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Free Expression and Education: Between Two Democracies

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FREE EXPRESSION AND EDUCATION: BETWEEN TWO DEMOCRACIES

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Political scientist Benjamin R. Barber has written: "[I]n democracies, education is the indispensable concomitant of citizenship."[1] If true—if education is integrally tied to democracy—then the definition of democracy would necessarily shape the purpose of education. And since democracy is also linked with free expression, then the scope of students' free-expression rights might vary in accordance with the purpose of education vis-à-vis democracy.

During the course of its history, the United States has operated under two fundamentally different forms of democracy. From the constitutional framing through the 1920s, Americans conceptualized the national and state governments as republican democracies.[2] Under republican democratic governments, virtuous citizens and officials ostensibly pursued the common good. An alleged lack of civic virtue—entwined with an apparent failure to accept certain traditional American values—could preclude one from participating in democratic processes. Throughout the nineteenth and early twentieth centuries, crusaders for virtue—often brooding about the habits and values of immigrants and their children—would insist that citizens exhibit values such as temperance, frugality, and industriousness. Frequently, on this ground, old-stock, white, Protestant Americans supposedly justified excluding from the polity African-Americans, Irish-Catholic immigrants, and other peripheral groups.[3]

In the republican democratic regime, courts reviewed governmental actions to ensure that they promoted the common good rather than partial or private interests.

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[1] BENJAMIN R. BARBER, AN ARISTOCRACY OF EVERYONE: THE POLITICS OF EDUCATION AND THE FUTURE OF AMERICA 15 (1992).

[2] For discussions of republican democracy, see STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (forthcoming 2008); Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 50–57 (2006).

[3] For accounts of efforts to impose white, Anglo-Saxon, Protestant values on immigrants, see JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (2d ed. 1988); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998); DESMOND KING, MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY (2000).

Consistent with this general practice of republican democratic judicial review, courts delineated the scope of free expression pursuant to a bad tendency test. The government could not impose prior restraints on expression, but it could impose criminal penalties for speech or writing that had bad tendencies or likely harmful consequences. Expression with bad tendencies supposedly contravened the common good, so courts, remaining consistent with republican democratic principles, readily upheld numerous restrictions on expression.[4]

The primary purpose of education within the republican democratic regime was to inculcate children with the values necessary to become virtuous citizens who would pursue the common good.[5] In *Meyer v. Nebraska*, decided in 1923, the Supreme Court held that a law proscribing the teaching of languages other than English before the ninth grade was an arbitrary and therefore unconstitutional exercise of the police power.[6] The Court underscored the importance of teachers to the promotion of the common good: "Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare."[7] In *Pierce v. Society of Sisters*, decided two years later, the Court elaborated on the powers of the government in the realm of education.[8] "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils," wrote Justice James C. McReynolds for a unanimous Court.[9] The state can "require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[10]

Succumbing to the pressures of industrialization, immigration, and urbanization, republican democracy crumbled in the late 1920s to mid-1930s, and a new democracy arose. Under this pluralist democracy, one did not need to demonstrate civic virtue to qualify as a participant. During the thirties, many ethnic and immigrant urbanites who had previously been discouraged from partaking in

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[4] *E.g.*, Fox v. Washington, 236 U.S. 273 (1915) (applying the bad tendency test to uphold conviction); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454 (1907) (upholding contempt of court conviction). For a discussion of free expression under republican democracy, see Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192 (2008).

[5] JUDITH RÉNYI, GOING PUBLIC: SCHOOLING FOR A DIVERSE DEMOCRACY 26 (1993) (describing the common school movement of the mid-nineteenth century as intended to impose a Protestant religious and cultural outlook on immigrants).

[6] 262 U.S. 390 (1923).

[7] *Id.* at 400.

[8] 268 U.S. 510 (1925).

[9] *Id.* at 534.

[10] *Id.*

national politics became voters and actively cast their support for the New Deal. Moreover, pluralist democracy acknowledged that politics was about the pursuit of self-interest. Interest group efforts to satisfy preexisting desires became normal and legitimate. Governmental goals could no longer be condemned as contravening the common good; all such substantive goals were determined through interest group bargaining and coalition building. Ultimately, then, pluralist democracy was defined through processes that ensured full and fair participation, the assertion of one's interests and desires, especially in the legislative arena.[11]

In 1937 and following years, the Court accepted the structures of pluralist democracy, and in doing so, the Justices rendered judicial review problematic. Previously, courts had used their power to enforce basic republican democratic principles: upholding governmental actions that promoted the common good and invalidating actions that furthered partial or private interests. With the repudiation of republican democracy, the purpose of judicial review became obscure, but over time, the Supreme Court developed new doctrines to implement its power. More than anything, the Court policed the processes of pluralist democracy, supposedly assuring that participation remained fair and open.[12] In the free-expression context, the change began with *Herndon v. Lowry*.[13] The Court reversed Georgia's conviction of Angelo Herndon, a black Communist Party organizer who had attempted to persuade other individuals, mostly African-Americans, to join the Party.[14] Justice Owen Roberts's confusing majority opinion rested on multiple grounds, yet it nonetheless marked a significant doctrinal turn. Roberts repudiated the bad tendency test while also creating a presumption favoring the protection of expression.[15] Subsequently, in a phenomenal string of cases from 1938 to 1940, the Court upheld one free expression claim after another.[16] While the Court, of course, did not continue to uphold every free expression claim, most scholars and jurists would agree that, in the regime of pluralist democracy, free expression became a constitutional "lodestar."[17]

Just as the transition from republican to pluralist democracy helped transform free expression, the transition to pluralist democracy also altered the primary

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[11] On the transition from republican to pluralist democracy, see Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 433–43 (2006).

[12] JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

[13] 301 U.S. 242 (1937).

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that labor picketing is protected free speech); Schneider v. State, 308 U.S. 147 (1939) (invalidating conviction for distributing handbills); Hague v. Comm. Indus. Org., 307 U.S. 496 (1939) (upholding right of unions to organize in streets).

