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## *ESSAY*

### THE GREAT UNFULFILLED PROMISE OF *TINKER*

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#### INTRODUCTION

The most famous line from *Tinker v. Des Moines Independent School District* is that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>1</sup> People who know only this line from *Tinker*—and the victory it gave to the Vietnam-war protesting students—likely think of it as an incredibly speech-protective decision. It turns out that although *Tinker* contains lofty language about the importance of student speech rights, it sowed the seeds for the erosion of those very same rights. In the

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<sup>1</sup> 393 U.S. 503, 506 (1969).

past fifty years, First Amendment protection for student speech rights in K-12 public schools has diminished substantially.

The *Tinker* decision contained three main weaknesses that have undermined student speech rights. First, it erroneously assumed that it was clear that minors had speech rights outside of school. Fifty years later, it still remains unclear what rights minors have. This uncertainty has made it easier for the Court (and lower courts) to chip away at their First Amendment rights in subsequent decisions and has left students particularly vulnerable in this digital age to online speech restrictions. Second, *Tinker* held that the speech rights of students—whatever they might be—can be restricted based on considerations of “the special characteristics of the school environment.”<sup>2</sup> With this qualification, the Court essentially announced that student speech rights are not subject to the same standards that normally apply when the government regulates speech. This leaves the Court free in future cases to develop *ad hoc* rules restricting student speech. The third weakness of *Tinker* is that the Court embraced a standard permitting the restriction of student speech whenever school officials reasonably forecast that the speech would cause “material and substantial interference with schoolwork or discipline.”<sup>3</sup> This standard is unnecessarily deferential to school administrators and poses precisely the sort of censorship that the Court would never tolerate outside of the school setting.

#### I. FIRST PROBLEM: DO CHILDREN HAVE A FIRST AMENDMENT RIGHT TO SPEAK?

When I was writing my first article on student speech rights,<sup>4</sup> I had an eye-opening conversation with another constitutional law scholar<sup>5</sup> who

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 511. The Court also said that the school can restrict speech that constitutes an “invasion of the rights of others,” but this prong has received little judicial attention, and its meaning remains unclear. *Id.* at 513; see, e.g., *Doe v. Valencia Coll.*, 903 F.3d 1220, 1229–31 (11th Cir. 2018) (applying the “rights of others” prong to a college student in a harassment case); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (holding that whatever this phrase means, it covers a threatened school shooting); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear.”).

<sup>4</sup> Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027 (2008).

<sup>5</sup> This conversation was with John Garvey, who has grappled with some of these questions in his own work. See, e.g., John Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321 (1979).

asked me why I had presumed that minors had any First Amendment rights. After all, this professor explained, children are subject to the authority of their parents except in the most limited of situations. In addition, because children cannot vote, one of the key theories for free speech—to promote self-government—does not apply to their expression, at least not in the same way it applies to adults.<sup>6</sup>

This line of inquiry caught me flat-footed, and I scrambled to add an entire section to my article to justify my assumption that minors had robust First Amendment rights.<sup>7</sup> As I worked on this new section, I quickly realized that the scholar had a point—the Court has not been very clear about whether children have First Amendment expressive rights, or what any such rights look like. Instead, the Court has focused on the right of parents to raise their kids without undue interference from the government,<sup>8</sup> or on protecting minors from the harmful speech of others.<sup>9</sup>

This is problematic because when *Tinker* declared that it “has been the unmistakable holding of this Court for almost 50 years” that children and teachers do not shed their rights to the freedom of speech or expression at the schoolhouse gate, the Court implied that it was clear what rights children (and government employees like public school teachers) had to speak *outside* of the schoolhouse gates.<sup>10</sup> This turns out not to be true at all. Furthermore, it is incorrect to assume the Court meant to say much of anything about the rights of minors outside of school. Although *Tinker* provided a long string cite of cases to support its famous statement,<sup>11</sup> it turns out that none of these cases concern the rights of minors to speak. Instead, a review of the cases *Tinker* cited after its famous “schoolhouse

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<sup>6</sup> These arguments are very similar to the arguments Justice Thomas has made in recent student speech cases. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting) (“The practices and beliefs of the founding generation establish that ‘the freedom of speech,’ as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”); *id.* at 836 (“Although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today.”); *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (declaring that *Tinker* is “without basis in the Constitution” because “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools”).

