

30 YEARS OF HAZELWOOD: REVISITING THE FIRST AMENDMENT RIGHTS
OF MINORS IN THE EDUCATION SYSTEM DURING THE SOCIAL MEDIA AGE

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ABSTRACT

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In 1969, the Supreme Court of the United States ruled in *Tinker v. Des Moines Independent School District* that students were entitled to protections of the First Amendment and “do not shed their constitutional rights at the schoolhouse gate”. However, subsequent Supreme Court decisions have chipped away at this protection by granting greater power to school administrators to restrict student liberties. After the *Tinker* decision, the three most influential cases were *Bethel School District v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*, with *Hazelwood* being the most broad, sweeping restriction on freedom of expression for American students. The *Morse* decision—the most recent of such cases—was decided in 2007, which predates the expansion of social media and the digital pervasiveness students are familiar with today. Given these new circumstances, the Supreme Court must revisit student free speech rights and err on the

side of the *Tinker* decision and not on the one in *Hazelwood*. Failure to establish a new precedent in this digital age is bad for both students and administrators. If the Supreme Court remains silent on student rights in the digital age—or worse, if the Court continue to rule in favor of administrators over student freedoms— it would be one of the biggest mistakes the Court could make in this day and age.

I. INTRODUCTION

The size and scope of the First Amendment has had varying degrees of application in the United States depending on the decade, content, and identity of the speaker. Despite the commonly associated connotations, testing the limits of freedom of expression is not limited to radical outliers and hate speech. While every American is affected by the rulings of the Supreme Court, an unlikely demographic has wrestled with the interpretations of the First Amendment for decades: minors.

For more than 50 years, children and teenagers have gone into battle to assert their inclusion in the First Amendment—in the courts, in the classroom, in assemblies and school newspapers, and most importantly and most recently, on the Internet. While the Supreme Court has spoken about the validity and legality of speech in most of these settings and circumstances, the highest court in the land has yet to hand down an opinion on the last item, which arguably has the greatest reach and potency students have ever had access to for voicing their wants, concerns, positions, and fears.

When Christopher Eckhardt and John and Mary Beth Tinker wore black armbands to protest the Vietnam War in 1965, neither the students nor the Justices of the Supreme Court could have imagined where the message would go or the size of the potential audience if the students had social media at their disposal. The declaration, “students or teachers [shouldn’t] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”¹ did not predict the schoolhouse gate would have a virtual plane and permit students the channels necessary to bring them into their place of learning

¹ *Tinker v. Des Moines Independent Community School District*, 393 U.S 503 (Feb 1969)

electronically. But regardless of technological advances and cultural dynamic shifts, the *Tinker* decision is still established law and remains in effect today.

However, students have not been able to exercise their speech without negative ramifications and some schools and districts have taken it upon themselves to punish students for their actions online, even if the activity did not take place on school property or during school hours. This overreach is a direct result of the faulty application of the ruling from *Hazelwood v. Kuhlmeier* in 1988. Despite this specific case pertaining to articles in a high school newspaper, the lone clause granting schools “to censor a school-sponsored publication, theatrical production or other vehicle of student expression [which] has no valid educational purpose”² has rested a boot on the necks of schoolchildren for 30 years. The *Hazelwood* ruling has given schools nearly free reign to enact dress codes and hair codes and other regulations of conduct which are not inherently flagrant or controversial.

In addition to the *Hazelwood* ruling, its predecessor *Bethel v. Fraser* and its successor *Morse v. Frederick* have successfully chipped away at the broad freedoms passed down to students from the *Tinker* decision. And since the *Morse* ruling in 2007, a subsequent case concerning student freedom of expression in the education system has not reached the Supreme Court. Coincidentally, this 11-year drought coincides with the rise of social media, especially with young people. Students are communicating with more tools and channels at their disposal and reaching larger audiences than ever before—certainly more than Cathy Kuhlmeier and her newspaper staff were capable of in 1983. The lack of recent precedent is dangerous for both educators and students because the ambiguity of law

² *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (Jan 1988)

makes it harder for educators to assess their authority over students, as well as the risk of infringing upon student rights if taken too far. Neither example is preferable and the presence of precedent would remedy these murky waters. The Supreme Court has had the opportunity to grant certiorari to several relevant cases from the circuit court level, but for reasons unknown did not, thus prolonging the legal limbo of student free speech in the digital age.

