

TEACHING THE NEW THREE Rs—REPRESSION, RIGHTS, AND RESPECT: A PRIMER OF STUDENT SPEECH ACTIVITIES†

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*We don't need no education
We don't need no thought control
No dark sarcasm in the classroom
Teacher leave those kids alone . . .*

—Pink Floyd, "Another Brick in the Wall (Part II)"¹

Although one might question Pink Floyd's particular articulation, the lyrics capture the problem of self-expression in the primary and secondary school setting. Students can legitimately complain that many primary and secondary schools unnecessarily subject them to enforced orthodoxy and repressive strictures. For example, school authorities have disciplined students for protesting the hiring of replacement teachers during a strike,² for selecting potentially controversial (although relevant) school plays and films,³ and for wearing T-shirts with relatively innocuous political statements.⁴ Moreover, school of-

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¹ PINK FLOYD, *Another Brick in the Wall (Part II)*, on *THE WALL* (Pink Floyd Music Ltd., 1979).

² *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 526 (9th Cir. 1992) (prohibiting students from wearing buttons with the word "scab" to school); see *Boyd v. Board of Directors*, 612 F. Supp. 86 (E.D. Ark. 1985); *Dodd v. Rambis*, 535 F. Supp. 23 (S.D. Ind. 1981).

³ See *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (school production of "Pippin" discontinued after members of school board objected to play's sexual content); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986) (school board prohibited high school drama production of the play "Runaways" due to its themes of drug abuse, alcoholism, prostitution, child abuse and rape); see also *Fowler v. Board of Educ.*, 819 F.2d 657 (6th Cir.) (school dismissed teacher for "conduct unbecoming a teacher" after she showed a high school English class Pink Floyd film, "The Wall"), *cert. denied*, 484 U.S. 986 (1987).

⁴ See *Broussard v. School Bd.*, 801 F. Supp. 1526 (E.D. Va. 1992) (upholding school authorities one-day suspension of student who wore "Drugs Suck" T-shirt to school, reasoning that regardless of whether "sucks" connotes a sexual meaning, its use is offensive and vulgar to many people); cf. *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); *Freedman v. Flake*, 448 F.2d 258 (10th Cir. 1971).

ficials have routinely censored school newspapers,⁵ removed library books,⁶ and engaged in ideologically based curriculum selection.⁷ They have even dictated a student's attire at the senior prom.⁸ Surprisingly, the federal courts have sustained these actions in most instances, and when doing so have accorded little or no weight to students' interest in free expression. These and similar decisions reflect a misguided attempt to provide school administrators with unfettered discretion to implement their educational programs at the cost of student speech rights.

In fact, the federal courts have not considered students' speech interests in a fashion consistent with the protection provided other student rights such as the right to be free from racial discrimination.⁹ Nor do the decisions reflect anything vaguely approaching the level of protection for speech rights that adults enjoy.¹⁰ Under existing law, core political speech is no more protected in the public schools than a dirty limerick scrawled in a bathroom stall. The lower courts' behavior can best be understood as a reflection of and reaction to a number of factors, including the compulsive nature of attendance at primary and secondary schools, the fact that students in a classroom are a captive audience, the maturity level of the students, the schools' duty

⁵ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Nicholson v. Board of Educ.*, 682 F.2d 858 (9th Cir. 1982); *Gambino v. Fairfax County Sch. Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977); *Pliscou v. Holtville Unified Sch. Dist.*, 411 F. Supp. 842 (S.D. Cal. 1976).

⁶ See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High Sch. Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979).

⁷ See, e.g., *Pratt v. Independent Sch. Dist.*, 670 F.2d 771 (8th Cir. 1982); *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980) (school board prohibited a high school English teacher from using three books in her course "Women in Literature": Frank Shiras's *Go Ask Alice*, Sylvia Plath's *The Bell Jar*, and Ira Levin's *The Stepford Wives*); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976) (upholding school board removal of Kurt Vonnegut's *Cat's Cradle* and *God Bless You, Mr. Rosewater* and Joseph Heller's *Catch-22* from the curriculum after a committee read the books and, contrary to faculty recommendations, determined they were "garbage").

⁸ *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353 (S.D. Ohio 1987) (upholding the removal from the high school prom of two students dressed in clothing of the opposite sex, reasoning that the action was reasonably related to the legitimate educational purposes of teaching community values and maintaining discipline). But see *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (reversing school board refusal to allow same-sex couple to attend senior prom).

⁹ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹⁰ See *Cohen v. California*, 403 U.S. 15, 26 (1971) (overturning conviction of defendant for wearing a jacket bearing the words "Fuck the Draft," stating that criminal prosecution for the public display of an expletive was a violation of the defendant's First Amendment rights). But cf. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding student's suspension for use of sexual innuendo in campaign nominating speech at school assembly).

to provide a safe environment conducive to learning, and the educational goal of inculcating the social, moral, and political values of society.

Many commentators have argued that the exchange of ideas within the context of secondary education is essential to foster precollege students' future civic competence.¹¹ Schools serve as "the cradle of our democracy,"¹² and student expression plays a fundamental role in the growth of students' knowledge, intellect, and capacity for rational deliberation.¹³ Student expression that diverges from or contradicts the school's curricular message, but does not interfere with or disrupt the school's work contributes to learning.¹⁴ Thus, a conflict potentially exists between a school's authority to inculcate knowledge and values that it deems important and the speech interests of individual students.¹⁵

¹¹ See, e.g., KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 129-30 (1960) (arguing that the road to genius requires an educational process that permits experimentation and creativity); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 25-31 (arguing for development of "personal autonomy" during precollege education); Robert B. Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 MO. L. REV. 25, 47-55 (1985) (advocating multidimensional model that encompasses both marketplace and inculcative approaches to education). In addition, a more democratic family or school is thought to predispose minors to democratic values. ROBERT D. HESS & JUDITH V. TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 93-115 (1967); see also RICHARD E. DAWSON & KENNETH PRUITT, *POLITICAL SOCIALIZATION* 165-66 (1969) (emphasizing that the most important aspect of political socialization is the atmosphere of the classroom). But see Richard M. Merelman, *Democratic Politics and the Culture of American Education*, 74 AM. POL. SCI. REV. 319 (1980) (discussing weaknesses in schools' socialization of democratic values).

¹² *James v. Board of Educ.*, 461 F.2d 566, 568 (2d Cir. 1972).

¹³ See John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 326-27 (1979) (arguing that educational practices that prevent children from attaining the knowledge and intellectual skills necessary for effective exercise of their First Amendment rights abridge their rights); see also R. George Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*, 22 NEW ENG. L. REV. 59, 61 (1987) (arguing that a public school student has "a presently enforceable free speech right prohibiting restrictions imposed by the school in such a way as to significantly impair, inhibit, or otherwise 'stunt' the development of the student's future free speech-relevant capacities").

¹⁴ See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06, 514 (1969) (holding unconstitutional the school's prohibition of students' wearing of armbands in protest of Vietnam War).

¹⁵ See William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 505-06 & n.2 (1989); see also Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 15-20 ("First Amendment paradox" of public education that must socialize children in society's norms while promoting children's autonomy to modify or abandon those norms); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) ("Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society.").

Since the late 1980s, the Supreme Court has held that the First Amendment provides only limited protection to student speech. Under a standard first developed by the Court in *Bethel School District No. 403 v. Fraser*¹⁶ and later refined in *Hazelwood School District v. Kuhlmeier*,¹⁷ school authorities have broad discretion to restrict student speech that ostensibly interferes with the school's intended curriculum. In short, when school-sponsored speech is involved, government need act with only minimal rationality.¹⁸ Indeed, under the current standard applicable to student speech, a commercial for Hostess Twinkies receives greater protection under the First Amendment than does a student's political speech.¹⁹

Under the Supreme Court's *Fraser/Hazelwood* test, which is essentially a rational basis test, student expression receives little protection and still less respect. The federal courts have largely discounted the value of student speech in order to provide school boards with broad discretionary authority to control and discipline students. For unclear reasons, the federal courts have not crafted an analytical model that provides significant protection to student speech without interfering with the school administrator's ability to achieve the institution's educational objectives.

This article acknowledges the importance of good order and discipline in primary and secondary schools, but argues that the Court's current jurisprudence significantly undervalues student speech. This article advocates an approach that would require courts to consider not only the special *context* in which student speech occurs, but also the *content* of the speech. The proposition that student speech activity should be protected based on its content seems to cut against the grain of contemporary First Amendment jurisprudence. Nevertheless, this article argues that it is the best and most effective means by which to protect student expression.

¹⁶ 478 U.S. 675, 683 (1986).

¹⁷ 484 U.S. 260, 270, 273 (1988).

¹⁸ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); see also *Fraser*, 478 U.S. at 685-86 (holding that school authorities acted within their discretion to protect school's educational mission by sanctioning lewd student speech in a school assembly).

¹⁹ Compare *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (holding that truthful commercial speech may be regulated only if the government interest is substantial, the regulation directly advances the government interest and the regulation is no more extensive than is necessary to serve that interest) with, e.g., *Poling v. Murphy*, 872 F.2d 757, 763 (6th Cir. 1989) (upholding under rational basis test the discipline of a high school student who campaigned on the platform of breaking the "iron grip" the school administrators had on the exercise of student rights), *cert. denied*, 493 U.S. 1021 (1990).

Part I of this article discusses the development of student speech rights and the current approach used to evaluate such claims. Part II argues that this approach is poorly suited to the special problems inherent in student speech controversies. By accommodating only considerations that arise from the forum in which student speech activities occur and not the nature of the student speech at issue, the courts have adjusted only one side of the equation. They are using a rigged scale, creating a severe imbalance when they engage in interest balancing. Finally, part III suggests a revised approach to establishing the proper balance between students' speech rights and the school's interest in its curriculum. This part presents an alternative analytical framework, a framework that satisfies the Supreme Court's concern for the school's role, but provides greater protection for student expression.²⁰

In this article, I argue that the current rational basis test fails to provide any meaningful protection to student speech. Under the *Fraser/Hazelwood* rational basis standard, a student's free speech interests are either minimized or completely ignored.²¹ Furthermore, the *Fraser/Hazelwood* rational basis test makes no distinction among classes of student speech. I argue that the Supreme Court should adopt a content-specific First Amendment analysis to test the validity of school authorities' restrictions on student expression. Recognizing that primary and secondary schools fulfill an important function in our society that justifies the imposition of some special burdens on student expression,²² I do not advocate a great broadening of the constitutional rights of students (i.e., they should not be coextensive with the speech rights enjoyed by adults). A more refined balancing approach, however, will provide greater protection to student expression and require reviewing

²⁰ The content-specific approach that I advocate would require courts to consider not only the special context in which student speech occurs but also the content of the speech. In analyzing any student expression claim under a content-specific test, the court would first determine whether the speech involved is political, scholastic, or indecent. This characterization is similar to the characterization the courts make when determining the level of protection accorded to particular kinds of adult speech. After determining the appropriate speech category, the court would then apply a corresponding level of scrutiny appropriate to the speech. Such an approach would provide greater respect for student expression by protecting it from the arbitrary whims of school officials.