<sup>7</sup> See Papandrea, *supra* note 4, at 1076–89 (discussing various justifications for restricting the speech rights of K-12 public school students).

<sup>8</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972).

<sup>9</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968).

<sup>10</sup> 393 U.S. 503, 506 (1969).

<sup>11</sup> *Id.* at 506–07.

gate” sentence reveals that the Court was saying something quite unremarkable and hardly worthy of celebration—that public schools are not First-Amendment-free zones.

Indeed, most cases *Tinker* cited involving minors and the First Amendment are really cases about the right of parents to raise their children without undue interference from the government. For example, in *Pierce v. Society of Sisters*, the Court struck down a law requiring students to attend public school because it conflicted with the right of parents to choose a school for their children.<sup>12</sup> Some of the other decisions *Tinker* cited involved the Establishment Clause,<sup>13</sup> and many involved the First Amendment rights of teachers, including some college professors.<sup>14</sup>

The strongest case *Tinker* cited for meaningful student speech rights is *West Virginia State Board of Education v. Barnette*.<sup>15</sup> In this case, the Court made several statements suggesting that the students themselves had robust First Amendment rights.<sup>16</sup> In addition, the Court suggested that the school can restrict speech or compel speech only if it can satisfy the “clear and present danger” test, the same test that would apply outside of the school setting to adults.<sup>17</sup> Notably, though, *Barnette* involves compelled speech. The Court has recently recognized that compelled speech is arguably worse than restrictions on what can be said because “[w]hen speech is compelled . . . individuals are coerced into betraying their convictions.”<sup>18</sup> Compelled speech in elementary school raises even

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<sup>12</sup> 268 U.S. 510, 534–35 (1925) (holding that the law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”). Three years after *Tinker*, the Court held that states could not require Amish families to send their children to public or private school after completion of the eighth grade, explaining that “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.” *Yoder*, 406 U.S. at 213–14.

<sup>13</sup> *Tinker*, 393 U.S. at 506–07; see, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (striking down a program of daily prayer in New York’s public schools); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211–12 (1948) (holding unconstitutional a program of religious instruction conducted during the school day to public school students).

<sup>14</sup> *Tinker*, 393 U.S. at 506–07 (citing several First Amendment cases involving public school teachers and professors).

<sup>15</sup> 319 U.S. 624 (1943).

<sup>16</sup> *Id.* at 631 (noting that the law punishes both parents and children, and “[t]he latter stand on a right of self-determination in matters that touch individual opinion and personal attitude”).

<sup>17</sup> *Id.* at 633–34.

<sup>18</sup> *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

more concerns. In *Barnette*, Justice Jackson criticized the pledge as a “short-cut” to “arouse[] loyalties” to the nation rather than the “slow and easily neglected route” to patriotism that comes from studying American history.<sup>19</sup> In addition, coercing children to repeat a state message potentially has more serious deleterious effects on them than it would on an adult.<sup>20</sup> *Barnette* does not hold that students have an affirmative right to speak; instead, it holds that schools cannot force students to speak.<sup>21</sup>

Furthermore, when the Court decided *Tinker*, it failed to grapple with its own recent decision suggesting that minors do not have robust speech rights. As Justice Stewart points out in his *Tinker* concurrence, the Court had decided *Ginsberg v. New York* just one year before *Tinker*.<sup>22</sup> In *Ginsberg*, which upheld a New York law banning the sale of materials obscene for minors, the Court refused “to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State.”<sup>23</sup> Nevertheless, the Court readily concluded that whatever rights minors had, they were not the same as the rights of adults.<sup>24</sup> The Court was less concerned with the rights of minors than with the rights their parents had to control what their children saw, stating that the Court has “consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”<sup>25</sup> Because the law did not prevent parents or guardians from giving their children access to the proscribed materials, the Court upheld the law as permissively controlling what minors could view without unduly interfering with parents’ rights.<sup>26</sup> One possible way of viewing *Tinker* is that it was cabined in the State’s ability to interfere with parental choices, not that it was defending the rights of children themselves.<sup>27</sup>

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<sup>19</sup> 319 U.S. at 631 (footnote omitted).

<sup>20</sup> See Garvey, *supra* note 5, at 328 (noting that compelled speech poses greater harms to children than censorship of speech).

<sup>21</sup> 319 U.S. at 642.

<sup>22</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>23</sup> *Id.* at 633, 636.

