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TINKER, HAZELWOOD AND THE REMEDIAL ROLE OF THE COURTS IN EDUCATION LITIGATION

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The main theme that I would like to discuss is the role the courts should play in values issues affecting education in 1994, twenty-five years after *Tinker*,¹ in light of the *Hazelwood*² and *Fraser*³ decisions. In order to place in perspective what may be a very important role for the courts, I would like to take a slightly different approach on the issues discussed today. I would like to examine the *Tinker/Fraser/Hazelwood* development from the point of view of the schools' role in the political socialization of students in a pluralistic setting.

Traditionally and historically, a prime mission of schools, especially in the United States, has been to inculcate values.⁴ This was just accepted, almost without comment or discussion, throughout American history. The

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¹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (finding prohibition of black arm bands worn by students in public school protest of Vietnam War unconstitutional as deprivation of students' right to free expression).

² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that students' First Amendment rights were not violated by principal's refusal to allow publication of two objectionable pages of school newspaper because students in schools are not automatically granted same rights as adults in society, and high school newspaper was not public forum within which free speech is protected).

³ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that school district's sanction of student for use of lewd and offensive speech during school-sponsored assembly was constitutional as appropriate function of public school and distinguishable from *Tinker*).

⁴ "Moral education is not a new idea. It is in fact, as old as education itself. Down throughout history, in countries all over the world, education has had two great goals: to help young people become smart and to help them become good." THOMAS LICKONA, *EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY* 6 (1991); see SHELDON S. COHEN, *HISTORY OF COLONIAL EDUCATION, 1607-1776*, at 44 (1974) ("Puritans were apprehensive that the absence of adequate education would mean the collapse of their attempt to implant pure religious societies in the New World.").

role of schools in instilling values was one of the main motivating factors behind the creation of the unique American system of local school district control. Inculcating values, particularly religious values,⁵ was very important to people in the New World⁶ who came from different countries and backgrounds to settle in a particular area.⁷ Different communities established school environments reflecting their own values for their children. This distinct American tradition of local school control imbedded in our history continues today.

Local school control gained much force in the mid-19th century with the common school movement.⁸ "As its name implies, the common school movement was an attempt to bring together all children living in a particular geographic area, whatever their class or ethnic background."⁹ A major purpose of the common school was to inculcate common values, not just to teach reading, writing and arithmetic.¹⁰ Among the values

⁵ "Given the religious motivation that brought many of the colonists to the New World and the reality that many of the colonies were religiously diverse, the core parental concern was to assure that their offspring adhered to the familial faith. The transmission of the sectarian religion therefore became one of the prime functions of the schools." Michael A. Rebell, *Schools, Values and the Courts*, 7 YALE L. & POL'Y REV. 275, 279 (1989); see 3 JAMES BOWEN, *HISTORY OF WESTERN EDUCATION: THE MODERN WEST* 203 (1981).

⁶ "The clean slate of the New World environment raised the questions of which aspects of traditional culture should be, and could be, successfully conveyed to the young, and which new values should be fostered." Rebell, *supra* note 5, at 278-79; see BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY* 21 (1960).

⁷ "The district system evolved from the special geographical and ideological circumstances of the colonial experience. Geographic isolation and transportation and communication difficulties in the early colonies contributed to the development of local school districts, but the chief reasons that this structure emerged were an intense belief in the value of local control and opposition to centralized authority." Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 448 (1991).

⁸ The "intermixture of patriotic/religious ideals . . . came together to forge the common school movement." Rebell, *supra* note 5, at 280; see 2 ENCYCLOPEDIA OF EDUCATION 312, 312-20 (Lee C. Deighton ed., 1971). "Morality was the most important goal of the common education." CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, at 96 (1983). See generally LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876* (1980).

⁹ Rebell, *supra* note 5, at 280.

¹⁰ With the advent of the American Revolution, many of the leaders of the new republic saw a broader, national purpose for the schools. Schools could assist in building the new nation by "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture." CREMIN, *supra* note 8, at 3; see Rebell, *supra* note 5, at 280.