²¹ See *Poling*, 872 F.2d at 762-64; *Broussard v. School Bd.*, 801 F. Supp. 1526, 1534-37 (E.D. Va. 1992).

²² For example, students are often required to write papers on controversial subjects and are asked to argue in favor of a viewpoint that they do not share. Also, the subject matter of speech in the classroom is closely regulated, and rightly so: not only may a student be forbidden to discuss history in algebra class, but she also may be forbidden even from discussing last week's homework assignment during the current week's session.

courts to give serious consideration to the necessity of school authorities' repression of student speech activities.

I. THE IMPORTANCE OF OUR PRIMARY AND SECONDARY SCHOOLS

Courts and academics have long recognized that schools differ from other environments because of the particular educational mission society entrusts to them.²³ We expect our primary and secondary public schools to select and implement a curriculum that will educate students and make them responsible citizens.²⁴ To fulfill this role, the schools must inculcate fundamental community values.²⁵ The commu-

²³ As Chief Justice Warren stated:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

²⁴ Courts agree that one of the most important functions of schools is to impart school-determined and school-endorsed knowledge, skills, and values to students. *See, e.g.*, *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) ("[S]chool boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and . . . 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" (quoting Brief for Petitioners at 10)); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (schools' functions include "inculcating fundamental values necessary to the maintenance of a democratic political system"); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of the school officials . . . to prescribe and control conduct in the schools."); *Brown*, 347 U.S. at 493 ("[Education] is the very foundation of good citizenship.").

²⁵ "Incultation" describes the schools' authority to select and implement their curriculum by "provid[ing] educational experiences that give pupils an understanding of the values, mores and traditions of society, and that will ensure adherence to these values in behavior." Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 2 n.1 (1984) (quoting J. SAYLOR & W. ALEXANDER, *CURRICULUM PLANNING FOR MODERN SCHOOLS* 127 (1966)); *see also* Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350 (1976) [hereinafter Goldstein, *The Asserted Constitutional Right*] ("historically accepted societal view [is] that the deliberate inculcation of the right societal values is a major function of American public education"); Stephen R. Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970) (traditional view of secondary education is the inculcative or "the prescriptive model, [in which] information and accepted truths are furnished to a theoretically passive, absorbent student. The teacher's role is to convey these truths rather than to create new wisdom."); Malcolm Stewart, *The First Amendment, The Public Schools, and the Incultation of Community Values*, 18 J.L. & EDUC. 23, 23-29 (1989) (education inevitably inculcative, as it disposes students to accept some values and opinions and reject others; therefore, school authorities should have broad powers to structure educational programs, with view towards inculcating community values).

nity grants primary and secondary schools broad discretion in the hope that attainment of these goals will prepare students to participate fully and responsibly as adults in American society. Under the inculcation theory, the school does not exist to facilitate student speech rights, but rather to fulfill its educational mission.

Our schools, however, must do more than teach young people about mathematics, the sciences, history, and English; they must also convey important information about the values of democracy, including the idea that we do not always agree about important questions of the day. Exposure to a variety of ideas and values is essential to nurturing the participation of young people in a truly democratic, pluralistic society. Learning to evaluate conflicting positions on the basis of their own developing knowledge, experience, and judgment is an important skill, one that must be mastered through the trial and error of experience.²⁶

II. A PRIMER ON STUDENTS' FIRST AMENDMENT RIGHTS

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."²⁷ In almost every context outside a primary or secondary school, the First Amendment protects an individual's speech activities from government interference unless they fall within one of several narrowly defined categories such as obscenity,²⁸ advocacy of imminent lawless behavior,²⁹ defamation,³⁰ or fraudulent misrepresentation.³¹ When speech does not fall into one of these unprotected categories, government must justify any regulatory burden that it imposes on the speech activity with a correspondingly

²⁶ The notion of the school as a place for the exchange of a variety of opinions has a number of supporters. See Ingber, *supra* note 15, at 25. The courts, though, have been willing to apply the concept of the marketplace of ideas to student expression only in the context of postsecondary education. See *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 547-49 (3d Cir. 1984) (although colleges may be marketplaces of ideas and hence open forums for their students, high school expression is more circumscribed), *vacated and remanded*, 475 U.S. 534 (1986) (lack of standing); Goldstein, *The Asserted Constitutional Right*, *supra* note 25, at 1341-43 (marketplace-of-ideas paradigm generally pertains to higher education, while value inculcation has traditionally been viewed as the role of precollege education).

²⁷ U.S. CONST. amend. I.

²⁸ See *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that state may not punish threatening speech unless the speech is directed to incite imminent lawless action and is likely to incite such action); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that government may not punish private citizens' distribution of anti-draft leaflets unless the speech poses a clear and present danger of interference with the workings of government).

³⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that actual malice must be shown before press rights may be restricted as to public figures in defamation actions).

³¹ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

important public interest, which varies with the exact content and nature of the speech. For example, the courts have provided substantial protection to political speech,³² while providing a lesser degree of protection to commercial speech.³³ By applying differing standards of review to different classes of speech, the federal courts have effectively policed unreasonable governmental regulations on speech activity, thereby promoting the values that the First Amendment ostensibly safeguards.³⁴ Unfortunately, the courts have failed to apply this analytical framework to student speech, treating all types of student speech without differentiation for First Amendment purposes. This has led to a substantial erosion in the First Amendment protection afforded student speech activities.

A. *Barnette and Tinker: Establishing Constitutional Norms in the Schools*

More than fifty years ago, the Court recognized the importance of protecting student First Amendment rights in the primary and secondary school setting.³⁵ In a student conduct case, *West Virginia State Board of Education v. Barnette*, the Supreme Court upheld the students' right to be free from government-compelled speech.³⁶ In *Barnette*, members of a Jehovah's Witness congregation, on behalf of children in public schools in West Virginia, challenged a state law requiring all students to salute the flag and recite the pledge of allegiance. The Jehovah's Witnesses argued that the state regulation conflicted with their religious beliefs and improperly subjected children, including their own children, to possible exclusion from school.

The Supreme Court held that requiring school children to salute the United States flag violated the First Amendment by compelling "affirmation of a belief and an attitude of mind."³⁷ The Supreme Court

³² See *Brandenburg*, 395 U.S. at 447-49.

³³ *Central Hudson*, 447 U.S. at 562-64.

³⁴ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 20-28 (1960).

³⁵ One should probably disregard the even earlier cases such as *Prince v. Massachusetts*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska*, in which the interests of children were central to the litigation, because these cases were argued and decided in terms of fundamental parental rights. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (denying legal guardian's claim that state cannot punish her under child labor law for bringing her niece with her to sell religious magazines at night); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding proprietary school owner's right to operate); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that it was unconstitutional for state to forbid educator from teaching German to students). However, these cases support the general point that minors have First Amendment rights.

³⁶ 319 U.S. 624, 642 (1943).

³⁷ *Id.* at 633, 642.

recognized that school officials have an important interest in promoting citizenship,³⁸ but declined to uphold the school's authority to punish students engaged in an exercise of their religious faith.³⁹ School officials must act within the limits of the Bill of Rights, the Court noted, and should be held accountable as role models of constitutional observance for students.⁴⁰ The Court reasoned that the school's interest in educating the students and promoting citizenship required "scrupulous protection of Constitutional freedoms," rather than acquiescence to a school board's overbroad exercise of plenary authority to prescribe student conduct.⁴¹

Indeed, the Court expressly recognized the need to cabin the discretion of school authorities in order to facilitate political self-determination, even in the context of a primary school: "That [states] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁴² Thus, *Barnette* recognized the dual function of the public schools: they must inculcate basic information, but they also serve as the training grounds of democratic self-government.⁴³

Significantly, the *Barnette* Court expressly noted that judicial review of the school administrator's action was important because school officials in small, local jurisdictions might not fulfill their constitutional responsibilities due to local political pressure.⁴⁴ Highlighting the importance of protecting individualism and diversity of thought, the Court stressed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁴⁵

The respect for diversity underlying *Barnette* formed an important part of the Court's holding in *Tinker v. Des Moines Independent Com-*

³⁸ *Id.* at 637. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Id.* at 640.

³⁹ *Id.* at 640-42.

⁴⁰ *Id.*

⁴¹ See *Barnette*, 319 U.S. at 637.

⁴² *Id.* at 637.

⁴³ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school." (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986))); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); Gordon Danning, *Freedom of Speech in Public Schools: Using Communication Analysis to Eliminate the Role of Educational Ideology*, 19 HASTINGS CONST. L.Q. 123 (1991).

⁴⁴ *Barnette*, 319 U.S. at 637.

⁴⁵ *Id.* at 642.

munity School District.⁴⁶ In *Tinker*, the Court held that the First Amendment protected expressive conduct by students in the secondary school setting.⁴⁷ In *Tinker*, a number of students, including Tinker, donned black armbands to protest the United States' involvement in the Vietnam War.⁴⁸ Des Moines principals, fearing possible controversy and disruption, directed the students to stop wearing the armbands at school and suspended them when they refused to do so. The Des Moines school superintendent then suspended three students for refusing to obey the principals' directive.

Writing for the Court, Justice Fortas held that wearing an armband to express a viewpoint was a symbolic act closely related to "pure speech," and was, therefore, clearly protected under the First Amendment.⁴⁹ He wrote that neither "students [n]or teachers shed their constitutional rights of freedom of speech or expression at the school-house gate."⁵⁰ The Court rejected the school officials' attempts to defend their actions based on their fear of a disturbance arising from the presence of the black armbands.⁵¹ Justice Fortas emphasized repeatedly that the students' wearing of black armbands was divorced from any actual or reasonably perceived disruptive conduct on their part. He acknowledged that words spoken in school, whether in or out of the classroom, might disrupt the normal school routine, but insisted that the Constitution obliges schools to take that risk.⁵² School officials may censor student speech only when they can show that it "materially and substantially interfere[s]" with the work of the school, school discipline, or the rights of others in the school community.⁵³

⁴⁶ 393 U.S. 503 (1969).

