[53] *Id.* at 270.

[54] *Id.*

[55] *Id.*

[56] *Hazelwood*, 484 U.S. at 270-71.

[57] *Id.* at 271. In *Hazelwood*, the Court distinguished between independent student newspapers and school-sponsored newspapers. *Id.* The Court ruled that school officials may constitutionally

The *Hazelwood* decision identifies two ways in which the issue of free speech may arise in public schools. The first way is through some attack on the school system's ability to promote its own message. For example, a teacher may say, "I don't want to teach that course. I don't want to teach in those words," or an administrator may say, "I don't like those books in the library. I don't like what the students propose for the newspaper." The second manner in which free speech issues arise in the public schools is through student conduct, such as when students publish an underground newspaper, speak in the hallway, or wear an armband. The *Hazelwood* decision identifies different rules for these two types of speech.

After *Hazelwood*, genuine *Tinker* speech is still subjected to the disruption test. Once it is determined, however, that the government is somehow implicated by the speech, then any limitations placed on that speech must be made in good faith and be reasonably related to a legitimate pedagogical purpose. One way to limit the government in a sensitive area is to counter the government viewpoint with other speech. Another way is to get the school to alter its message, an endeavor which is much more complex and controversial. This goal could be achieved by calling for the purchase of different types of books on the subject, by authorizing different lesson plans for the teachers, or by allowing theatrical productions on the subject.

I am probably one of the few academics who embraces the dichotomy that has arisen after *Hazelwood*. Professor Gress has said that he is puzzled by this dichotomy because he believes that the resulting harm in these cases is the same. It does not really matter to him whether the newspaper is a school newspaper or a student newspaper because in either case the students do not have the opportunity to express their views. Additionally, Professor Stanley Ingber stated at this Symposium that the *Hazelwood* Court arguably portrayed the premise of *Tinker* as holding that school children, too, have fundamental First Amendment rights.[58] With all deference to my good colleague, that argument has no basis.

I do not think *Hazelwood*, on its face, signals the demise of *Tinker*. The *Hazelwood* decision simply clarifies the distinction between personal

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control the content of student speech in a school-sponsored newspaper as long as such control serves a legitimate pedagogical interest. *Id.* at 273. It reconciled its outcome with *Tinker* in that a school may refuse to lend its name and resources to further student expression without violating the First Amendment but may not suppress the free speech of students absent material or substantial disruption. *Id.*

[58] *See* Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L.REV. 421 (1995).

and government expression. Although I think the holding in *Hazelwood* is persuasive, I think there may be reason for concern. I think Professors Gress and Ingber may have had a prescient idea here. The problem is that this trend toward defining the school's socialization mission in broader terms is on a collision course with the substantial disruption test.[59] More recently, and equally as important, the lower courts on a number of occasions have appeared confused over the scope of the *Hazelwood* decision. Again, the *Hazelwood* test is whether school officials use good faith and reasonableness in regulating the curriculum. *Hazelwood* has now been applied to the academic freedom of teachers. This application changes the analysis from a self-embodied, free-standing right, to more of a cog in the process of socialization. The lower courts have also begun to apply this test of good faith and reasonableness to the speech of students. This is an outcome which *Hazelwood* did not authorize and which is certainly inconsistent with *Tinker*.

The United States Court of Appeals for the Seventh Circuit, in *Baxter v. Vigo County School Corporation*,[60] upheld a ban on a T-shirt bearing language that protested racism and grading policies at a school. Citing *Fraser* and *Hazelwood*, the court actually said that the Supreme Court has cast some doubt on the extent to which *Tinker* remains viable and that students retain free speech rights.[61] In addition, the court in *Baxter* applied *Tinker* in a context that the *Hazelwood* Court presumably would not have.

Recently, in *Webster v. Lenox School District*,[62] the Seventh Circuit also treated *Hazelwood* as a case of general application, applicable to both types of speech in the school.[63] In yet another case, *Gano v. School District No. 411 of Twin Falls County*,[64] students sold humorous T-shirts depicting three inebriated administrators drinking alcoholic beverages. The court upheld the students' suspension. Once again, the broad language of *Hazelwood* was used without distinguishing the individual's message from the school's message. This, along with the notion of civility set forth in *Fraser*, carried the day.

My feeling is that good lawyers can distinguish these cases from *Tinker*. Much of the troublesome language that I have cited is dictum, but

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[59] *See supra* text accompanying notes 10-13.
[60] 26 F.3d 728 (7th Cir. 1994).
[61] *Id.* at 737.
[62] 917 F.2d 1004 (7th Cir. 1990).
[63] *Id.* at 1008.
[64] 674 F. Supp. 796 (D. Idaho 1987).

I think there is a genuine reason for concern. The distinguished biologist J. Steven Gould stated that "[t]he beauty of nature lies in detail; the message, in generality. Optimal appreciation demands both . . . ."[65] I think the same premise holds true for the law in this area. In my judgment, the courts need to appreciate the generality of *Tinker* and the detail of *Hazelwood*. To do otherwise is to jeopardize the beauty of the First Amendment.

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[65] STEPHEN J. GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY 13 (1989).