[17] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 300–01 (1996).

purpose of education. No longer were teachers to inculcate students with the values integral to republican democratic civic virtue. Now, it seemed, children had to be taught the skills needed to participate in democratic processes. Children needed to learn to read, to write, to communicate orally, and to reason analytically. In *West Virginia State Board of Education v. Barnette*, decided during the nation's World War II battle against totalitarian governments, the Court held that compulsory flag salutes in the public schools violated free expression.[18] Consistent with pluralist democracy, the Court celebrated "the rich cultural diversities" in American society and stressed that governments cannot coerce patriotism, national unity, or orthodoxy in values, even in young school children.[19] In *Brown v. Board of Education*, decided in 1954, the Court held that separate-but-equal public schooling violated equal protection.[20] "Today, education is perhaps the most important function of state and local governments," emphasized Chief Justice Earl Warren's unanimous opinion.[21] "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."[22]

Yet recent Supreme Court cases adjudicating free expression issues in educational contexts are anomalous. Instead of adhering to the strictures of pluralist democracy, as other free expression cases have done, education cases have oscillated between republican and pluralist democracies. This Article argues that, under the pluralist democratic regime, the role of education has remained contested and ambiguous—in both secondary and higher education—and that this ambiguity has in part engendered the Court's ambivalence.

Part I of this Article discusses *Tinker v. Des Moines Independent Community School District* and its progeny.[23] *Tinker*, decided in 1969, articulated broad free expression rights for public school students, but subsequent cases retreated from that strong First Amendment position.[24] Part I analyzes how the Court's sundry viewpoints manifested opposed conceptions of education corresponding with republican and pluralist democracies. Part II focuses on *Morse v. Frederick*, holding that a public school did not violate the First Amendment when it punished a student for displaying a banner proclaiming, "BONG HiTS 4 JESUS."[25] The Justices' various opinions in *Morse* epitomize the complex interrelations among education, democracy, and free expression.

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[18] 319 U.S. 624 (1943).
[19] *Id.* at 640–42.
[20] 347 U.S. 483 (1954).
[21] *Id.* at 493.
[22] *Id.*
[23] 393 U.S. 503 (1969).
[24] *Id.*
[25] 127 S.Ct. 2618, 2622 (2007).

I. FREE EXPRESSION, EDUCATION, AND DEMOCRACY

A. Education as Training for Pluralist Democratic Participation

Tinker arose when a high school and a junior high school suspended students for wearing black armbands in protest against the Vietnam War.[26] Writing for a seven-Justice majority, Justice Abe Fortas began by categorizing the armbands as "pure speech" rather than conduct and, therefore, deserving of "comprehensive protection under the First Amendment."[27] Fortas emphasized that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[28] Fortas acknowledged that the school environment might diminish the scope of First Amendment rights, so he articulated a doctrinal rule specific for educational institutions. Even so, beginning with a presumption of constitutional protection, the Court adopted a highly speech-protective doctrine: student expression would be constitutionally protected unless it caused "material and substantial interference with schoolwork or discipline."[29] In this case, the evidence did not show "that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[30] To the contrary, the officials appeared to want merely to avoid a political controversy.[31]

The Court stressed that free expression in the public schools was especially important to American constitutional government. Quoting Justice William Brennan, Fortas wrote: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[32] Why so? Because public schools provide the training grounds where students learn the skills prerequisite for participation in pluralist democracy—the skills needed to become citizens and leaders. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained 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.'"[33] In pluralist democracy, citizens need to be able to reason, to negotiate, to compromise, and to accept (or at least tolerate) a multitude (or plurality) of values—in short, they need to communicate with diverse other citizens—and schools are "dedicated" to teaching, among other things,

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[26] *Tinker*, 393 U.S. at 504.
[27] *Id.* at 505–06.
[28] *Id.* at 506.
[29] *Id.* at 511.
[30] *Id.* at 509.
[31] *Id.* at 510–11.
[32] *Id.* at 512 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
[33] *Id.*

"personal intercommunication."[34] In sum, *Tinker* was a prototypical pluralist democratic free expression decision. The Court not only interpreted the First Amendment broadly, but it also seemed oblivious to the considerations of virtue, values, and civility that had loomed prominently under republican democracy.[35] Instead, Fortas emphasized:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. 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, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[36]

While *Tinker* involved high school and junior high students, *Healy v. James* involved college students.[37] A state college refused to accord "official recognition" to students who sought to form a chapter of Students for a Democratic Society (SDS), an organization renowned for its protests against the Vietnam War.[38] "Denial of official recognition posed serious problems for the organization's existence and growth," the Court explained.[39] The group's "members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and [they were barred] from using campus facilities for holding meetings."[40] Reversing and remanding for further development of the facts, the *Healy* Court unequivocally applied *Tinker* in the college context.[41] Justice Lewis F. Powell, writing for an eight-Justice majority (Justice William H. Rehnquist concurred in the result only), elaborated the *Tinker* doctrine—student expression would be protected unless it "posed a substantial threat of material disruption"[42]—by

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[34] *Id.*

[35] The *Tinker* Court never mentioned virtue, values, or civility. *Id.* at 504–14.

[36] *Id.* at 508–09.

[37] 408 U.S. 169 (1972).

[38] *Id.* at 170–71.

[39] *Id.* at 176.

[40] *Id.*

[41] *Id.* at 190–91.

[42] *Id.* at 189.

linking it to the landmark case *Brandenburg v. Ohio*.[43] Like *Brandenburg*, *Healy* pronounced a dichotomy: advocacy versus incitement. In the college context, the expression of ideas is always constitutionally protected, while expression urging (or inciting) imminent disruptive conduct is unprotected.[44] Thus, students could advocate with impunity for changing or eliminating campus rules—including reasonable time, place, and manner restrictions on expression—but students could neither violate nor incite imminent violations of those same rules without risking punishment.[45]

Once again, like in *Tinker*, the *Healy* Court's opinion resonated with pluralist democracy. "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[46] To the contrary, higher education should epitomize the operations of free expression in a pluralist democratic society: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[47] In fact, under pluralist democracy, political dialogues often seem more like pitched battles than coldly rational marketplace exchanges, and the *Healy* Court acknowledged that incivility could therefore appear "on the campus" as it did elsewhere.[48] "[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society."[49] Yet, the Court reasoned, we must abide uncivil speech and writing and the bitter clashes of opposed political groups if we are to maintain "our vigorous and free society" and to realize the advantages of pluralist democracy.[50]

The *Healy* Court's embrace of the spirited, conflict-laden nature of pluralist democracy echoed another Supreme Court decision from nearly a quarter-century earlier. In *Terminiello v. Chicago*,[51] the Court reasoned:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

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[43] 395 U.S. 444 (1969). In *Brandenburg*, the Court held that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

[44] *Healy*, 408 U.S. at 188–89.