⁴⁷ *Id.* at 513-14.

⁴⁸ *Id.* at 504.

⁴⁹ *Id.* at 505-06, 513-14.

⁵⁰ *Id.* at 506.

⁵¹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969). The facts indicated only "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.* at 508.

⁵² *Id.* at 508-09. Justice Fortas cited precedent employing the clear and present danger doctrine and used language reminiscent of that doctrine:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunch-room, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.

Id. at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

⁵³ *Id.* at 508-09, 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). *Burnside* involved the wearing of freedom buttons by black children in an all black Mississippi high school. School officials forbade the students from wearing the buttons because they would cause a disturbance in the classroom. *Burnside*, 363 F.2d at 746-47. The Fifth Circuit held that the school

The *Tinker* Court held that students enjoyed at least some of the rights of citizenship, including freedom of speech, and that student speech in the classroom and even in less formal extracurricular activities warranted First Amendment protection.⁵⁴ Additionally, the *Tinker* Court emphasized that a school official's discretionary authority is limited greatly when the student conduct being regulated involves political speech—even symbolic speech such as black armbands:

In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. . . .

. . . [It is not the function of the State to] conduct its schools so as to "foster a homogeneous people."⁵⁵

It is this openness to competing ideas, said Justice Fortas, "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."⁵⁶

Invoking *Barnette*, the *Tinker* Court tied the students' protest to the citizen-critic model: "That the [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁵⁷ The Court concluded that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁵⁸ Thus, in reconciling the conflict between student speech rights and the authority of the schools to abridge such rights,⁵⁹ the *Tinker* Court struck a balance that required tolerance of student speech activities at school.

district had a constitutional obligation to permit the children to wear the buttons. *Id.* at 748–49. The court explained that, "wearing buttons on collars or shirt fronts is certainly not in the class of activities which inherently distract students and breakdown the regimentation of the classroom" *Id.* at 748.

⁵⁴ *Tinker*, 393 U.S. at 512–14.

⁵⁵ *Id.* at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

⁵⁶ *Id.* at 508–09.

⁵⁷ *Id.* at 507; see MEIKLEJOHN, *supra* note 34, at 20–28.

⁵⁸ *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

⁵⁹ After establishing the proposition that students retain First Amendment speech rights in school, the Court added:

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools. Our problem lies in the area where students

Although consideration of the school's educational mission led the Court to apply a test that does not accord students the same speech rights as those possessed by the person on the street, the *Tinker* test emphasizes the democratic values at stake in students' speech⁶⁰ and requires that the government provide substantial justification for burdening the student speech activity. Both *Barnette* and *Tinker* provide strong support to the proposition that student speech activity is entitled to robust First Amendment protection.⁶¹

B. Fraser and Hazelwood: *The Inexplicable Retreat*

Despite *Tinker's* emphasis on the importance of protecting diversity of viewpoints within the school, the Supreme Court subsequently has demonstrated its willingness to reject student free-speech claims when the conduct at issue more closely involves the school's authority over its curriculum.⁶² Although *Tinker* has not been expressly overturned,⁶³ the Supreme Court has severely circumscribed the application of the *Tinker* test.

in the exercise of First Amendment rights collide with the rules of the school authorities.

393 U.S. at 507 (citations omitted).

⁶⁰The *Tinker* test does not require the state to offer a "compelling interest" to justify restricting the students' speech activities, nor does it require a narrow tailoring of the school's means to its educational objective. The test also lacks the immediacy of harm associated with the "clear and present danger" doctrine, which is the equivalent of a strict scrutiny standard of review. See Levin, *supra* note 15, at 1662 ("The *Tinker* standard clearly provides less protection for free expression in the special environment of the schools than is available to the ordinary citizen"). For a contrary argument, i.e., that *Tinker's* standard is the equivalent of the First Amendment standard applicable to adult speech, see Mark Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L. REV. 746, 759-60 (arguing that "*Tinker* applies ordinary First Amendment standards to the expressive activities of students in schools. No concessions in doctrine were made to the special needs, if any, of schools, or to the immaturity of the students. . . . The first amendment rights of young adults in schools are, according to *Tinker*, exactly the same as those of adults.").

⁶¹Some commentators acknowledge the long tradition of court-employed rhetoric supporting the constitutional rights of minors, but discount its long-term significance. See William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 949-50 (1988) ("Supreme Court cases have been characterized by declarations, often accompanied by soaring rhetoric, that the constitutional guarantee at issue is indeed available to juveniles. However, the Court also employs what I call 'juvenileness' to reach the conclusion that the young person loses." (footnote omitted)).

⁶²In *Tinker*, the Court did not characterize the wearing of armbands in protest of the Vietnam War as a curriculum-related matter. *Tinker*, 393 U.S. at 510. The *Tinker* Court thus did not rely on the school's articulated curricular position on the war, but rather on the school authorities' exclusion of a particular viewpoint.

⁶³For an argument that the adoption of public forum analysis necessarily entails a rejection of *Tinker*, see Gordon Danning, *supra* note 43.

The first major deviation from the *Tinker* "material and substantial disruption" test occurred in 1986 in *Bethel School District No. 403 v. Fraser*.⁶⁴ Matthew Fraser, a high school honor student, delivered a nominating speech on behalf of a classmate at a school-sponsored assembly. To communicate the qualities of his candidate, throughout his speech, Fraser made use of crude, if humorous, sexual innuendos.⁶⁵ The record indicates that a few students hooted and hollered and simulated sexual actions. Some students and teachers were offended and upset.⁶⁶ The school subsequently suspended Fraser and removed his name from the list of candidates for graduation speaker.

The Supreme Court, in a seven to two decision, upheld the disciplinary action against Fraser. Writing for the Court, Chief Justice Burger reasoned that the school's legitimate interest in protecting the student audience from exposure to lewd, vulgar, and plainly offensive speech justified the school's disciplinary action.⁶⁷ He further reiterated the proposition that speech protected by the First Amendment for adults is not necessarily protected for children, arguing that in the public school context school authorities may take the sensibilities of fellow students into consideration when regulating speech activities.⁶⁸

Although Chief Justice Burger paid lip service to the importance of permitting the expression of a variety of viewpoints in the schools,⁶⁹ without hesitation, he deferred to the school authorities' conclusory determination that Fraser's speech seriously disrupted the school's educational activities.⁷⁰ Reasoning that the school's fundamental role

⁶⁴ 478 U.S. 675 (1986).

⁶⁵ The relevant portions of Fraser's speech, were as follows:

"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.

"Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

"Jeff is a man who will go to the very end—even the climax, for each and every one of you.

"So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687 (Brennan, J., concurring).

⁶⁶ *Id.* at 678, 683.

⁶⁷ *Id.* at 683–85.

⁶⁸ *Fraser*, 478 U.S. at 682–83.

⁶⁹ See *id.* at 681. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681.

⁷⁰ "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683.

was to instruct students about the "essential lessons of civil, mature conduct,"⁷¹ the Court held that a school may suppress speech that does not directly inculcate such lessons.⁷²

The *Fraser* Court distinguished *Tinker* based on the specific content of Fraser's speech. The majority held that the black armbands at issue in *Tinker* expressed personal political beliefs that did not impede any identified educational mission of the school; on the other hand, the tawdry speech in *Fraser* interfered with the school's mission of inculcating "habits and manners of civility."⁷³ The Court found a "marked distinction" between the double entendres contained in Fraser's speech⁷⁴ and the political message communicated through the students' armbands in *Tinker*.⁷⁵

In a concurring opinion, Justice Brennan stressed that school officials acted only to ensure the orderliness of a high school assembly; they did not attempt to discipline Fraser because they disagreed with the content of his message.⁷⁶ Thus, if the school's regulation of Fraser's speech had been based on content, Justice Brennan would have found that such regulation violated the *Tinker* test: "Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar."⁷⁷

⁷¹ *Id.* Ironically, the school's mission includes teaching civil and effective public discourse. "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

⁷² *Id.* at 685-86. There are limits, however, both to permissible values the schools may specify and to the degree students must conform to specified values. See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (establishment clause forbids state curricular goals that aid or oppose any religion); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (despite acknowledged authority to teach patriotic values, state cannot require swearing of allegiance to the flag).

⁷³ *Fraser*, 478 U.S. at 681. The district court, the Ninth Circuit and the two dissenting Justices on the Supreme Court all concluded that the facts presented did not establish that Fraser had created a "material and substantial disruption" of the school environment as required under *Tinker*. *Id.* at 690, 693-96 (Marshall, J. & Stevens, J., dissenting).

⁷⁴ The *Fraser* Court noted that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." *Id.* at 683. Arguably the speech could not have been that offensive to many of the students because Fraser ultimately delivered a commencement speech after being elected as a write-in candidate. See *id.* at 679.

⁷⁵ *Id.* at 680.

⁷⁶ *Id.* at 689. Justice Brennan's emphasis on the particular facts, on the "weighty" state interest involved, and on the absence of any evidence of impermissible motive to suppress certain speech, all reflect a far more probing judicial inquiry than the majority undertook in its analysis. And yet even Justice Brennan did not engage in the active scrutiny suggested by *Tinker*. He did not require the state to make any empirical showing that any alleged disruption interfered with the school's curriculum. See *id.* at 687-90 (Brennan, J., concurring).

⁷⁷ *Id.* at 689-90 (Brennan, J., concurring) (quoting *Thomas v. Board of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)); see *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

The second major deviation from *Tinker* occurred only two years later in *Hazelwood School District v. Kuhlmeier*.⁷⁸ The issue involved the extent to which school officials could exercise control over the content of an official high school newspaper produced as part of a school journalism class. Following the accepted practice in the Hazelwood School District, the journalism teacher submitted printer proofs of the forthcoming edition of the school newspaper, (ironically named *Spectrum*), to the principal for review prior to publication. The principal expressed concern about the content and subject matter of two stories.⁷⁹ One story described several students' pregnancies and the other described the impact of divorce on the lives of students. The principal was concerned that the articles interfered with the privacy of the subjects involved and did not give family members an opportunity to respond to remarks appearing in the articles or to object to their publication.⁸⁰ Without providing the student writers with any notice or opportunity to respond to his concerns, the principal directed that the two articles be deleted from the newspaper because they were "inappropriate, personal, sensitive, and unsuitable."⁸¹ Three Hazelwood students, all staff members on the *Spectrum*, brought suit in federal court alleging that the principal's acts of censorship violated their First Amendment rights.