To the point, the Supreme Court is long overdue for another interpretation of the First Amendment concerning minors in the American school system. The compulsion for such a case is because of a variety of reasons, including but not limited to the increase of social media use in young people and the gross enforcement of the *Hazelwood* ruling. Concerning the latter, a caveat is made to separate the overreach of *Hazelwood* from legitimate threats to student safety, such as harassment and bullying. Such negative uses of free speech are restricted in the public sphere between adults (when safety is breached), so naturally students must follow suit. The vulnerable speech to the *Hazelwood* ruling is that which is perfectly legal and protected outside of schools but happens to not receive the same treatment once a student utters the same words on school grounds, absent of malice and violence.

Justice Clarence Thomas bluntly claimed in his concurring opinion in *Morse v. Frederick* that “the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools”³ and that he would like to see the *Tinker* decision overturned completely. This sentiment is not new either, as Justice Hugo Black’s dissent in the original *Tinker* ruling echoed the same patrimony,

³ *Morse v. Frederick*, 551 U.S. 393 (June 2007)

writing, “It may be that the Nation has outworn the old-fashioned slogan that ‘children are to be seen not heard,’ but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.”

In contrast, Justice William J. Brennan Jr. wrote in his dissent in *Hazelwood v. Kuhlmeier* that this country cannot expect young people to have appreciation in our “cherished democratic liberties the constitution guarantees” if public officials—especially school officials—hold “unthinking contempt for individual rights,” famously quipping, “the young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.”

This thesis asserts that not only should student freedom of expression be allowed in schools, it should be taught and encouraged for the benefit of the students and society at large. Limiting the First Amendment rights of a group of individuals, who are just as impacted by legislation and the machinations of the older generation as the rest of the population, is not healthy for democracy and future voters. An effective step in fostering this environment would be the Supreme Court setting a precedent that weighs the digital age and restores the strong free speech rights established in *Tinker* and rejects the abuse of power allowed by *Hazelwood*.

Modern technology, social media, and the new ways young people communicate force this hand by amplifying the voices of the young that should no longer be suppressed.

Chapter 2: HISTORY OF PRECEDENTS

Although both the Supreme Court and the First Amendment were established in the infancy of the United States, the two did not interact as we now have come to expect until roughly a century ago.

Before *Tinker*

The first case of the modern interpretation of free speech rights the Court considered was in *Schenck v. United States*, in which Charles Schenck, an anarchist, distributed literature in opposition to military conscription during the Great War and urged men to resist the draft. Schenck was arrested for violating the Espionage Act of 1917 and the Supreme Court, in 1919, under Chief Justice Edward D. White, unanimously sided with the federal government's right to restrict speech during war time.

The Court ruled with an emphasis on war time because Schenck's speech was interpreted to be an act of sabotage. This argument would later fail, as speech alone was later determined to not be sufficient enough to constitute an act of violence or endangerment.

Besides being the first, *Schenck* also set the precedent of Justice Oliver Wendell Holmes' "clear and present danger" test. Often cited even to this day, Holmes famously wrote in the majority opinion, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁴ The term "falsely shouting fire in a public theatre" has become a metaphor for speech specifically meant to incite panic and cause harm and remained unprotected by the First Amendment until the

⁴ *Schenck v. United States*, 249 U.S. 47 (March 1919)

Schenck ruling was overhauled in *Brandenburg v. Ohio* to protect even the advocacy of violence unless "imminent lawless action"⁵ occurred.

When framing the road to *Tinker*, it's important to note what the Court considered dangerous and violent because every precedent passed down to America's students was first imposed on the general public, with varying degrees of congruence.

Tinker v. Des Moines

Although *West Virginia State Board of Education v. Barnette* set an earlier precedent of prohibiting public schools from requiring students to salute the flag or pledge allegiance during class in 1943⁶, the *Tinker* ruling is considered the first to establish that First Amendment rights extend to students in public schools because of the scope the ruling granted to America's young people.

Less than four months before the Court unanimously upheld Clarence Brandenburg and the Ku Klux Klan's right to hate speech, John and Mary Beth Tinker and Christopher Eckhardt won a victory for student free speech and expression and signaled the start of fifty years of additional court battles and the crux of this body of work.