The founders reasoned that democracy is government by the people; the people themselves are responsible for ensuring a free and just society. Thus, the people must be good; they must "understand and be committed to the moral foundations of democracy." LICKONA, *supra* note 4, at 6.

conveyed in nineteenth-century America were the democratic values of the whole American political system¹¹ and those broadly accepted religious values espoused by the utilitarian, unitarian perspective of Horace Mann and other leaders of the common school movement.¹² The *McGuffey Reader*,¹³ the traditional readers used by about eighty percent of school children in the 19th century, unabashedly conveyed character, disciplinary, political, and religious values.¹⁴ Although the propriety of the schools engaging in such inculcation was not substantially disputed, those who opposed these values had to find other means of educating their children.

Parents who could not accept the predominant cultural values of the society had the right to start their own private schools. Essentially, it was this situation that led to the creation of the separate Catholic school movement in the United States.¹⁵ The result was that there were few

¹¹ "Democratic values would be enhanced by integrating under one roof, and inculcating with one common patriotic creed, the rich and the poor, the long-settled and the immigrant, the religious and the irreligious." Rebell, *supra* note 5, at 280; see also ENCYCLOPEDIA OF EDUCATION, *supra* note 8, at 314 ("Moral instruction was . . . thought to be an effective means of ensuring the promotion of a strong and viable republicanism throughout the land.").

¹² Horace Mann was the first Secretary of Massachusetts' State Board of Education and the leader of the movement for common schools. As an educational pioneer and leader, he founded the country's first state normal schools, supported the teaching of moral character, and encouraged the construction of well planned buildings. His ideas were ultimately adopted to popularize the United States' public education system. EDWARD L. DEJNOZA & DAVID E. KAPEL, AMERICAN EDUCATORS' ENCYCLOPEDIA 311 (1982); see ENCYCLOPEDIA OF EDUCATION, *supra* note 8, at 313 ("Horace Mann declared that wisdom would never reside in the government 'until Common Schools . . . create a more far-seeing intelligence and a purer morality than has ever yet existed among communities of men.'" (quoting HORACE MANN, TWELFTH ANNUAL REPORT COVERING THE YEAR 1848, at 84 (1849))).

¹³ As the most widely-used elementary school primer in early America by 1919, the *McGuffey Reader* had the largest circulation of any book in the world next to the Bible. LICKONA, *supra* note 4, at 7; see HARVEY C. MINNICH, MCGUFFEY AND HIS READERS (1975). For a discussion of the continued use of *McGuffey Readers*, see Alfred W. Putnam, Jr., *Haskins and McGuffey*, 134 U. PA. L. REV. 16 (1985).

¹⁴ Through discipline, the teacher's good example, and the curriculum, schools sought to instruct children in the virtues of patriotism, hard work, honesty, thriftiness, altruism and courage.

When children practiced their reading, for example, they typically did so through *McGuffey Reader* tales of heroism and virtue. . . . Better than anything else, *McGuffey Reader* stories expressed the confidence of an age that knew what it thought about virtue and how to go about instilling it into children.

LICKONA, *supra* note 4, at 7. See generally RICHARD D. MOSIER, MAKING THE AMERICAN MIND: SOCIAL AND MORAL IDEAS IN THE MCGUFFEY READERS (1965) (discussing political origins of McGuffey readers).

¹⁵ Catholic leaders saw the common school curriculum as a serious threat to the integrity of their faith. Rebell, *supra* note 5, at 282. See generally TURNING POINTS IN AMERICAN EDUCATIONAL HISTORY (David B. Tyack ed., 1967) (discussing different philosophies toward education in America). A number of attempts were made to negotiate methods that might allow

questions raised regarding what values should be conveyed in public schools, as there were no longer any real value clashes. Rather, there was a broad acceptance of the values public schools would convey and their right to do so.

By the 1960s, the *Tinker* era, there was much cultural change, including a rejection of the long-standing broad unanimity of cultural values.¹⁶ Contemporary America, in contrast to colonial or nineteenth-century America, is a very different, highly pluralistic, highly value-sensitive environment.¹⁷ The underlying clash of values brought the *Tinker* line of cases to the forefront.

One aspect of these modern pluralistic values is that they come to the fore in larger school districts which brought together people from different cultural backgrounds and different points of view.¹⁸ Concurrent with the development of this new pluralism, society underwent a change in political cultural awareness and an increase in citizens' assertion of their rights.¹⁹ As Professor Hafen discussed, there has been a new way of thinking about

public schools with Catholic majorities to use different Bibles or otherwise to assert their own religious perspectives, but these proved fruitless. Consequently, Catholic leaders decided to establish a separate parochial school system. Rebell, *supra* note 5, at 282; see DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973* (1974).