[45] *Id.* at 192–94.

[46] *Id.* at 180.

[47] *Id.* at 180–81.

[48] *Id.* at 194.

[49] *Id.*

[50] *Id.*

[51] 337 U.S. 1 (1949).

> conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[52]

One year after *Healy*, the Court followed the same approach in *Papish v. Board of Curators of University of Missouri*.[53] The case arose when a university expelled a student for publishing an on-campus (though not university-sponsored) newspaper that contained allegedly indecent expression.[54] The Court reiterated the *Healy* Court's distinction between advocacy and incitement. "We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[55] In a pluralist democratic regime, the government cannot restrict expression to promote those values or virtues supposedly needed to engender civil interactions. Chief Justice Warren Burger dissented on this very point: "[A] university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms."[56] Indeed, Burger articulated a distinction that hearkened back to the republican democratic past. Under republican democracy, courts traditionally distinguished between liberty and license: freedom of expression did not justify an abuse of expression. Chief Justice Burger wrote: "To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values."[57]

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[52] *Id.* at 4–5 (citations omitted).

[53] 410 U.S. 667 (1973).

[54] *Id.*

[55] *Id.* at 670.

[56] *Id.* at 672 (Burger, C.J., dissenting).

[57] *Id.* For examples where judges distinguished liberty from license or freedom from its abuse, see *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 555 (1860); *Respublica v. Montgomery*, 1 Yeates 419 (Pa. 1795); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 212–13 (1985) (quoting Judge Thomas McKean); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1874–86 (1833), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 182–84 (Philip B. Kurland & Ralph Lerner eds., 1987).

B. Education as Cultivation of Republican Democratic Virtue

By 1986, when the Court decided its next major case involving free expression in an educational institution, the majority of Justices had swung toward Burger's outlook. In *Bethel School District No. 403 v. Fraser*, a high school suspended a student who delivered an allegedly lewd speech at an assembly.[58] Burger's majority opinion began by acknowledging that *Tinker* held that students retain First Amendment rights, but the Court then retreated from the *Tinker* doctrine.[59] Rather than protecting student expression unless it caused material and substantial interference with schoolwork or discipline, the *Bethel* Court emphasized school officials' discretion to determine whether expression "would undermine the school's basic educational mission."[60] Based on this deferential stance, the Court found the student's expression unprotected, upheld the punishment, and even quoted Justice Hugo Black's *Tinker* dissent, disclaiming "that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[61]

Once again, the Court emphasized the intertwinement of education and democracy, but this time the Court followed Burger's *Papish* dissent and characterized democracy in more republican terms. "The role and purpose of the American public school system were well described by two historians," the *Bethel* Court explained, citing and quoting Charles and Mary Beard's *New Basic History of the United States*, first published in 1944.[62] "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[63] The *Bethel* Court lifted this quotation from a section of the Beards' *New Basic History* discussing the development of democracy during the Jacksonian age of the nineteenth century. Given the era being discussed, the Beards conceptualized education in republican democratic terms. Worried about the combination of widespread male suffrage and heavy immigration, Jacksonian-era "philosophers of educational progress [believed] public education must prepare pupils for citizenship in the Republic," wrote the Beards.[64] After emphasizing the educational inculcation of "the habits and manners of civility as values . . . indispensable to the practice of self-government," the Beards

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[58] 478 U.S. 675 (1986).

[59] *Id.* at 680.

[60] *Id.* at 685.

[61] *Id.* at 686 (quoting Tinker v. Des Moines Indep. County Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

[62] *Id.* at 681.

[63] *Id.* (quoting CHARLES A. BEARD ET AL., THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[64] BEARD ET AL., *supra* note 63, at 228.

quoted Horace Mann, the "indefatigable leader in the public-school movement," who stated that the purpose of education "is to preserve the good and to repudiate the evil which now exists."[65] Mann, the Beards concluded, intended to "bring wisdom, knowledge, and virtue to bear upon the improvements of the conditions of the people."[66]

The *Bethel* Court's emphasis on civility and values contrasted sharply with the *Tinker-Healy-Papish* insistence that we must tolerate pugnacious, offensive, and even indecent expression within the constant give-and-take of the pluralist democratic arena. Instead, the *Bethel* Court stressed that the "fundamental values of 'habits and manners of civility' essential to a democratic society must . . . take into account consideration of the sensibilities of others."[67] Given this more republican democratic depiction of American government, the *Bethel* Court reasoned that "[t]he inculcation of these values is truly the 'work of the schools.'"[68] Consequently, the Court concluded: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[69]

In *Hazelwood School District v. Kuhlmeier*, decided in 1988, the Court upheld a high school principal's decision to delete articles discussing divorce and teen pregnancy from a school-sponsored newspaper.[70] Although Justice Byron White began the majority opinion by acknowledging *Tinker*, he then stressed the *Bethel* retreat: "[T]he First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'"[71] Thus, under *Bethel*, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[72] Even so, the *Hazelwood* Court further chipped away at students' free expression rights by creating an explicit exception to the *Tinker* (and thus, presumably, the *Bethel*) doctrine. The *Tinker* (*Bethel*) doctrine applies when school officials seek to restrict "a student's personal expression that happens

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[65] *Id.*

[66] *Id.* These passages were identical in the 1944 and 1968 editions. *Compare id.*, *with* CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 237–38 (1944). Charles and Mary Beard were renowned progressive historians who matured during the early twentieth century (during the heyday of progressive politics). Generally accepting republican democracy, progressives advocated for interpretations of the common good consistent with empirical realities rather than intuitions or a priori categories.

[67] *Bethel*, 478 U.S. at 681.

[68] *Id.* at 683 (quoting Tinker v. Des Moines Indep. County Sch. Dist., 393 U.S. 503, 508 (1969)). This quotation from *Tinker* is misleading. Although the *Tinker* Court used the phrase, "work of the schools," it certainly did not suggest that the inculcation of particular values of civility was the "work of the schools." *Tinker*, 393 U.S. at 508.

[69] *Bethel*, 478 U.S. at 685.

[70] 484 U.S. 260 (1988).

[71] *Id.* at 266 (quoting *Bethel*, 478 U.S. at 682).