Citing *Fraser*, the Supreme Court, in a five to three decision, upheld the principal's actions and thus expanded even further school authorities' discretion to censor speech deemed to be inconsistent with "educational objectives."⁸² Applying First Amendment forum analysis,⁸³

⁷⁸ 484 U.S. 260 (1988).

⁷⁹ *Hazelwood* has been succinctly and perhaps accurately described by one court as a case "upholding censorship of a school-sponsored student newspaper." *Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562, 565 (D. Minn. 1990).

⁸⁰ *Hazelwood*, 484 U.S. at 263.

⁸¹ *Id.* at 278 (Brennan, J., dissenting) (quoting the decision below, *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1371 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988)).

⁸² *Id.* at 273, 276.

⁸³ *Id.* at 267-73. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-56 (1983), the Court defined the scope of the three categories of public forums. In "quintessential" public forums, such as streets and parks, government may regulate on the basis of content only if it can show a compelling state interest and a narrowly drawn regulation to achieve that end. *Id.* at 44. The state may also impose reasonable content-neutral time, place, and manner regulations. *Id.* The law must serve significant government interests and must leave open alternative channels of communication. *Id.* A limited public forum is public property that the state has opened up or designated as a place for expressive activity. *Id.* at 45. The same First Amendment principles apply in a limited public forum as in a traditional public forum. *Id.* A nonpublic forum is public property that "is not by tradition or designation a forum for public communication." *Id.* at 46. Regulation in a nonpublic forum need only be viewpoint-neutral and rational. *Id.*

In dictum, the *Hazelwood* majority stated that:

The public schools do not possess all of the attributes of streets, parks, and other

the Court held that the newspaper constituted a "school-sponsored activity" representing the school's views rather than a public forum⁸⁴ for student viewpoints because it was funded by the school and published as a function of a school journalism class.⁸⁵ Because the student writing in the *Spectrum* was deemed to be a part of the school's educational curriculum,⁸⁶ which the school was entitled to regulate in any "reasonable manner," the Court followed *Fraser's* reasoning and deferred to the school authorities' determination that the articles were inappropriate.⁸⁷

The Court concluded that the *Tinker* standard of "material and substantial disruption" was not applicable to student speech activities if the speech at issue occurs incident to a school-sponsored activity.⁸⁸ When student expression is part of a curriculum-related activity, school officials may exercise editorial control over the "style and content" of the student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."⁸⁹ Without explaining the legal limits of the "pedagogical concerns" exception to *Tinker*, the Court went on to hold that judicial intervention would be justified only when a "decision to censor a school-sponsored . . . vehicle of expression," including publications and theatrical productions, has "no valid educational

traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hence, school facilities may be classified as public forums only if school officials have "by policy or by practice" opened those facilities "for indiscriminate use by the general public" or by some segment of the public, such as student organizations.

Hazelwood, 484 U.S. at 267.

⁸⁴ *Id.* at 267-70. Many commentators have noted that the public forum analysis is poorly suited to the resolution of free speech controversies that arise in public schools. See, e.g., C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986).

⁸⁵ *Hazelwood*, 484 U.S. at 266-70; see also Buss, *supra* note 15, at 512-13, 520-22 (agreeing with majority's rejection of the *Spectrum* as a forum for student free speech).

⁸⁶ *Hazelwood*, 484 U.S. at 270. The Court expansively interpreted the category of student expression subject to censorship as that occurring in school publications and all school-sponsored activities (including extracurricular activities). *Id.* at 273.

⁸⁷ *Id.* at 273, 276. For a discussion of the theory that the *Hazelwood* holding focused on control over communication of the school's views, see Buss, *supra* note 15, at 513 ("the *Hazelwood* decision is best explained in terms of the school's power to control its communicative resources, rather than as a power to regulate student speech").

⁸⁸ See *Hazelwood*, 484 U.S. at 270.

⁸⁹ *Id.* at 273.

purpose."⁹⁰ Applying the new standard, the Court found that the principal's stated concerns about disruption were reasonable, and held that his censorship was a lawful response to that threat.⁹¹

In so holding, the *Hazelwood* Court granted school officials sweeping authority to censor expression in school-sponsored activities. To be sure, the Court attempted to distinguish the student expression in *Tinker* from the facts at issue in *Hazelwood*, arguing that *Tinker* involved the personal expression of students that merely happened to occur on school premises.⁹² Consequently, it was appropriate in *Tinker* to accord the speech activity First Amendment protection. *Hazelwood*, on the other hand, involved speech in a curricular context, and thus placed the school in a position of appearing to promote or support particular student speech with school resources. Consistent with this line of reasoning, the school officials were therefore entitled to greater control over the curriculum-related forms of student expression.

After reiterating *Tinker's* assertion of free speech rights inside the schoolhouse gate, the court in *Hazelwood* noted that students cannot be punished for expressing their views on school premises, in the absence of good evidence of potential material and substantial disruption, "whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.'"⁹³ Significantly, the Court omitted the sentence preceding the quoted language stating that a "student's rights, therefore do not embrace merely the classroom hours."⁹⁴ The Court thus made a feeble attempt to distinguish *Tinker*. Arguably, the *Hazelwood* Court overruled *Tinker*—at least in part.⁹⁵

Justices Marshall and Blackmun joined Justice Brennan in a spirited dissent which, in part, decried this implicit overruling of *Tinker*. Justice Brennan reminded the majority that the standard of "material and substantial disruption" in *Tinker* applied whether the students' conduct took place in the classroom or the cafeteria. The dissent's approach did not recognize a dichotomy between student speech rights in curricular and noncurricular contexts, but instead recognized that student speech in a curricular context, such as the classroom, is

⁹⁰ *Id.*

⁹¹ *Id.* at 273, 276.

⁹² The Court thus declined to follow the Eighth Circuit's application of the *Tinker* standard. *Id.* at 266–73. The lower court had determined that the school failed to demonstrate a reasonable expectation that the censored materials would materially disrupt classwork. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

⁹³ *Hazelwood*, 484 U.S. at 266 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512–13 (1969)).

⁹⁴ *Tinker*, 393 U.S. at 512.

⁹⁵ See *Hazelwood*, 484 U.S. at 270–73, 276.

more likely to result in a material disruption of pedagogy than speech occurring in a noncurricular context.⁹⁶ Although Justice Brennan acknowledged the merit of the majority's concern that a student's view might wrongfully be perceived as the school's own expression, he stated that the principal should have considered less restrictive alternatives to deletion of the articles, such as revision of the articles in response to his concerns.⁹⁷

Hazelwood extended *Fraser's* deference to school authorities' regulation of student speech by making a distinction between tolerating and promoting student speech. According to the Court, the First Amendment requires schools to *tolerate* personal student speech that "happens to occur on the school premises" but is unrelated to the curriculum.⁹⁸ On the other hand, if student speech activity is curriculum-related, it might be perceived by students, staff and outsiders as having the school's sanction.⁹⁹ In consequence, schools have the authority to regulate (or even prohibit) such speech.¹⁰⁰

Under the *Hazelwood* standard, the school's decision to suspend the students in *Tinker* arguably would have been upheld.¹⁰¹ Applying *Hazelwood*, any student speech inside the classroom, including the wearing of armbands, could be viewed as school-sanctioned or approved and, therefore, subject to regulation.¹⁰² In effect, *Hazelwood* overruled *Tinker* by severely circumscribing the decision's applicability.

⁹⁶ *Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting).

⁹⁷ *Id.* at 290 (Brennan, J., dissenting). He suggested that use of a disclaimer or a school statement disassociating itself from the article would be more sensitive to First Amendment concerns. Moreover, the principal excised six articles because he objected to two. Rearranging the layout or delaying publication, Justice Brennan argued, would have been preferable. *Id.* at 289-90.

⁹⁸ *See id.* at 270-71.

⁹⁹ *Id.* at 270-73.

¹⁰⁰ *Id.* The Court addressed the question of "whether the First Amendment requires a school to tolerate particular student speech" that challenges the "educators' ability to silence a student's personal expression that happens to occur on the school premises" and found that *Tinker* requires toleration. *Id.* at 270-71. However, the Court went on to question "whether the First Amendment requires a school affirmatively to promote particular student speech" and concluded that the issue "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." *Id.*

¹⁰¹ *See Hazelwood*, 484 U.S. at 271.

¹⁰² *See id.* The Court in *Hazelwood* stated, "these activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

For a discussion that *Hazelwood* limits only student speech that may be perceived as school-promoted and thereby falls under First Amendment limitations on government speech, see Mark G. Udof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 693-94 (1988)

The Court's invocation of the rational basis standard translates into essentially no judicial review of the school authorities' conduct. Under *Hazelwood*, courts have no obligation to weigh or investigate the government's interest in excluding student speech or the availability of less restrictive alternatives to an outright bar. A school's speech regulation has a reasonable relation to the school's curriculum unless it completely lacks "any valid educational purpose."¹⁰³ Under the *Hazelwood* standard, if student expression interferes with the school's power "to assure that participants learn whatever lessons the activity is designed to teach,"¹⁰⁴ school officials may restrict it. Thus, although the Court in *Fraser* had declared that students have an "undoubted freedom to advocate unpopular and controversial views in schools and classrooms,"¹⁰⁵ the practical effect of the *Fraser/Hazelwood* judicial deference to school officials leaves little real protection for student expression not endorsed by school authorities.¹⁰⁶ In short, the school authorities may label the speech and then suppress it, without fear of serious judicial oversight.

The *Fraser/Hazelwood* framework largely ignores the reality that schools, as a practical matter, are the only forum in which minors may express themselves publicly. Under *Fraser* and *Hazelwood*'s broad definition of "curriculum" and concomitant deference to school authorities, the schools have wide power to regulate and exclude student speech. This deference reflects judicial abdication of substantive review of restrictions on student speech activities.