¹⁶ The 1960s marked the growth of personalism, which celebrated the "worth, dignity, and autonomy of the individual person, including the subjective self or inner life of the person." LICKONA, *supra* note 4, at 9. Because "it emphasized rights more than responsibilities, freedom more than commitment, it [personalism] led people to focus on expressing and fulfilling themselves as free individuals rather than on fulfilling their obligations as members of groups such as family, church, community, or country." *Id.*

¹⁷ "Values consensus is difficult to achieve in modern America because there is today a much greater degree of conflict on basic values than in decades past." Rebell, *supra* note 5, at 283. "While a common concern for children's moral education has persisted even in an atmosphere where adults are not necessarily setting the best example, there has hardly been a public consensus on how to go about achieving the next generations' moral improvement." Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Incultation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 770 (1995).

¹⁸ "[L]arge urban school districts, as well as centralized suburban and rural districts, bring together under one broad umbrella an unprecedented range of diversity in their student populations." Rebell, *supra* note 5, at 283. "Districts that are too small to offer a variety of educational services may not have the capacity to exercise meaningful control. . . . Districts with pupil populations larger than 20,000 . . . may need to develop internal decentralizing arrangements to avoid becoming too unwieldy and cumbersome." Faber, *supra* note 7, at 458. "[T]here has been an increase in both state and national control of our schools, and a corresponding decrease in local control, during the past forty years." *Id.* at 456.

¹⁹ "[T]he emergence of a legal climate of rights entitlement in recent decades has motivated many students and their parents to assert vigorously their personal values and to resist attempts by school administrators to inculcate traditional or 'mainstream' values." Rebell, *supra* note 6, at 284.

rights.²⁰ The current climate carries with it an expectation that people will assert their ethnic values, cultural background, and individual perspectives.²¹

The *Tinker* case demonstrated that people who were opposed to the Vietnam War would no longer keep their opinions at home or to themselves.²² Protestors felt that they had not only a right, but, in some sense, a moral obligation to express their view in a school environment.²³ When these pluralistic values clashes came to a head, schools basically did not know how to respond. The schools did not know how to handle the problem in 1969, at the time of *Tinker*, and I am not confident they are any better able to handle it now.

School officials, when faced with controversy and confrontation of this sort, tend to respond timidly. A typical response is, "Uh uh, when it gets to that level, when people are talking about their personal values, their morality and all, this is something the schools can't deal with. We should stay away from it."

This is unfortunate, as schools necessarily continue to play an important political socialization role. As Professor Ingber has stated, "You need mediating structures in modern society. You need the Church. You need the community, the family, all these institutions to really help mold the values in the young people."²⁴ Individuals rely on the schools to

²⁰ Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379 (1995).

²¹ Personalism led to a rebellion against authority and "a reluctance on the part of authority figures (including teachers and parents) to exercise their legitimate authority." LICKONA, *supra* note 4, at 9. "Since we see values as growing from a person's experiences, we would expect that different experiences would give rise to different values and that one person's values would be modified as his experiences accumulate and change." LOUIS RATHS, *VALUES AND TEACHING: WORKING WITH VALUES IN THE CLASSROOM* 27 (1978).

²² *Tinker*, 393 U.S. at 504.

²³ *Id.* at 514. "American involvement in Vietnam by . . . 1968 symbolized for many all that was wrong with Western Capitalism." BOWEN, *supra* note 5, at 539. "The turmoil spread even into secondary schools in some cases, although their forms of activism were generally more internally expressed in the questioning and defiance of established procedures and moral norms." *Id.* at 540.

²⁴ Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. (1995); see Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990) [hereinafter Ingber, *Rediscovering the Communal Worth*]. Ingber argued that basing First Amendment rights solely on concepts of individualism undermines the character building individuals experience from institutions in society. *Id.* "Individualism's rights discourse is wedded to a notion of negative rights that focuses on the protection of individuals from coercive state power rather than to one of positive rights that emphasizes the obligation of the community to correct societal injustices . . . What is needed is simply a view of human nature that takes account of the extent to which individuality is shaped by and dependent upon community." *Id.* at 108; see also Stanley Ingber,

inculcate these values. The schools, however, tend to avoid their responsibilities in this area in our pluralistic age because they feel ill-equipped to handle difficult values clashes.