[72] *Id.* (quoting *Bethel*, 478 U.S. at 685).

to occur on the school premises,"[73] but it does not apply to school-sponsored activities that "may fairly be characterized as part of the school curriculum."[74]

In the latter instance, free expression rights turn on whether the school created a designated (or limited) public forum. Government property can be divided into three categories: public forums, non-public forums, and designated public forums.[75] A public forum, including the streets and parks, is government-owned property that has traditionally been held open for public speaking.[76] All other government-owned property is a non-public forum, unless the government has specially designated the property for public speaking, in which case the property is transformed into a designated or limited public forum.[77] "[S]chool facilities may be deemed to be [limited] public forums," the *Hazelwood* Court explained, "only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."[78] The Court concluded that the school-sponsored newspaper was not a public forum and that school officials were, therefore, empowered "to regulate the contents of [the paper] in any reasonable manner."[79] Thus, while *Hazelwood* created a large

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[73] *Id.* at 271.

[74] *Id.* The *Hazelwood* Court wrote:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. at 270–71; *see* J. Marc Abrams & S. Mark 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 (criticizing *Hazelwood* for eviscerating *Tinker*); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527 (2000) (arguing that the Court's recent cases follow Black's *Tinker* dissent more than the *Tinker* majority).

[75] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45–46 (1983).

[76] *Id.* at 45.

[77] *Id.* at 45–46.

[78] *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47) (citation omitted).

[79] *Id.* at 270. Presumably, at the time that the Court decided *Hazelwood*, the Court would have applied a strict scrutiny test if it concluded that the government had designated a limited public forum. *Perry*, 460 U.S. at 45–46.

exception to *Tinker-Bethel*, the *Hazelwood* doctrinal approach harmonized closely with *Bethel* by showing great deference to school officials. At least when the school has not created a designated public forum, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[80] Unsurprisingly, then, the *Hazelwood* Court emphasized that school officials could censor student publications to promote the values of civility and even to avoid political controversy.[81]

> A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality on matters of political controversy.[82]

C. Free Expression and Education: Atypical Cases

In the transition from *Tinker-Healy-Papish* to *Bethel-Hazelwood*, the Court has moved from a highly speech-protective approach generally consistent with pluralist democracy to a less protective approach more characteristic of republican democracy.[83] But why? After all, the Court still typically adheres to the strictures of pluralist democracy in free expression as well as other cases. Why, in the context of education, has the Court adopted a more republican democratic approach that accords less protection to student speech and writing? Three factors might contribute to this phenomenon: first, the nature of education; second, the nature of pluralist democracy; and third, the politics of judicial decisionmaking.

First, the disputed nature of education in American society today might provoke the Justices to conceive of free expression in educational institutions in a narrower and more republican democratic fashion. Professional educators and theorists of education disagree wildly about the purposes of education and have done so for decades.[84] Some educators, conceiving of their roles in republican democratic terms,

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[80] *Hazelwood*, 484 U.S. at 272–73.

[81] *Id.* at 272.

[82] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)) (citation omitted).

[83] It is worth noting that the *Hazelwood* Court expressly reserved the question of whether its doctrinal approach would apply to higher education. "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 274 n.7.

[84] *See* JOHN D. PULLIAM, HISTORY OF EDUCATION IN AMERICA 161–92 (5th ed. 1991) (describing competing philosophies of education); WILLIAM E. SEGALL & ANNA V. WILSON,

emphasize the inculcation of certain substantive values that supposedly provide a foundation for our nation. As the former Secretary of Education, William J. Bennett, explained, "We must care about our public schools; and we must care about the values taught in them."[85] Children must be educated to be good citizens, and citizens are judged by "their character, their virtue, and their interest in the common good."[86] But other educators shy away from such commitments to teaching particular substantive values. Instead, these educators recognize a plurality, and sometimes even a relativity, of values that political theorists have often invoked to defend and justify pluralist democracy itself.[87] From this standpoint, if schools should avoid cultivating specific moral values—because there are a variety of competing and equally worthy values—then schools should focus on teaching individuals the skills needed to function in a diverse democratic society.[88]

INTRODUCTION TO EDUCATION: TEACHING IN A DIVERSE SOCIETY 143–46, 152–59 (1998) (describing competing educational theories that ascribe different purposes to schools and curriculums). In 1979, Robert D. Kamenshine observed:

> There is much current debate over the proper role of public education in a democratic society. For some, a major purpose of public schools is to produce graduates who share a fundamental commitment to "our way of life." Others oppose this thinking and emphasize the need to produce graduates capable of independently and critically assessing American society.

Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1133 (1979) (citations omitted).

[85] WILLIAM J. BENNETT, OUR CHILDREN AND OUR COUNTRY 71 (1988).

[86] *Id.* at 10; *see* Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421 (1995) (arguing for a civic republican conception of free expression in public schools). "Many states have statutes that require indoctrination in 'patriotism' and 'Americanism' or specify that the curriculum shall emphasize the virtues of the 'free enterprise system.' Other laws specify that the curriculum shall portray the evil of Communism or shall not present Communism favorably." Kamenshine, *supra* note 84, at 1135 (citation omitted).

[87] Unsurprisingly, Bennett condemns "moral relativism." BENNETT, *supra* note 85, at 71. For a theoretical presentation of pluralist democracy, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989).

[88] *See* Kamenshine, *supra* note 84, at 1134 (criticizing educators and other scholars who assume "the existence of 'correct,' or at least uniformly acceptable, political values"). Because of value pluralism or relativism, Kamenshine argues, religious and other non-governmental organizations are better situated than public schools to teach values. "[I]n 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.* In 1994, the United States Department of Education articulated this goal: "Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship." 1 EDUCATION SOURCEBOOK 10 (Jeanne Gough ed., 1997).

In light of such disagreements among theorists and scholars of education, Supreme Court Justices themselves predictably also have disagreed about the purposes of education. Some Justices have conceived of education from the vantage of republican democracy, while others have conceived of education more consistently with pluralist democracy. Because republican democracy historically justified greater governmental incursions on liberty of expression, while pluralist democracy historically catapulted free expression to the status of a constitutional lodestar, the Justices have associated lesser or greater protections for student speech and writing with their respective conceptions of education—either as republican or pluralist democratic. A republican democratic concept of education would intertwine with a narrower definition of free expression. A pluralist democratic concept of education would intertwine with a broader free expression.

