When Students Speak: Judicial Review In The Academic Marketplace

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As with most "absolutes" in constitutional law, the Supreme Court's rule against regulating the content of speech is more a statement of a bias than an imperative.[1] Among the qualifications the Court has made to the bias against content regulation, the most potentially sweeping involves government limitations on expression in restricted environments or special contexts. In the context of the military,[2] prisons,[3] government employment[4] and the public

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1. In Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972), holding unconstitutional a statute proscribing picketing other than labor picketing, the Court stated: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." However, the Court has limited this broad principle in several significant ways. For example, the alleged rule applies only to expression which is part of "the freedom of speech." Content-based regulation of speech that is categorically excluded from the first amendment is permitted. Even when the speech is within the protective confines of the freedom of speech, government regulation can be justified, but it is subject "to the most exacting scrutiny." Boos v. Barry, 108 S. Ct. 1157, 1164 (1988).

2. *See* Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (application of Air Force regulation to prevent airman, who was also an ordained rabbi, from wearing his yarmulke, held constitutional); Parker v. Levy, 417 U.S. 733 (1974) (court-martial conviction of army physician for making statements critical of certain personnel and urging resistance to Vietnam War upheld); Brown v. Glines, 444 U.S. 348 (1980) (upholding, against vagueness and overbreadth challenge, an Air Force regulation prohibiting service personnel from circulating petitions or posting materials on military base without prior approval of base commander). *See generally* Dienes, When the First Amendment Is Not Preferred: The Military and Other 'Special Contexts,' 56 U. Cin. L. Rev. 779 (1988).

3. *See, e.g.*, O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404 (1987) (prison policy that prevented prisoners from fulfilling Islamic religious obligation of attendance at religious services held constitutional) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); Turner v. Safley, 107 S. Ct. 2254, 2261 (1987) (restrictions on correspondence of inmates upheld

schools, the first amendment[5] presumption against content regulation becomes far less meaningful than in civil society generally. Indeed, the principle of freedom of speech is itself of doubtful applicability in these special environs.[6]

In a series of recent cases, the Court has taken dramatic steps that weaken first amendment protections in the restricted environment of the public schools. In a retreat from the Court's earlier, more protective attitude toward student speech, represented by *Tinker v. Des Moines School District*,[7] the Court has permitted the imposition of significant sanctions against a student speaker at a high school assembly[8] and allowed the censoring of a high school newspaper.[9] But, as is so often the case, it was less what the Court did than the way it did it that threatens the vitality of first amendment values in the academic forum.

In *Bethel School District v. Fraser*, the Court affirmed the principle that the state's interest in preserving its educational mission by controlling the curriculum justifies a strong deference towards bureaucratic regulation in student speech cases, even to the extent of altering the normal standards of judicial review. Further, the *Fraser*

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but restrictions on marriage of inmates held unconstitutional) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penalogical interests.").

4. *See* Rankin v. McPherson, 107 S. Ct. 2891, 2895 (1987) (discharge of clerical employee for remark, "[i]f they go for him again, I hope they get him," made following an attempt on President's life, held unconstitutional by 5-4 vote); Connick v. Myers, 461 U.S. 138 (1983) (courts balance competing interests only when employee's speech involves matter of public concern); Pickering v. Board of Educ., 391 U.S. 563 (1968) (employee's interest in expression balanced against government's interest in efficiency in performance of government's business). *See generally* Note, The Public Employee's Right of Free Speech: A Proposal for a Fresh Start, 55 U. Cin. L. Rev. 449 (1986) (discussing *Connick* and recommending that the Court adopt a more expansive analysis); Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1756-80 (1984) (analyzing state of public employee law and contrasting public employees' freedom of expression with that enjoyed by employees in private sector).

5. "First amendment" will be used in this article to cover both first amendment guarantees applicable to federal regulations and the freedom of expression guarantees applicable to the states as part of the liberty protected by the fourteenth amendment due process clause.

6. While the "principle of freedom of speech" is stated in various ways, it consistently provides that when first amendment speech is significantly burdened, more stringent standards of judicial review are to be employed. As Professor Fred Schauer stated: "[I]f the state needs no stronger justification for dealing with speech than it needs for dealing with other forms of conduct, then the principle of freedom of speech is only an illusion." F. Schauer, Free Speech: A Philosophical Enquiry 8 (1982) (analysis of philosophical foundations supporting an independent principle of freedom of speech).

7. 393 U.S. 503 (1969). *See infra* text accompanying notes 46-76.

8. Bethel School District No. 45 v. Fraser, 106 S. Ct. 3159 (1986). *See infra* text accompanying notes 77-100.

9. Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988). *See infra* text accompanying notes 101-126.

majority recognized the existence of hierarchies of first amendment speech in the school context, with sexually offensive speech being excluded from full first amendment protection. In *Hazelwood School District v. Kuhlmeier*, the Court invoked the nonpublic forum doctrine as a basis for employing a diminished standard of judicial review for student speech. The Court in *Hazelwood* suggested a mode of judicial deference to bureaucratic regulation of school-sponsored or curricular speech that actually entails the abdication of meaningful judicial review. Together, these decisions threaten to diminish the universe of student speech subject to significant first amendment judicial scrutiny.

This article is intended to explore the implications of this trilogy of Supreme Court decisions—*Tinker*, *Fraser*, and *Hazelwood*—for first amendment student speech in the academic forum. Our thesis is that the Court's willingness to limit the principle of freedom of speech in restricted environs cases like the student speech context is misguided.[10] The Court's judicial review methodology in *Fraser* and *Hazelwood* reflects modes of conceptualistic, formalistic analysis which, while appealing from some vantages, are inadequate for reconciling the competing interests involved in government regulation of expression in the schools.

In place of the Court's deferential standard of review in the student speech cases, we urge a weighted balancing of interests that recognizes a preference for free speech values. In this balancing process, courts must recognize that freedom of student speech is not incompatible with order in the classroom and administrative control over the curriculum. On the contrary, protection of student speech is a vital means towards accomplishing the schools' central purpose of preparing students to function as self-governing individuals and free citizens. The need for deference to special governmental interests in the school environment, we will argue, can be adequately accommodated within the contours of the traditional first amendment analysis employing heightened scrutiny.

I. Free Speech in the Classroom

A. The Values of Free Speech

When the courts decide a traditional first amendment case they often stress the special role of the amendment in our constitutional

10. Dienes, *supra* note 2, developed the thesis in the context of freedom of speech in the military.

jurisprudence. While the language of "preferred position" is not commonly used today, the "firstness of the first amendment" remains an abiding theme.[11] Simple rationality will not suffice to justify government regulation of protected speech. The "principle of freedom of speech" imposes a higher burden of justification upon the government.[12] From this principle flows an array of speech-protective doctrines, one of which is the bias or presumption against content regulation.[13]

Courts and commentators provide a variety of rationales for the protective posture accorded first amendment rights. Perhaps the best synthesis of the prevailing constitutional jurisprudence is provided in Justice Brandeis' concurrence in *Whitney v. California*:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of

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11. *See* McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182 (1959). The doctrine is usually traced to Chief Justice Stone's suggestion in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), that the usual presumption of constitutionality might have a "narrower scope" when legislation appears to be facially within one of the prohibitions of the Bill of Rights or when legislation restricts the ordinary political processes on which we rely as a corrective to legislative excesses. The doctrine of preferred position was actually framed in Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting), *vacated*, 319 U.S. 103 (1943) (per curiam).

12. *See supra* notes 1 and 6 and *infra* note 13.

13. Government must prove that the "regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end." Perry Educ. Ass'n. v. Perry Local Educators Assn., 460 U.S. 37, 45 (1983). *See* United States v. Grace, 461 U.S. 171 (1983) (total ban on leafletting on sidewalks adjoining United States Supreme Court held unconstitutional). Special clarity and precision of regulation are required when government employs content-based regulation. *See also* Houston v. Hill, 107 S. Ct. 2502 (1987) (ordinance making criminal interruption of policeman in execution of his duty held substantially overbroad); Board of Airport Comm'rs v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987) (total ban on all first amendment activity in airport terminal held substantially overbroad). *See generally* Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine, 78 Nw. U.L. Rev. 1031 (1983). A law must be drawn with sufficient clarity as to inform persons of common intelligence and law enforcement agencies what conduct is proscribed. *See, e.g.*, Smith v. Goguen, 415 U.S. 566 (1974) (flag misuse statute held unconstitutionally vague).

For general discussions of the speech-protective doctrines flowing from the principle of freedom of speech, see J. Barron & C. Dienes, Handbook of Free Speech and Free Press (1979); M. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment (1984); J. Nowak, R. Rotunda & J. Young, Constitutional Law ch. 16 (3d ed. 1986); L. Tribe, American Constitutional Law ch. 12 (2d ed. 1988); Buchanan, Toward a Unified Theory of Governmental Power to Regulate Protected Speech, 18 Conn. L. Rev. 531 (1986); Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 430-81 (1980); Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107 (1982).

> political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[14]

Three principles of free speech inform Brandeis' concurrence. The first is the "marketplace of ideas" in which speech serves the socially instrumental function of promoting a free exchange of views. It is through this dialectic process, where ideas are subject only to the pressures of opposing views, that people pursue "truth."[15] The second is the citizen-critic theory, which stresses the instrumental role free speech plays in our democracy. The citizen-critic must be free to criticize the operation of government and to hear such criticism.[16] But freedom of speech also serves intrinsic

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14. 274 U.S. 357, 375-76 (1927).

15. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes provided a rationale for the marketplace model: "But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . . ." *Id.* Consider Alexander Bickel's response: "[W]e have lived through too much to believe it." A. Bickel, The Morality of Consent 71 (1975). *See generally* Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1 (1984) (criticizing marketplace model on grounds that it does not account for the fact that sophisticated communications technology has skewed the ideological marketplace).

16. As Alexander Meiklejohn put it: "The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. Meiklejohn, Free Speech and Its Relation to Self-Government 26-27 (1948). The Supreme Court has said that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964), citing the citizen-critic model as reflecting "the central meaning of the First Amendment." *See also* Kalven, The New York Times Case: A Note On "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191.

Closely related to the citizen-critic model is the "checking value" urged by Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521. Blasi distinguishes his approach from that of Meiklejohn: "[T]he role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds." *Id.* at 542.

ends; it is a good in itself. Through self-expression and through hearing the ideas and opinions of others, the individual sharpens her own capabilities and develops a sense of autonomy.[17] This is the third principle, the liberty model of the first amendment.

While a number of writers have argued for the exclusivity of one of these first amendment models, we believe it is the combination of all three of these values, and others, that provides the foundations of the free speech principle.[18] The fact that particular speech may serve only some of these values does not remove it from the protective mantle of "the freedom of speech". So long as expression serves the panoply of first amendment values, heightened judicial scrutiny ought to apply to governmental justification for speech regulation. It is against this understanding of the principle of freedom of speech that we measure the judicial performance in the student speech cases.

B. Free Speech in the Schoolhouse: Competing Paradigms

> Our problem lies in the area where students in the exercise of first amendment rights collide with the rules of the school authorities.[19]

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17. Professor Martin Redish argues for a theory of individual self-realization reflecting both the development of individual abilities and self-rule. All other free speech values, while legitimate, are only subvalues of the self-realization value. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 603 (1982). *See generally* M. Redish, Freedom of Expression: A Critical Analysis (1984).

Professor C. Edwin Baker also argues for a liberty model emphasizing self-rule and self-development, but grounds his model in the concept of political obligation. Obligation, he argues, is justified only if the community treats its individual members "as rational, equal, autonomous moral beings." People must be regarded as ends and not merely as means.

> This requires that people's choices, their definition and development of *themselves*, must be respected—otherwise they become mere objects for manipulation or means for realizing someone else's ideals or desires . . . . Moreover, since group decisions significantly influence both one's identity and one's opportunities, respecting people's autonomy as well as people's equal worth requires that people be allowed an equal right to participate in the process of group decisionmaking . . . .

Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 992 (1978).

18. Dienes, *supra* note 2, at 795-98. A leading exponent of the view that the values of freedom of expression are complementary and interdependent is Professor Thomas Emerson. *See* T. Emerson, The System of Freedom of Expression 6-9 (1970); T. Emerson, Toward a General Theory of the First Amendment 3-5 (1966); Emerson, *supra* note 13, at 423. But note that Professor Emerson limits first amendment protection to "speech," excluding "action." Indeed, he warns that a broader coverage will undermine the preferred position doctrine: "[W]hen such a vast array of conduct is eligible for some degree of protection, none of it is entitled to 'special' protection." *Id.* at 432. Professor Tribe also accepts a diversity of first amendment values, but without Emerson's approach to the meaning of "speech." L. Tribe, *supra* note 13, at 788-89.

19. *Tinker*, 393 U.S. at 507.

Does the first amendment guarantee even apply when the speaker is a child? Does the principle of free expression control judicial review of government regulation of speech in the schoolhouse? There seems to be little question that the free speech values underlying the principle of freedom of expression were developed for adult speakers.[20] Nor is it likely that the framers of the first and fourteenth amendments wrote with children/students in mind.[21] Thus, the initial question must be whether the principles and doctrines governing freedom of speech in adult society should be applied to student speech in the schoolhouse.

The Court has suggested, on numerous occasions, that the rights of children are not coextensive with those of adults.[22] These references to the diminished rights of minors suggest that the first amendment does not fully apply to children. It can be argued that they lack "the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them;"[23] thus they lack the preconditions for exercising the free speech guarantee. This certainly is a critical consideration. If the values of the first

20. For example, the origins of the marketplace model, the oldest of the free speech models, give no hint that the speech of children was included. Milton wrote to protest government censorship of adult speech. J. Milton, Areopagitica, Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644). Mill expressly excluded children from his free speech regime. J.S. Mill, On Liberty 9 (E. Rapaport ed. 1978). Holmes was addressing the problem of adult wartime protest in Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). Professor David Diamond, a strong advocate of judicial deference in student speech cases, contrasts "[t]he special constitutional status of children" with those of adults: "The adult, by definition the person at whom the Constitution is directed, possesses all the first amendment rights that exist, for all the reasons that first amendment rights exist at all." Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Tex. L. Rev. 477, 478, 487 n.56 (1981).