This, I believe, explains why there is so much judicial involvement today. The courts are the one institution in modern times that is comfortable with and capable of handling values clashes. Courts are more comfortable than are churches, families, and schools with these type of issues. Judges and lawyers deal daily with such controversies. When courts are functioning properly, they serve to resolve conflicts, specifically values conflicts. Therefore, it is not coincidental that citizens frustrated with the schools' seeming inability to resolve value conflicts will turn to the courts.

In the past few decades, as the courts have increased their role in resolving values confrontations involving the schools, the range of sources that courts look to in making constitutional law decisions has increased. In *Tinker*, several of the Justices considered the issues as John Dewey did: that school has to be an environment that molds citizenship and prepares people for democracy. For example, a close reading of Justice Fortas' opinion in *Tinker*²⁵ reveals language apparently coming directly from the insights of John Dewey.²⁶ Thus, to a large extent, the First Amendment perspective taken by Justice Fortas in *Tinker* was a Deweyian perspective.

Religion or Ideology: A Needed Clarification of the Religion Clauses. 41 STAN. L. REV. 233 (1989) (detailing importance of religion as societal institution when interpreting Constitution); Stanley Ingber, *Socialization, Indoctrination, or the "Fall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15 (1987).

²⁵ Justice Fortas stated that the school's mission to prepare "the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Tinker*, 393 U.S. at 507 (quoting *West Virginia State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943)). "[O]ur history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society." *Id.* at 508.

²⁶ See, e.g., JOHN DEWEY, *THE SCHOOL AND SOCIETY* (1943) [hereinafter DEWEY, *SCHOOL AND SOCIETY*]. "What the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy." *Id.* at 3. Dewey believed that education in a democratic society should strive to improve that society through the continuous reconstruction of experience, rather than habituate the young to a fixed system of economic, political, and social institutions. JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916) [hereinafter DEWEY, *DEMOCRACY AND EDUCATION*]; see also John L. Childs, *John Dewey and Education*, in JOHN DEWEY: *PHILOSOPHER OF SCIENCE AND FREEDOM* 153-63 (Sidney Hook ed., 1967).

Alternatively, Justice Black's dissent²⁷ had its roots in a pedagogical perspective similar to the educational writings of Emile Durkheim.²⁸ Durkheim wrote strongly about the need for social institutions to establish a core of consistent homogenizing values as a basis to enable children to develop their own autonomy.²⁹ This theory is similar to what Professor Hafen spoke about earlier.³⁰

Thus, the courts are not only dealing with values clashes, but they are doing so within the framework of the competing pedagogical theories. The way the values are presented in the majority and dissenting opinions in these seminal cases is virtually a text in educational values today. I use the major decisions of *Tinker*, *Fraser*, and *Hazelwood* as pedagogical tools when teaching in law schools or dealing with school officials, because they provide a wealth of perspective, knowledge, and views of all sides of the issues and can offer a real understanding of the stakes involved in educational values today.

Moreover, the development of the cases, from *Tinker* to *Fraser* to *Hazelwood*, can be viewed as a constitutional common law evolution. In *Tinker*, the Court commenced the debate with the abstract notions of Justices Fortas and Black, who were seemingly applying lessons in Deweyian and Durkheimian educational philosophy to the school context.³¹ For the twenty years that followed, a broad practical application of these concepts occurred, beginning with "the hair cases"³² and

²⁷ Justice Black stressed the principle that "schools . . . are operated to give students an opportunity to learn, not to talk politics [and students should not be] distracted from that singleness of purpose which the state . . . desired . . . in its public educational institutions." *Tinker*, 393 U.S. at 523-24 (Black, J., dissenting). He also stated, "school discipline, like parental discipline, is an integral and important part of training our children to be good citizens." *Id.* at 524.

²⁸ See EMILE DURKHEIM, *DURKHEIM: ESSAYS ON MORALS AND EDUCATION* (H.L. Sutcliffe ed., 1979).