Second, while pluralist democracy revolves around the processes that assure full and fair participation in the democratic arena, it does not preclude all discussion and recognition of cultural values. The foremost theorist of pluralist democracy, Robert Dahl, readily acknowledges that pluralist democracy rests on a foundation of (democratic) cultural values.[89] American culture, according to Dahl, nurtures a consensus regarding democratic processes that allows individuals and interest groups to clash in political struggles without tearing society asunder.[90] A people who are accustomed to pursuing their self-interest with the greatest vigilance must still be willing to compromise.[91] "In practice . . . the democratic process isn't likely to be preserved for very long unless the people of a country preponderantly believe that it's desirable and unless their belief comes to be embedded in their habits, practices, and culture."[92] Given this relevance of cultural values to pluralist democracy, one should not be surprised to find even a staunch pluralist democratic court occasionally referring to the importance of values, especially in the context of education. And such discussions of values might gradually slide into the terms of republican democratic virtue, or vice versa, discussions of republican democratic virtue might slip into references to pluralist democratic culture. Indeed, in the midst of the *Bethel* Court's discourse on the "fundamental values of 'habits and manners of civility'"[93]—unmistakably republican democratic in tone—the Court nonetheless included as a value, "tolerance of divergent political and religious views," which resonates strongly with pluralist democracy.[94] My point here is that the wall separating republican democracy from pluralist democracy is, to a degree, permeable. Aspects of

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[89] ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34–36, 150–51 (1956).

[90] *Id.* at 145–46.

[91] *Id.* at 34–36.

[92] *Id.* at 172.

[93] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[94] *Id.*

republican democracy bleed into aspects of pluralist democracy.[95] In light of the ambiguous nature of education, one should not be surprised to find that the late-twentieth and early twenty-first century Court, firmly entrenched in the pluralist democratic era, might nonetheless lapse into invocations of republican democratic values when focusing on free expression in educational institutions.

Third, legal interpretation and, hence, Supreme Court decisionmaking, are inherently political: Justices generally interpret legal texts to correspond with their political preferences.[96] Thus, perhaps tautologically, politically conservative Justices are more likely to interpret the First Amendment and free expression in accord with political conservatism, while politically liberal Justices are more likely to interpret the First Amendment in accord with political liberalism. Significantly, then, recent debates about the nature of education often split along the traditional political lines of conservatism and liberalism. Conservative educators tend to stress the inculcation of values historically consonant with republican democracy, while liberal educators tend to emphasize the acceptance of multiple values and the compromise of diverse interests within the political processes of pluralist democracy.[97] Consequently, in the context of First Amendment disputes in public education, conservative Justices' interpretations of free expression are likely to resonate with republican democracy, while liberal Justices' interpretations are likely to resonate with pluralist democracy.

The significance of politics to Supreme Court adjudication is highlighted if one compares *Bethel* and *Hazelwood* with *Rosenberger v. Rectors and Visitors of the University of Virginia*.[98] *Rosenberger* arose when the University of Virginia funded a variety of student organizations but refused to fund a student-created and student-run periodical because of its overtly religious message.[99] The periodical's self-proclaimed mission was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[100] The periodical, in other words,

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[95] For example, both forms of democracy emphasize the sovereignty of people. Feldman, *supra* note 11, at 433, 439.

[96] *See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89 (2005). I am not suggesting that Supreme Court decisionmaking is purely or primarily political. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (examining Supreme Court decisions in light of the Justices' attitudes and values). Rather, that Justices sincerely interpret legal texts and that those sincere interpretations accord with the Justices' political inclinations.

[97] *See* LOUANN A. BIERLEIN, CONTROVERSIAL ISSUES IN EDUCATIONAL POLICY 4 (1993) (contrasting conservative and liberal views of education).

[98] 515 U.S. 819 (1995).

[99] *Id.*

[100] *Id.* at 826 (citation omitted).

was dedicated to evangelical "proselytizing," as Justice David Souter emphasized in dissent.[101] Given this mission, the University worried that funding the periodical would violate Establishment Clause principles (or values).[102] Yet, the Court not only held that funding would not violate the Establishment Clause, but that the denial of funding violated the students' free expression rights.[103]

In a majority opinion written by Justice Anthony Kennedy, the *Rosenberger* Court reasoned that the University's funding program for student organizations created a limited public forum.[104] In other scenarios, the Court had reasoned that when the government designates a limited public forum, then the government "is bound by the same standards as apply in a traditional public forum," like the streets or parks.[105] The government, then, cannot impose a content-based restriction on expression unless it can satisfy the strict scrutiny test by showing that the restriction is narrowly tailored to achieve a compelling governmental interest.[106] In *Rosenberger*, however, even though the Court found that the University had created a limited public forum, the Court applied a less rigorous degree of scrutiny.[107] "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint."[108] Typically, in the past, the Court had applied this reasonableness and viewpoint-neutrality test to cases involving a non-public forum. In fact, in *Lamb's Chapel v. Center Moriches Union Free School District*, another case involving religious expression in public schools decided only two years before *Rosenberger*, the Court assumed that the school had *not* created a limited public forum and applied this *same* test.[109] A school ban on religious expression, the *Lamb's Chapel* Court reasoned, "could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral."[110] Putting

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[101] *Id.* at 874–75 (Souter, J., dissenting).

[102] *Id.* at 837 (majority opinion).

[103] *Id.*

[104] *Id.* at 840.

[105] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983).

[106] *Id.* at 45; *see, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–70 (1981) (applying strict scrutiny to a limited public forum). "The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

[107] *Rosenberger*, 515 U.S. at 829.

[108] *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)) (citation omitted).

[109] 508 U.S. 384, 392–93 (1993).