III. ASSESSING THE AFTERMATH: THE LEGACY OF *FRASER* AND *HAZELWOOD*

Not surprisingly, many federal courts have upheld local school officials' restrictions on student expression in the wake of the *Fraser* and *Hazelwood* decisions. For example, in *Poling v. Murphy* school authorities disqualified a high school student from candidacy for stu-

("Kuhlmeier 'valid educational purpose' test applies only to government expression in the public schools. The *Tinker* disruption test remains applicable to the students' own expression.") (footnote omitted).

¹⁰³ *Hazelwood*, 484 U.S. at 273. Only then is the First Amendment "so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights." *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁰⁴ *Hazelwood*, 484 U.S. at 271. The Court offered two further justifications for restricting student speech: readers or listeners might be exposed to material inappropriate for their level of maturity, and the views of individual speakers might be attributed to the school. *Id.* at 271-73.

¹⁰⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

¹⁰⁶ See *Krizek v. Board of Educ.*, 713 F. Supp. 1131, 1139 (N.D. Ill. 1989) (broadly applying the *Hazelwood* standard to uphold restrictions on the content of classroom materials).

dent council president after he delivered a speech criticizing school authorities at a school-sponsored candidates' assembly.¹⁰⁷ The principal found Poling's speech "inappropriate, disruptive of school discipline, and in bad taste," and therefore disqualified Poling as a candidate for office.¹⁰⁸

Applying the lenient standard of scrutiny established in *Fraser* and *Hazelwood*, Judge Nelson, writing for the majority, deferred to the judgment of the local school authorities¹⁰⁹ and affirmed a grant of summary judgment in their favor. Judge Nelson initially determined that the election assembly and election were both "school-sponsored" activities within the meaning of *Hazelwood*.¹¹⁰ Applying the *Hazelwood* test, the court then concluded that the school authorities had acted appropriately by sanctioning the student speech, explaining that speech sponsored by the school is subject to "greater control" by school authorities than personal speech because educators have a legitimate interest in ensuring that students involved in school-sponsored activities learn intended lessons and values related to proper pedagogical concerns.¹¹¹ Although it recognized that independent thought and frank expression "occupy a high place on our scale of values, or ought to,"¹¹² the court found that "shared values of a civilized social order,"¹¹³ namely discipline, courtesy, and respect for authority, fall within the universe of legitimate pedagogical concerns.¹¹⁴ Thus, "[i]t was not

¹⁰⁷ 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Poling, a candidate for student government, said that:

"The administration plays tricks with your mind and they hope you won't notice. For example, why does [Assistant Principal] Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted. All you have to do is vote for me, Dean Poling."

Id. at 759. Poling's first draft of the speech had been reviewed by a faculty member, who advised Poling to change the reference to the administration's "iron grip." After the review, however, Poling added the remark about the assistant principal's stutter. *Id.*

¹⁰⁸ *Id.* Although students responded to Poling's speech with comments such as "way to go, Dean" and "we don't like him either," the evidence suggested that "[t]he clapping, yelling, and so forth did not go 'above or beyond that present for any of the candidates.'" *Id.* The principal was upset, however, and other students "complained that Dean Poling had gained an unfair advantage." *Id.* at 759-60.

¹⁰⁹ *Id.* at 762-63 ("[l]ocal school officials [are] better attuned than we to the concerns of the parents/taxpayers who employ them"). *Id.* at 762.

¹¹⁰ *Id.* "School officials scheduled the assembly to be held during school hours and on school property. . . . And they vetted the speeches in advance, correcting inappropriate grammar and attempting to weed out or temper inappropriate content." *Id.*

¹¹¹ *Id.* at 762-63.

¹¹² *Poling*, 872 F.2d at 762.

¹¹³ *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

¹¹⁴ *Poling*, 872 F.2d at 762.

irrational, to say the least, for the school authorities to take offense at a remark that was calculated to get [Poling] votes at the expense of the assistant principal's dignity."¹¹⁵

The *Poling* court never explicitly examined the appropriateness of the school authorities' determinations and disciplinary actions, stating merely that determining the most appropriate course of conduct was a decision "best left to the locally-elected school board, not to a distant, life-tenured judiciary."¹¹⁶ The court emphasized that "local school officials . . . must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted."¹¹⁷ Assuming this deferential stance, the court did not consider whether the authorities' disapproval of Poling's ideas was proper, instead holding that Poling communicated his ideas in an unacceptable manner that justified the school authorities' decision to sanction him.¹¹⁸

The case of Dean Poling reveals the breadth of the *Fraser/Hazelwood* doctrine.¹¹⁹ On one level, it illustrates the problems inherent in allowing the suppression of student speech based on a forum limitation defined by the *Hazelwood* "school sponsorship" test. *Poling* demonstrates that lower courts construe "school sponsorship" so broadly that any events occurring at a primary or secondary school are at least arguably connected to the school's curriculum.

At another level of analysis, courts have become very deferential to suppression of student speech by school authorities who can offer *any* reason for their action that is related to some pedagogical objective, however fanciful. This deference leaves open a black hole into which school authorities may cast speech they dislike if the speech is tainted by minor breaches of decorum, as in *Poling*. Even when student speech does not demonstrably interfere with or disrupt either the

¹¹⁵ *Id.* at 763.

¹¹⁶ *Id.* at 761; *see also* Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990) (upholding censorship of student's valedictory speech for the graduation ceremony).

¹¹⁷ *Poling*, 872 F.2d at 762. Although the court of appeals recognized that it was "obviously not the ideal body" to judge the actions of the school authorities, the tone of the court's language suggested that it did not fully agree with the school's actions. *See id.* The court noted: "[i]t may well be that a more relaxed or more self-assured administration would have let the incident pass without declaring [Poling] ineligible, and perhaps that is what this administration ought to have done." *Id.* at 761.

¹¹⁸ *Id.* at 763. The court noted: "[t]he art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum." *Id.*

¹¹⁹ Indeed, a primary or secondary school student wishing to engage in philosophical, religious or political speech would be well-advised to consult with Judith Martin ("Miss Manners") before opening her mouth in school because the consequences of even a minor or isolated breach of decorum can be severe.

schools' work or students' ability to learn an intended lesson, *Poling* indicates that schools are under no constitutional obligation to allow viewpoints that diverge from curricular lessons, that criticize school administrators, or that support unpopular views. They can simply censor expression that they determine conflicts with "legitimate pedagogical concerns," a concept so broad that its reach is practically limitless.¹²⁰

However, applying *Tinker* to all types of student speech, as some commentators have suggested, would not cure the problem. Before the advent of the rational basis standard, several courts had interpreted the *Tinker* standard broadly in order to censor indecent student speech, speech they viewed as having a lesser value, particularly in the school setting.¹²¹

To be sure, some lower federal courts have indicated dissatisfaction with the lack of protection that the *Hazelwood* test provides to student expression.¹²² Particularly in cases squarely raising political

¹²⁰ An Arkansas federal district court also upheld a school's rejection of a student's candidacy for student council office. *Bull v. Dardanelle Pub. Sch. Dist. No. 15*, 745 F. Supp. 1455, 1461 (E.D. Ark. 1990). The student claimed that teachers disapproved of his candidacy because of his outspoken attitudes, but the court concluded that the teachers' actions were not taken to retaliate but to foster the objectives of the Student Council. *Id.* at 1460. The court stated that having teachers approve the candidates was related to legitimate pedagogical concerns, noting that schools have an important role in teaching shared values. *Id.* The court acknowledged that although independent thought and frank expression occupy a high place among these values, discipline, courtesy, and respect for authority are also important. *Id.* at 1459-61.

¹²¹ For example, in *Trachtman v. Anker*, 563 F.2d 512, 519 (2d Cir. 1977), the Second Circuit applied the "substantial disruption" test and upheld the school's prohibition on the distribution to students of a sex questionnaire that the school officials claimed would cause "significant psychological harm." *Id.* at 519-20. The school attempted to bolster the legitimacy of its concerns with expert psychological testimony. *Id.* at 517-19. Similarly, in *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979), the court held that the school administrations had met the "substantial disruption" test. *Id.* at 1050-51. There, a school seized an issue of the school newspaper that printed a letter from the school lacrosse team that complained of the lack of sports coverage by the newspaper, and which included a threat to "kick [the editor's] greasy ass." *Id.* at 1046. The school's action was motivated by "the possibility that: 'an impressionable 14 year old member of the freshman Lacrosse team [might] take the letter as a license to hunt up the sports editor for the stated purpose of the letter.'" *Id.* at 1051 (quoting affidavit of the principal), and that "'the letter foreseeably could provoke a confrontation. . . .'" *Id.* (quoting affidavit of the newspaper's faculty advisor).

As these cases indicate, the "material and substantial disruption" test failed to take into account the different concerns that arise when the student speech is nonpolitical. The courts wanted a lower standard and rather than adopting a new test to take into account the different content of the speech, they merely interpreted the *Tinker* test loosely.

¹²² See *McIntire v. Bethel Sch.*, 804 F. Supp. 1415 (W.D. Okla. 1992). *McIntire* involved school authorities' prohibition on students wearing shirts with the words, "the best of the night's adventures are reserved for people with nothing planned." *Id.* at 1418. The school district asserted that the shirts violated the school's prohibition on attire advertising alcoholic beverages. Although finding the school's prohibition on attire promoting liquor to be facially constitutional, the court was not convinced that the phrase on the shirts would be perceived as encouraging the consump-

speech rights, a few courts have refused to apply the more deferential *Hazelwood/Fraser* standards.