<sup>24</sup> *Id.* at 638 (“[W]e have recognized that even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .’” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))).

<sup>25</sup> *Id.* at 639.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., Sheerin N.S. Haubenreich, Parental Rights in MySpace: Reconceptualizing the State’s *Parens Patriae* Role in the Digital Age, 31 *Hastings Comm. & Ent. L.J.* 223, 232

Most of the Court's free speech decisions involving minors before and after *Tinker* concern efforts to protect children from harmful speech.<sup>28</sup> Although the Court has made clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them,"<sup>29</sup> the Court has never wholesale abandoned the general principle that the government can restrict the speech minors access in order to promote their proper development. In *Erznoznik v. City of Jacksonville*, for example, the Court struck down a ban on the showing of films containing nudity in drive-in theaters. Although one rationale for the ordinance was to protect minors, the Court declared that legislatures could not ban speech for minors based on vague ideas about what is unsuitable for them.<sup>30</sup> But even in reaching this speech-protective conclusion, the Court continued to embrace the idea that some restrictions are permissible. In a footnote in *Erznoznik*, the Court quotes *Tinker*'s statement that the rights of minors are not co-extensive with the rights of adults, and cites *Ginsberg* for the proposition that sometimes speech restrictions are permissible to protect minors who are "captive audience[s]" or because they are deemed to lack "full capacity for individual choice" that is the premise of full First Amendment rights.<sup>31</sup> The Court's more recent violent video games decision, *Brown v. Entertainment Merchants Ass'n*, likewise rejected the idea that legislatures can restrict material minors can access at will, but the Court did not overrule *Ginsberg* to reach its conclusion.<sup>32</sup>

As a result, to this day, it is not entirely clear what First Amendment rights students have outside of the schoolhouse gates. The Court has not clearly distinguished between the rights of children to speak and the rights of children to consume speech of others.<sup>33</sup> Although the Court has made

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(2009) (citing *Tinker* to support statement that "[p]arents must address school issues that conflict with their child-rearing decisions and schools must likewise address parental choices that conflict with curricular decisions.").

<sup>28</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (upholding restrictions on indecent broadcasts in part because "broadcasting is uniquely accessible to children, even those too young to read").

<sup>29</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).

<sup>30</sup> *Id.* at 213–14.

<sup>31</sup> *Id.* at 214 & n.11 (stating that "[i]n most circumstances" the government cannot restrict the speech minors hear, but then citing *Tinker* and *Ginsberg*).

<sup>32</sup> 564 U.S. 786 (2011).

<sup>33</sup> See, e.g., Amitai Etzioni, On Protecting Children from Speech, 79 *Chicago-Kent L. Rev.* 3, 5 (2004) (explaining at the outset of his article that it is focusing "on the right to 'consume' speech rather than to produce it. The main question is not whether children should be entitled

statements in some of its student speech cases that minors have speech rights outside of the schoolhouse gates, these statements are entirely dicta and have not been reconciled with *Ginsberg*'s suggestion that children do not have the same First Amendment rights as adults outside of the school setting.<sup>34</sup>

One possible response to concerns that the Court has failed to define minor speech rights is to reject the dichotomy between the right to speak and the right to receive speech. Instead, one potential view of the Court's student speech cases is that they consistently concern when schools can regulate speech to protect the listeners in the audience (i.e., other students). In *Tinker*, the armband-wearing students did not pose any risk of harm to their fellow students with their political views about the Vietnam War, and therefore their expression could not be restricted.<sup>35</sup> In its later cases, however, the Court has concluded that the harm certain types of student speech cause the audience justifies its restriction. In *Bethel School District No. 403 v. Fraser*, for example, the Court abandoned *Tinker*'s instruction that schools must tolerate unpopular speech to hold that schools can prohibit sexually explicit, indecent, or lewd speech at school in order to protect other students.<sup>36</sup> The Court explained that the "fundamental values" of a civil society are not limited to the freedom of expression but instead "must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."<sup>37</sup> The Court noted that in legislative bodies across the country, politicians are forbidden from using "expressions offensive to other participants in the debate."<sup>38</sup> *Bethel* also mentions that the student's sexually suggestive election speech "was acutely insulting to teenage girl[s] . . . many of whom were only 14 years

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to make movies, produce CDs, and so on, but whether their access to the harmful content found in some cultural materials should be limited.").