[110] *Id.* at 393. The Court elaborated: "[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 392–93 (quoting *Cornelius*, 473 U.S. at 806). *Cornelius* involved a non-public forum. In *Lamb's Chapel*, the

Rosenberger and *Lamb's Chapel* together, one would apparently (and confusingly) apply the same test—requiring governmental reasonableness and proscribing viewpoint discrimination—regardless of whether or not a school designated a limited public forum. If so, why distinguish limited public forums from non-public forums in the first place? Regardless, the *Rosenberger* Court followed the *Lamb's Chapel* Court by imbuing this reasonableness and viewpoint-neutrality test with pointed bite.[111] Specifically, the *Rosenberger* Court concluded that, in the facts of that case, the University's funding of numerous secular organizations but denial of funding to a religious periodical constituted viewpoint discrimination, contravening the First Amendment.[112]

The Court, it seems, has tangled itself in a bramble of doctrinal thistles with its varied invocations of the public forum doctrine in *Rosenberger* and *Lamb's Chapel* as well as in *Hazelwood*.[113] Despite the doctrinal ambiguities, however, the Court's degree of deference in *Bethel* and *Hazelwood*, varied markedly from that in *Rosenberger* (and for that matter, *Lamb's Chapel*). *Bethel* and *Hazelwood* adopted highly deferential standards that would allow school officials to restrict student expression based on the content of the speech and writing. And then, in applying these standards, the Justices emphasized that they needed to respect how school officials' interpreted and applied their institutions' educational missions and pedagogical

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Court reasoned that it need not decide whether the school district had created a limited public forum, which the Court suggested would have triggered strict scrutiny, because the district could not even satisfy the reasonableness and viewpoint-neutrality test applied to a non-public forum. *Id.* at 390–97.

[111] *Rosenberger*, 515 U.S. at 830 (emphasizing the decision to follow *Lamb's Chapel*).

[112] *Id.* at 831. *Lamb's Chapel* held that a school district violated free speech when it opened school property for public uses but denied access to a church that sought to use the property for religious purposes. *Lamb's Chapel*, 508 U.S. at 384. Subsequent to *Rosenberger*, the Court decided *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), which held that a public school violated the free-expression rights of a Christian organization when the school refused to allow the organization to hold on school property club meetings for children, ages six to twelve. The Court in *Good News Club* followed the *Rosenberger* doctrine requiring reasonableness and viewpoint neutrality for a limited public forum and again applied it with bite. *Id.* at 107–12; *see also* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a university violated free expression by refusing to allow a student religious group to use school facilities ordinarily open to student organizations).

[113] In 1981, when the Court first invoked the public forum doctrine to resolve a free expression case involving religious expression in an educational context, some of the justices questioned whether the public forum analysis was appropriate. *Widmar*, 454 U.S. at 277–79 (Stevens, J., concurring) (arguing that public forum analysis was inappropriate); *id.* at 287–88 (White, J., dissenting) (doubting whether public forum analysis was useful); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1138 (3d ed. 2006) (criticizing the Court's confusion of doctrine in the limited public forum context). Furthermore, Chief Justice Roberts has complained: "The mode of analysis employed in *Fraser* [*Bethel*] is not entirely clear." Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007).

approaches. But in *Rosenberger*, the Court refused to defer to the University officials' decision to deny funding to a religious periodical. While the *Rosenberger* doctrinal standard appeared on its surface to be deferential—requiring the government merely to act reasonably and neutrally—the Court added serious bite to this standard in application. The *Rosenberger* Court, for instance, did not conclude that the University officials could promote anti-establishment principles or values as a reasonable goal or as a legitimate pedagogical concern—even though the Establishment Clause is part of the Constitution. Perhaps more important, the Court did not conclude that the University's denial of funding was permissible content-neutral discrimination. Given the facts, this conclusion would have been reasonable: the University policy was to deny funding to religious organizations and activities in general, regardless of sectarian viewpoint. The University, that is, did not discriminate specifically against Christian evangelical organizations.

I do not, however, intend to argue that the Court decided *Rosenberger* incorrectly, whether based on doctrine or otherwise.[114] Instead, my point is that one fruitful way to understand the results in *Bethel*, *Hazelwood*, and *Rosenberger* lies in the Justices' political inclinations. A conservative bloc of Justices in *Bethel* and *Hazelwood* allowed school officials to discriminate against student expression when the content was allegedly lewd or controversial (discussing divorce and teen

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[114] While I disagree with the *Rosenberger* holding, *cf.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 275–76 (1997) (criticizing the *Rosenberger* Court's concept of neutrality), I acknowledge that there are reasonable doctrinal arguments in support of the Court's conclusion. For example, one could counterargue that the University's denial of funding was content-based discrimination because the University distinguished religious activities from secular ones. *See Lamb's Chapel*, 508 U.S. at 393–94 (noting that the lower court categorized the governmental action as "viewpoint neutral"). Recognizing this possibility, the University argued that the Establishment Clause compelled this discrimination, to the extent that it was content-based.

Judge Frank Easterbrook suggests that the result in *Hazelwood* can be reconciled with the result in *Rosenberger* because of the public forum doctrine. Hosty v. Carter, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006). In *Hazelwood*, the school had not created a public forum, so the Court justifiably deferred to the school officials, while in *Rosenberger*, the University had created a limited public forum, so the Court justifiably refused to defer. While Judge Easterbrook's argument is reasonable, it has certain problems. First, Judge Easterbrook ignores how the Supreme Court has confounded the standards to be applied in limited public forum and non-public forum cases. Second, Judge Easterbrook disregards the degree to which the Justices appeared to follow their political inclinations both in deciding whether the government had created limited public forums and in applying the respective free expression standards for limited public forums and non-public forums (particularly in light of the fact that both the *Hazelwood* and *Rosenberger* Courts, despite reaching different conclusions regarding the existence of a limited public forum, both claimed to apply reasonableness standards).

pregnancy).[115] Then a conservative bloc of Justices in *Rosenberger* refused to allow school officials to discriminate against student expression that had an overtly religious (Christian) content (or viewpoint).[116] Thus, in *Bethel* and *Hazelwood*, the Court interpreted the First Amendment to allow school officials to discriminate, while in *Rosenberger*, the Court interpreted the First Amendment to preclude discrimination. But in all the cases, the Justices interpreted and applied (ambiguous) doctrine in a politically conservative fashion. Politically conservative Justices reached conservative results: the Court protected Christian religious speech but not more controversial or challenging expression.

II. *MORSE V. FREDERICK* AS A CASE STUDY

The Court's recent decision, *Morse v. Frederick*, illustrates how the Justices' interpretations of free expression rights in educational institutions oscillate between the two democracies.[117] A high school principal, Deborah Morse, decided to allow students to watch the Olympic Torch Relay as it passed by her school in Juneau, Alaska.[118] As the torchbearers and accompanying camera crews passed the school, a student, Joseph Frederick, "unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS.'"[119] Morse confiscated the banner and suspended Frederick.[120] A five-Justice majority, with an opinion written by Chief Justice John C. Roberts, held that this punishment did not violate Frederick's free expression rights.[121]

The Justices disagreed strongly about the meaning of "BONG HiTS 4 JESUS." While dissenting Justice John P. Stevens deemed it "a nonsense message."[122] Roberts wrote:

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[115] The only liberal Justice to join the majority opinion in either *Bethel* or *Hazelwood* was John P. Stevens, who joined Justice White's opinion in *Hazelwood* but dissented in *Bethel*. Moreover, the categorization of Justice Stevens as a liberal is disputable. He was appointed by a Republican President (Gerald Ford), and his voting record across a variety of cases might lead one to categorize Justice Stevens as a "centrist" with a "reputation for independence and moderation." THE OXFORD COMPANION TO THE SUPREME COURT 836 (Kermit L. Hall et al. eds., 1992).