For example, in 1992, in *Chandler v. McMinnville School District*, the Ninth Circuit addressed the issue of what standard should apply to students' wearing buttons with the word "scab" to protest an Oregon school board's hiring of replacement teachers for striking teachers.¹²³ The court discussed both the *Fraser* and *Hazelwood* standards and held that they did not apply in this case.¹²⁴ The court first concluded that the term "scab" could not be considered vulgar, lewd, obscene, or plainly offensive and thus the *Fraser* test did not apply.¹²⁵ The court also found that the *Hazelwood* test would not apply as the buttons could not conceivably have been viewed as representing the school's point of view.¹²⁶

The *Chandler* court concluded that the expression fell within the small category of student speech activity still governed by the *Tinker* disruption standard.¹²⁷ Rejecting the school officials' claim that the "scab" buttons were inherently disruptive, the court remanded the case to provide the school district with an opportunity to prove that the buttons actually presented a reasonable risk of disruption.¹²⁸ The court noted that evidence that the buttons were insulting and directed toward replacement teachers "would bear upon the issue of whether the buttons might reasonably have led school officials to forecast substantial disruption to school activities."¹²⁹ Although the court concluded that *Tinker* governed the constitutional protection afforded to the buttons at issue in *Chandler*, it recognized that student attire considered vulgar or plainly offensive could be curtailed without being linked to a disruption.¹³⁰

tion of liquor simply because of its similarity to a slogan previously used to advertise Bacardi Rum. Noting that the only disruption associated with wearing the shirts occurred after the superintendent banned the slogan in question, the court granted a preliminary injunction against applying the school district's dress code to these shirts. *Id.* at 1426-29. The court concluded that neither *Fraser* nor *Hazelwood* governs all school regulation of student expression that might reasonably be viewed as representing views of the school itself, and therefore held that the *Tinker* test applied. *Id.* at 1426-27.

¹²³ 978 F.2d 524 (9th Cir. 1992).

¹²⁴ *Id.* at 529-30.

¹²⁵ *Id.* at 529.

¹²⁶ *Id.*

¹²⁷ *Id.* at 529-30.

¹²⁸ *Chandler*, 978 F.2d at 530-31.

¹²⁹ *Id.* at 531.

¹³⁰ *Id.* at 529. For example, a Virginia middle-school student was unsuccessful in challenging her one-day suspension for refusing to change her shirt printed with the words "Drugs Suck." *Broussard v. School Bd.*, 801 F. Supp. 1526, 1537 (E.D. Va. 1992). The court recognized that regardless of whether "sucks" connotes a sexual meaning, its use is offensive and vulgar to many

Another court attempted to remedy the lack of meaningful judicial review under *Fraser* and *Hazelwood* by interpreting *Hazelwood* narrowly.¹³¹ In *Romano v. Harrington*, a tenured English teacher was released from his position as advisor to the high school newspaper after publication of a student's editorial opposing the then-proposed federal holiday for Martin Luther King, Jr. The teacher brought suit, and the court denied the school board's request for summary judgment. The board claimed that its action regarding the controversial anti-King article was reasonably related to the legitimate pedagogical goal of "minimizing tensions within an integrated student body that had experienced occasional racial conflicts."¹³²

Rejecting the broad interpretation of school sponsorship as pertaining to all extracurricular activities, the court distinguished the newspaper at issue in *Hazelwood*, which was part of a class, from the extracurricular paper in this case. Reasoning that "inroads on the First Amendment in the name of education are less warranted outside the confines of the classroom and its assignments,"¹³³ the court was not willing to equate an extracurricular, though school-funded, paper with a publication that is part of a journalism class.¹³⁴

These cases, however, are exceptions to the prevailing trend. In most post-*Hazelwood* decisions, courts have expanded the discretion of school authorities to censor student expression by broadly defining what constitutes school-sponsored expression and legitimate pedagogical concerns. They have restricted application of the *Tinker* disruption standard to student expression that clearly does not give the appearance of representing the school.¹³⁵

people, including some middle school students. Citing *Fraser*, the court found that the school administration's action was permissible "to regulate middle school children's language and channel their expression into socially appropriate speech." *Id.* at 1537; see also *Cano v. School Dist.*, 674 F. Supp. 796, 798 (D. Idaho 1987) (holding that a public school could prevent a student from wearing a T-shirt that depicted three school administrators drunk because the shirt undermined the administrators' authority); *Olesen v. Board of Educ.*, 676 F. Supp. 820, 822-23 (N.D. Ill. 1987) (upholding a policy prohibiting male students from wearing earrings, reasoning that the policy was rationally related to the school's legitimate objective of deterring gangs, which sometimes used earrings to symbolize membership).

¹³¹ *Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989).

¹³² *Id.* at 688.

¹³³ *Id.* at 690.

¹³⁴ The court stated:

[B]ecause *Hazelwood* opens the door to significant curtailment of cherished First Amendment rights, this court declines to read the decision with the breadth its dictum invites. Because educators may limit student expression in the name of pedagogy, courts must avoid enlarging the venues within which that rationale may legitimately obtain without a clear and precise directive.

Id. at 689.

¹³⁵ For example, in *Olesen*, an Illinois federal court rejected a First Amendment challenge to

IV. BEYOND *HAZELWOOD* AND *FRASER*: A CONTENT-SPECIFIC APPROACH

The current First Amendment framework applicable to student speech fails to protect adequately student expressive activity. In balancing the freedom to advocate unpopular or controversial views in primary and secondary schools against society's interest in teaching students the boundaries of civil behavior, the courts should not automatically favor school officials' interest in advancing curricular objectives over student speech activities.

Absent from the Court's current First Amendment jurisprudence is a recognition that protecting student speech serves important social and civic values. Although school officials may have legitimate and even compelling reasons for silencing particular student speech in some specific contexts, these facts provide no justification for abandoning a priori the values and principles articulated in *Barnette* and *Tinker* in favor of a rational basis test. School administrators and officials should not be regarded as benevolent dictators.¹³⁶ They should be limited by a guiding principle recognizing that students' speech rights have value and deserve greater First Amendment protection in appropriate contexts.

Courts must not permit school officials to squelch student expression for any reason, however arbitrary or subjective. On the other hand, not all student speech activity should receive a high level of protection under the First Amendment. In short, courts must evaluate the strength of a student's speech claim on a content-specific basis, providing greater First Amendment protection for student political speech, while applying a lower standard of review to scholastic and obscene/indecent speech. The *Fraser/Hazelwood* test, on the other

an anti-gang policy that prohibited students from wearing or displaying any indicia of gang membership "on or about school property," and even from "us[ing] any speech, either verbal or non-verbal (gestures, handshakes, etc.), showing membership or affiliation in a gang." 676 F. Supp. at 822. The court found that the student's professed message of "individuality" was not protected speech under the First Amendment.

Several commentators have noted that the *Tinker* test is not sufficiently precise for application to nonprotest student speech activity. See, e.g., Danning, *supra* note 43, at 128-29 (noting that in most student speech cases, the harm the school seeks to prevent is not so immediate and tangible as the direct interruption of class meetings); Susan Garrison, Comment, *The Public School as Public Forum*, 54 Tex. L. Rev. 90, 113 (1975) (noting that problems exist because "[e]ssential to a definition of disruption is identification of the disrupted endeavor").

¹³⁶ The courts have not always been in agreement with the decision of school authorities, but feel bound by the current rationality test to defer to their decisions. For example, in *Poling*, the court acknowledged that it did not completely agree with the school's decision to sanction Poling's speech. 872 F.2d 757, 761 (6th Cir. 1989).

hand, treats all speech as having equal value; the result of this analytical approach is decisions that appear arbitrary and unfair.

Notwithstanding the deficiencies of the *Fraser/Hazelwood* regime, a one-size-fits-all approach to "protecting" student expression has some support in the legal academy. A number of scholars have argued that public school officials must be granted a great deal of discretion in their administration of a primary or secondary school in order to ensure that such schools operate efficiently.¹³⁷ They suggest that local authorities are in the best position to judge what students should learn and what they should not, whether through formal instruction or informal peer association. Defenders of the status quo argue that the *Fraser/Hazelwood* test provides needed flexibility to school officials, thereby allowing them to maintain order and discipline.¹³⁸

Conversely, a number of academicians have questioned the minimal protection accorded to student speech rights under the current test and have put forth a variety of proposals for reform. Some commentators have advocated providing students with the same First Amendment protections as adults.¹³⁹ Others have suggested that legislative action may be the only hope for increased protection of student speech.¹⁴⁰

Neither the advocates nor the critics of the *Fraser/Hazelwood* analytical framework have adequately identified the central problem with a test that focuses on the effect of speech on a school's curriculum or whether the speech activities might be attributed to the school: the test treats all student speech the same, regardless of the values implicated.

¹³⁷ See Keiter, *supra* note 11 at 47-55; Alan Goldberg, Comment, *Textbook Removal Decisions and the First Amendment—A Better Balance*, 62 TEMP. L. REV. 1317, 1338-39 (1989) (arguing that local school boards need broad discretionary powers in the First Amendment area).

¹³⁸ See Christopher J. Palermo, *Only the News That's Fit to Print: Student Expressive Rights in Public School Communications Media After Hazelwood v. Kuhlmeier*, 11 HASTINGS COMM. & ENT. L.J. 35, 51-52, 69 (1988) (arguing that although *Hazelwood* was correctly decided to provide local school boards with the necessary authority to run their schools effectively, but acknowledging that the holding is vulnerable to excessively broad interpretation).

¹³⁹ See Celia Rooney, Note, *Constitutional Law: Freedom of Speech in the Public Schools—Fraser v. Bethel Sch. District Revisited*, 39 OKLA. L. REV. 473, 473 (1986) (arguing that public school students should have free expression rights coequal to those of adults in public forums); see also Martha M. McCarthy, Ph.D., *Post-Hazelwood Developments: A Threat to Free Inquiry in Public Schools*, 81 EDUC. L. REP. 685 (1993).

¹⁴⁰ See Robert J. Shoop, Ph.D., *States Talk Back to the Supreme Court: "Students Should be Heard as Well as Seen"*, 59 EDUC. L. REP. 579, 585-86 (1990) (providing a review of state legislature, school board, and educational organization responses to the *Fraser* and *Hazelwood* decisions).

Indeed, several state legislatures have considered enacting legislation that would safeguard the free speech rights of students. For example, in 1989, the Ohio general assembly considered enacting a bill to guarantee the freedom of speech, assembly and press to public school students. *Id.*

Although the rational basis test might seem appropriate to student expression that is obscene, it is inappropriate as a First Amendment matter to treat political and scholastic speech activities no better than smut. The protection of First Amendment values requires a more content-sensitive approach.