<sup>34</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); *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." (citation omitted)).

<sup>35</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–11 (1969) (noting the school did not restrict all political speech and instead singled out the students wearing the black armbands on the basis of their viewpoint opposing the war).

<sup>36</sup> 478 U.S. 675, 685–86 (1986).

<sup>37</sup> *Id.* at 681.

<sup>38</sup> *Id.* at 681.

old and on the threshold of awareness of human sexuality.”<sup>39</sup> To drive the point home, the Court cited several other decisions in which it has restricted offensive, lewd, or vulgar speech to protect minors, including *Ginsberg, Board of Education v. Pico*, and *FCC v. Pacifica Foundation*.<sup>40</sup> In *Hazelwood v. Kuhlmeier*<sup>41</sup> and *Morse v. Frederick*,<sup>42</sup> the Court likewise expressed concern about the impact of speech on observers. The *Hazelwood* Court noted that

“a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”<sup>43</sup>

In *Morse*, the Court held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>44</sup>

It is not clear, though, why student speech rights should be defined in terms of whether the speech is potentially harmful to minors, especially when the Court has been so deferential to arguments about harm. This deference stands in sharp contrast to the Court’s approach to speech restrictions outside of the school setting, where the Court has shown some willingness to second-guess government claims that speech is harmful to children.<sup>45</sup> Indeed, in *Hazelwood*, the Court went so far as to hold that in the context of school-sponsored expressive activities, schools have virtually unbridled power to restrict student speech to protect the student audience from “potentially sensitive topics.”<sup>46</sup> The only showing that a

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<sup>39</sup> *Id.* at 683.

<sup>40</sup> *Id.* at 684–85. In his concurrence, Justice Brennan points out that there was no evidence in the record that any students found the student’s speech insulting, and the suggestive speech came nowhere close to the explicit language at issue in *Ginsberg* or *Pacifica*. *Id.* at 689 n.2 (Brennan, J., concurring in judgment).

<sup>41</sup> 484 U.S. 260 (1988).

<sup>42</sup> 551 U.S. 393 (2007).

<sup>43</sup> 484 U.S. at 272.

<sup>44</sup> 551 U.S. at 397.

<sup>45</sup> See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 805 (2011) (striking down law banning the sale of certain violent video games to minors); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (rejecting the government’s argument that a ban on all drive-in movies with nudity was necessary to protect children, explaining that “[c]learly all nudity cannot be deemed obscene even as to minors.”).

<sup>46</sup> 484 U.S. at 271–72.



school has to make is that the censorship serves a legitimate pedagogical concern.<sup>47</sup> In that case, the Court upheld the school's refusal to publish portions of the student newspaper that addressed teenage pregnancy, sighting the sensitivity of the younger high school students.<sup>48</sup> The Court recognized that the article on teenage pregnancy contained no graphic content but mentioned "[students'] sexual histories and their use or nonuse of birth control."<sup>49</sup> The Court concluded that the school was "not unreasonable" to censor such "frank talk."<sup>50</sup> Most shockingly, in considering the relevant audience, the Court asserted that it included not only the actual students at the school but also "the students' even younger brothers and sisters" who might read the newspaper.<sup>51</sup> The Court also failed to explain why protecting students from speech on "sensitive topics" is justifiable in school,<sup>52</sup> especially given that they are very likely hearing the same speech from their peers (and from others) when they are not at school.

Without a more robust understanding of why children have First Amendment rights to speak when they are outside of the schoolhouse gates, it is no surprise subsequent Supreme Court decisions have limited those rights when they are inside those gates. By focusing on the potential harm to the audience in its post-*Tinker* cases, the Court dramatically curtails the rights of student speakers. It is time for the Court to recognize that students are people, too, and that they have affirmative rights to speak that cannot be so easily balanced away in the face of amorphous "harms."

## II. SECOND PROBLEM: BALANCING FIRST AMENDMENT RIGHTS IN LIGHT OF THE "SPECIAL CHARACTERISTICS OF THE SCHOOL ENVIRONMENT"

In the same paragraph in *Tinker* where the Court declared that students have First Amendment rights within the schoolhouse gates, the Court stated that these constitutional rights (whatever they might be) must be balanced against the need "for affirming the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."<sup>53</sup>

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<sup>47</sup> Id. at 273.

<sup>48</sup> Id. at 274–75.

