

St. John's Law Review

Volume 69
Number 3 *Volume 69, Summer-Fall 1995,*
Numbers 3-4

Article 6

A Practical Approach to Tinker and Its Progeny

Elliot M. Mincberg

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

A PRACTICAL APPROACH TO *TINKER* AND ITS PROGENY

ELLIOT M. MINCBERG*

I agree with the notion that schools should be teaching values, and that at a minimum, they need to tolerate, rather than promote, certain forms of student free expression. But I also agree with the view that schools should be promoting the values of the First Amendment in a real way, both inside and outside the classroom.

People for the American Way is an organization that often represents students who have wound up in an adversarial relationship with school districts with respect to free expression and other issues. More often, we represent school districts that are attempting to resist censorship efforts directed against them.

With respect to the rights of students, I think Professor Yudof's categorization¹ of the interplay among *Tinker*,² *Hazelwood*,³ and the other decisions is generally correct. If something is considered a school-

* Elliot Mincberg is the Legal Director of People for the American Way, a 300,000 member non-partisan civil and constitutional rights organization. Prior to joining People for the American Way, Mr. Mincberg was a partner at Hogan & Hartson. He graduated Magna Cum Laude from Harvard Law School, and Summa Cum Laude from Northwestern University.

¹ Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365 (1995).

² *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, three students were suspended for wearing black armbands in school as a protest against the war in Vietnam. *Id.* at 504. The Court held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Id.* at 506. The Court further held that peaceful expressions of disapproval which do not interrupt school activities or intrude upon school affairs are protected by the First Amendment. *Id.* at 514.

³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, students alleged First Amendment rights violations in response to the deletion of two stories from the school newspaper. *Id.* at 262. The deletions were made because the school's principal objected to the subject matter of the articles. *Id.* at 263-64. The Court held that "educators do not offend the First Amendment by exercising 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." *Id.* at 273. The deletions by the principal were held to have met that standard. *Id.* at 274.

sponsored activity,⁴ students' independent rights tend to be minimized under the law. In other situations, students' rights are greater. What is the practitioner to do when he or she wants to maximize students' rights?

Three basic approaches are available to the practitioner. First, the practitioner should try to characterize the student activity as non-school sponsored in order to fit it squarely within the *Tinker* rather than the *Hazelwood* framework.

Second, the practitioner should characterize the expressive activity as one within the recognized categories that limit *Hazelwood*. For example, in *Board of Education v. Pico*,⁵ the Court suggested that attempts to remove information for ideological, as opposed to pedagogical, reasons may be unconstitutional. Another example is suggested by *Westside Community Board of Education v. Mergens*.⁶ The Court in *Mergens* indicated that, once a forum is opened for expressive extracurricular activities, a school cannot prohibit certain activities and allow others based on their content.⁷

Third, the practitioner can claim that the school itself has removed the activity from the school-sponsored category and must live with the consequences of that choice. A good deal of litigation takes place in this

⁴ A school-sponsored activity has been defined by the Supreme Court as one which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271; see *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (students' buttons bearing word "scab" could not reasonably have been viewed as bearing imprimatur of school); *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 819 (9th Cir. 1991) (applying *Hazelwood* to Planned Parenthood advertisements in school-sponsored publications); *Romano v. Harrington*, 725 F. Supp. 687, 690 (E.D.N.Y. 1989) (genuine issue as to whether extra-curricular student newspaper bore school's imprimatur).

⁵ 457 U.S. 853 (1982) (plurality opinion). In *Pico*, the school board ordered the removal of nine books which it had characterized as "'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy'" from the high school and junior high school library shelves. *Id.* at 857 (brackets in original) (quoting school board press release). Students brought an action claiming that "the Board's actions denied them their rights under the First Amendment." *Id.* at 859. The Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Id.* at 872.

⁶ 496 U.S. 226 (1990). In *Mergens*, students were permitted to join a variety of student groups and clubs which met after school on the premises of Westside High School. *Id.* at 231. The school board denied a student's request for permission to form a Christian club on the ground that it would violate the Establishment Clause. *Id.* at 232-33. Students brought an action claiming that the school board's decision violated the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), which prohibits federally funded secondary schools from denying "equal access" to students who wish to meet in the school's "limited open forum" on the basis of the content of the speech at the meeting. *Mergens*, 496 U.S. at 233.

⁷ "Because Westside maintains a 'limited open forum' under the Act, it is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time." *Id.* at 246-47.

area.⁸

This kind of argument can be illustrated with specific examples. My organization is working with a student in Easton, Pennsylvania, who was given a postcard indicating when he was supposed to come to get his picture taken for his senior class yearbook. The postcard said that all males should come with a color-coordinated shirt, tie and jacket. The student's color-coordinated shirt, tie and jacket was his Army National Guard uniform.

The school would not let him get his picture taken in the uniform. No one had said that only a civilian coat and tie would be allowed. Indeed, in previous years the school had permitted students to be photographed in uniform. If the matter goes to litigation, we will argue that the school has moved this activity into one of the categories to which *Hazelwood* does not apply and that the student's rights should therefore be given some respect.

Another example arose in New York. In the town of Goshen, an art teacher gave an assignment to students: they were told to create a poster on a political issue, and all the posters would then be posted in the hall. The students created posters on a number of different issues, including two addressing opposing sides of the abortion issue. The posters were put up. There were posters on gun control, animal rights, and all sorts of other controversial issues. The principal decided to pull down only the two posters that related to abortion, thereby changing the rules of the game after they were set up.