21. *But see* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1974) ("[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority"); In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

22. *Fraser*, 478 U.S. at 682-85. *See* New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985). In Bellotti v. Baird, 443 U.S. 622 (1979), the Court upheld the right of minors to obtain abortions, but it also upheld the right of the states to regulate that decision by requiring parental consent or court authorization. Justice Powell set forth "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634.

23. *Bellotti*, 443 U.S. at 635. Justice Stewart, concurring in Ginsberg v. New York, 390 U.S. 629, 649-50 (1968), stated: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Concurring in *Tinker*, 393 U.S. at 515, Justice Stewart questioned the Court's "uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."

amendment are not served by the speech of children, it might then follow that student speech is not within the "freedom of speech" protected by the first amendment. It is necessary to consider, then, whether the panoply of values underlying the principle of freedom of speech are applicable to children.

An underlying assumption of the marketplace of ideas is that individuals are capable of making rational choices.[24] If children lack the adult capacity for intelligent decisionmaking, how can they function properly in the marketplace? This concern has led many commentators and judges to conclude that the marketplace model is not applicable to children, particularly to young children in elementary school.[25]

Yet, the marketplace involves dialogue—a give and take of ideas.[26] Are we prepared to say that children, regardless of their age or maturity, have nothing to contribute to the interchange of ideas? Even adults with diminished mental capacity and little prospect for developing mature mental abilities do not lose their claim to first amendment rights. The marketplace model cannot protect only the speech of intelligent, fully mature, and capable persons.[27]

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24. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting)("the best test of truth is the power of the thought to get itself accepted in the competition of the market.") Arguably, this proposition envisions rational decision makers.)

25. *See generally* Diamond, *supra* note 20; Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L.J. 663, 670-71 (1987) (children "lack the intellectual capacity to engage in reasoned discourse"). Diamond contrasts the full first amendment rights of the adult with those of "the child, living in the home of the parent, [who] possesses virtually no first amendment rights." Diamond, *supra* note 20, at 487 n.56. While a child may not have first amendment rights against a parent, this is of little relevance to a child's rights against the State. While the schools may seek to act in loco parentis, they still act as government subject to constitutional limitations. Further, it is a mistake to assume that a parent's interests are necessarily aligned with the State. *See infra* note 36.

26. While it is typical to focus on the interests of the speaker in the marketplace, the Court has recognized the constitutional interests of listeners. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (restrictions on corporate speech held unconstitutional given the public's interest in hearing messages); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"); Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Counsel, Inc. 425 U.S. 748 (1976) (statute prohibiting drug price advertising held unconstitutional citing public interest in hearing message); Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) ("the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom").

27. Compare the view of Wright, Free Speech Values, Public School, and the Role of Judicial Deference, 22 New Eng. L. Rev. 59, 63 (1987), who challenges the value of student speech to the marketplace because "children tend not to be at the cutting edge of truth or insight into geopolitical issues, even of complex moral dimensions." We would hope that such attributes do not become preconditions for the exercise of first amendment rights. Too few of us would qualify. A somewhat more limited rejection of our position is provided by Mill, *supra* note 20, at 6: "It is, perhaps, hardly necessary to

Further, to shelter children from the marketplace by exposing them only to government-approved ideas may frustrate, if not destroy, a child's ability to develop as a rational decision maker. Without childhood exposure to a variety of ideas and opinions, and without practice in sifting through competing views to determine what is "true" (or, at least, "better"), individuals, upon reaching majority, will be ill-equipped to participate in the marketplace. Although the benefits of the marketplace for children are more attenuated and less immediate, marketplace values of free speech may well be lost altogether if we shelter children until they reach maturity.[28]

This argument does not suggest that children have the right to say whatever they want, whenever they want, wherever they want. Unquestionably, special considerations which are not relevant when adults are involved come into play when the speaker and/or recipient of speech is a child/student. These considerations will vary with the age and maturity of the speaker.[29] The state may have significant reasons for limiting the children's speech, especially when younger children are involved. But none of these considerations denigrate the fact that the children possess the fundamental right to express themselves and to hear the speech of others so that they can search for truth and knowledge.[30]

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say that [the marketplace of ideas] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children. . . ."

28. Professor John Garvey's frequently cited defense of children's rights employs an instrumental perspective. While protecting a child's speech rights may "serve no immediate purpose," he argues:

> Guaranteeing the child's right of free speech thus plays an instrumental role in advancing the search for knowledge and truth; the benefits do not accrue immediately, but neither can they be secured by sheltering the child until he is ready to join the adult community.

Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321, 344 (1979). *See Pico*, 457 U.S. at 867, where a plurality recognized a first amendment right of students to receive information and ideas.

29. *See* Tushnet, Free Expression and the Young Adult: A Constitutional Framework, 1976 U. Ill. L.F. 746, 749-52, discussing the effects of age and maturity.

30. The term "right" is commonly employed to refer to the end product after the government's justification for burdening an individual interest has been rejected. Thus, commentators generally speak of a "right" to speak only if government lacks sufficient legal justification to suppress the speech. We prefer to use the concept of "right" to identify any *legally protected* claim or interest. When a "right" is significantly burdened, government must provide justification. In cases where the principle of freedom of speech applies, for example, the government may be required to demonstrate that the law is narrowly tailored to achieve a sufficient overriding interest. We prefer this usage of right, since the right is grounded on constitutional text, history, values, etc., regardless of the strength or weakness of the government interest. The free speech right, for example, is an interest or claim within the freedom of speech; it is afforded legal recognition by the first amendment. Whether the government may burden the right of free speech depends on a balancing of the values underlying the individual's claim against the government's regulatory interests.

Speech is also protected under the citizen-critic model, because freedom of expression is necessary for Americans to participate in our political system. Our democratic structure is premised upon a popular sovereignty that requires individuals freely expressing ideas and opinions in order to make informed political decisions. Again, it is easy to discount this theory as having no application to student speech. While students/children are citizens, they are not voting citizens. It is arguable, though tenuous, that school authorities are not accountable to students since students lack the right to vote. It would follow then that there is no need to involve students in the governance of the school.[31]

But the fact that children do not vote and are not mature citizens does not justify rejection of their free speech rights. Children can be citizens and not lose the rights and obligations of citizenship upon entering the schoolhouse.[32] More importantly, in order for children to participate effectively in self-government upon reaching adulthood, they must be prepared to assume the role of citizen-critic. Free speech is an important factor in training children to participate in self-government. Nor should we ignore the fact that children can further first amendment values by providing information to citizens who are responsible for checking official misconduct. If we prevent children from speaking, there is a net loss in the communication vital to a free society.[33]

Finally, speech is not simply a vehicle for pursuing truth, knowledge, or democratic values. The liberty model of free speech recognizes that speech is also a good in itself. Through expression, an individual is able to test his or her ideas, opinions, and beliefs. The liberty model postulates the value of speech as vital for the individual in terms of personal growth, autonomy, and self-realization.

"There is no reason to believe that self-expression is any less important to young people than to adults."[34] For the child, self-expression has both an immediate impact and a future promise. The immediate experience is similar to that for adults—speech is an expression of oneself, and of personal awareness. For children, self-expression is the means of growing into autonomous adults capable of employing free speech to pursue self-government and to search

31. *See generally* Hafen, *Hazelwood School District v. Kuhlmeier* and the Role of First Amendment Institutions, 1988 Duke L.J. 685.

32. *See Tinker*, 393 U.S. at 506.

33. *See* Garvey, *supra* note 28, at 338-42; Tushnet, *supra* note 29, at 753.

34. Tushnet, *supra* note 29, at 761.

for truth. Through speech children can grow toward greater autonomy and self-rule. It is vital to permit children to experience the self-awareness and self-satisfaction that results from expression.[35]

The values of the first amendment, then, apply to speech by children. While the strength of the particular constitutional values may vary with the maturity of the child, children's speech serves the values of the guarantee. Apart from the intrinsic worth of expression for children, it is questionable whether the general values underlying the first amendment are achievable if they are denied freedom of expression during their maturation period. Further, as indicated above, it makes little difference that one particular value underlying the first amendment guarantee is not fully applicable when children are involved. It is the complex of values that are realized through freedom of expression that makes speech a fundamental right worthy of stringent judicial protection.[36]

Perhaps by denigrating the first amendment rights of children, judges and commentators are implying that governments (and parents)[37] have vital interests in controlling and guiding the speech of the developing child. While this observation is true, it should not affect the claim or right of the child to constitutional protection. If the speech of children serves the values of the first amendment, then the State must justify burdening the right. When fundamental rights are significantly burdened, a demanding judicial standard of justification should be applied. This standard is the mandate of the

35. *See* Ingber, Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools, 1987 U. Ill. L. Rev. 15, 19 (1987), who states: "The goals of free speech—pursuing truth, self-governance, and self-fulfillment—are absurd if society leaves children unprepared to act as autonomous individuals."

Garvey identifies four ways in which free speech furthers autonomy. First, an individual experiences satisfaction from self-expression and from the role it plays in defining a person as an individual. Second, free speech at an early age trains citizens to reason, persuade, listen, etc., by providing opportunities to practice these skills. Third, the consequences, good and bad, of speech may be taught to the young so their experience will help them throughout life. And fourth, free speech allows a wide variety of information to be disseminated. Garvey, *supra* note 28, at 347-50.

36. *See supra* text accompanying note 18.

37. The special interests of parents in their children are often of critical importance in constitutional analysis. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory education law held unconstitutional as applied to Amish children in light of parents' free exercise claim). But in the context of student speech, there seems little reason to assume that the parent has a common interest with the State in regulating the student expression. The parents may, in fact, endorse the student speech as they did in *Tinker*. In short, the special interests of the parents in control of their children do not usually enter into the first amendment analysis in student speech cases.

free speech principle. At least this is one perspective, essentially liberal, informing the exercise of judicial review in student speech cases.[38]

Yet an alternative paradigm competes for acceptance. Under a community-oriented perspective, the proper role of courts in reviewing official regulation of student speech is deference, or even abstention. While the proponents of this communal paradigm, urging judicial deference, frequently question the applicability of free speech values to child speakers, their primary emphasis is on the importance of the government's interest in regulating the schools—the community interest in the pursuit of the educational mission.[39] Schools are charged with a vital role in the socialization and acculturation of children into adult society. While they share this task with other social institutions, especially the family, the school is a vital participant in the maturation process. Indeed, recognition of this fact is the principal foundation for compulsory education.

While the proper content and scope of the educational mission is itself a matter of sharp controversy, it is partly defined in terms of educating future citizens. Schools should teach democratic rights and obligations since public education is responsible for "inculcating fundamental values necessary to the maintenance of a democratic political system."[40] Also, the community transmits its "basic values" to the young, and schools are generally perceived as having a vital role in this acculturation, socialization process. "[S]chools

38. On the liberal model of education, see generally B. Ackerman, Social Justice in the Liberal State ch. 5 (1980). The problem of reconciling liberalism's emphasis on individual freedom and autonomy and government value neutrality with the need to acculturate and socialize the child into the community's values is of concern in part II of this paper. Professor Shiffrin, noting the problem of reconciling these interests, refers to children as "the Achilles heel of liberal ideology." Shiffrin, Government Speech, 27 UCLA L. Rev. 565, 647 (1980).

39. *See* Diamond, *supra* note 20; Hafen, *supra* note 25. *See generally* R. Nisbet, The Quest for Community (1953).

40. Ambach v. Norwick, 441 U.S. 68, 77 (1979) (stressing importance of public schools in preparation of individuals for participation as citizens.) *See* Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 Yale L.J. 1647, 1648 (1986), who stated:

> Americans believe that education is central to the realization of a truly democratic and egalitarian society. It is through education that the skills necessary to exercise the responsibilities of citizenship and to benefit from the opportunities of a free economy will be imparted, no matter how recently arrived or previously disadvantaged the individual.

must teach by example the shared values of a civilized social order."[41] Education also provides the child with opportunities for personal growth and development. Experiences in the schoolhouse during the formative years play a vital part in defining the mature adult.[42]

It is not the function of the judiciary to choose the political, moral, and social values that schools are to transmit.[43] Politically accountable school officials, serving as the community's agents, are more likely to reflect accurately the values and beliefs of the community and parents than are judges. Furthermore, it is argued, the community should ultimately define the contents of the educational mission.[44] Judicial deference or abstention allows the political process to operate and thereby define how we shall govern our schools.

If the educational mission is to be effectively implemented, the argument continues, order and authority must be maintained. Education cannot be pursued in a condition of anarchy. It is school authorities who are charged with primary responsibility for maintaining order and authority in the schoolhouse. Proponents of the community paradigm argue that courts are not in a position to second-guess school officials regarding the degree of order that must be maintained in order to pursue the educational mission, nor are they equipped to determine what conduct will be disruptive of

41. *Fraser*, 106 S. Ct. at 3165. The plurality in *Pico*, 457 U.S. at 864, also acknowledged that "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). In *Ambach*, 441 U.S. at 76, the Court referred to the importance of the schools "in the preservation of the values on which our society rests. . . ."

42. Hafen, *supra* note 31, at 700, argues that "[u]ntil children have developed this [capacity to exercise] 'freedom of expression,' their freedom *from* restraints on expression' has only limited value." *See* Note, Constitutional Law: Freedom of Speech in the Public Schools—*Fraser* and *Bethel School District* Revisited, 39 Okla. L. Rev. 473, 474 (1986).

43. *See* Diamond, *supra* note 20, at 496-505.

44. Chief Justice Burger, dissenting in *Pico*, 457 U.S. at 890-91, stated:

> Discretion must be used [in determining educational policy] and the appropriate body to exercise that discretion is the local elected school board, not judges. . . . [T]he people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. [L]ocal control of education involves democracy in a microcosm.