<sup>49</sup> Id. at 274.

<sup>50</sup> Id.

<sup>51</sup> Id. at 274–75.

<sup>52</sup> Id. at 272.

<sup>53</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Accordingly, in a dramatic departure from its usual method of First Amendment analysis, *Tinker* embraces a balancing approach to free speech rights in public schools. Whatever free speech rights students (or teachers) might have in the abstract are essentially balanced against the need to restrict speech “in light of the special characteristics of the school environment.”<sup>54</sup> This balancing approach has led directly to the Court’s subsequent decisions that systematically undervalue student speech and overvalue the interests of school administrators in maintaining civility and good order. Most disturbingly, the Court inappropriately permits schools to restrict student speech based on the unexamined assertion that onlookers assume schools endorse any speech that they do not censor.

Several scholars support the Court’s institution-specific approach to student-speech restrictions,<sup>55</sup> and to some extent, it makes sense to recognize that schools need to have some power to restrict speech in order to achieve their educational mission. This deference, however, is much more appropriate in the classroom than it is on the playground or cafeteria, or with respect to speech online. In the classroom, teachers necessarily must have the authority to engage in content-based and even viewpoint-based speech regulations.<sup>56</sup> The selection of course materials and assignments, and effective class discussions, demand this level of control.<sup>57</sup> And it is not just K-12 schools that require this level of authority. University professors and school officials require it as well. As Justice Stevens once explained with respect to universities, “[t]hey select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written.”<sup>58</sup> Outside of the classroom, however, it is much less clear that it is essential for schools to have broad powers to regulate student speech.

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<sup>54</sup> *Id.* at 506.

<sup>55</sup> See, e.g., Paul Horwitz, *First Amendment Institutions* 18–19 (2013) (arguing that courts should largely defer to First Amendment institutions like schools to “give them room to develop their own visions of what the First Amendment means, even if that vision is different from the one courts would choose themselves” (emphasis omitted)).

<sup>56</sup> See R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U. L.J. 175, 212–13 (2007).

<sup>57</sup> See *Hazelwood*, 484 U.S. at 271 (“Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach . . .”).

<sup>58</sup> *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in judgment).

Since *Tinker*, the Court has embraced the arguments of school officials that the toleration of speech is equivalent to approval of that speech. In other words, a student's expressive activities pose more of a threat to his peers when he speaks at school because that speech will have more impact on them when teachers and administrators let speech go unpunished and unregulated. *Bethel School District v. No. 403 Fraser*, *Hazelwood v. Kuhlmeier*, and *Morse v. Frederick* all suggest that a minor's First Amendment rights must give way to the interest of school officials in avoiding any association with their speech and perceptions that they tacitly approve of such speech. In *Bethel*, for example, the Court concluded that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."<sup>59</sup> *Hazelwood* held that schools can censor student speech in school-sponsored activities "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>60</sup> In *Morse*, the Court explained that it is hard to keep children away from drugs "when the norms in school appear to tolerate such behavior."<sup>61</sup> Unless the school punished the student waving the "BONG HiTS 4 JESUS Banner," the Court asserts, students might get the wrong idea that school officials endorsed his message.<sup>62</sup> As the Court explained, "Student speech celebrating illegal drug use at a school event, *in the presence of school administrators and teachers*, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse."<sup>63</sup>

The Court's willingness to accept schools' arguments that tolerating student speech amounts to endorsement is not consistent with most of the Court's First Amendment jurisprudence in other contexts, but it is representative of the general "creep" of the government speech doctrine.<sup>64</sup> In most of its First Amendment cases, particularly those involving the public forum, the Court does not accept arguments that reasonable observers would believe that the government sanctions the speech of

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<sup>59</sup> 478 U.S. 675, 685–86 (1986).

<sup>60</sup> 484 U.S. at 271.