[116] As the *Rosenberger* Court admitted, viewpoint discrimination is a "subset" or "form of content discrimination." *Rosenberger*, 515 U.S. at 829–31.

[117] 127 S. Ct. 2618 (2007).

[118] *Id.* at 2622.

[119] *Id.*

[120] *Id.* at 2622–23.

[121] Justice Stephen Breyer concurred in the judgment in part and dissented in part. He did not reach the First Amendment issue but reasoned that the principal was nonetheless shielded by qualified immunity. *Id.* at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part).

[122] *Id.* at 2649 (Stevens, J., dissenting).

> The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.[123]

Moreover, the Justices' various opinions in the case implicitly disagreed about whether students' free expression rights should be conceptualized in accord with republican or pluralist democracy. Roberts's opinion waffled between republican democratic and pluralist democratic concepts of free expression in the public schools, though Roberts ultimately leaned toward a more conservative and republican democratic interpretation of the First Amendment. Justice Clarence Thomas's concurrence strongly favored a republican democratic approach, while Justice Stevens's dissent and Justice Samuel Alito's concurrence both resonated with pluralist democracy.

Justice Roberts reviewed the precedents running from *Tinker* through *Hazelwood*. Even while Justice Roberts recognized that the Court has modified the *Tinker* doctrine, he suggested that *Tinker* is still a vital decision. Justice Roberts characterized the black armbands in *Tinker*, worn to protest the Vietnam War, as "political speech," which is "at the core of what the First Amendment is designed to protect."[124] Justice Roberts thus alluded to the so-called self-governance theory, which justifies a strong reading of the First Amendment. Significantly, the judicial and scholarly emphasis on self-governance arose only after the rise of pluralist democracy in the 1930s.[125] Free expression became a constitutional lodestar because, in part, political participation cannot be fair and open for all citizens—a prerequisite for pluralist democracy—unless each individual can freely express his or her interests in the democratic arena. Free expression, in other words, became an integral component of the pluralist democratic processes. Unsurprisingly, then, Justice Roberts refused to adopt a rule, more consonant with republican democracy, that would allow school officials to restrict expression because it was offensive or unpleasant.[126]

Yet, Justice Roberts did not merely follow *Tinker*. To the contrary, he discerned two principles embodied in its progeny—two principles that reflect a serious weakening of the *Tinker* precedent. First, students' free expression rights are less than the full rights enjoyed by individuals outside a school context, and second, *Tinker* no longer provided the doctrinal rule for determining the scope of students'

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[123] *Id.* at 2624 (majority opinion) (citation omitted).

[124] *Id.* at 2626 (quoting Virginia v. Black, 538 U.S. 343, 365 (2003)).

[125] Feldman, *supra* note 11, at 454–55.

[126] *Morse*, 127 S. Ct. at 2629.

free expression rights.[127] Predictably, then, Justice Roberts wrote approvingly of parts of *Bethel* and *Hazelwood* that resonated strongly with republican democracy. Justice Roberts quoted from the *Bethel* Court's judgment that a school district could punish a student's "offensively lewd and indecent speech"[128] and from the *Hazelwood* Court's ruling that school officials can control the "content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[129] And ultimately, Justice Roberts reached the conservative conclusion—Frederick's expression was constitutionally unprotected—by deferring to the principal's interpretation of the banner as promoting illegal drug use.[130] Following this interpretation, Justice Roberts reasoned that the danger in *Morse* "is far more serious and palpable" than in *Tinker*:[131] "The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy."[132]

Justice Thomas's concurrence is less equivocal in its preference for a republican democratic concept of free expression in the public schools. Justice Thomas argued to overrule *Tinker* because it was not grounded "in the history of education."[133] According to Justice Thomas, "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[134] In fact, Justice Thomas's depictions of nineteenth-century public school education and free expression under republican democracy, which held sway from the framing through the 1920s, are persuasive. As Justice Thomas emphasized, the purpose of the mid-nineteenth-century common schools was to inculcate children with the values necessary to become virtuous citizens who would pursue the republican democratic common good. "[E]arly public schools were not places for freewheeling debates or exploration of competing ideas," Thomas wrote. "Rather, teachers instilled 'a core of common values' in students and taught them self-control."[135] Parents bore the duty to train their children to become "virtuous members of society," and with that duty, parents necessarily had the power to discipline, "to command obedience."[136] Acting *in loco parentis*, schools shared the same duty and power, a power that would therefore allow schools to regulate student speech. Justice Thomas concluded by quoting from an 1859 state court opinion: a

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[127] *Id.* at 2626–27.

[128] *Id.* at 2626 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

[129] *Id.* at 2627 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

[130] *Id.* at 2629.

[131] *Id.*

[132] *Id.* (citation omitted).

[133] *Id.* at 2635 (Thomas, J., concurring).

[134] *Id.* at 2630.