By developing a content-sensitive system of evaluating students' speech rights in the schools, the federal courts could select and apply a level of judicial scrutiny appropriate to the nature and content of the students' expression. Consistent with such an approach, the courts could provide schools with the authority necessary to regulate indecent or disruptive speech without unnecessarily sacrificing a student's interest in engaging in speech activities about controversial social and political issues, and other entirely appropriate matters of the day.¹⁴¹

Although a content-specific approach may appear at first to be a radical departure from the content neutrality project,¹⁴² such an analytical framework would be little different from the courts' current First Amendment jurisprudence.¹⁴³ Courts have properly treated some types of speech as having higher First Amendment value than other kinds of speech and have made frequent references to the constitutional inequality of speech activities.¹⁴⁴ The courts, moreover, have consis-

¹⁴¹ A number of efforts to fashion a hierarchical approach have attempted to limit the bias against content-based regulation to viewpoint discrimination. Under this theory, distinctions based on the subject matter or form of the speech would not trigger close judicial scrutiny, absent evidence that the government was taking sides, favoring one viewpoint over another. See Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Both authors warn of the danger that subject-matter restrictions, although superficially viewpoint-neutral, present a compelling case for content-based scrutiny because of the potential for corrupt viewpoint bias.

¹⁴² See Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1424 (1995) (arguing that consideration of context is essential to applying the First Amendment properly); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-52 (1985) (arguing that context is an important element of contemporary First Amendment analysis).

¹⁴³ See, e.g., Farber, *supra* note 141 at 727-28; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 203-07 (1982) (noting that the approach reflected in the Court's free speech opinions posits some hierarchy of values entitled to constitutional protection); Stone, *supra* note 141, at 81-82. But see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 940 (2d ed. 1988) (commenting that "[a] hierarchy of ever-proliferating intermediate categories requires the Court to assign relative values to different classes of expression, a task that is all but impossible to reconcile with the basic theory of the First Amendment").

¹⁴⁴ A plurality in *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976), upholding a zoning ordinance regulating the location of adult movie theaters, endorsed the principle that "it

tently considered the content of a student's speech activity. Indeed, opinions from several courts, including the Supreme Court, indicate that they have implicitly considered the nature of the speech before determining whether to apply *Fraser/Hazelwood* or *Tinker*.

For example, in *Fraser*, the controversial nature of the student's speech clearly influenced Chief Justice Burger's holding. His opinion reflects a subjective value judgment that indecent speech deserves less constitutional protection than other kinds of speech. Thus, Chief Justice Burger distinguished *Tinker* and refused to apply its test to *Fraser*'s speech, based at least in part on the theory that *Tinker* involved political speech activity, which the First Amendment has traditionally afforded the greatest degree of protection.¹⁴⁵ Because the speech involved in *Fraser* was, at least in the majority's view, indecent speech, it did not merit the same level of protection.¹⁴⁶ The majority, therefore, applied a lower level of scrutiny that it believed appropriately reflected the value our society places on bawdy speech.¹⁴⁷

Additionally, Judge Merritt, in his dissenting opinion in *Poling*, indicated that because of the political content of *Poling*'s speech he believed that it deserved greater protection than the *Fraser/Hazelwood* standards would provide.¹⁴⁸ Judge Merritt stated explicitly that "[t]he Court [in this case] has applied the wrong First Amendment test to this student's political speech and has therefore reached the wrong result."¹⁴⁹ In Judge Merritt's view, the political nature of *Poling*'s speech was a more important factor in determining the level of protection the speech should receive than whether the speech was connected with the school's curriculum or was merely personal.¹⁵⁰ Under Judge Merritt's view, *Poling*'s speech, as political expression, should have been entitled

is manifest that society's interest in protecting [non-obscene, sexually indecent speech] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate" See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (stating "this Court has long recognized that not all speech is of equal First Amendment importance"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986); Stephan, *supra* note 143, at 203-07 (noting that the Court has never embraced a rule of absolute content neutrality because that would deny the government the power to distinguish speech falling within the ambit of the First Amendment from that falling without).

¹⁴⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680-87 (1986); see MEIKLEJOHN, *supra* note 34, at 20-28; WILLIAM W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 41-42 (1984) (describing the First Amendment's protection of speech activities as a series of concentric circles, each farther away from a "core" of political speech).

¹⁴⁶ *Fraser*, 478 U.S. at 683.

¹⁴⁷ See *id.*

¹⁴⁸ *Poling v. Murphy*, 872 F.2d 757, 765-66 (6th Cir. 1989) (Merritt, J., dissenting).

¹⁴⁹ *Id.* (Merritt, J., dissenting).

¹⁵⁰ *Id.* (Merritt, J., dissenting).

to greater First Amendment protection, whether or not it conflicted with the school's intended lesson.

A better approach would be to divide student speech into three categories: political, scholastic, and obscene/indecent. After determining the appropriate speech category, a reviewing court would then apply a corresponding level of scrutiny appropriate to the speech. The mechanics of applying this approach, and the practical difficulties that would have to be overcome to implement it, are discussed below.

A. Political Speech

Political speech has traditionally been accorded the greatest First Amendment protection in our society.¹⁵¹ In myriad contexts and in a variety of cases, the Court has repeatedly held that political speech is qualitatively different from other kinds of speech as a First Amendment matter.¹⁵² Likewise, when student expression involves political speech, the burden should be on the school to demonstrate that the regulation or censorship was narrowly tailored to effect a compelling school interest or to prevent an imminent threat of disruption.¹⁵³ Thus, although a school in the inner city of Detroit could legally prohibit a student from wearing a Junior Klansman's robes based on the imminent threat of harm, the same school probably could not establish the same threat of harm from a student's wearing a button supporting Phyllis Schlafly, Lyndon LaRouche, or Patrick Buchanan.

The narrow tailoring prong of the test would necessarily be site-specific.¹⁵⁴ For example, a school in New Mexico might permit students to demonstrate against Christopher Columbus's treatment of Ameri-

¹⁵¹ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) ("Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good."); William W. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-39 (1963). In *Poling*, Judge Merritt lamented that "if the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?" 872 F.2d at 766 (Merritt, J., dissenting).

¹⁵² See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 552-58 (1975); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁵³ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969) (stating that, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

¹⁵⁴ See *Miller v. California*, 413 U.S. 15, 24 (1973) (endorsing a First Amendment jurisprudence, at least insofar as the regulation of obscenity is concerned, sensitive to the vagaries of local conditions).

can Indians on Columbus Day, whereas a school in a heavily Italian section of New York City might legitimately prohibit such a demonstration because of the threat of disruption.¹⁵⁵

B. *Scholastic Speech*

Student speech in the scholastic category would include speech that is school-sponsored or that occurs during a school program that a reasonable student or member of the community might reasonably attribute (at least in part) to the school. For example, the concept encompasses student science fair projects, student book reports, student plays, student newspapers and student fund-raising and marketing efforts on behalf of student clubs. Because this student speech can be attributed directly to the school, the school must have a greater ability to regulate it.¹⁵⁶ This is so because such speech implicates the community's interest in inculcating its values through the curriculum of the public schools.

To evaluate student speech claims in this category, the courts should apply the First Amendment test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission* applicable to commercial speech.¹⁵⁷ Under the *Central Hudson* test, truthful speech may be regulated if the government interest is substantial, the regulation directly advances the government interest and the regulation is no more extensive than is necessary to serve that interest.¹⁵⁸

Applying the *Central Hudson* test in the school context, a reviewing court would first consider whether the school's interest in preventing

¹⁵⁵ This analysis causes difficult problems because general First Amendment principles do not permit the "heckler's veto" to override political speech activities. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). In the context of the schools, however, providing full protection against the heckler's veto could preclude the attainment of educational objectives. Thus, a conflict exists between the heckler's veto and the school's educational mission, which might require a modified heckler's veto analysis. The formation of such a modified heckler's veto requires further development and is beyond the scope of this article.

¹⁵⁶ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Chief Justice Burger feared that controversial student speech activities occurring within the school's official curriculum would be attributed to the school itself. The fear is that toleration of student speech in certain contexts would be viewed as promotion or endorsement of the speech by the school, and thus, by implication, attributed to the community. The problem with this is that the community may not embrace the values reflected in the student speech activities, much less wish them to be inculcated into their children.

¹⁵⁷ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹⁵⁸ *Id.* The courts reason that commercial speech is more hardy and verifiable and hence less dependant on judicial protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). For a criticism of the tiered treatment of commercial speech using the same critical attitude toward categorical rules developed in the present article, see Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. REV. 1212 (1983).

the student scholastic speech activity was substantial. To determine whether the interest is substantial, the court would view the impact of the regulated speech on the student body as a reasonable educator would view it—would the student body and the school's community impute the student speech to the school system? The court would then determine whether the regulation directly advances a pedagogical interest of the school. Finally, the court would determine whether the regulation was narrowly tailored.

For example, suppose that a senior high school student decides to prepare his book report for his social science class on Charles Murray's *The Bell Curve*. Applying the *Central Hudson* test, the school could attempt to establish that it has a substantial interest in prohibiting the book report because it is inconsistent with the school's pedagogical mission with respect to race relations and teaching the science of biology. The school would also assert that its decision to prohibit the report would directly advance this interest. Finally, the school could argue that this decision was narrowly drawn, only impacts a narrow category and, if the speech were permitted, it could be directly imputed to the school. Whether the school would prevail should depend on the accuracy of these allegations; assuming that record evidence would demonstrate their veracity, the school's interest in maintaining its curriculum would outweigh the student's interest in academic freedom.¹⁵⁹

C. *Obscene/Indecent Speech*

The third category of student expression is obscene/indecent speech, including sexual and scatological¹⁶⁰ speech.¹⁶¹ The current

¹⁵⁹ Of course, the student would be free to discuss the book and his views about the book during lunch times, recess, study hall and after school. See *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 363 U.S. at 512–13). Such student activities are not school-sponsored and would not fall within this test. Moreover, student speech occurring during such times would not be attributed to the school.

Since 1984 students have not had to rely on the First Amendment in their efforts to hold student gatherings for expressive purposes in public high schools. Under the Equal Access Act ("EAA"), if federally assisted secondary schools provide a limited open forum for noncurriculum student groups to meet during noninstructional time, access cannot be denied to specific groups based on the religious, political, philosophical, or other content of the groups' meetings. 20 U.S.C. § 4071 (1994); see also *Board of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (rejecting an establishment clause challenge to the EAA).

¹⁶⁰ Additionally, this category would include statements about other school students or school officials that involve those officials' private lives. For example, publication of an article concerning a sexual liaison between the football coach and the principal's wife would most likely not be allowed.

¹⁶¹ For adults, profane, indecent, lewd, vulgar, offensive speech is not legally obscene speech unless it satisfies the Supreme Court's controlling three-part definition fashioned in *Miller v.*

Fraser/Hazelwood rational basis standard should govern speech claims falling within this category. However, reviewing courts should place a greater emphasis on the purpose of the speech.