<sup>61</sup> 551 U.S. 393, 408 (2007).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> For a lengthier discussion of this topic, see Mary-Rose Papandrea, *The Government Brand*, 110 Nw. U. L. Rev. 1195, 1226–33 (2016).

private actors merely by permitting speech to occur.<sup>65</sup> If this were not the case, the government would be able to regulate any speech it does not like that occurs on government property. The Court appears to accept uncritically that whenever a school tolerates speech, students will think that the school endorses it. But as Justice O'Connor once said, "The proposition that schools do not endorse everything they fail to censor is not complicated."<sup>66</sup> It is hard to imagine, for example, that students actually thought the school endorsed Fraser's election speech, Frederick's banner, or even the news articles in *Hazelwood*. Relatedly, the Court also fails to consider whether schools could engage in counter speech or at least more speech to address any misconceptions about government endorsement.<sup>67</sup>

In evaluating whether the "special characteristics of the school environment" give educators constitutional dispensation to regulate student speech, the Court should be leery of arguments that toleration equals endorsement. These arguments are persuasive in the classroom setting, but they are not persuasive in most other contexts. Students are smarter than that. The Court should examine more critically claims that reasonable observers—particularly students—would think that school officials approve of their classmates' expressive activities.

### III. THIRD PROBLEM: DEFERENCE TO SCHOOL OFFICIALS

*Tinker* declared that school authorities can regulate speech when there are "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities."<sup>68</sup> This standard contains at least two elements that contribute to a potentially devastating reduction of student speech rights. First, the standard defers to the "reasonable" interpretations of what speech means and how it will impact the school environment. Second, it allows school officials to act long before any substantial disruption actually occurs. As a result, student

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<sup>65</sup> See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763–65 (1995).

<sup>66</sup> *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990).

<sup>67</sup> See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting) (arguing that the Court should have considered whether a disclaimer in the student newspaper, or an official response clarifying the school's position on a particular topic, would alleviate any confusion about whether the school endorsed the student speech appearing in the school newspaper).

<sup>68</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969).

speech rights rest less on a judicially enforceable First Amendment right and more on the willingness of school administrators to tolerate speech.

The facts of *Tinker* come pretty close to a perfect vehicle for a decision recognizing student speech rights. Not only were the plaintiffs engaged in core political speech, but they also engaged in that speech silently. Their expression did not involve the assertion of any false facts; nor did it threaten any sort of harm to others. Furthermore, only seven out of 18,000 students in the entire school system wore black armbands.<sup>69</sup> As the Court expressly stated, this was not a case involving “aggressive, disruptive action or even group demonstrations.”<sup>70</sup> The record contained “no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other[s].”<sup>71</sup> Instead, the school punished the students for “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”<sup>72</sup> School officials claimed they feared disruption would result from the armbands, but the Court called this out as an “undifferentiated fear or apprehension of disturbance” based on “an urgent wish to avoid the controversy which might result from the expression” opposing the Vietnam War.<sup>73</sup> In addition, the school officials could not credibly argue that they hoped to keep all politically controversial subjects out of the school because it permitted other forms of political expression, including political campaign buttons as well as the Iron Cross, a symbol of Nazism.<sup>74</sup> The Court then declared that public schools are not “enclaves of totalitarianism” and cannot treat students as “closed-circuit recipients of only that which the [school] chooses to communicate.”<sup>75</sup>

Throughout its decision, the Court embraced core First Amendment principles. The Court rejected the heckler’s veto, noting that “[a]ny variation from the majority’s opinion may inspire fear” or “start an

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<sup>69</sup> Id. at 516 (Black, J., dissenting).

<sup>70</sup> Id. at 508 (majority opinion).

<sup>71</sup> Id.; see also id. at 514 (“[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”).

<sup>72</sup> Id. at 508.

<sup>73</sup> Id. at 508, 510.

<sup>74</sup> Id. at 510–11.

<sup>75</sup> Id. at 511.

argument or cause a disturbance.”<sup>76</sup> Indeed, the Court said, the open debate the First Amendment fosters “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.”<sup>77</sup> The Court also emphasized that students learn not just in the classroom from their teachers but also from their fellow students on the “playing field” and in the cafeteria.<sup>78</sup>

This soaring language reflecting a deep commitment to the marketplace of ideas has been the foundation for so many of the Court’s First Amendment cases, from incitement<sup>79</sup> to defamation.<sup>80</sup> Accordingly, the Court concluded, “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”<sup>81</sup> The Court also initially suggested that public schools, as government actors, will not be able to regulate student speech unless it causes a material and substantial disruption in the operation of the school.<sup>82</sup> This standard sounds very similar to the test for incitement, which requires imminent lawless action.<sup>83</sup> It also is not too far off from the tests for time, place, and manner restrictions, which permit government actors to impose content-neutral speech restrictions to serve important government interests.<sup>84</sup>

But the facts of *Tinker* made it easy for the Court to dodge more complicated questions that have plagued student speech cases ever since. First, because the students’ armbands had virtually no impact on the operation of the school, the Court did not directly discuss whether reactions to student speech could constitute a valid “disruption” for purposes of its new test. Although the Court seemed to suggest that the

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<sup>76</sup> Id. at 508.