Justice Powell, dissenting in *Pico*, 457 U.S. at 893, contended that the plurality was rejecting "a basic concept" of our educational policy: "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools."

this mission. The day-to-day administration of the schools must be left to school administrators.[45]

It is these paradigms—a liberal paradigm emphasizing the importance of student free speech and the need for judicial protection, and a communal paradigm stressing judicial deference to the community's concern for effective performance of the educational mission—that compete in the Supreme Court's trilogy of student speech cases. While *Tinker* launched the Court on a path emphasizing the free speech side of the equation, *Fraser* and *Hazelwood* have adopted the more traditional community-oriented posture of judicial deference.

II. A Judicial Trilogy

A. Tinker v. Des Moines School District*: The Court Strikes a Weighted Balance*

The leading case extending broad first amendment protection to student speech is *Tinker v. Des Moines School Dist.* [46] As part of a general protest against the Vietnam War, a number of students in Des Moines' junior and senior high schools agreed to wear black armbands. When word of the planned protest reached school principals, they hastily met and fashioned a rule prohibiting the wearing of armbands. Failure to remove the armband on request would result in suspension until the student agreed to abide by the rule. Three children suspended under the regulation, acting through their parents, brought suit challenging the rule as a denial of their free speech rights.

When *Tinker* reached the Supreme Court, Justice Fortas, for the Court, applied a textual approach to the Constitution to provide a definitive answer as to whether students may claim the benefits of the first amendment guarantee: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[47] The student

45. The Court in Epperson v. Arkansas, 393 U.S. 97, 104 (1968), while invalidating a law prohibiting the teaching of the Darwinian theory of evolution, recognized that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." The Court stressed considerations of federalism, noting that "public education in our Nation is committed to the control of state and local authorities." *Id.* at 104.

46. 393 U.S. 503 (1968).

47. *Id.* at 511.

petitioners, while engaged in symbolic protest, were said to be engaged in conduct "closely akin to 'pure speech,' " which had regularly been accorded "comprehensive protection" by the Court.[48] Nor was this first amendment protection lost by the student status of the speakers: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[49]

After establishing through textual analysis that the first amendment applies to student speech, Justice Fortas went on to define the available extent of judicial protection. It is here that the competing paradigms regarding student speech are most directly implicated. In the ordinary public forum cases, if the government regulates speech on the basis of content, the free speech principle mandates that the government justify its regulation by showing that the law is narrowly tailored to some overriding or compelling interest.[50] But in *Tinker*, the Court fashioned a formulaic standard particularly designed for the academic forum. To justify its regulation, the Des Moines School District had to prove that the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or that it "impinge[s] upon the rights of other students."[51]

Is *Tinker*'s judicial review formula the equivalent of the first amendment standard generally applicable to content control of speech?[52] The formula does not use the language of compelling or overriding interest nor require a narrowed tailoring of means to end. It seems to lack the immediacy of harm associated with the "clear and present danger" doctrine—which the authors view as the

48. *Id.* at 505-06. Justice White, concurring, noted that "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest." *Id.* at 515.

49. *Id.* at 506.

50. *See supra* notes 1, 6, and 13. In fact, there are indications that the regulation in question was discriminatory regarding content, *i.e.*, viewpoint based. It was directed against anti-Vietnam war protest and did not prohibit the wearing of all political symbols that were controversial. 393 U.S. at 510-11.

51. 393 U.S. at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

52. *Compare* Levin, *supra* note 40, 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"), *with* Tushnet, *supra* note 29, at 759-60, who argues:

> *Tinker* applies ordinary first amendment standards to the expressive activities of students in schools. No concessions in doctrine were made either to the special needs, if any, of schools, or to the immaturity of the students. Once that fact is recognized, the analysis of the first amendment rights of young adults in schools, insofar as self-expression is the issue, need not be considered in detail. The first amendment rights of young adults in schools are, according to *Tinker*, exactly the same as those of adults.

equivalent of a strict scrutiny standard of review.[53] Yet, there is a clear emphasis in Justice Fortas' opinion on the free speech values at stake in the students' speech, and there is a mandate that the government provide substantial justification for burdens on student speech.

The *Tinker* Court rejected the premise that school officials exclusively should decide the contents of the educational mission.

> 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.'[54]

Rather, Justice Fortas adopted the view that the classroom is "peculiarly the 'marketplace of ideas.' " In this academic marketplace, our nation trains its leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of 'tongues, [rather] than through any kind of authoritative selection.' "[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]

Justice Fortas' rejection of the particular State interests offered to justify the school district's content-based regulation indicated the Court's full acceptance of the free speech principle. Justice Fortas began by acknowledging that the State has a variety of compelling concerns for regulating particular communicative behavior in schools that might not be compelling in ordinary civil society. While teachers and students could claim free speech rights, they must be "applied in light of the special characteristics of the school environment."[57] The Court had "repeatedly emphasized the need for affirming the comprehensive authority of the States and of

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53. *But see infra* note 61 and accompanying text.

54. 393 U.S. at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

55. 393 U.S. at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

56. 393 U.S. at 508-09. Invoking West Virginia v. Barnette, 319 U.S. 624, 637 (1943), which had rejected compulsory saluting of the flag, Justice Fortas in *Tinker* tied the students' symbolic protest to the citizen-critic model:

> That [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.

393 U.S. at 507.

57. *Id.* at 506.

school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[58]

Yet, having acknowledged the force of these abstract state interests, Justice Fortas rejected the suggestion that the particular interests in *Tinker* were compelling, or that suppression of the armbands was really necessary to achieve these vital educational interests. Only "reasonable regulation of speech connected activities in carefully restricted circumstances"[59] would survive judicial scrutiny. In applying this standard, the Court cited the absence of government evidence of any interference, actual or nascent, with the work of the school or any threat to the rights of other students. Mere discomfort of others, unpleasantness, or offensiveness would not suffice.

Nor was it sufficient that there was an "undifferentiated fear or apprehension of disturbance."[60] 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 lunchroom, 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, *Terminiello v. Chicago*, 337 U.S. 1 (1949). . . .[61]

In short, the language and spirit of *Tinker* is not judicial avoidance, nor judicial deference under a rationality standard, nor even a simple balancing of interests. Instead, the Court demands substantial governmental justification for the burdens that school officials impose on student speech. Actual government interests that motivate regulation of the speech in question and the evidence supporting the need for the restriction are to be judicially examined. This heavy burden of justification at least approximates the methodology mandated by the free speech principle.

Justices Black and Harlan dissented in *Tinker*. While both Justices clearly accepted the communal paradigm of school regulation of student speech, it was Justice Black who most forcefully articulated its underlying rationale and conclusions. Although Justice Black argued that there was in fact evidence indicating that the symbolic protest "diverted" students from their studies,[62] he regarded this

58. *Id.* at 507.
59. *Id.* at 513.
60. *Id.* at 508. The facts indicated only "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.* at 508.
61. *Id.* at 508.
62. *Id.* at 518 (Black, J., dissenting).

fact as irrelevant because he rejected any judicial scrutiny of the government's basis for regulating student speech. Rather, Black identified two "crucial" questions that the courts had to answer in *Tinker:*

> [W]hether students and teachers may use the schools at their whim as a platform for the exercise of free speech — 'symbolic' or 'pure' — and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent.[63]

Justice Black's questions really reduce to the single issue: Who governs? His answer was school authorities, not the students or the courts. For him, judicial review of school regulations and protection of student speech would lead to anarchy in the schoolhouse since it is the function of school officials, not the courts or students, to run the schools. The schoolhouse context is simply inconsistent with judicially protected student free speech; the first amendment guarantee does not even apply.[64]

Justice Black's rejection of student free speech in the context of the schoolhouse is consistent with his first amendment views in other contexts. A principal formulator of the nonpublic forum doctrine, his dissent in *Tinker* reflects the essential principles of that doctrine.[65] For example, in *Adderly v. Florida*,[66] he stressed that the first amendment does not guarantee that one can speak at any place, at any time, in any manner—"speech" itself is protected by the first amendment, not speech in a particular fashion or in a particular place. In *Adderly*, dealing with speech at the jailhouse, Justice Black essentially analogized government control of public property to that of the private property owner. According to Justice Black, just as the private property owner exercises broad dominion over his property, so also government enjoys broad prerogatives in the control of that part of its property not dedicated to general public use.[67] Since the government creates the schools as forums for learning, not for the practice of free speech, the government is free to exclude even

63. *Id.* at 517 (Black, J. dissenting).

64. Justice Black began his dissent by claiming that the Court was transferring the power to control pupils to the Supreme Court, and ended by rejecting any reading of the Constitution that compels school officials to surrender control of the public school system to students. *Id.* at 515, 526 (Black, J., dissenting).

65. *See infra* notes 105-113 and accompanying text.

66. 385 U.S. 39 (1966). *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965). Both are cited by Black in *Tinker*, 393 U.S. at 517, 522 (Black, J., dissenting). *See generally* Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 Geo. Wash. L. Rev. 109, 112, 115-17.

67. 385 U.S. at 47.

political speech from its property free of first amendment constraints.

The private property analogy fails because the government is not the equivalent of a private property owner. Government operates under constitutional constraints not applicable to a private person; it is charged with legally enforceable obligations to the public which it serves. Public property is not "owned" by the government in the traditional sense, but is to be used by government for the public welfare. Public property, as Justice Douglas noted in his *Adderly* dissent,[68] is often a natural and appropriate place for first amendment expression even when government would prefer to exclude it. Given the importance of the first amendment values to our society, reliance on a formalistic, attenuated property owner analogy to exclude student speech is misplaced. The government should not be exempted from the first amendment simply because the speech occurs on public property. Only if the speech is incompatible with the performance of the public's business should it be excludable.[69]

But even if such a forum approach were to be used, the schoolhouse, the academic marketplace, is a public forum. The schoolhouse may not be a public street or park, traditionally open to speech, but neither is it the equivalent of a military base,[70] a jailhouse,[71] a mailbox,[72] or a teacher's mailbox system,[73] from which first amendment speech may be excluded. The academic marketplace is a place for the disputation of ideas, for the development and fashioning of the values of citizenship, and for the maturation of the intrinsic values of self-rule and personal development. In *Tinker*, the majority appears to reject the position that "the constitutional rights

68. *Id.* at 53 (Douglas, J., dissenting).

69. The early history of the public forum doctrine focused on whether under the circumstances then existing, the speech was incompatible with the normal functioning of the public property. *See, e.g.*, Edwards v. Louisiana, 372 U.S. 229 (1963) (protest at statehouse grounds protected); Brown v. Louisiana, 383 U.S. 131 (1966) (silent protest at public library protected); Grayned v. City of Rockford, 408 U.S. 104 (1972) (speech adjacent to schools is protected if schools' activities are not disrupted). *See generally* Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287 (1979).

70. *See* United States v. Albertini, 472 U.S. 675 (1985); Greer v. Spock, 424 U.S. 828 (1976) (upholding regulation requiring approval before any political activity could be conducted on base).

71. *See* Adderly v. Florida, 385 U.S. 39 (1966) (upholding trespass convictions of protestors demonstrating on jailhouse grounds).

72. *See* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (upholding federal ban on distributing mail via letter boxes without payment of postage).

73. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (teacher mailboxes are not public forums; rival teachers' union may be forbidden from using them to distribute information).

of persons entitled to be [in the schoolhouse] are to be gauged as if the premises were purely private property."[74]

Since Justice Black rejects the applicability of the first amendment guarantee to student speech in the schoolhouse, it follows that he also rejects any meaningful judicial role in reviewing official regulations burdening student speech. Justice Black's rejection of such judicial involvement springs from his general due process methodology—absent any constitutionally guaranteed right, it is not the function of courts to review the "reasonableness" of state action.[75] According to Justice Black, by judging the rationality of a school regulation "the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable'."[76] Since there is no constitutional right burdened, it is for school officials, not the courts, to determine the conditions requisite to the pursuit of the educational mission. This call for judicial deference is a demand for abdication of substantive judicial review.

For Justice Black, the principle of freedom of speech, with its presumption against government content-based regulation of speech and its demand for substantial government justification, is simply inapplicable to the schoolhouse setting. While Justice Black wrote in dissent in *Tinker*, the principles he articulated have found judicial endorsement in *Fraser* and *Hazelwood*.

B. Fraser: *A Retreat from* Tinker?

In *Bethel School District v. Fraser*,[77] the Supreme Court addressed the question of whether it is constitutional for a school board to discipline a student for delivering what the board considers to be an inappropriate and indecent speech at a school assembly. The assembly in question was school-sponsored but student-run, and was attended by approximately 600 high school students who had their choice of attending the assembly or going to a study hall. Matthew Fraser, a seventeen-year-old high school senior, delivered a nominating speech on behalf of a classmate. To communicate the qualities of his candidate, Fraser made use of humorous sexual

74. 393 U.S. at 512 n.6.

75. *Id.* at 518-21 (Black, J., dissenting). However, at one point, he seems to preserve the possibility of *some* first amendment review in the schoolhouse by arguing that the teacher or student does not carry "a *complete* right to freedom of speech and expression" into the schoolhouse. *Id.* at 521 (Black, J., dissenting) (emphasis added).

76. *Id.* at 517 (Black, J., dissenting).

77. 478 U.S. 675 (1986).

innuendos.[78] The record indicates that a few students hooted and hollered and simulated sexual actions; some students and teachers were offended and upset.

The day after the speech was delivered, school officials informed Fraser that his conduct at the assembly violated the school's student handbook, which prohibited conduct that "materially and substantially interferes with the educational process . . . including the use of obscene, profane language and gestures." After being given an opportunity to explain his conduct, he was then suspended for three days. In addition, Fraser was told that he would be ineligible to run for graduation day speaker—an office for which he was an approved candidate.[79] He unsuccessfully petitioned the school district for redress through the normal administrative channels. Finally, acting through a parent, Fraser filed a federal civil rights action alleging that the school district violated his first amendment rights. The district court entered judgment in his favor and the Court of Appeals for the Ninth Circuit affirmed.[80] The Supreme Court granted certiorari and reversed, seven to two.