²⁹ EMILE DURKHEIM, *EDUCATION AND SOCIOLOGY* (1956). "It is idle to think that we can rear our children as we wish. There are customs to which we are bound to conform; if we flout them too severely, they take their vengeance on our children. The children, when they are adults, are unable to live with their peers, with whom they are not in accord." *Id.* at 65. "Society can survive only if there exists among its members a sufficient degree of homogeneity; education perpetuates and reinforces this homogeneity by fixing in the child, from the beginning, the essential similarities that collective life demands." *Id.* at 70.

³⁰ See *supra* note 20.

³¹ See *Tinker*, 393 U.S. at 503; see *supra* notes 28-29 and accompanying text.

³² See Recent Cases, 84 HARV. L. REV. 1702 (1970) (listing 37 "long hair" cases); see, e.g., *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (finding that school board could not expel male students for wearing long hair to school), *cert. denied*, 398 U.S. 937 (1970). *But see* *King v. Saddleback Jr. College*, 445 F.2d 932 (9th Cir.) (permitting regulation of hair length of male students based on affidavits that long hair interfered with educational process), *cert. denied*, 404

continuing to *Fraser* and *Hazelwood*. The doctrine in *Tinker* became applied more broadly by society and other courts.³³ In applying a general doctrine of this type to a broad range of factual situations and problems, judges come to understand the impact of their decisions and ascertain the additional factors that must be taken into account. From this perspective, *Fraser* and *Hazelwood* can be seen as corrections or modifications, but not a reversal, of the original *Tinker* doctrine.

While the courts' role in clarifying the basic principles involved in values clashes in the schools is highly significant,³⁴ courts do not and should not have comprehensive responsibility for resolving school-based values clashes. Clearly, not every issue can be decided within the confines of a courtroom or a Supreme Court decision. Unfortunately, among many administrators and teachers, there is an attitude that, once the courts have addressed an area, there is nothing more that needs to be said. The attitude is that, if the courts have intervened in students' rights and free speech in school, then whatever the courts have said is the complete, final, and last word.

Interestingly, the perceptions of educators and judges on these issues differ. The educators think that the courts are all-knowing and omnipotent, and, thus, educators back off.³⁵ On the other hand, judges are quite humble about their role and are cognizant of not usurping the educators' responsibility for making major decisions. Judges see their role as a narrow one in which they leave to the educators great latitude in policy making.

A few years ago, a conference was held at Yale Law School on the role of the courts in determining values.³⁶ The conference brought together a number of federal judges and educators to discuss the relevant landmark cases, including *Goss v. Lopez*.³⁷

U.S. 973 (1971); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.) (upholding enforcement of regulation prohibiting male students from wearing excessively long hair because length of hair was not designed as expression of speech), *cert. denied*, 400 U.S. 850 (1970).

³³ See John E. Burgess, Recent Development, *Lamb's Chapel v. Center Moriche's Union Free School District*, 113 S. Ct. 2141 (1993): *A Critical Analysis of the Supreme Court's First Amendment Jurisprudence in the Context of Public Schools*, 47 VAND. L. REV. 1939, 1976 (1994) (describing law's development after *Tinker*).

³⁴ See MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS (1982) (analyzing legal system's ability to intervene in educational and social policy making).

³⁵ See REBELL & BLOCK, *supra* note 34, at 6.

³⁶ See Rebell, *supra* note 5, at 294 n.60.

³⁷ 419 U.S. 565 (1975). In *Goss*, the Supreme Court held that students were denied due process when the school suspended the students without giving them notice of the charges against

Judge Joseph P. Kinneary, the district court judge who decided *Goss v. Lopez* in the 1970s, attended the conference, which featured a heated discussion in which approximately fifty students joined. For two hours, we discussed whether *Goss*, which gave due process rights to students facing suspension, totally revolutionized the school atmosphere. One side argued that *Goss* undermined school discipline, and that students are running rampant because the administrators' hands are tied. The other side emphasized on a Deweyian perspective, arguing that schools should teach democracy through individual rights and due process procedures.

Judge Kinneary was silent for about an hour and a half and then, finally, he said that he had no idea of the impact his decision had. He said, in essence, "I had no idea all this was going on. I decided a case fifteen years ago because I thought it was very unfair that a few kids got thrown out of school without anybody even hearing their side of the story." Although he knew that the Supreme Court had affirmed his decision, he was unaware that the *Goss* decision had become a focus of educational literature, and that educators throughout the country were discussing its implications. Clearly, Judge Kinneary at the time of his decision did not think that he was formulating the final statement on the appropriate suspension procedures for high school students.