<sup>77</sup> Id. at 508–09.

<sup>78</sup> Id. at 512–13 (“[P]ersonal intercommunication among the students . . . is also an important part of the educational process.”).

<sup>79</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>80</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

<sup>81</sup> *Tinker*, 393 U.S. at 511.

<sup>82</sup> Id. at 509.

<sup>83</sup> *Brandenburg*, 395 U.S. at 447.

<sup>84</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

ban on the heckler's veto applies with equal force to schools,<sup>85</sup> it is also possible that the reaction could be so significant it would interfere with the operation of the school. Accordingly, there is an obvious disconnect between the assertion that a disruptive heckler's veto can have no place in America, with a standard that permits restrictions on speech to avoid disruption.

Second, the Court concluded its opinion by stating that "the record does not demonstrate any facts *which might reasonably have led school authorities to forecast* substantial disruption of or material interference with school activities."<sup>86</sup> It is possible that the Court did not mean to water down its new material and substantial disruption test by suggesting that as long as it is "reasonable" for school officials to predict that speech would cause a disruption, they could restrict it. Instead, perhaps the Court simply meant to comment on the complete lack of disruption or threat of disruption in this particular case. It is also possible that the Court meant to suggest that it would not be necessary for speech to actually cause a material and substantial disruption in the operation of the schools as long as the disruption was about to occur. After all, the test for incitement does not require government officials to wait until unlawful conduct occurs but requires unlawful conduct to be "imminent."<sup>87</sup>

Regardless of what the Court actually meant, subsequent decisions have read this language as embracing a form of deference to school officials.<sup>88</sup> This deference is not merely in determining what constitutes a material and substantial disruption but also deference to whether a disruption is likely to occur. It is also unclear what school officials can consider when making their predictions. For example, the U.S. Court of Appeals for the Fourth Circuit suggested it is permissible for schools to consider any history of disruption for perhaps the last century, and certainly for the last several decades.<sup>89</sup> With this one sentence, the Court substantially waters down its otherwise potentially speech-protective standard.

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<sup>85</sup> *Tinker*, 393 U.S. at 508.

<sup>86</sup> *Id.* at 514 (emphasis added).

<sup>87</sup> *Brandenburg*, 395 U.S. at 447.

<sup>88</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (deferring to school official's "reasonable" interpretation of the nonsensical phrase "Bong Hits for Jesus" as advocating illegal drug use).

<sup>89</sup> *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 438 (4th Cir. 2013) (upholding ban on confederate flags in schools after noting that "[o]ver the past four decades" there have been racial tensions).

## CONCLUSION

In the five decades since *Tinker*, the Court has backed away from some of the more robust statements in the opinion about the importance of student speech.<sup>90</sup> This Essay argues that the evolution of the Court's jurisprudence in this area can be traced back to various weaknesses and unresolved tensions in *Tinker's* celebrated opinion. Without a more complete understanding about why minors have student speech rights, it is easier for courts to expand the authority of school officials and to restrict those rights even more. In addition, the Court needs to resist the "creep" of the government speech doctrine and recognize that students as well as the larger community do not equate (or at least do not reasonably equate) toleration of speech with endorsement of that speech.

The tensions outlined in this Essay have particularly important ramifications for the current uncertainty regarding the ability of schools to restrict the speech of students online. Although the Court has yet to grapple with how to interpret *Tinker* in light of new technology, lower courts have embraced the *Tinker* "substantial disruption" standard to justify student speech restrictions both inside and outside of the schoolhouse gates.<sup>91</sup> Given how deferential courts are to schools and dismissive of student rights, it would be very easy to water down those rights even when students are not at school.

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<sup>90</sup> See *Morse*, 551 U.S. at 397 (holding school could punish speech it reasonably perceived as advocating illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding school officials can censor student expression in school-sponsored activities as long as "their actions are reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (holding public schools can restrict the use of lewd and profane language in order to promote "socially appropriate behavior").

<sup>91</sup> See, e.g., *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 391–92 (5th Cir. 2015); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011).