[135] *Id.*

[136] *Id.* at 2631 (quoting State v. Pendergrass, 19 N.C. 365, 365–66 (1837)).

teacher's power to punish student expression was "essential to the preservation of order, decency, decorum and good government in schools."[137] From Justice Thomas's republican democratic perspective, then, the principal, Morse, could punish the student, Frederick, for any expression that Morse deemed unvirtuous, including the banner proclaiming "BONG HiTS 4 JESUS."[138]

Of course, despite Justice Thomas's insistence on following a stultifying originalist interpretation of the Constitution, the nation is no longer a republican democracy. It is a pluralist democracy, and it has been for seven decades. In light of the transition to pluralist democracy, one must question whether the Court should still construe students' free expression rights as if we lived in 1845. Justice Alito refused to do so but nonetheless concurred. He strongly endorsed the *Tinker* doctrine, which protects student expression unless it "threatens a concrete and 'substantial disruption.'"[139] Given that *Tinker* resonates strongly with pluralist democracy, Justice Alito was understandably wary of allowing school officials "to censor any student speech that interferes with a school's 'educational mission,'" a doctrinal approach that seemingly would be more consonant with *Bethel* than *Tinker*.[140] The "educational mission" approach, resonating with republican democracy, would afford school officials broad discretion to inculcate their preferred values or "political and social views."[141] This position, Justice Alito declared, "strikes at the very heart of the First Amendment."[142] Why, then, did Justice Alito concur instead of dissent? While the *Healy* Court had interpreted *Tinker* to harmonize with the *Brandenburg* doctrine, protecting expression unless it creates an imminent risk of proscribed conduct, Justice Alito argued that in "the school environment, school officials must have greater authority to intervene before speech leads to violence."[143] From Justice Alito's vantage, "*Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts."[144] Justice Alito agreed with Justice Roberts that Frederick's banner should be interpreted as "advocating illegal drug use," which poses "a grave and in many

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[137] *Id.* at 2632 (quoting Lander v. Seaver, 32 Vt. 114, 121 (1859)).

[138] Justice Thomas mentioned the treatment of students at colleges, *id.* at 2631 n.2, but then expressly stated that his "discussion is limited to elementary and secondary education." *Id.* at 2631 n.3.

[139] *Id.* at 2637 (Alito, J., concurring) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969)). Justice Alito acknowledged, however, that *Tinker* "does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 2638.

[144] *Id.* (quoting *Tinker*, 393 U.S. at 508–09).

ways unique threat to the physical safety of students."[145] Thus, Justice Alito concluded, Morse could punish Frederick pursuant to the *Tinker* doctrine.

Like Justice Alito, the dissenting Justice Stevens emphasized the *Tinker* doctrine, but Stevens interpreted *Tinker* more consistently with *Brandenburg*. "[U]nder *Tinker*, 'regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. . . . *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.'"[146] The majority's approach, Stevens protested, allowed Morse to discipline Frederick "because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner."[147] But Justice Stevens argued that students, in accord with pluralist democracy, ought to be able to express their diverse political views without fear of punishment.[148] The Court's holding "strikes at 'the heart of the First Amendment' because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint."[149] Specifically, "the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[150] Not only must school officials allow students to voice their sundry political positions, but officials should be precluded from enforcing values previously associated with republican democratic virtue and civility. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[151] Thus, like the *Tinker* Court, Justice Stevens concluded that we must "risk" the "hazardous freedom" of the First Amendment because it is crucial in our "relatively permissive, often disputatious, society."[152]

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[145] *Id.*

[146] *Id.* at 2645 (Stevens, J., dissenting) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001)) (emphasis omitted). Stevens wrote: "[T]he First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." *Id.* at 2644.

[147] *Id.* at 2645.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 2649. Stevens noted: "The Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska." *Id.* at 2649 n.8.

[151] *Id.* at 2645 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[152] *Id.* at 2651 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508–09 (1969)). Justice Stevens added that, even if the Court were to apply a less rigorous interpretation of the First Amendment, Frederick's expression was too ambiguous to be categorized as advocacy and, therefore, too ambiguous to punish. *Id.* at 2646. Finally, Justice Stevens noted that if there were any doubt about whether the expression was unprotected, the Court should find it within the compass of the First Amendment. He quoted

CONCLUSION

For decades, the Court generally has decided free expression cases in accordance with pluralist democracy. But the Justices' competing opinions in *Morse* epitomize the unique nature of free expression in educational institutions. Sometimes, the Justices delineate students' free expression rights consistently with pluralist democracy, but other times, for a variety of reasons, the Justices retreat toward republican democratic principles that usually help justify narrower conceptions of students' First Amendment rights. *Morse*, of course, involved a high school rather than a college or university. In future cases, the Court could reason that one set of doctrinal rules should apply to primary and secondary schools while a second set of rules should apply to institutions of higher education. Yet in the past, the Court has not relied on this possible distinction, though the Justices have acknowledged it.[153] The Court has apparently developed its doctrine without seriously considering the possible distinctions among different levels of education. *Tinker* arose in a high school (and junior high), but *Healy* and *Papish* arose in colleges, and finally, *Bethel* and *Hazelwood* were back in high schools. Lower courts have disagreed about the degree to which *Hazelwood* should control in the college context, though they generally accept that, at a minimum, the *Hazelwood* distinction between public forums, designated public forums, and non-public forums is crucial to the free expression analysis.[154] When the courts have concluded that a college has not created a designated public forum, then the courts tend to follow closely the *Hazelwood* exception to *Tinker*. That is, school officials can restrict student expression in school-sponsored activities, such as the publication of a newspaper, so long as the officials' restrictions "are reasonably related to legitimate pedagogical concerns."[155] Indeed, the Supreme Court's confusing public forum

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Roberts from another case: "[W]hen the 'First Amendment is implicated, the tie goes to the speaker.'" *Id.* at 2649 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007)).

[153] *Id.* at 2631 n.3 (Thomas, J., concurring); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273–74 n.7 (1988).

[154] Jeff Sklar, Note, *The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of* Hazelwood*'s Application to Colleges*, 80 S. CAL. L. REV. 641, 657–62 (2007) (discussing lower court cases). The dissenters in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006), argued that the Supreme Court precedents suggest that elementary and secondary education should be distinguished from higher education. *Id.* at 739–42 (Evans, J., dissenting).

[155] *Hazelwood*, 484 U.S. at 272–73; *see Hosty*, 412 F.3d at 734–38 (majority opinion) (applying *Hazelwood* at college level); Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–93 (10th Cir. 2004) (same); Bishop v. Aronov, 926 F.2d 1066, 1074–77 (11th Cir. 1991) (same), *cert. denied*, 505 U.S. 1218 (1992).

cases suggest that even if the school has created a limited public forum, courts should still apply a test requiring the government to act reasonably and neutrally. Significantly, then, the en banc Seventh Circuit, with an opinion by Judge Frank Easterbrook, has argued that the determination of what constitutes a reasonable regulation might vary with the age of the students.[156]

[156] *Hosty*, 412 F.3d at 734–35. The court decided that, based on the summary judgment record, it could not resolve whether the expression was protected, but that the university dean was nonetheless protected by qualified immunity. *Id.* at 738–39; *see* Sklar, *supra* note 154, at 665–69 (discussing *Hosty*).