Chief Justice Burger, in a rambling, ambiguous opinion, offered two justifications for the Court's holding that Fraser's speech is not constitutionally protected. First, the government's interest in preserving its educational mission by controlling the curriculum and protecting other children justifies the burden imposed on the student speech. Second, the Chief Justice suggests that sexually indecent speech is not protected "freedom of speech," at least in the school context, or alternatively, that such speech deserves less first amendment protection. The first theme is a debatable, but reasonable conclusion. The second theme advocates an undesirable departure from traditional first amendment principles.

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78. The relevant portions of Fraser's speech, quoted at 478 U.S. at 687 (Brennan, J., concurring), 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.

79. Matthew Fraser was, in fact, elected student speaker by write-in vote of Bethel students and delivered his speech on graduation day. *Id.* at 679.

80. No. C83-306T (W.D. Wash. June 8, 1983), *aff'd.*, 755 F. 2d 1356 (9th Cir. 1983) (holding that absent obscene speech or material and substantial interference with educational process, first amendment protected Fraser's speech).

The first theme, concluding that the school had justified the burden it imposed on Fraser's first amendment rights, is a logical and reasonable decision which could be supported by the rationale of *Tinker*. Speech can be controlled in a particular forum, concluded *Tinker*, when the speech is inconsistent with the performance of vital governmental functions in that forum. While *Tinker* indicates that physical disorder may frustrate a school's educational mission, *Fraser* establishes that it can also be impeded by other conduct. Speech may be regulated in the school forum to prevent this disruption of school functions.

In *Fraser*, the Court, with Justice Brennan concurring, held that the school officials could conclude that Fraser's speech excessively interfered with the State's interest in inculcating values of proper social behavior. This educational mission includes teaching civil and effective public discourse.[81] School officials could reasonably determine Fraser's speech impeded these objectives and therefore, could regulate it. For the Chief Justice, the minimal free speech value of Fraser's speech and the offense it gave to the sensibilities of others were essentially conclusive.[82] Justice Brennan, on the other hand, sought to narrow the holding: "under the circumstances of this case," according to him, the sanctions visited on Fraser were constitutional. It was vital for Brennan that the speech took place at a school-sponsored assembly and that "school officials sought only to ensure that a high school assembly proceed in an orderly manner."[83] Under other circumstances, even if the speech occurred on the school grounds, the same speech might be constitutionally protected.

Chief Justice Burger purported to apply a balancing test that pits the first amendment right of students to advocate unpopular views against the school's educational mission in teaching socially appropriate behavior. But his denigration of the value of Fraser's speech and his efforts to distinguish the speech of Fraser from that of Tinker suggests that the Chief Justice placed almost no weight on

81. 478 U.S. at 687 (Brennan, J., concurring).

82. *See infra* notes 86-100 and accompanying text.

83. 478 U.S. at 689 (Brennan, J., concurring). He stressed the limited nature of the holding:

> To my mind, the most that can be said about respondent's speech—and all that need be said—is that in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude... that respondent's remarks exceed permissible limits.

Id. at 687-88.

the free speech side of the scales. Once the State had recited its legitimate pedagogical objective for the restriction, the judicial inquiry was essentially complete.[84] The location of Fraser's speech and the nature of assembly were noted, but were not really vital. Under Burger's analysis, it is probable that the same speech in another school location could be as easily suppressed. The Court's true concern was that Fraser's speech offended the sensibilities of others. At best, the first theme of *Fraser* was essentially a rationality test with abject judicial deference to school authorities regarding the appropriateness of Fraser's speech in the school context.[85]

Chief Justice Burger's second theme is a significant departure from traditional first amendment principles. He seemed to suggest that, at least in the school context, "indecent speech" is categorically excluded from the "freedom of speech" protected by the first amendment. Alternatively, he may have been endorsing a hierarchical or tiering approach to speech evaluation that affords sexually indecent speech less constitutional protection than the political speech that was involved in *Tinker*. Established first amendment doctrine, however, requires the rejection of both approaches.

Under traditional first amendment analysis, "obscenity" is not entitled to first amendment protection—it is categorically excluded from "the freedom of speech." Yet the Chief Justice does not make the claim that Fraser's speech qualifies as legal obscenity.[86] Instead, Chief Justice Burger acknowledged that non-obscene, indecent

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84. *Id.* at 681. Actually, his reference to balancing refers to "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms. . . ." The Chief Justice may have been referring to the free speech interest that was present in *Tinker* which required balancing, not to *Fraser*'s minimal speech interest. This reading would support the suggestion that the Chief Justice didn't really balance at all. Absent a true first amendment interest, only rationality would be required.

85. 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 suggest a far more active judicial inquiry than that of the Court. He leaned more to the free speech, liberal paradigm. Perhaps his concurrence is simply an effort to limit the broader implications of the Court's opinion by painting the decision as consistent with *Tinker*. And yet, even Justice Brennan did not engage in the active scrutiny suggested by *Tinker*. He did not demand that the State make the empirical showing *Tinker* required. 478 U.S. 687-90 (Brennan, J., concurring).

86. 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. California, 413 U.S. 15, 24 (1973), which requires that each element of a three-part test be satisfied.

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

speech has been repeatedly held to be constitutionally protected. But then he added:

> It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school.[87]

While sexually indecent, offensive speech is protected in the outside world absent some compelling government interest, in the cloisters of the school, some speech may be suppressed.[88]

The *Tinker* Court had extended broad first amendment protection to offensive speech in the school setting. The Chief Justice, therefore, was forced to draw still another distinction—between the political speech of Tinker and the sexually indecent speech of Fraser. While the school could not constitutionally suppress Tinker's black armband, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms [such as Fraser's] in public discourse."[89] He added, "[t]he determination of what manner of speech in the classroom or school assembly is inappropriate properly rests with the school board."[90]

It is unclear whether the Chief Justice is claiming that such sexually indecent speech is a category of speech entirely excluded from "the freedom of speech" in the school context, obviating any need for first amendment review, or that such speech is merely less protected in the school setting, calling for a diminished standard of first amendment scrutiny, *i.e.* a departure from the heightened review

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While Chief Justice Burger cited Ginsberg v. New York, 390 U.S. 629 (1968), which varies the obscenity test for material targeted at children, he never claimed that Fraser's speech would be legally obscene under the variable obscenity standard of *Ginsberg*.

The Chief Justice tied his *Ginsberg* discussion to the offensiveness of the speech and referred to the "captive audience." Given that the students were required to be at the school-sponsored assembly or at a study hall and could not leave once the offensive speech was under way, the captive audience theory might have offered a useful line of analysis.

87. 478 U.S. at 682.

88. *Id.* at 684. Chief Justice Burger stressed the power of government, acting in loco parentis, to regulate sexually oriented material for the protection of minors. The in loco parentis doctrine argues that public school authorities act in place of the parents while children are in school. It follows that school officials may exercise the broad prerogatives of a parent over a child and there is no legally enforceable free speech right against a parent. But public school regulation of speech is not simply a case of parental control of a child. Public schools are governmental institutions, armed with the power of the state, and invocation of a Latin formula cannot alter that reality. As the Court said in New Jersey v. T.L.O. 469 U.S. 325, 336 (1985): "[S]chool officials act as a representative of the State, not merely as surrogates for the parents. . . ." *See* Levin, *supra* note 40, at 1671-72, arguing that the in loco parentis argument is no longer viable.

89. 478 U.S. at 683.

90. *Id.*

mandated by the principle of free speech. His effort to distinguish Tinker's speech from Fraser's, and his references to the factual context of Fraser's speech, suggest that he was arguing only for a hierarchical or tiered approach to student speech, *i.e.*, that such speech simply is not worth as much in any judicial balancing process. Once the school determines that the speech is "inappropriate," the first amendment mandate is satisfied. Again, at best, the Chief Justice urged a rationality standard of review; alternatively, he urged complete judicial abdication of first amendment review.

Efforts to secure Supreme Court endorsement for a sliding scale, hierarchical approach to indecent or offensive speech in the past have failed outside of the special environments.[91] While the thesis has been accepted by a plurality of the Court[92] and there are recurrent references to the inequality of speech forms in Court

91. In a recent example of the first amendment protection afforded non-obscene, indecent or offensive speech, the Court in Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988), held that damages for intentional infliction of emotional distress could not be awarded for an ad parody concerning Reverend Jerry Falwell published in Hustler magazine absent proof of actual malice. Chief Justice Rehnquist stated: "Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* at 882. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (total ban on live nude dancing violates first amendment); Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (ordinance prohibiting drive-ins from showing films containing nudity held unconstitutional). The durability of the principle that nonobscene, sexually indecent speech is entitled to full first amendment protection recently was upheld again in the context of a challenge to a congressional statute prohibiting indecent dial-a-porn messages. Sable Comm. Corp., Inc. v. FCC, 109 S. Ct. 2829 (1989).

One area where the Court has accepted a diminished protection for first amendment expression is commercial speech. Truthful commercial 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. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. 447 U.S. 557 (1980). Commercial speech is deemed more hardy and verifiable and hence less dependant on judicial protection. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council. 425 U.S. 748, 771 n.24 (1976). For a criticism of the tiered treatment of commercial speech using the same critical attitude towards categorical rules developed in the present article, see Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U.L. Rev. 1212 (1983).

92. A plurality in Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976), upholding a zoning ordinance regulating the location of adult movies, endorsed the principle that "it 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. . . ." But this thesis was rejected by four dissenting justices and Justice Powell, concurring. In a more recent "erogenous zoning" case, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court did not rely on the *American Mini Theatres* plurality approach, but adopted the view that such zoning is content-neutral time, place, and manner regulation—any burden on speech is simply an indirect

opinions,[93] the hierarchical approach has yet to win majority acceptance.

The rationale for rejecting the thesis in the adult setting is instructive in determining how indecent speech should be treated in the school setting. *Cohen v. California*[94] rejected the application of a breach of the peace statute to convict Paul Cohen for wearing a jacket inscribed with the words "Fuck the Draft" in the Los Angeles County Courthouse. Justice Harlan, writing for the majority and citing *Tinker*, rejected the proposition that an "undifferentiated fear or apprehension of disturbance" would justify censorship. Nor could the State, as *custos mores*, remove the offensive speech.

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with

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byproduct. Nevertheless, Justice Rehnquist stated: "[I]t is manifest that a Society's interest in protecting this type of [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . ." *Id.* at 49, n.2.

In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), upholding FCC sanctions against Pacifica for broadcasting George Carlin's "Seven Dirty Words" monologue, a plurality again endorsed the hierarchical approach to speech. Justice Stevens argued that a rule against indecent speech would be primarily a matter of form rather than content control since "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18. But Justice Powell, joined by Justice Blackmun, concurring, stated: "I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is 'most valuable' and hence deserving of the most protection, and which is 'less valuable' and hence deserving of less protection." *Id.* at 726. *Pacifica* is best treated as a broadcasting case, a context in which the Court has traditionally accepted content-based federal regulation.

93. In *Falwell*, 108 S. Ct. at 882, for example, Chief Justice Rehnquist cited an admonition in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 758 (1985), stating: "this Court has long recognized that 'not all speech is of equal First Amendment importance.' " 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 government was taking sides, favoring one viewpoint over another. *See* Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L.J. 727 (1980); 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, pose a uniquely compelling case for content-based scrutiny" because of the potential for corrupt viewpoint bias.

The Court continues to treat subject matter restrictions as content-based regulation triggering a more exacting judicial scrutiny. Boos v. Barry, 108 S. Ct. 1157, 1163 (1988); Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530, 537 (1980).

94. 403 U.S. 15 (1971). *See generally* A. Bickel, The Morality of Consent 72 (1975); Cohen, A Look Back at Cohen v. California, 34 UCLA L. Rev. 1595 (1987); D. Farber, Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of *Cohen v. California*, 1980 Duke L.J. 283.

> verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.[95]

These considerations are equally applicable to student speech. Even speech that government labels indecent or offensive furthers the values of the first amendment. In part, this conclusion is due to the fact that the medium is often the message—"we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[96] The full cognitive value of particular speech is often dependent on the words and the manner by which speech is communicated. Justice Brennan, concurring in *Fraser*, stated, "Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar."[97]

Equally important in *Cohen* was Justice Harlan's recognition of the non-cognitive, emotive value of offensive speech. The full meaning of the communication to the speaker—its intrinsic worth to him—is often realized only through the particular words or manner of expression used.

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[98]

There is still another consideration in *Cohen* that applies with force to *Fraser*—the "inherently boundless" character of the legal principle being urged by the Chief Justice: was Fraser's speech indecent and offensive? Burger replied that the determination of appropriateness of speech is for school officials.[99] In short, the school board may label the speech and then suppress it free from judicial interference. The judicial deference thus accorded administrative action is excessive and threatens the free speech values elegantly

95. 403 U.S. at 24-25.
96. *Id.* at 26.
97. *Fraser*, 478 U.S. at 689-90 (Brennan, J., concurring) (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).
98. 403 U.S. at 26.
99. 478 U.S. at 683.

articulated in *Cohen*.[100] It is the equivalent of a categorical exclusion of offensive speech, or more exactly, speech that school officials label indecent, from first amendment protection. There is no demand that government demonstrate how the indecent speech impedes the educational mission or otherwise harms students. Whether this judicial deference toward suppression of "indecent speech" will be limited to *sexual* offensiveness in academic settings, such as a school-sponsored assembly with a captive audience, remains to be determined. But the tone of the *Fraser* decision gives little reason for optimism.