Under direction from their father Leonard Tinker, John, Mary Beth, Hope, and Paul Tinker, ages 8 to 15, decided to wear black armbands to protest America's military presence in Vietnam and support Sen. Robert F. Kennedy's Christmas Truce, which called to end the war by Christmas. The Tinker children, joined by their family friend Christopher Eckhardt, planned to wear the armbands at school for the remainder of December.

School administrators learned of this plan and met to draft a policy to punish any student caught wearing the armbands. On December 16, 1965, Eckhardt and the Tinker

⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (June 1969)

⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (June 1943)

children remained committed to the plan and wore the black armbands to school in peaceful protest. Eckhardt and Mary Beth Tinker were suspended that day, with John Tinker joining them the next day. Curiously, Hope and Paul were not punished for exercising their First Amendment right at the elementary school.

The American Civil Liberties Union took up the case in support of the Tinkers and Eckhardt, asserting that their suspension was unjust because the students were peacefully protesting, which was protected by the First Amendment. After oral arguments in the fall of 1968, the Court ruled 7-2 in favor of the students on February 24, 1969. In the majority opinion, Justice Abe Fortas wrote “students or teachers [shouldn’t] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” affirming that public school students were not exempt from the constitutional right of free speech and expression.

The majority ruling of *Tinker v. Des Moines* also established the criteria of substantial disruption or “the Tinker test.” The principals in Des Moines Independent Community School District asserted the armbands were a distraction but the Court found this to be unfounded. The Tinker test thus required future Courts to consider this question: “Did the speech or expression of the student materially and substantially interfere with the requirements of appropriate discipline in the operation of the school?” If the answer were no, then free speech would reign supreme, which was the case with Eckhardt and the Tinker children.

Fortas clarified this by writing, “Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted.” In fact, the

only time Fortas included violence or harassment in the assessment of what the black armbands caused, the participants were actually the recipient of jeers and criticism from their peers.

The only caveat of free expression not extended to students was the substantial disruption element laid out in the *Tinker* test. The future appeared bright for opinionated free-thinkers in Kindergarten through 12th grade with a voice yearning to be heard. However, this optimism would be dashed in the 1980s.

Bethel v. Fraser

Tinker remains established law to this day, but these broad freedoms bestowed on our students have since been chipped away by subsequent cases. The degradation of *Tinker*'s strength began on April 26, 1983, at Bethel High School in Pierce County, Washington, when high school senior Matthew Fraser got up on stage during a school assembly to endorse his friend, Jeff Kuhlman, for student body vice president.

No form of academic writing can do Mr. Fraser's speech justice and the transcript of the fateful endorsement is 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 please vote for Jeff Kuhlman, as he'll never come between us and the best our school can be."*⁷

Fraser was suspended for disruption and vulgar and offensive speech, despite his speech containing only double entendres and nothing inherently explicit. The strongest

⁷ Transcript of Matthew Fraser's speech

evidence against Fraser were the reactions from the crowd, which school administrators considered a sufficient amount of disruption. Teachers also claimed student discussion about the speech in the classrooms distracted from lessons.

Unlike the Tinker children, the lower appellate courts sided with Fraser and his ACLU counsel that his First Amendment rights permitted him to deliver that speech, but upon the case's deliverance to the Supreme Court, the Burger Court ruled 7-2 in favor of the school district in 1986, upholding Matthew Fraser's suspension from three years prior.

The ruling made an exception to the framework of the *Tinker* ruling excluding vulgarity from protected student speech and symbolic speech. Students following in Fraser's footsteps would not be able to crack vulgar and lewd jokes at assemblies without incurring the wrath of administrators from here on out. The two dissenting votes were Justices John Paul Stevens and Thurgood Marshall. Marshall wrote that rulings from the previous lower court decisions were sufficient.

Stevens' dissent, however, was much more defiant, beginning with the iconic quote from *Gone With the Wind*: "Frankly, my dear, I don't give a damn." Stevens uses this reference to explain that the test for vulgarity was constantly changing, with time, peer groups, and local culture. Thus, he wrote, the Court was not the best authority to decide Fraser's fate.

He finished his opinion with this declaration: "I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable...because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the

district and circuit judges who are in a much better position to evaluate this speech than we are.”

Furthermore, the decision by the Burger Court would seem to backpedal on the progress they made 15 years earlier when siding with an adult, Paul Cohen, and his right to wear a jacket bearing the words “Fuck the draft” in the 1971 court case *Cohen v. California*. In the majority opinion, Justice John M. Harlan II wrote, “Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.”⁸ Harlan also considered vulgarity to be a mere side effect of the free exchange of ideas and a permissible one at that.