In most instances, indecent speech will add little to the school's curriculum. At the same time, however, such speech will not detract from the curriculum either.¹⁶²

Many, if not most, claims arising under this category will involve regulations governing student clothing and dress codes. A school administrator could reasonably determine that hot pants, sheer blouses and T-shirts with phrases such as "Fuck You" or "Pinch the Tail and Suck the Head" printed on them do not convey a political message, are not within the ambit of academic freedom, and could impede the attainment of legitimate pedagogical objectives. In consequence, it is appropriate to vest school administrators with discretion to regulate or ban such messages within the schools.

However, courts must take into account the context of such speech and the overall thrust of its message. Courts should not be overly hasty to apply a rational basis standard to student speech that is merely in bad taste or mildly shocking. For example, shocking or disturbing speech such as T-shirts emblazoned with "God is Dead" or "Drugs Suck" should not go unprotected. If the Constitution permits an adult to wear a jacket inscribed with the words "Fuck the Draft" in a courthouse,¹⁶³ then surely the First Amendment must provide some breathing room for similar kinds of speech by students. Even student speech that school authorities may consider gross or repellent oftentimes may further First Amendment values.

* * *

California, 413 U.S. 15, 24 (1973), which requires that each element of a three-part test be satisfied. To declare such speech obscene, a court must find that:

- (a) . . . "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. (citation omitted).

¹⁶² For example, under this standard, the court should deny the school authorities the power to regulate T-shirts stating "Drugs Suck" because the central message is political, i.e., drugs are bad, and it outweighs any potential sexual message.

¹⁶³ See *Cohen v. California*, 403 U.S. 15, 16, 26 (1971). See generally ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 72 (1975); William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595 (1987); Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283.

A content-specific approach would permit courts to make rational distinctions between the different kinds of speech activities that occur in the school setting. When regulating student speech, courts could no longer disregard the differing First Amendment value of various kinds of speech in the same manner. Schools would be required to consider the relative First Amendment value of the student speech. Students should have opportunities to make political speeches and hold rallies on important social and political controversies, and to express themselves through their academic endeavors. Because a content-specific approach requires courts to weigh the relative value of speech against the level of disruption that it would generate, it maximizes the "marketplace of ideas" function of the First Amendment without undermining the schools' "inculcation" role.¹⁶⁴ In short, the language and spirit of this approach rejects the current judicial avoidance of providing meaningful protection for student speech activities under the *Fraser/Hazelwood* rationality standard. A more refined analysis is both necessary and proper.

D. *The Problem of Viewpoint Discrimination*

A number of academics have noted that content-specific First Amendment tests could lead to viewpoint discrimination. For example, Professor Laurence Tribe warns that "all attempts to create content-based subcategories entail at least some risk that government will in fact be discriminating against disfavored points of view."¹⁶⁵

The content-specific approach that I advocate does not sanction subjective decisions by judges based on ideological factors. An important distinction exists between *viewpoint* discrimination and *content* discrimination.¹⁶⁶ Viewpoint discrimination involves the government's choosing one side of an issue, promoting this position and prohibiting

¹⁶⁴ Some "hate speech" codes at the college level that impose prior restraints on student expression of discriminatory epithets have been invalidated for being vague or overly broad. *See, e.g., The UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-50 (1992) (invalidating Minnesota's hate crime statute as unconstitutionally prohibiting otherwise permissible speech solely on the basis of its subject); Matt Helms, *License to Hate*, U. THE NAT'L COLLEGE MAG., Aug.-Sept. 1992, at 14, 36. However, applying the *Tinker* disruption standard, it appears that such expression could be curtailed among students at the K-12 level. *See* David Schimmel, *Are "Hate Speech" Codes Unconstitutional?—An Analysis of R.A.V. v. St. Paul*, 74 EDUC. L. REP. (WEST) 653, 663-65 (1992).

¹⁶⁵ TRIBE, *supra* note 143, at 940.

¹⁶⁶ *See* Farber, *supra* note 141, at 735 (noting that viewpoint-based discrimination is clearly more troublesome than subject-matter discrimination).

discussion of alternative points of view. Viewpoint discrimination is undesirable because it prevents a full and fair discussion of an issue.¹⁶⁷

A content-specific approach, however, does not have the effect of limiting the scope or ferocity of debate. All viewpoints may compete equally in the marketplace of ideas.¹⁶⁸ Thus, content analysis involves the application of a hierarchy to ensure that speech receives adequate First Amendment protection. As a practical matter, this means that varying levels of scrutiny must be applied to different kinds of speech. A content-specific approach does not necessarily imply viewpoint discrimination; all speech within a particular category is to be treated similarly.

The content-specific approach would not necessarily provide a different result from the use of the mere rationality standard in some cases. Under this approach, a court could in its discretion still uphold the principal's decision in *Fraser* to censor the mildly lewd speech. Such a result, however, does not take away from the increased judicial review provided to a majority of student expression claims. The content-specific approach not only requires a meaningful explanation from the school officials for their actions, but also requires that the courts give weight to student expression. This review will result in fewer instances where students believe that school administrators have acted arbitrarily and unfairly.

¹⁶⁷ See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510-11 (1969) (public school prohibition against wearing of black armbands to protest American involvement in Vietnam, in absence of prohibition against wearing other symbols of political or controversial significance, unconstitutional viewpoint restriction); see, e.g., Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."); MEIKLEJOHN, *supra* note 151, at 26-27.

For example, the Ninth Circuit held that a school board violated students' First Amendment rights because it failed to produce a compelling justification for excluding an antidraft organization's advertisement from the school newspaper while allowing military recruitment advertisements. See *San Diego Comm. Against Registration & Draft (Card) v. Governing Bd.*, 790 F.2d 1471, 1481 (9th Cir. 1986). The court emphasized that even applying the rational basis standard, such viewpoint discrimination was not permissible. *Id.*; see also *Searcey v. Harris*, 888 F.2d 1314, 1324-26 (11th Cir. 1989) (holding that school authorities had unconstitutionally excluded a peace activist group from participating in the public school's career day and placing its literature on school bulletin boards and in offices of school guidance counselors when military recruiters were allowed such access); *Clergy & Laity Concerned v. Chicago Bd. of Educ.*, 586 F. Supp. 1408, 1413-14 (N.D. Ill. 1984).

¹⁶⁸ Stone, *supra* note 141, at 104-06.

E. *The Problem of Judicial Discretion*

A second criticism is that the content-specific approach increases judicial discretion, and thus increases the likelihood that unfair or arbitrary results will obtain.¹⁶⁹ Courts will be called on to determine the precise nature of speech and to establish a "tolerable" level of disruption. The decision to allow some student speech to occur even at the cost of nontrivial disruption necessarily requires an exercise of discretion. A judge's particular sensitivities may well determine the level of First Amendment protection student speech receives. The implementation of this approach will result in some students believing that their speech rights have been unfairly denied or circumscribed.¹⁷⁰

In the school context, however, judicial discretion will not lead to lesser protection of any student expression. The new approach creates a hierarchy of speech rights that can be used to evaluate a majority of student speech claims, setting forth a new constitutional ceiling but not removing the rational basis floor that exists under *Fraser/Hazelwood*.¹⁷¹ Thus, application of a content-specific analysis will not leave any student speech less protected than it is under current law. Instead, the content-specific test would provide a higher degree of protection in appropriate circumstances.

Courts applying existing First Amendment jurisprudence applicable to adult speech activity exercise a similar kind of discretion when deciding how to classify particular kinds of speech.¹⁷² If anything, the existing rational basis standard is more troublesome, because it concludes before any balancing occurs that student speech activities enjoy little, if any, protection.

Judges under the content-specific approach will have to use their discretion to characterize the nature of student speech involved in a student speech claim. Although this task is not an easy one and creates the possibility of an arbitrary characterization of speech (and perhaps a denial of First Amendment protection in individual cases), the bene-

¹⁶⁹ See Lawrence C. George, *King Solomon's Judgment: Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning*, 30 HASTINGS L.J. 1549, 1559-66, 1573-75 (1979); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524, 1538-39 (1991).

¹⁷⁰ For example, a reviewing court may uphold a school's determination that a student should not be allowed to wear a black T-shirt with a pink triangle because this speech is obscene rather than political. Under such a holding, the student's ability to express his beliefs is greatly diminished. However, by providing courts with a greater role in reviewing speech claims, such decisions will not often occur and would most likely be reversed on appeal.

¹⁷¹ See Krotoszynski, *supra* note 142, at 1438.

¹⁷² VAN ALSTYNE, *supra* note 145, at 47-49.

fits of providing greater protection to student expressive activity more than compensate for this opportunity cost.¹⁷³

V. CONCLUSION

Courts will continue to find it necessary to balance competing interests when students' speech activities collide with school authorities' interest in maintaining an appropriate educational environment. However, school officials should not be able to censor or ban student speech simply because it occurs on school property or in connection with a school event. First Amendment values are just as vital in the classroom as they are in the schoolyard or on the street; the challenge is striking a proper balance between student speech activities and curricular integrity.

The deferential approach set forth in *Hazelwood* is a virtual abdication of the judicial obligation to protect the First Amendment rights of students. A more refined approach is needed—an approach that weighs the student's interest in a particular kind of speech against the school's need to maintain good order and discipline. By restriking the balance in favor of student speech activities under certain circumstances, a content-specific analysis ensures that students with serious grievances against the school, or who wish to engage in robust debate about the problems of the day, can do so during school hours.

A more content-specific approach would permit reviewing courts to reconcile the conflict between a school's inculcation of community values with the concern that school officials not cast "a pall of orthodoxy"¹⁷⁴ over the school. If courts continue to apply the rational basis test without further refinement, First Amendment freedoms—although not shed at the schoolhouse gate¹⁷⁵—will be lost at the classroom door.¹⁷⁶

¹⁷³ See *id.* at 15–19, 47–49.

¹⁷⁴ See *Keyishian v. Board of Regents*, 385 U.S. 589, 602–04 (1967) (holding unconstitutional a New York law requiring public employees, including college teachers, to sign loyalty statements).

¹⁷⁵ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁷⁶ *Romano v. Harrington*, 725 F. Supp. 687, 688–90 (E.D.N.Y. 1989).