C. Hazelwood School District: *From Retreat to Rout*

In *Hazelwood School District v. Kuhlmeier*,[101] the Supreme Court once again abandoned traditional first amendment analysis by concluding that school principals can suppress school-sponsored student newspapers so long as they act rationally. Members of the Journalism II class at Hazelwood East High School in Saint Louis County, Missouri, wrote and edited *Spectrum*, the school newspaper. The journalism instructor delivered the page proofs for the May 13, 1983 issue to the principal, who objected to two of the articles. One of the articles discussed several students' experiences with teenage pregnancy. The principal was concerned that the students could be identified despite a guarantee of anonymity because of the small number of pregnant students at Hazelwood, and concluded that this would be unfair to the students, their boyfriends, and their parents. He thought, moreover, that some of the discussions in the article were inappropriate for younger students. The principal objected to the second article, discussing divorce, because an identified student openly criticized her father, who had not been given an opportunity to consent or respond. The principal, believing that time constraints made rewriting or editing the stories impossible, deleted two entire pages from the newspaper without providing the student writers with any notice or opportunity to respond to his concerns.

100. Professor Tribe comments 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.' " He also 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." L. Tribe, American Constitutional Law 940 (2d ed. 1988).

101. 108 S. Ct. 562 (1988). For an interesting presentation of divergent views on *Hazelwood*, compare Hafen, *supra* note 31 (favorable to *Hazelwood*), with Abrams & Goodman, End of an Era? The Decline of Student Press Rights in the Wake of *Hazelwood School District v. Kuhlmeier*, 1988 Duke L.J. 706 (critical of *Hazelwood*). *See generally* The Supreme Court-Leading Cases, 102 Harv. L. Rev. 143, 271 (1988).

The student editors were subsequently told that the two articles were "inappropriate, personal, sensitive, and unsuitable."[102]

Three former *Spectrum* staff members sued the school district and various school officials. The district court found no first amendment violation,[103] but a divided Eighth Circuit reversed.[104] The Supreme Court, 5-3, accepted the district court's findings, holding that the principal's actions did not violate the first amendment. Whereas the *Fraser* opinion was disjointed and opaque, Justice White's opinion for the Court in *Hazelwood* is painfully clear. It is based on two themes. First, Justice White invoked the nonpublic forum doctrine, finding the principal's action viewpoint-neutral and rational. Second, and even more troubling, Justice White created a distinction between speech sponsored by the school and other student speech. Under *Tinker*, schools must tolerate a student's personal expression unless it substantially interferes with work of the schools or impinges upon the rights of others. *Hazelwood*, however, holds that this standard is not applicable to speech that bears the imprimatur of the school and could reasonably be attributed to the school. School officials can regulate school sponsored student speech that occurs in "curricular" activities so long as there is some rational basis for the regulation.

Justice White introduced his two themes by repeating the admonition in *Fraser* that the determination of what speech is appropriate in fulfilling the school's educational mission is for the school officials to make, not for the federal courts.[105] He then considered the type of educational forum at issue in this case—not the schoolhouse but the school newspaper. More particularly, he asked whether the school authorities had "by policy or by practice" created a limited public forum. After examining the record, Justice White concluded that the evidence "fails to demonstrate the 'clear intent to create a

102. 108 S. Ct. at 573 (Brennan, J., dissenting) (citing *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1371 (8th Cir. 1986)).

103. 607 F.Supp. 1450 (E.D. Mo. 1985) (holding that *Spectrum* is nonpublic forum and applying more deferential standard of review).

104. 795 F.2d 1368, 1372 (8th Cir. 1986) (*Spectrum* is a public forum "intended to be and operated as a conduit for student viewpoint"; *Tinker* standard applied to find censorship unconstitutional). Ironically, the Eighth Circuit decision was handed down the same day the Supreme Court decided *Fraser*.

105. 108 S. Ct. at 567.

public forum.' " Applying rationality review, not *Tinker*, as the applicable judicial standard, the Court held that the principal's concerns were reasonable, and his censorship a rational response.[106]

Since the 1960s, courts have become increasingly enamored of such a forum focus.[107] The use of "public forum" or "nonpublic forum" analysis as a determinant of the outcome is a formalistic categorical approach which reflects a "jurisprudence of labels." The Court labels the context as a "public forum" or a "nonpublic forum," and on the basis of this categorization it applies essentially outcome-determinative principles governing the level of judicial scrutiny.[108] When speech takes place in the "nonpublic forum" the result is generally preordained: the government wins, the speaker loses. Everything turns on the categorization.

Except for the traditional public fora of streets and parks, the courts label the property simply on the basis of the government's intent to open it to general or restricted public use. Government itself, therefore, controls whether the place will be open to freedom of speech. Free speech, however, may be compatible with and even important to the business of government. This observation is especially true in the educational context. It is the compatibility of the

106. *Id.* at 567-69. The Eighth Circuit found *Spectrum* to be a public forum because student editors chose staff members, determined the articles to be written and determined their content. The newspaper published stories of general interest to Hazelwood East students and sold more than 4,500 copies during an academic year. The school board's policy on student publications said, "School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Kuhlmeier*, 795 F.2d at 1373.

107. One of the authors has previously criticized this mode of first amendment analysis. Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 Geo. Wash. L. Rev. 109 (1986). For additional criticism, see Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219 (1984); Werhan, The Supreme Court's Public Forum Doctrine and the Return of Formalism, 7 Cardozo L. Rev. 335 (1986). *See generally* Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713 (1987).

108. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983), the Court defined the scope of the three categories of fora. 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. The state may also impose reasonable content-neutral time, place, and manner regulations. The law must serve significant governmental interests and must leave open alternative channels of communication. A limited public forum is public property that the state has opened up or designated as a place for expressive activity. The same first amendment principles apply in a limited public forum as in a traditional public forum. A nonpublic forum is public property that "is not by tradition or designation a forum for public communication." Content regulation in the nonpublic forum must only be viewpoint-neutral and rational.

speech with the regular workings of government that should control the question of access to the forum.

Justice White's application of forum analysis to student speech contradicts the Court's methodology in *Tinker*. Arguably, Tinker was operating in a nonpublic forum when she entered the classroom. According to the *Hazelwood* Court's forum analysis, her speech could therefore be censored. In fact, it is hard to conceive what part of the educational enterprise might qualify as a "public forum." The very act of excluding particular student speech is itself evidence that government did not intend to create a public forum.[109]

Invocation of the rational basis standard translates into essentially no judicial review of the government's conduct. In fact, no government regulation of the nonpublic forum has ever been declared unconstitutional by the Supreme Court.[110] This abdication of judicial review goes against the principles established in *West Virginia State Board of Education v. Barnette*, where the Court expressly recognized the need to review regulations of school authorities:

> 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.[111]

Forum labeling limits judicial attention to the free speech interests of the student; they are minimized or ignored. Courts do not really assess the government's real interest in excluding the speech and the alternatives available.[112]

As an alternative mode of decisionmaking the Court could have applied a weighted balancing analysis similar to *Tinker*.[113] It could have considered the free speech values served by maintaining journalistic freedom and the traditional first amendment bias against

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109. Justice Blackmun, dissenting in Cornelius v. NAACP, Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 825 (1985), noted that using evidence of the exclusion of speakers from a forum to prove government intended it to be a nonpublic forum "makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum."

110. In Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 107 S. Ct. 2568, 2572 (1987), the Court did hold that a regulation banning all first amendment activity at the airport was so broad that it was unconstitutional regardless of the designation of the forum.

111. 319 U.S. 624, 637 (1943).

112. *See infra* text accompanying notes 158-79, criticizing the formalism involved in such a categorical analysis.

113. *See* Justice Brennan's dissenting opinion discussed *infra* in text accompanying notes 117-22.

prior restraint. The burden could have been placed on the government to demonstrate that the censorship was narrowly tailored to effectuate overriding interests of the school. The *Tinker* balancing test would not necessarily provide a different result from use of public forum analysis. A judge using weighted balancing could uphold the principal's decision on the *Hazelwood* facts. The *Tinker* standard, however, at least requires school officials and courts to give weight to student expression and requires that government provide meaningful reasons for its actions.

Justice White employed a second theme in *Hazelwood* that is even more deferential to government than the nonpublic forum doctrine. He created a whole new category of student speech that is outside the gambit of *Tinker* by distinguishing between "personal expression that happens to occur on the school premises" and "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."[114] Only the former category is still governed by *Tinker*. In the latter category, "[e]ducators are allowed to exercise greater control," and their regulations will be upheld "so long as their actions are reasonably related to legitimate pedagogical concerns."[115] A decision lacks such a reasonable relation only if it has "no valid educational purpose."[116] In short, when school-sponsored speech is involved, government need act with only minimal rationality.

Justice Brennan, joined in dissent by Justices Marshall and Blackmun, sharply attacked not only the lack of any precedent for this free speech/school-sponsored speech dichotomy but the majority's three reasons for creating the dichotomy. First, according to the dissent, the school officials' desire to assure that curricular objectives are achieved would not warrant abandoning *Tinker*: "[W]e need only apply it."[117] School authorities may correct "poor grammar, writing, or research," but they may not censor speech simply because of its content or viewpoint.[118] The Court's second reason for categorizing freedom of speech, shielding students from objectionable and sensitive material, is, as Brennan proclaimed, not a

114. 108 S. Ct. at 569-70. For a defense of *Hazelwood*'s two track approach, see Yudof, Personal Speech and Government Expression, 38 Case W.L. Rev. 671 (1988).

115. 108 S. Ct. at 570-71.

116. *Id.* at 571. Only then is the first amendment "so 'directly and sharply implicate[d]' [Epperson v. Arkansas, 393 U.S. 97, 104 (1968)] as to require judicial intervention to protect students' constitutional rights."

117. 108 S. Ct. at 576 (Brennan, J., dissenting).

118. *Id.* at 576-77 (Brennan, J., dissenting).

"general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[119] Acceptance of such "a vaporous non-standard," argues Brennan, would inevitably lead to impermissible viewpoint discrimination.[120]

Justice Brennan acknowledged that the majority's third justification—that a student's view may be wrongfully perceived to be the school's own expression—has some merit. He suggested, however, that less oppressive alternatives than removal of two pages of the paper were both available and capable of accomplishing the school's objective without infringing on the students' rights.[121] Even if a rationality standard were to apply to the student speech, Brennan contended that the principal did not act reasonably by using a "paper shredder" instead of "more sensitive tools."[122] Unfortunately, Justice White accepted the paper shredder approach.

Also troubling is the seemingly endless reach of Justice White's school-sponsored speech concept. "Curriculum" is no longer limited to the basic subjects taught, but includes marginal activities like school plays, school newspapers, and clubs, as well as any activity that might give the appearance that it might be sanctioned by the school. In effect, *Hazelwood* nullifies *Tinker* by severely limiting the occasions when *Tinker* applies.[123]

Both *Hazelwood*'s nonpublic forum and school sponsored speech approaches are formalistic, doctrinal and outcome-determinative. Absent from either perspective is any recognition that protecting

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119. *Id.* at 577 (Brennan, J., dissenting).

120. *Id.* at 577-78 (Brennan, J., dissenting).

121. *Id.* at 579 (Brennan, J., dissenting). He suggested that the use of a disclaimer or a school statement disassociating itself from the article would be more sensitive to first amendment concerns.

122. *Id.* at 579-80 (Brennan, J., dissenting). The principal excised six articles because he objected to two. Rearranging the layout or delaying publication, he argues, would have been preferable.

123. Justice Brennan in a blistering dissent criticized the Court's abandonment of *Tinker*:

> The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American System," and "that our Constitution is a living reality, not parchment preserved under glass," the Court today "teach[es] youth to discount important principles of our government as mere platitudes." The young men and women of Hazelwood East expected a civics lesson, but not the one Court teaches them today. [citations omitted].

108 S. Ct. at 580.

student speech in "curricular" contexts can serve important values. While school officials have legitimate and even compelling reasons for silencing particular student speech in particular contexts, that is no reason to abandon *a priori* the values and principles articulated in *Tinker* for a whole, open-ended category of student speech. Both free speech values and educational needs can be faithfully protected by the weighted balancing of *Tinker*.

The court has established on numerous occasions that all administrative actions, including curricular decisions and educational policy generally, must be consistent with constitutional norms.[124] School officials should not be able to shut off student speech simply because it occurs in connection with a school event. When government manages the public's property or sponsors speech-related events, it remains government action subject to constitutional constraints. First amendment values may be vital when government "property" or activities are involved, and the government interest in regulating the speech may be minimal. The deferential approach in *Hazelwood* when government-sponsored speech is involved is nothing more than an abdication of the judicial obligation to protect first amendment rights of student free speech. Perhaps Justice Black has won the war.

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It has been argued that "[t]he [*Hazelwood*] Court's introduction of the public forum doctrine into the student speech context and its articulation of a novel 'school-sponsored speech' doctrine threaten to reduce *Tinker* to virtual irrelevance."[125] We agree. Furthermore, the *Fraser* opinion, in spite of Justice Brennan's protestations in *Hazelwood* to the contrary,[126] is fundamentally at odds with the methodology and spirit of *Tinker* and its free speech paradigm. The outcome of *Fraser* and *Hazelwood* is judicial abdication of meaningful federal court review of administrative regulation of student speech. While *Tinker* envisioned active judicial scrutiny of restraints on student speech, there is no evidence that the lower courts were engaged in a massive assault on the school bureaucracy. Judges, after all, are themselves members of the government and are not likely to share the values and attitudes of student claimants.

Perhaps part of the explanation for the retreat from *Tinker* lies in the fact that *Tinker*, involving an anti-Vietnam War protest, was a

124. *See infra* notes 155, 156 and 177.
125. The Supreme Court-Leading Cases, 102 Harv. L. Rev. 143, 276 (1988).
126. *Hazelwood*, 108 S. Ct. at 575 (Brennan, J., dissenting).

child of the 60s and of the Warren Court. *Fraser* and *Hazelwood* are progeny of the 80s and of the Burger and Rehnquist Courts. The two sets of decisions are very much products of their times, exhibiting a marked difference in the dominant paradigm used, in values regarding the operation and governance of the educational forum, and in styles of judicial constitutional decisionmaking. The variance in judicial decisional styles becomes the focus of the next section, as we examine how disparate educational values and issues of educational governance are to be reconciled with constitutional rights.