Curiously, Harlan was also one of the justices to dissent in *Tinker* two years earlier, siding with Justice Hugo Black that the Court should rule in favor of the school district (albeit Harlan’s reasoning was more in line with the good faith of the school to govern how they see fit and less of the disdain for young people Black harbored).

Ultimately, as previously stated, Fraser did not receive the same courtesy as Cohen, despite being less explicit than the draft protester. With the *Bethel v. Fraser* ruling leaving a vulnerable (but necessary in the moment) opening on student free speech, the stage was set for *Hazelwood v. Kuhlmeier* to change the course of public school free expression for at least the next 30 years.

Hazelwood v. Kuhlmeier

⁸ *Cohen v. California*, 403 U.S. 15 (June 1971)

The student journalists of *The Spectrum*, the school newspaper of Hazelwood East High School in St. Louis, Missouri, finished another standard issue in May 1983. When the newspaper advisor, Howard Emerson, submitted the proofs for Principal Robert Eugene Reynolds to review—as was the practice and custom—Reynolds objected to two stories included in the coverage. One article was about teen pregnancy and was localized to the high school by including interviews with pregnant students. However, the students interviewed were given different names to protect their identities. Reynolds objected to the article, even with this protection, on the grounds the sources could still be identified and ostracized for speaking out.

The second objected article was about divorce and contained an interview from a student with divorced parents. The source was very critical of her father's behavior and lack of compassion for her mother and sister. Reynolds objected to this article on the grounds the father should have the opportunity to defend himself if he was to be slandered in the publication.

Instead of amending the material, Reynolds ordered the pages the pieces appeared on cut out entirely, as a delay in publication could not be accounted for that late in the school year. The student staff were not consulted on this decision and an additional five articles failed to print because they appeared on the same pages as the divorce and pregnancy articles.

In January of the following year, student editor Cathy Kuhlmeier, along with two of her reporters, filed a lawsuit against the school district for the prior restraint of those two articles. As with the Tinker children and Christopher Eckhardt, and Matthew Fraser in their respective cases, the ACLU picked up the case on their behalf.

Four years later, the conservative Rehnquist Court asserted the revival of school authority with a 5-3 ruling in favor of the school district to exercise prior restraint on the student newspaper at Hazelwood East High. School sponsored and school funded activities were not protected by the First Amendment from administrative oversight.

Morse v. Frederick

The application of the legal precedent of the *Hazelwood* ruling became relevant again decades later when another high school student by the name of Joseph Frederick raised his banner declaring "BONG HiTS [sic] 4 JESUS".

For context, Frederick unfurled this banner after arriving late to a school-approved congregation of students to watch the Olympic torch pass through their town of Juneau, Alaska on January 24, 2002. When the news crews passed through with television cameras, Frederick seized the opportunity to reach a larger audience. In turn, his principal, Deborah Morse, would also seize the opportunity to confiscate the banner and suspend Frederick for an initial five days, which was then increased to ten days after further insubordination from the student.

Five years later, the Supreme Court granted certiorari to *Morse* and the School Board's appeal after the Ninth Circuit Court ruled unanimously in favor of Frederick. Despite occurring off-campus, both the lower courts and the Supreme Court approached the case as an incident happening at a school-sponsored event, thus incorporating the school speech precedents set by *Tinker*, *Bethel*, and *Hazelwood*.

In a close 5-4 decision, the Court ruled *Morse* and the school were permitted to discipline Joseph Frederick for the banner because advocacy for illegal drug activity was not protected by the First Amendment and the rights guaranteed to students from the *Tinker*

ruling. Interpreting Frederick's banner was not as simple as this initially, as Chief Justice John Roberts described it as "cryptic" and "no doubt offensive to some, perhaps amusing to others." The Court eventually came to the conclusion that "bong hits" were a reference to marijuana use, which was decriminalized but not legalized in Alaska in 2002 when Frederick made the banner.

Frederick could only describe the banner's message as "meaningless and funny," which would ironically hurt his case, as a meaningless message would not receive the same protections as religious or political speech. Roberts assured that student speech of a political or religious nature would be protected by the First Amendment, but Frederick did not testify that his banner carried such a message. The Court decided the banner's true intention was to disrupt and grab attention, which is not protected under the First Amendment according to the Tinker test.