We are thus confronted with the issue of how these cases should be handled. How should the courts be relating to the schools? If one understands the great value of these cases as a pedagogical tool, one may put these cases to a very interesting use. But, at the same time, these cases should not be overused. They should not serve as a substitute for the important work that educators should be doing.

In this regard, I like to make a distinction between national and local community values. National values are the major issues that have been decided by the courts in these significant cases; there remain, however, significant local community values, which are left open by the cases, and need to be decided at the local level by the educators and the members of the school community.³⁸ *Hazelwood* can be used to exemplify this distinction. There has been much debate as to whether *Hazelwood* totally clamped down on individual liberties and imposed a strong authoritarian

them and an opportunity to present their case. *Id.*

³⁸ For a full discussion of the national/local values dichotomy, see Rebell, *supra* note 5. See also William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 506 (1989).

regime on the schools;³⁹ or whether it was largely a reaffirmation of pre-existing law.⁴⁰ I would submit that both of those views over-read the *Hazelwood* decision.

Hazelwood did not mandate that school authorities must impose some kind of authority, discipline, or censorship on school newspapers. Nor did it say that they could not. What *Hazelwood* said was that the First Amendment of the Constitution is not going to preclude a certain type of intervention by educators in school newspapers and other parts of the educational process.⁴¹ It did not say that educators had to intervene. It did not say educators should or should not intervene. It left that decision open to the school administrators.⁴² In short, *Hazelwood* clarified *Tinker* by explicating a broad area open for the development of local community values on education within the parameters of the national value that the First Amendment continues to apply within the schoolhouse gate.

Consistent with *Hazelwood*, some educators may take a Deweyian perspective and emphasize the pedagogical values involved with a student newspaper editor learning responsibility by being granted very broad freedom of expression.⁴³ Other educators believe that students are young,

³⁹ "[T]he *Hazelwood* decision provides no limiting mechanism to restrain educators from censoring student speech." Helene Bryks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291, 323 (1989). "[E]ven a narrow reading of *Hazelwood* gives administrators almost unlimited discretion to censor school-sponsored publications . . ." David Schimmel, *Censorship of School-Sponsored Publications: An Analysis of Hazelwood v. Kuhlmeier*, 45 EDUC. L. REP. 941 (1988); see also Laura S. Kohl, *First Amendment I: The Commercial Press v. The Student Press*, 1989 ANN. SURV. AM. L. 177 (1990) (comparing broad First Amendment rights under *Hustler Magazine, Inc. v. Falwell* with more restrictive rights under *Hazelwood*).

⁴⁰ See Buss, *supra* note 41, at 507 ("*Hazelwood* does not—or, at least, need not—represent a significant shift in first amendment law toward restriction of nongovernmental messages communicated in public schools . . ."); see also Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 720 (1990) (proposing *Hazelwood* was not departure from pre-existing law but rather reaffirmation of prior policy).

⁴¹ *Hazelwood*, 484 U.S. at 273 ("[E]ducators 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."); see also Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 253 (1992) ("The Court's sweeping language in *Hazelwood* moved far beyond the narrow issue of school newspaper censorship.").

⁴² "Educators are entitled to exercise greater control over this . . . form of student expression." *Hazelwood*, 484 U.S. at 271 (emphasis added).

⁴³ Justice Brennan expressed the Deweyian view that a student's free expression must be accommodated even if that expression is at odds with a school board position. *Hazelwood*, 484 U.S. at 574 (Brennan, J., dissenting); see also Rebell, *supra* note 5, at 309; Robert R. Verchick, *Engaging the Spectrum: Civic Virtue and the Protection of Student Voice in School-Sponsored*

impressionable people in need of guidance, and may consider it necessary to review their writings prior to publication.⁴⁴ Both are valid views and *Hazelwood* leaves to local communities the responsibility to determine which of these values to promote.⁴⁵

In a recent case, a student spoke out against certain practices at her school by wearing T-shirts which read, "Racism," "Unfair Grades," and "I hate Lost Creek" (the name of her school).⁴⁶ The issue was whether under *Tinker* the student should be allowed to wear the T-shirts to school. The student in this case was in the third grade and not in high school, a distinction which the judge believed was important.⁴⁷ Both legally and pedagogically, it is questionable whether age should have been an issue for the court to consider. It is a pedagogical issue reflecting community values, not a national value for judges to assert. The local school should consider, "How do we see our third graders handling the great area of free expression afforded our high school students?" *Hazelwood*, correctly, leaves that question open for decision at the local community level.⁴⁸