III. Redressing the Balance

> [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 adjust to his environment.[127]

In both *Tinker* and *Fraser*, the Court confronted the problems of maintaining the academic forum's need for authority and order in the face of alleged disruption produced by student speech. The Court focused on the process, *i.e.*, the *conditions*, needed for the schools to pursue the educational mission. In *Fraser*, and again in *Hazelwood*, the focus shifts to the *content* of the educational mission itself. In both cases the Court asked: Who decides what is to be communicated in the classroom? Who determines what is and what is not to be taught as part of the curriculum? Yet there is a commonality among all three Supreme Court cases. Each case confronts the question of how the conflict of interests and values over the operation of the educational system are to be handled, and how the governing of the academic forum is to be accommodated to constitutional imperatives.

The educational arena involves a number of competing interests, with differing perceptions as to how school authority and the concern for order is to be reconciled with academic freedom, and as to how the ability of schools to inculcate values is to be reconciled with

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

the concern that school officials not cast "a pall of orthodoxy" over the academic marketplace.[128]

> Students, parents, teachers, and school boards each claim the right to structure the value training of students. Each group is uncomfortable allocating the responsibility to decide to the others. It therefore comes as no surprise that the history of curricular choices in public schools has often been one of conflict.[129]

In the past, these competing interests waged their battle in the educational marketplace. Schoolboard meetings, PTA sessions, and faculty meetings provided the locus for the battle. Increasingly, and especially since *Brown v. Board of Education* and the civil rights battles of the 1960s,[130] participants in the educational debate, including students, have looked to the courts to referee the contest, to define the rules of the game, and to assure that relevant voices are not silenced. Courts have become a vital arbiter for educational decisions alleged to impinge on substantive constitutional guarantees.[131]

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128. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (holding unconstitutional a New York law requiring public employees, including college teachers, to sign loyalty statements).

129. Ingber, *supra* note 35, at 40. Professor Ingber differentiates between controversial and noncontroversial curriculum choices in the extent to which interest group conflict is stimulated. "Deciding whether to teach plant fertilization in biology is significantly less problematic than deciding whether to teach sex education. . . . Similarly, standards in aesthetics, religion, politics, and morality are more highly variable than in most other subjects." *Id.*

Professor Levin similarly notes that the "mission of schools as the transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions." Levin, *supra* note 40, at 1649. *See also* Hafen, *supra* note 25, at 670; Garvey, *supra* note 28.

130. Professor Hafen asserts that *Brown* introduced "[c]hild advocacy litigation in the form of public interest class actions." He argues that this development eroded the authority school officials need to exercise in order to foster an appropriate, disciplined learning environment. Hafen, *supra* note 25, at 682-88.

131. The factual contexts in which the courts have been asked to intervene in school conflicts are varied. For a sampling of the Supreme Court's involvement, in addition to the student speech trilogy and the desegration cases, see Epperson v. Arkansas, 393 U.S. 97 (1968)(school curriculum); *Pico*, 457 U.S. 853 (1982) (removal of books from school libraries); Pickering v. Board of Educ., 391 U.S. 563 (1968) (procedural due process and teacher rights of expression); Mount Healthy City Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (same); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exemptions from state compulsory school attendance laws); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (school finance reform); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave for teachers); *Keyishian*, 385 U.S. 589 (academic freedom); Healy v. James, 408 U.S. 169 (1972) (college student rights of association); Widmar v. Vincent, 454 U.S. 263 (1981) (college student speech, free exercise of religion, and association rights); Wallace v. Jaffree, 472 U.S. 38 (1985) (school prayer); Goss v. Lopez, 419 U.S. 565 (1975) (student discipline and procedural due process); Ingraham v. Wright, 430 U.S. 651 (1977) (student discipline); Board of Curators v. Horowitz, 435 U.S. 78 (1978) (procedural due process for academic dismissal), New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of student's purse); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender-based discrimination in admission to schools or programs); Wood v. Strickland, 420 U.S. 308 (1975) (liability of schools for

A. The Competing Values of Freedom and Order

It has been said that "[t]he most important characteristic schools share in common is a preoccupation with order and control."[132] Teachers and administrators alike are often judged in terms of their ability to maintain order and discipline, since these conditions are vital to performing the educational mission.[133] Even as *Tinker* stressed the free speech rights of students, it affirmed "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[134] Speech that "intrudes on the work of the schools or the rights of other students" can legitimately be suppressed.[135] Maintenance of authority and order, in the abstract, are legitimate, indeed compelling, interests of government.

Yet, the Carnegie Foundation for the Advancement of Teaching warned that "[t]he claims of order compete with the claims of freedom."[136] Bureaucracies generally—and the schools are a bureaucracy—tend towards conformity and the suppression of deviance and dissent.[137] These tendencies become even more intense as

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violating rights of students); Carey v. Piphus, 435 U.S. 247 (1978) (nature of damages for school official's wrongs). The involvement in questions of educational policy on the part of lower federal courts and state courts has been even more pervasive. *See generally* Kirp & Yudof's Educational Policy and the Law (M. Yudof, D. Kirp, T. Van Geel & B. Levin eds. 2d ed. 1982); Levin, *supra* note 40, at 1649-50.

132. C. Silberman, Crisis in the Classroom: The Remaking of American Education 122 (1970). He continues: "In part, this preoccupation grows out of the fact that school is a collective experience requiring, in the minds of those who run it, subordination of individual to collective or institutional desires or objectives." *Id.*

133. *See generally* J. Anderson, Bureaucracy in Education (1968). Conformity and effectiveness, unfortunately, become synonymous in evaluating teacher performance. *Id.* at 18-19. As a result, "[p]roper behavior becomes understood as rigid adherence to rules and conformity, regardless of the circumstances or the merits of the individual case." *Id.* at 21. Teachers trying to improve performance evaluations focus on adhering to prescribed rules, maintaining order, and not improving the quality of education in the classroom. C. Silberman, *supra* note 132, at 128, states: "This preoccupation with efficiency, which is to say with order and control, turns the teacher into a disciplinarian as well as a timekeeper and traffic manager. In the interest of efficiency, moreover, discipline is defined in simple but rigid terms: the absence of noise and movement." *Id.*

134. 393 U.S. at 507.

135. *Id.* at 508. Professor Hafen contends that the educational reforms of the 1960s and 1970s reducing school officials' discretionary authority was linked to a decline in educational achievement. Hafen, *supra* note 31, at 666, 685-88. Given the multiplicity of factors that affect educational achievement, this is a highly questionable hypothesis.

136. E. Boyer, High School: A Report on Secondary Education in America 141 (1983). *See generally* A. Gutmann, Democratic Education (1987); C. Silberman, *supra* note 132, at 123.

137. *See* A. Downs, Inside Bureaucracy (1967); J. Medeiros & D. Schmitt, Public Bureaucracy: Values & Perspectives (1977); M. Weber, Essay on Bureaucracy, in Bureaucratic Power in National Politics (F. Rourke, ed., 1965).

schools become more massive and complex. The increasing administrative demands imposed on principals and teachers encourage routinization and the removal of ideas, issues, topics or conduct having a potential for disorder.[138] Maintenance of authority and control become ends in themselves rather than means for fulfilling the institutional educational objectives.

Despite the acknowledged need for order, freedom and growth are stifled when speech that is offensive or annoying is suppressed based simply on allegations that it is "disruptive" to the educational mission. The objective of developing informed, mature persons and citizens is impeded by excessive, unnecessary regimentation. Professor Betsy Levin observes: "Education . . . requires some degree of order within the institution to carry out the educational mission. On the other hand, if the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society."[139] To ensure that children learn proper respect for constitutional values, the need for order and discipline must not be used to purge the school of speech by using labels and unsubstantiated conclusions of disruption. Constitutional freedom generally, and freedom of speech in particular, should be curtailed only upon a state showing that the particular speech in question actually disrupts and intrudes on the educational mission.

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138. Kvaraceus, Fantasies in a Place called 'School,' in Reactions to Silberman's Crisis in the Classroom 70 (A. Passow ed. 1971), claims that "[t]he community school is now running the risk of becoming an omnibus agency serving all the needs of the people and their families." *See also* E. Boyer, *supra* note 136, at 20, 63; C. Silberman, *supra* note 132, at 123.

139. Levin, *supra*, note 40, at 1649. Professor Levin draws upon John Seldin's often quoted phrase: "Do as I say, and not as I do" to make the point that society sends students mixed messages. *Id.* at 1660. If schools exhibit this "do as I say, not as I do" approach, then schools may well fail to accomplish many of their goals. For example, "[c]hildren are unlikely to internalize the value of a belief in individual autonomy if their schools appear to trivialize and ignore it systematically. Consequently, public recognition of first amendment rights for students itself serves a necessary indoctrinative function." Ingber, *supra* note 35, at 73.

Justice Brennan, writing in dissent in New Jersey v. T.L.O., 469 U.S. 325 (1985), criticized the majority for concluding that while the fourth amendment applied to protect students in schools, it did not require a warrant or probable cause prior to conducting a search. *Id.* at 361. Justice Brennan contended that this differing standard sent children the wrong message that government does not honor constitutional protections. *Id.* at 354. If a child is to learn democratic principles, Brennan argued, he must experience democracy.

B. Value Inculcation and the Escape from Indoctrination

The tension reflected in *Tinker* (and to a lesser extent in *Fraser*) between order and discipline and freedom of expression is only part of the value conflict in the educational marketplace. Indeed, while it is important, it is probably the simpler part of the problem. *Hazelwood* focuses on the far more difficult issue of who controls the content of the educational curriculum.

The purpose of education is to produce individuals capable of functioning in the adult world. This is the heart of the educational mission—to prepare the nation's youth for adulthood both as persons and as citizens.[140] In performing this educational mission, school officials inevitably make choices that lend government support to particular viewpoints or ideas. Value neutral education is simply not possible.[141] Each time school officials choose particular textbooks, library books or curriculum formats, they implicitly, if not explicitly, accept one value or viewpoint over another. Western democracy is favored over communism; morality prevails over license; family life is a favored traditional value. Students are socialized and acculturated through the educational system and this process is not achieved through value neutrality. Yet, the Constitution imposes limits on what schools can teach.

Justice Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[142] How is this principle forbidding school officials from casting a "pall of orthodoxy"—this prohibition against value and belief indoctrination—to be reconciled with the power, and duty, of the schools to inculcate socially-accepted values?

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140. Commentators like Professor Diamond, adopting the communal paradigm, argue that the courts should apply a rationality standard to student speech cases. They reason, at least in part, that schools need broad discretion if they are to produce fully mature, responsible adults. *See* Diamond, *supra* note 20. *See also* Hafen, *supra* note 25. On the other hand, commentators emphasizing the liberal's free speech paradigm stress the role of speech in producing individuals capable of thinking, acting, and living on their own. *See, e.g.*, Ingber, *supra* note 35, at 18-20; Levin *supra* note 40, at 1653-54; Garvey, *supra* note 28. *See generally* Arons & Lawrence, The Manipulation of Consciousness: A First Amendment Critique of Schooling, 15 Harv. C.R.-C.L. L. Rev. 309 (1980). Thus, the two camps differ on the *means* for creating rational adults.

141. *See, e.g.*, Diamond, *supra* note 20, at 499 ("value inculcation . . . has been the tradition of public education since the beginning of the American republic"); Ingber, *supra* note 35, at 25, 30; Levin, *supra* note 40, at 1654.

142. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Some commentators would respond to the dilemma by denying the State the power to inculcate values.[143] We believe such efforts to redefine the educational mission in an effort to achieve value neutrality are unrealistic and undesirable. While the model of liberal education reflected in such approaches posits a freely choosing, uncoerced person, the reality of compulsory education itself compromises the model. Political society has made the value choice that education is desirable and necessary for the child. Accordingly, education is compulsory. The individual is constrained; he is not free to choose to remain uneducated.[144] While parents have broad power over their children, they cannot choose to keep them uneducated. Socialization into the values of the society, including the values of republican democracy, are to be achieved, at least in part, through the schools. Horace Mann, an early advocate of public education, argued: "[N]o political structure . . . can inherently guarantee the rights and liberties of citizens, for freedom can be secure only as knowledge is widely distributed among the populace."[145]

143. For example, Professor van Geel, The Search for Constitutional Limits on Government Authority to Inculcate Youth, 62 Tex. L. Rev. 197 (1983), contends that the authority of schools must be subject to the traditional limitations of the first amendment in order to allow the autonomous development of student beliefs. In order to accomplish this objective, van Geel argues for the establishment of a "principle that would protect students from any effort by public schools to inculcate pupils with political ideas, attitudes, viewpoints, ideologies, values, or beliefs." *Id.* at 239. To achieve this end:

> (1) When a school provides instruction on matters of a political or moral nature, it must adequately and objectively cover the issues explicitly and implicitly touched upon by the materials;
>
> (2) The coverage must be fair in that it accurately and objectively reflects the opposing view on the issues; and (3) The instruction must devote reasonable attention to the major opposing views.

Id. at 290.

Similarly, Professor Kamenshine challenges political value inculcation as "political establishment" subject to strict scrutiny review: "Establishment problems exist whenever a public school advocates a particular political viewpoint to the exclusion of others." Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 Calif. L. Rev. 1104, 1133 (1979). He contends that the need for infusion of values in the schools, "assumes the existence of 'correct' or at least uniformly acceptable, political values." But he argues that "[s]hort of general concepts of social responsibility . . . no such values exist. Moreover, attempts to indoctrinate students with values of debatable acceptability may raise compelled adherence problems." Further, Kamenshine notes that there are alternatives to the State for value inculcation: "Families, religious organizations, youth groups, and other institutions adequately perform this function. And in view of the lack of general consensus about important values, means such as these which provide a choice among ideological orientations are more consistent with free speech concerns." *Id.* at 1134.