As previously stated in the introduction, Justice Thomas agreed with the majority opinion in full but wrote a separate concurring opinion about his views on *Tinker v. Des Moines*, which he thought ought to be overturned completely. Justice Samuel Alito, however, was much more specific in this particular case and reiterated that this ruling should not encroach upon broader political student speech and opposed "any further extension" of the opinion to be applied beyond illicit drug use.

Justice Stevens authored the dissenting opinion (as he previously did in *Bethel*), arguing the banner was too vague to warrant *Morse's* disciplinary action in confiscating the banner and suspending Frederick. According to Stevens, high school students were reasonably intelligent enough to "know dumb advocacy when they see it" and that "[t]he

notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.”

Stevens also considered the ruling to be a grave step in the wrong direction for free speech, as advocating for marijuana law reform was no different than peaceful protest against Prohibition and the Vietnam War.

Despite losing at the Supreme Court, Frederick received a undisclosed substantial settlement from the school district in 2008 after arguing his right under the Constitution of Alaska (as opposed to the U.S. Constitution) was violated. The "BONG HiTS [sic] 4 JESUS" banner is now hanging in the Newseum in Washington, D.C.

Since the *Morse v. Frederick* ruling in 2007, the issue of school speech has not returned to the Supreme Court. In 2002, Joseph Frederick only had access to a banner, just as Cathy Kuhlmeier only had a print newspaper in 1983. The tools at students’ disposal in 2018 are a limitless arsenal compared to their predecessors, thus setting the stage for urgent need for a new interpretation.

Before a new interpretation can be requested, however, the legal framework to compose one has to be assessed and critiqued. The full effect of *Hazelwood v. Kuhlmeier* is the widest, hardest obstacle to achieve this and therefore requires its own chapter.

III: *HAZELWOOD V. KUHLMEIER* AND ITS EFFECTS

The full effect of *Hazelwood v. Kuhlmeier* is so extensive and pervasive in the deterioration of the rights of minors, it requires a closer look beyond the other preceding court opinions.

Court Makeup

The oral arguments for the prior restraint exercised by principal Reynolds occurred on October 13, 1987. At this time, the Supreme Court was composed of Chief Justice William Rehnquist and seven associate judges: William J. Brennan Jr., Byron White, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia.

The vacancy on the Court remained from Justice Lewis F. Powell Jr.'s retirement several months prior. At the time of the oral arguments, President Ronald Reagan's nomination to Powell's seat, Robert Bork, was awaiting Senate confirmation. Bork would be rejected by the Senate later that month. Reagan's subsequent nominee, Douglas Ginsburg, would also fail to join the Court after withdrawing the nomination as a result of his admission to the illegal use of marijuana.

Reagan's third nominee, Anthony Kennedy, would not be unanimously confirmed by the Senate until February 3, 1988—three weeks after the *Hazelwood* ruling. Despite undergoing the vote during a court vacancy, the 5-3 ruling makes the hypothetical decision of Kennedy's swing vote a moot point, as the student journalists of Hazelwood East High School needed two additional votes in their favor.

With five Justices voting against the students, Justice Byron White wrote the majority opinion and was joined by Chief Justice Rehnquist and Associate Justices Stevens,

O'Connor, and Scalia. Rehnquist, Stevens, Scalia, and O'Connor were Republicans, although Stevens and O'Connor would not always vote in line with conservative interpretations. The majority opinion's author, however, was a Democrat nominated by President John F. Kennedy. Byron White's judicial philosophy is harder to describe than the other four justices who joined him in *Hazelwood*.

The three dissenting votes came from Justices Brennan, Marshall, and Blackmun—the former two being Democrats and the latter justice, Republican. From the mid-1970s to the early 90s, Brennan and Marshall would be the only progressives on the Court—a sentiment Brennan found professionally isolating but not without exception, as seen when Brennan issued two consecutive majority opinions against laws prohibiting flag burning in *Texas v. Johnson*⁹ and *United States v. Eichmann*.¹⁰ These two opinions would be the last of his career before retiring in 1990.

The *Hazelwood* ruling did not fall along party lines but came close enough to draw a correlation. Although White was a Democrat, he sided with the conservative wing often enough to render his partisanship dubious. Blackmun, although Republican, drifted further left as his career went on. Between 1986 and 1990, when the *Hazelwood* decision was made, Blackmun sided with Brennan and Marshall in over 95 percent of cases¹¹.