Other situations are examples of blatant censorship. For instance, a book called *The Sorcerer's Scrapbook*⁹ was removed from a school in Houston, not for educational reasons, but because somebody did not like the fact that the book contained wizards and unicorns.¹⁰ The censorship issue also arises when a performance of *Peter Pan* is cancelled because there are objections to the portrayal of Indians therein.¹¹

⁸ See, e.g., *Lueth v. St. Clair County Community College*, 732 F. Supp. 1410, 1416 (E.D. Mich. 1990) (holding that educator's control over content of student-run newspaper must be narrowly tailored to serve its interests); *Romano*, 725 F. Supp. at 690 (educators may be able to exercise greater control over content of student speech in classroom than in extra-curricular publications).

⁹ MICHAEL BERENSTAIN, *THE SORCERER'S SCRAPBOOK* (1981).

¹⁰ See Paul Hyde, *School Book Purgers Don't Have Right to Decide for Everybody*, HOUS. POST, Sept. 12, 1994, at A15 ("A local minister claimed the fairy tale figures—beloved characters in folklore, fable and literature—actually promote Satanism in the public schools."). See generally *Books Under Fire*, PORTLAND OREGONIAN, Sept. 29, 1995, at C5 (describing various books which were targeted to be banned from schools).

¹¹ See Frank Rich, *Styne After Styne*, N.Y. TIMES, Sept. 25, 1994, §4, at 17 (describing how school in Southampton, Long Island, "banned a student production of *Peter Pan* because song

In all of these examples, there are controversies concerning which category the situation falls into. The job of the practitioner is to try to put the case into the proper category when and if it gets to court. The real solution to such problems, however, lies outside the courtroom, and involves changing the way that schools react to such controversies.

Hazelwood does not require schools to censor or restrict expression everywhere they can. Schools can indeed do the opposite.¹² Many of these controversies occur because some school personnel are not trained to resolve this kind of issue. School officials may react with inflexibility and rigidity¹³ because they are not as concerned as they ought to be with the values that can be promoted by allowing more open student expression within certain limited forums.

I therefore strongly advocate increased flexibility on the part of school district administrators in this area, and urge them to set up the rules of the game in advance and to stick with them. School officials are under a lot of pressure, and most handle this pressure very well. With more training, more forbearance, and more interest in promoting free expression as part of a student's training to participate in a democratic society, many problems in this area can not only be solved, but also turned into genuine learning experiences.

Finally, it is important to note that *Tinker* and its progeny can sometimes be abused in the name of free speech. For example, a Mississippi statute required schools to authorize student initiated prayer at graduation, assemblies, sporting events, and other school related events.¹⁴ The State of Mississippi, as well as The American Family Association Law Center, argued that *Tinker* authorized the statute, since the students simply

lyric containing the phrase 'ugg-a-Wugg' was 'insulting to Native Americans'); Frank Rich, *Ugg-a-Wugg*, N.Y. TIMES, March 13, 1994, §4, at 17 (noting several musicals, including *Peter Pan*, that cannot be presented in some schools because of political incorrectness); *Schools Should Be Prepared for the Book Burners*, COURIER-JOURNAL (Louisville, Ky.), Sept. 5, 1994, at A8 (listing *Peter Pan*, *Huck Finn*, and *Schindler's List* as potentially offensive to individual groups).

¹² See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988). The *Hazelwood* Court allowed educators to exercise control over certain forms of student expression, but did not require that they do so. *Id.*

¹³ See, e.g., *McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1418 (W.D. Okla. 1992) (school attempted to ban t-shirts bearing words "[t]he best of the night's adventures are reserved for people with nothing planned"); *Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989) (faculty advisor of high school newspaper was fired from position after publication of article opposing Martin Luther King federal holiday).

¹⁴ MISS. CODE ANN. § 37-13-4.1 (1994). This statute has been enjoined in all instances "except as to nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencement." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473, 1492 (S.D. Miss. 1994).

wanted to express their views.¹⁵

People for the American Way responded that *Tinker* did not apply at all.¹⁶ The Mississippi statute demands that schools create a special platform for religious speech that no other kind of speech has. Students had no right to stand up in an assembly and lead the class in a non-religious chant; they were only authorized to initiate prayer under the circumstances listed in the statute. This statute violates the Establishment clause,¹⁷ and is an example of an abuse of *Tinker* that can occur. We as practitioners must be alert to this possibility in order to prevent it.

¹⁵ The American Family Association Law Center attempted "to intervene on behalf of certain students enrolled in Mississippi public schools" who were in favor of school prayer. *Ingebretsen*, 864 F. Supp. at 1479. The student body had voted 490 to 96 in favor of permitting prayer to be delivered over the school intercom system. *Id.* at 1478; see also *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 907 (N.D. Miss. 1995) (school district argued that prayers said over intercom system were student expression, protected by First Amendment).

¹⁶ People for the American Way, along with the Mississippi American Civil Liberties Union, represents the plaintiffs who obtained a preliminary injunction in *Ingebretsen*. See also Lisa Herdahl, Testimony before the Senate Judiciary Committee, 1995 WL 544365, at *6 (F.D.C.H.) (describing how attorneys from People for the American Way helped obtain preliminary injunction against prayer over school intercoms in *Herdahl*).

¹⁷ *Ingebretsen*, 864 F. Supp. at 1491-92.