144. *See* Shiffrin, *supra* note 38, at 648-49. He notes: "To make education compulsory was itself to challenge liberal ideology." *Id.* at 648.

145. H. Mann, The Republic and the School 7 (L. Cremin ed. 1957). Mann is credited with establishing a modern public education system in Massachusetts that became the model for the rest of the nation. *See, e.g.*, Family Encyclopedia of American History (1975). "He was perhaps more responsible than any other other person of his

An alternative model to the value-neutral approach would allow school officials to do as they please so long as they have some rational pedagogical justification. This position, adopted in *Hazelwood*,[146] is even more unacceptable. If children are to develop the faculties necessary for individual autonomy, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die."[147] By manipulating the classroom's marketplace of ideas through censorship and suppression, school officials can adversely affect the child's development. There may be a need to shelter the child from certain ideas, not as a sign of disapproval of the idea, but in order to prevent harm to the child. But the justification for paternalism is situational and depends upon the nature of the message, the reason for suppression, and the age and maturity of the children.[148] The State must justify the suppression of competing ideas.

If school officials enjoy carte blanche in their educational choices, then compulsory attendance, combined with students' inability to evaluate critically the school's message, creates a dangerous threat of indoctrination. Government will be in the position to propagandize under the guise of educating. Students tend to give great weight to the messages their teachers profess. The ability of teachers to reward and punish students adds to the inherent coercion of the academic setting. Given this potential for control, "public schools are a communication theorist's dream."[149]

The question then is how do we resolve the conflict between inculcation and indoctrination? In other words, how do we allow

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era for driving home the need for an educated citizenry as essential to a democracy." *Id.* at 679.

146. 108 S. Ct. at 571. *See supra* text accompanying notes 114-16. *See generally* Hafen, *supra* notes 25 and 31, and Diamond, *supra* note 20, who argue for this position.

147. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

148. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (applying a content/context analysis to "indecent" speech broadcast into private places where minors are present). *See also* Tushnet, *supra* note 29, at 749-52 (discussing variations in child's age and maturation as they bear on judicial review).

149. M. Yudof, When Government Speaks 213 (1983). Yudof also observes: "The power to teach, inform, and lead is also the power to indoctrinate, distort judgement, and perpetrate the current regime." Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863, 865 (1979). Professor Ingber similarly refers to public schools as an indoctrinator's dream. Ingber, *supra* note 35, at 21.

schools to inculcate basic values while protecting the rights of students to develop into self-governing individuals, capable of operating in the marketplace of ideas, and free citizens capable of performing their democratic duty?

The best way to inculcate values while preventing indoctrination is to allow students to be exposed to a variety of opinions and ideas. The most viable approach to reconciling the problem posed by competing educational values is to assure that voices other than that of school officials will be heard.

> [T]he First Amendment . . . does not tolerate laws that cause a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . . The Nation's future depends upon leaders trained through the wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[150]

The State may and does constitutionally teach, inculcate, and endorse selected values such as democracy, morality, and traditional family life. What the State cannot do is censor, suppress or exclude competing ideas, beliefs and values, unless it can establish an overriding justification. As the Court stated in *Tinker*, the schools must not be "enclaves of totalitarianism."[151] Students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[152]

Justice Blackmun, concurring in *Board of Education v. Pico*, which involved the removal of offensive books from a school library, similarly emphasized this first amendment limitation on the State's ability to inculcate values.[153] School officials have no affirmative constitutional duty to provide instruction in competing values; they may teach certain values and not teach others. What school officials cannot do is attempt to shield students from certain ideas that officials find distasteful.[154] Purging the school environment of speech

150. *Keyishian*, 385 U.S. at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960) and United States v. Associated Press, 52 F. Supp 362, 372 (1943)).

151. *Tinker*, 393 U.S. at 511.

152. *Id.* at 511. Economist Henry Levin observes that "schooling for democracy must ensure exposure to different views in controversial areas, a discourse among those views, and the acceptance of a mechanism for reconciling the debate." Levin, Education as a Public and Private Good, 6 J. Pol'y Analysis and Mgmt. 628, 636 (1987).

153. 457 U.S. 853, 879 (1982) (Blackmun, J., concurring in part). *Pico* elicited seven different opinions, demonstrating the difficulties posed by issues of value inculcation.

154. *Id.* Justice Blackmun would have prohibited the school boards from removing books "for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of

simply because it is offensive or annoying is constitutionally unacceptable; the State must have better reasons for excluding speech from the academic marketplace.

The threat of indoctrination is diminished when alternative values and ideas may be presented. Students presented with more than one perspective are freer to choose which values, ideas, and opinions they prefer. Moreover, enhancing the deliberative opportunities for maturing children similarly enhances first amendment values. They can increase their abilities to participate rationally in the adult marketplace of ideas and grow in self-awareness through exposure to competing ideas. By seeing the State itself tolerating diversity of views, students can achieve a better understanding of democratic citizenship.

C. The Judicial Role in the Academic Marketplace

The educational forum involves a panoply of actors representing a wide range of interests. Federal and state educational officials, school boards, principals, teachers, students, and parents all help to define the educational mission. While the courts' role in this dialogic process is controversial, the validity of judicial review of educational policy has been established in a large body of legal precedent.[155] Even though judicial action seldom provides definitive answers to conflicts, the threat of judicial intervention reshapes the dispute and becomes part of the give and take of the dialogue.

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the ideas involved." *Id.* at 879-80 (emphasis in original). See Justice Harlan's dissent in *Tinker*, 393 U.S. at 526, which also looks to motivation.

155. State legislators may have ultimate responsibility for the educational system, but that does not mean that they can require the teaching of creationism or preclude the instruction of evolution. *See* Edwards v. Aguillard, 107 S. Ct. 2573 (1987); *Epperson*, 393 U.S. at 97. School boards may define operative educational policy, but the school board cannot choose to pursue a policy of racially segregated education even if it is believed to be educationally desireable and more conducive to peace and order in the schools. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Washington v. Seattle School Dist., 458 U.S. 457 (1982); Milliken v. Bradley, 418 U.S. 717 (1974). Officials may consider that beginning the school day with prayer or other forms of religious worship is valuable in molding a more moral and ethical citizenry, but such an educational policy is not consistent with the Constitution. *See* Wallace v. Jaffree, 472 U.S. 38 (1985); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). A school board (or parents or a principal) may determine that certain books endorse views that are inimical to proper American values, but that does not mean they are free to purge the school library of the offending books. *See Pico*, 457 U.S. 853. Schools may promote order and discipline in the schoolhouse, but they cannot punish students who engage in symbolic speech merely because it is distracting or offensive or upsetting. *See Tinker*, 393 U.S. at 309.

After *Tinker*, school boards are likely to anticipate judicial review of any decision to suppress peaceful student political protest. Principals are less likely to feel constitutional constraints in editing the school-sponsored newspaper after *Hazelwood*. Judicial action and reaction become part of a dialogic process whereby educational and legal policy is shaped and reshaped. To attempt to exclude the courts from the educational marketplace is not only inconsistent with the functions of judicial review, it is to lose vital communication regarding the values and principles embodied in the educational mission.[156] *Tinker*, *Fraser*, and *Hazelwood* indicate that the character of the judicial participation depends in large part on the methodology employed by the reviewing court. As Ronald Dworkin observed in an introduction to the study of decisionmaking: "It matters how judges decide cases."[157]

One methodology employed in the student speech cases is a formalistic, conceptual, categorical mode of analysis. This "doctrinal formalism" involves the use of fixed rules, or "bright lines," in an effort to confine and control judicial discretion.[158] An effort is made to confine judicial review by predetermining rules of decision, perhaps out of concern that the judicial review power will be abused, perhaps because of uncertainty over the legitimacy of judicial review in democratic society,[159] perhaps because of a traditional way in which the art of judging is conceived,[160] or perhaps because of concern over the "correctness" of judicial value choices. But the

156. As the Court stated in *Barnette*, "The Fourteenth Amendment, as now applied to the states, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." 319 U.S. at 637.

157. R. Dworkin, Law's Empire 1 (1986).

158. It has been suggested that formalism, with its emphasis on rules of law and bright-lines for decisionmaking, "is about power and its allocation." Schauer, Formalism, 97 Yale L.J. 509, 543 (1988). By vesting decisional authority in one decision maker and disabling another, the legal rule determines "who governs" regarding the subject of the rule. Rules purport to limit the discretion of the judge to fashion a decision responsive to the particular fact context. The factors governing decisions are, at least theoretically, predefined for the judge, and the discretion of a judge to do justice in the case is thereby limited. Schauer concludes: "formalism therefore achieves its value when it is thought desirable to narrow the decisional opportunities and decisional range of a certain class of decisionmakers." *Id.* at 544.

159. *See* Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502 (1985) (discussing formalism and anti-formalist responses to the counter-majoritarian difficulty, i.e., judicial review enables judges to invalidate the acts of the people's elected representatives).

160. *See* H. Hart, Philosophy of Law, Problems of Legal Reasoning, in 6 Encyclopedia of Philosophy 270-71 (1967).

use of formalism distorts the process; if adjudication is to be meaningful, courts need to balance legitimate interests.[161]

The triumvirate of Supreme Court student speech cases reflects the multiple faces of formalism, or "ruleness." In *Fraser*, for example, Chief Justice Burger excluded speech labelled "sexually indecent" from the full protection of the first amendment. Such categorization seeks to constrain judicial choice by confining it to the narrow process of defining what is "sexually indecent" speech. The labelling methodology limits the courts' ability to articulate and evaluate competing interests;[162] it treats "as definitionally inexorable that which involves nondefinitional, substantive choices."[163] Once the speech is labelled as sexually indecent, the decisional outcome follows virtually automatically.[164]

Justice White's *Hazelwood* opinion is also steeped in formalism, relying on definitions of "school-sponsored speech" and the "nonpublic forum" doctrine. While Justice White admitted that in theory the court may review administrative action controlling curricular speech, in actuality he accepted a rule of judicial deference and

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161. The opposing position to formalism is variously referred to, *inter alia*, as functionalism, instrumentalism, and anti-formalism. It emphasizes rule-skepticism, interest balancing, and the use of standards rather than rules.

> Understanding the way in which rules truncate the range of reasons available to a decisionmaker helps us to appreciate the distinction between formalism and functionalism, or instrumentalism. Functionalism focuses on outcomes and particularly on the outcome the decisionmaker deems optimal. Rules get in the way of this process, and thus functionalism can be perceived as a view of decisionmaking that seeks to minimize the space between what a particular decisionmaker concludes, all things considered, should be done and what some rule says should be done. Rules *block* consideration of the full array of reasons that bear upon a particular decision in two different ways. First, they exclude from consideration reasons that might have been available had the decisionmaker not been constrained by a rule. Second, the rule itself becomes a reason for action, or a reason for decision.

Schauer, *supra* note 158, at 537.

162. Of course, some opportunity for interest balancing exists in defining terms of art, providing the Court with a judicial escape hatch for egregious cases of official misconduct. Concepts such as obscenity, commercial speech, defamatory speech made with "actual malice," child pornography, and fighting words—by which speech is categorically excluded from first amendment protection—are not self-defining. In the process of defining the category and the elements of the resulting rule, values come into play and interests are balanced. For a discussion of "definitional balancing," see M. Nimmer, *supra* note 13, at § 2.03.

163. Schauer, *supra* note 158, at 513.

164. This is not intended as a criticism of all uses of categorization in lawmaking or decisionmaking. Indeed, categorization is involved when cases are simply classified as free speech or "special exception" situations. *See* Schauer, Categories and the First Amendment: A Play In Three Acts, 34 Vand. L. Rev. 265 (1981). We are only challenging the use of categorization that is determinative of the outcome as a method of deciding student speech cases involving legitimate values and claims to be accommodated. For a criticism of such use of the categorical approach in first amendment law, see Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1983).

avoidance achieved through an essentially meaningless standard of review.[165] Whether the lower courts in applying *Hazelwood* will adopt a position of rubber-stamping school administrative action in the "curriculum" remains to be determined.[166]

Formalism is admittedly attractive. Reliance on discretion-confining rules provides an aura of certainty, predictability, and objectivity. Indeed, when a court adopts a position of judicial nonjusticiability—of judicial avoidance of decision—there is a certainty of result whenever the rule is invoked. Is there, however, objectivity and predictability regarding the occasions for the invocation of the rule? Is it predictable when material will be labeled "sexually indecent," or when speech will be categorized as "school-sponsored" or as part of the "curriculum"?[167] If the invocation of the rule merely diminishes the standard of judicial review but the review remains meaningful and represents a judicial judgment of the reasonableness of the official conduct, much of the perceived evils of subjectivity and uncertainty return.

The reasons for our rejection of the formalistic methodology in student speech cases are not limited to the problems of definition and categorizing. We question the desirability of fashioning categorical and doctrinal rules that seek to constrain significantly judicial discretion by triggering rules of decision that ignore particular fact contexts and dictate outcomes. When formal rules are used to limit judicial action in the student speech cases, the courts tend to

165. Judicial deference can be so extreme as to leave government action that is theoretically open to judicial review non-justiciable in fact. The result is a de facto political question doctrine where "the Court has, as a technical matter, affirmatively exercised its power of judicial review [but where] as a practical matter the Court has effectively engaged in the prudential surrender of its review power to the political branches." Redish, Judicial Review and the "Political Question," 79 Nw. U.L. Rev. 1031, 1037 (1984-85). Commenting on Korematsu v. United States, 323 U.S. 214 (1944), Professor Redish notes: "The aspect of the Court's decision that renders it a de facto exercise of the political question doctrine is not its ultimate conclusion but rather its total unwillingness to examine the political branch's asserted factual basis to support its claim of necessity." *Id.* at 1038. Much the same could be said of the Court's decisions in *Fraser* and *Hazelwood*.