The reconciliation of the values of autonomy and authority has to come at the community level. The role of the courts is, as in *Hazelwood*, to clarify national values on a broad scale. Thereafter, I believe a judge ought to establish a remedial process that brings a broad representative group of people from the affected community together, and set up a special master, a facilitator or some representative of the court, as a liaison between the community and the court to ensure that there is a proper dialogue.⁴⁹

Such an endeavor should ensure that a broad, representative group

Forums, 24 J. MARSHALL L. REV. 339 (1991). See generally DEWEY SCHOOL AND SOCIETY, *supra* note 26.

⁴⁴ See Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 686 ("[P]ersonal rights may take ongoing sustenance from certain forms of institutional nurturing."); Bryks, *supra* note 42 (discussing tension between schools' authority to proscribe speech and students' First Amendment rights).

⁴⁵ For a discussion of the various ways *Hazelwood* has been applied to school board curriculum decisions, see Robert M. Steans, Comment, *At the Schoolhouse Gate: Education, Law and Democracy*, 1991 U. CHI. LEGAL F. 413 (1991).

⁴⁶ *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994).

⁴⁷ *Id.* at 738 ("[A]ge is a relevant factor in assessing the extent of a student's free speech rights in school . . .").

⁴⁸ See *Hazelwood*, 484 U.S. at 272 (stating that school may take into account emotional maturity of intended audience).

⁴⁹ A detailed proposal for such a procedure, which I call a Community Engagement Dialogic Process ("CED"), is set forth in, Michael A. Rebell & Robert L. Hughes, *Schools, Communities and the Courts: A Dialogic Approach to Education Reform*, YALE L. & POL'Y REV. (forthcoming Spring 1996).

participate in the process and that they be provided a range of balanced background materials about the policy concerns that bear on the issue and about the legal issues and their proper parameters. It should also require that information be provided to the participants about the implications of their decisions. Then, the court could review their decisions and, if there were objections to the decisions, the court could hold a hearing. Once the decision was approved, it would go into effect. The court, thereafter, would have jurisdiction to ensure the decisions' appropriate implementation and to determine if any subsequent modification was needed.

This proposal does not intend to create another school board with coercive judicial powers, but rather suggests that the role of the school board be altered in positive ways. Once a matter has been brought before the courts, to some extent, it has been taken out of the school board's hands. Therefore, from one perspective, I am proposing a means of returning policy initiatives to the school community. Yet this proposal would broaden the number of people involved and, presumably, would allow the broader community to resolve issues in a manner that the school board could not have done in its original form. This new approach is based on my belief that school boards have had a difficult time dealing with these value conflict areas.

One example of the difficulties encountered by school boards was the controversy which tore the New York City school system apart several years ago on the issue of condom distribution.⁵⁰ For approximately a year and a half, all that was discussed at school board meetings and at high levels of the Board of Education was this controversial values confrontation. These types of problems must be approached in a different manner. Under the current school board system, such issues are capable of creating major problems in education, but, under the proposed system, such problems can offer a forum in which the pluralistic strains of the values at issue can be reconciled.

The proposed model is an effective way of using the courts' power and ability to deal with explosive values issues, while at the same time sharing that power and ability with a group of people who have the necessary wisdom and grass-roots sensitivity to promote the values of the

⁵⁰ See *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993) (holding that public schools may not distribute condoms to unemancipated minors without prior parental consent or parental opt-out provision), *appeal dismissed without op.*, 83 N.Y.2d 906, 614 N.Y.S.2d 388 (1994); Peter Marks, *The Vote Against Fernandez: Fernandez Silently Sits in Real-Life People's Court*, N.Y. TIMES, Feb. 11, 1993, at B12; Sam Roberts, *Politics and the Curriculum Fight*, N.Y. TIMES, Dec. 15, at B1.

local community. The model ensures that constitutional rights are reconciled in a way that is pedagogically sensitive to real needs and allows the courts and the schools to engage in an ongoing dialogue about how ultimately to resolve these very difficult questions of balancing liberty, authority, and conflicting values.