166. For an example of post-*Hazelwood* judicial sanctioning of school removal of books deemed offensive, see Virgil v. School Bd. of Columbia County, 862 F.2d 1517 (11th Cir. 1989), involving the removal of *Lysistrata* and *A Miller's Tale* from the classroom.

167. Professor William Clune notes that "[F]ormalism . . . strives for . . . separation of law from reality by giving increased attention to definitions, that is, the orderliness and internal consistency of concepts." Clune, The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment, 1975 Sup. Ct. Rev. 289, 291.

deal with abstract interests of government, rather than with the particularized government interests actually at stake in the case. Assuming that the particular government interest is compelling, the need for the particular law in order to achieve this interest becomes increasingly unimportant. Actual burdens imposed by the law on individuals or groups tend not to be considered.

In both *Fraser* and *Hazelwood*, for example, the interest of government is deemed so important that the more demanding standards of judicial review are abandoned. Note that it is not the government interest in the particular factual context that produces this reorientation of judicial review. It is the abstract government interest, such as the need for authority and discipline in the schools or government responsibility for inculcation of values, that underlies the demand for confined judicial review. Whether or not the government interest is, in fact, seriously undermined by the regulated conduct is not really evaluated. What the court does not consider, however, are means that would be less burdensome on the rights at stake while still allowing the government to achieve its ends. The values of freedom of speech burdened by government regulation are trumped at the stage of selecting the standard of review, before any judicial weighing of the interests implicated by the particular case under consideration.[168]

There is an alternative to such formalistic judicial decisionmaking—judicial interest balancing. Balancing methodologies involve identifying the actual interests at stake in the dispute, with the outcome of the case dependent on a comparison and weighing of the competing interests.[169] The focus is on the actual facts; decisions are made on a case-by-case basis. It is not the abstract government interest that is evaluated, as in formalistic analyses, but the governmental regulatory interest that is actually implicated by the factual

168. Consider Judge Levanthal's admonition: "Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is acting not reasonably." Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir.) (en banc) (Levanthal, J., concurring), *cert. denied*, 426 U.S. 941 (1976).

169. *See generally* Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987) (questioning the form and implications of balancing as method of constitutional interpretation); Bogen, Balancing Freedom of Speech, 38 Md. L. Rev. 387 (1979) (reconciling Supreme Court's balancing of interests in first amendment cases with general theory that first amendment prohibits laws abridging free speech); Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755 (1963) (discussing the Court's allocation of duties of parties, based upon their competency to deal with the issue at hand, as means of balancing competing interests); Henkin, Infallibility Under Law: Constitutional Balancing, 78 Colum. L. Rev. 1022 (1978) (balancing viewed as essential element of constitutional construction and of jurisprudence of particular clauses).

context of the case. If formalism emphasizes predictability of outcome and objectivity, balancing stresses flexibility and fairness in dealing with the competing interests actually at stake in the dispute.[170] Of course, for the critics of interest balancing, the appropriate adjectives are instead "subjectivity" and "manipulability."[171] And, as in the case of formalism, there are many forms of balancing.

In "ad hoc" balancing, the court identifies the competing interests seeking recognition and applies a test that is not necessarily outcome-determinative. While this mode of analysis is far more acceptable than rationality review, it nevertheless treats government interests and first amendment values as essentially fungible. No preference is given to the speech claim; no demand for overriding or substantial government interests and for narrowly tailored means is imposed. In fact, as Chief Justice Burger's opinion in *Fraser* demonstrates, in application ad hoc balancing often becomes little more than a rationality test. Chief Justice Burger accorded the official conduct a broad deference and strong presumption of validity, even while purporting to apply a balancing analysis.

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170. Consider the following evaluation of the debate:

> The Supreme Court Justices spend much time, space, and energy quarreling over whether to draw bright lines or formulate balancing tests. The criticisms and defenses of each approach are repetitive because each technique has characteristic strengths and weaknesses. Bright lines are easier to administer, afford greater predictability, limit unwanted discretion, and provide greater certainty and thus better notice. Yet they are rigid, potentially arbitrary, and frequently ignore relevant aspects of reality. Balancing tests permit courts to adapt the law to changing circumstances, to keep the law responsive to the case in question, and to diminish the scope of the holding. Yet, the very discretion inherent in balancing tests makes them unpredictable, malleable, and as their critics have so often said, "ad hoc."

Wilson, The Morality of Formalism, 33 UCLA L. Rev. 431, 436 (1985).

171. Professor Schlag provides the following diagram on claimed virtues and vices of adherence to rules versus standards:

RULES	
Virtues	Vices
certainty	intransigence
uniformity	regimentation
stability	rigidity
security	closure
STANDARDS	
Virtues	Vices
flexibility	manipulability
individualization	disintegration
open-endedness	indeterminacy
dynamism	adventurism

Schlag, *supra* note 164, at 400.

A different mode of interest balancing is employed in *Tinker*. The *Tinker* Court did not merely identify the competing interests. It demanded that the State make a very substantial showing of harm to its interests in protecting the educational process or avoiding harm to other students.[172] This heightened standard of review reflects the values underlying the first amendment and the commitment of our legal system to those values under the principle of freedom of speech. As Ronald Dworkin puts it:

> [A] responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility—that it is calculated to produce more overall benefit than harm. . . . But those constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the Citizen.[173]

This "rights" perspective is not a necessary principle, but it does represent the present-day value choice of our legal system. It reflects a legal bias grounded in the system's commitment to freedom and equality values and our Lockean conception of limited government. Rights are meant to limit what government can do to an individual or group, even when expressing majoritarian sentiment.[174]

Weighted balancing may occur under the rubric of strict scrutiny or in less demanding terms such as "narrowly tailored to substantial or overriding governmental interests."[175] The particular standard of weighted interest balancing adopted by a court tends to reflect the severity of the regulatory burden on first amendment rights.

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172. The presumption in favor of speech introduces a "standard" or "principle" for decision rather than a "rule." *See* R. Dworkin, Taking Rights Seriously, 22-23 (1977). Dworkin asserts that those who adopt a balancing or clear and present danger approach to first amendment analysis are employing principles or policies; absolutists use the first amendment as a rule. *Id.* at 27. Weighted balancing does not provide a bright line rule of decisional outcome comparable to rationality review as it is applied. Nevertheless, since the introduction of presumptions and weights is intended to significantly influence judicial decisionmaking, we are willing to acknowledge some deference to formalism.

173. *Id.* at 191.

174. Dworkin defines individual rights as "political trumps": "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." *Id.* at xi. Dworkin's usage employs the term "right" as the *end product* after the government's justification for burdening an individual interest has been rejected. *Compare supra* note 30, where the authors' use of the term "right" is discussed.

175. *See supra* notes 1, 6 & 13.

The critical factor is that the standard of review employed truly reflects the principle that freedom of speech is a fundamental right, a right "in the strong sense," and that the standard be applied to the particular facts consistent with first amendment values.

Of course, the decision to reconcile competing claims could be left to the bureaucracy, as it was in *Hazelwood* and *Fraser*. But it is unrealistic to expect that the academic bureaucracy will give high priority to first amendment values that clash with what it determines to be its vital interests.[176] It is the courts' role to interpret and define constitutional limits on the choices of other governmental actors. The courts must require government actors to give meaningful reasons for restricting rights.[177] When fundamental rights generally, and freedom of speech in particular, are significantly burdened, those reasons must be of sufficient moment to justify the burden imposed on the fundamental right; the regulation must be narrowly tailored to the overriding government interest.

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Lawmaking is essentially an interactive process and constitutional policy is essentially a product of a dialogue among government institutions and other political actors.[178] In this interactive, dialogic process by which the public interest is defined, the courts play a vital role.[179] Excessive judicial deference or nonjusticiability where fundamental rights are at stake abdicates this judicial role. If judicial

176. Professor Owen Fiss notes that "[j]udges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent." Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979).

177. In discussing the judicial review model in administrative law, Professor Frug states:

> The courts' function under the judicial review model is to prevent any serious abuse of power that a bureaucracy organized in accordance with the formalist or expertise models might otherwise generate. One way to describe this task is to say that the judiciary subjects the bureaucracy to the rule of law. This description emphasizes the limitations on the judicial role: as long as the bureaucracy operates within the limits of the law, its constituents and employees are free to function as they see fit. The description also underscores why judicial review is essential to bureaucratic legitimacy: self-policing is no more credible when practiced by bureaucratic managers than it is when practiced by anyone else in society. Objective limits on bureaucracy, whether understood in formalist or expertise terms, are meaningful only if they are legally enforceable.

Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1334 (1984).

178. For one of the authors' analysis of legal policy change as the product of the interaction of legal institutions, see D. Aaronson, C. Dienes, & M. Musheno, Public Policy and Police Discretion ch. 2 (1984); C. Dienes, Law, Politics and Birth Control (1972); Dienes, Judges, Legislators and Social Change, 13 Am. Behav. Sci. 511 (1970).

179. Professor Michelman sees dialogic themes as expressing "the vision of social normative choice as participatory, exploratory, and persuasive, rather than specialized,

review is to be meaningful and not simply a charade, it must involve some form of judicial interest-balancing. In this interest-balancing, we believe that there should be a presumption in favor of freedom generally and freedom of speech in particular. It is government that should bear the significant burden of proof when it undertakes to restrain student speech.

Yet invocation of weighted balancing should not itself decide student speech cases. The methodology only seeks to impose weights and presumptions in the judicial interest balancing, not to be outcome determinative. Government does have vital interests to be served. In many cases, the achievement of these interests will require a significant burdening of first amendment rights. Indeed, in the context of the schools, more regulations may pass constitutional muster than in non-academic contexts. But the rationale for judicial deference in student speech cases does not demand a formalistic mode of judicial decisionmaking. Weighted balancing accords a presumption to the free speech side of the balance scales. This does not mean that judicial deference cannot be accorded to the particular government interests actually involved, and to administrative expertise where it is relevant and used by school officials, when the lack of judicial information and capability makes deference appropriate. The mandate of weighted balancing is simply that government narrowly tailor its laws and provide substantial justification when it imposes significant burdens on fundamental rights.

IV. Conclusion

In *Tinker*, the Court established that students do have first amendment rights in the academic marketplace and that courts have the prerogative and duty to assure that those rights are respected. Neither *Fraser* nor *Hazelwood* ostensibly rejects those critical propositions. Yet the mode of judicial review they endorse and the first

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deductive or demonstrative. They emphasize openness to 'otherness' as a way toward recognition not only of the other, but also of oneself." Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 33 (1986). Balancing analysis, he asserts, reflects such a dialogic theme, since it involves a commitment,

> to the Court's and the country's project of resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit. . . . The balancing test, with its contextual focus, solicits future conversation, by allowing for resolution of this case without predetermining so many others that one "side" experiences large-scale victory or defeat.

Id. at 34. *See also* Burt, Constitutional Law and the Teaching of the Parables, 93 Yale L.J. 455 (1984) (examining judicial review in dialogic terms).

amendment principles they forge are inconsistent with *Tinker*, reflecting more the jurisprudence of Justice Black's dissent. While paying lip service to the free speech rights of students, *Fraser* and *Hazelwood* exhibit a sweeping deference to school officials. While accepting the principle of judicial review of the actions of school officials, they employ a formalistic mode of analysis that denies *meaningful* judicial review. In short, they announce a policy of diminished standards of judicial scrutiny or even judicial avoidance.

A number of commentators arguing for a judicial role in the educational marketplace limit the judicial function to assuring that the political process works; the judiciary has the prerogative and constitutional duty of assuring that "structural due process" is not violated.[180] School policies must be understandable and procedurally fair to be legally effective. While we accept the legitimacy of this procedural orientation, we believe it defines the role of the courts in the educational marketplace too narrowly. Students, teachers, and parents have *substantive* constitutional rights that the courts are obligated to protect. Freedom of speech and religion limit the substantive decisional choices that school officials can make, not merely the way in which decisions are made or implemented. While judges may properly give deference to administrative decisions when deference to administrative expertise is called for, the concern with administrative discretion and flexibility must not be exalted to the point that substantive judicial review becomes a meaningless ritual.

Fraser and *Hazelwood* suggest just such a model of meaningless judicial review. By adopting a formalistic mode of decisionmaking that either precludes judicial review or employs a deferential rationality standard that borders on nonjusticiability, the decisions withdraw the courts from their vital role in the educational marketplace. If the free speech claims of students to constitutional protection are to be heard under such a judicial methodology, they must be heard by the political actors in the marketplace—a dubious source of constitutional protection.

The Court's formalistic methodology is born of deference to administrative decisionmaking in restricted environments such as

180. *See, e.g.*, Ingber, *supra* note 35, at 83-94. The term "structural due process" was coined by Professor Tribe. *See* Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975). Tribe, The Emergency Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking, 10 Creighton L. Rev. 433, 440 (1977), discusses structural due process as involving the achievement of substantive constitutional ends "through variations in government structures and processes of choice."

schools. But, the abstract governmental interests operate to diminish the standard of judicial review rather than coming into play solely in applying the review standard. The fact that fundamental constitutional rights are significantly burdened, which normally triggers a form of heightened judicial scrutiny, is simply ignored. Whether the government interest is, in fact, vitally affected by the particular student speech being regulated is not critical to the judicial judgment. Whether government could achieve its vital interests by means that are less burdensome on protected rights is not controlling, or even considered. Fundamental rights analysis is simply never used, leaving administrative decision makers free to act without meaningful judicial scrutiny. Such a stilted form of judicial review is simply too confining given the vital competing interests at stake in the student speech cases.

How *Fraser* and *Hazelwood*'s hands-off policy will play in the educational marketplace and in the lower courts remains to be seen. Undoubtedly, free speech claimants will seek to have the decisions narrowly interpreted. But the attitude to the competing paradigms exhibited by the Court and the judicial methodology employed portend dark days for those favorably inclined towards the free speech paradigm of *Tinker*.