The First Amendment is not normally a partisan issue when it comes to the Supreme Court. Conservative courts also rule in favor of free speech from time to time, such as the flag burning cases in 1989 and 1990, *Snyder v. Phelps* in 2011¹², and *United States v.*

⁹ *Texas v. Johnson*, 491 U.S. 397 (June 1989)

¹⁰ *United States v. Eichman*, 496 U.S. 310 (June 1990)

¹¹ Greenhouse, Linda. *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. Times Books, 2005

¹² *Snyder v. Phelps*, 562 U.S. 443 (March 2011)

Alvarez in 2012¹³. Granted, in all four cases, left-leaning justices also sided with the First Amendment for the most part. Conversely, Brennan himself filed a concurring opinion with the majority ruling in *Bethel v. Fraser* while his Republican colleague Stevens wrote a dissenting opinion, as enumerated in the previous chapter.

With the makeup of the Court well established, the direction of the majority and dissenting opinions becomes clearer when unpacking their intent. White’s majority opinion will be examined piece by piece, followed by the same treatment of Brennan’s dissenting opinion, concluding with the established precedent and after effects of the case.

The Majority Opinion

Following a recap of the events surrounding the prior restraint exercised by principal Reynolds on Hazelwood East High School’s newspaper and the decision of the lower courts, White began his opinion with affirming the basic framework of *Tinker v. Des Moines*—that students do not shed their constitutional rights at the schoolhouse gate unless the speech causes substantial disruption. However, this affirmation was followed by the sentiment of *Bethel v. Fraser*—that the First Amendment rights of students in public schools “are not automatically coextensive with the rights of adults in other settings” and that granting such freedoms should be “applied in light of the special characteristics of the school environment.”

Before discerning if the editorial decisions of the *Spectrum* were disruptive or in line with the basic educational mission of the school setting, White examined the newspaper as a public forum. In accordance with *Hague v. CIO*, “school facilities may be deemed to be public forums only if the school authorities have ‘by policy or practice’

¹³ *United States v. Alvarez*, 567 U.S. 709 (June 2012)

opened those facilities ‘for indiscriminate use by the general public.’” This was not the case in a public high school.¹⁴

As the newspaper was assembled in a class laboratory setting with regular class meetings, grades distributed, and credit earned, its publication was intended to be in-line with school curriculum, which the school district absolutely had authority in adjusting its parameters. This reflected the school’s prior review policy, which brought forth the conflict in question.

Editorial decisions, according to these circumstances, rested in the hands of the faculty adviser, not the students, according to White. As such, the students’ claim that they had previously been granted unrestricted editorial authority prior to the prior restraint on May 13, 1983, was “not credible.”

White then made the distinction between a school being unable to prohibit student speech versus a school being required to affirmatively facilitate student speech. The former was affirmed in *Tinker*, while the latter was not affirmed in *Bethel*. *Hazelwood* would defer to *Bethel*, as the school newspaper was a school facilitation of free speech.

Using the faculty supervision trend of thought, White considered 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” was constitutional provided that the activities are “designed to impart particular knowledge or skills to students participants and audiences.”

White also interpreted schools to have the authority to discern if the maturity and age of students deserved a different extent of the First Amendment than “the real world.”

¹⁴ *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (June 1939)

Furthermore, the Court would only consider the First Amendment rights violations of students in future cases if prior restraint was exercised with no educational or administrative benefit. This narrow scope would facilitate the 11-year drought after *Morse v. Frederick*.

In sum, White found that Reynolds had not acted outside his authority as principal of a public high school and found that the First Amendment rights of the students were not violated because students exercised their speech within a school-funded, school-organized activity, which was susceptible to prior restraint if the restraint came in the benefit of the educational environment.

The Dissent

Brennan, along with Marshall and Blackmun, rejected this assessment on the grounds that what the student journalists were doing in their Journalism II class was more than just a high school course but “an opportunity to express their views while gaining an appreciation for their rights and responsibilities under the First Amendment.” Brennan argued that the main focus of journalism education should be to uphold the principles of a free press, as they were paramount to any additional components of the curriculum.

He continued further to comment on the role of public education, writing, “The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society.” Quoting *West Virginia v. Barnette*, Brennan rejected that the First Amendment allowed school administrators to censor any and all speech just because it was deemed contrary to the school’s function, warning of schools becoming “enclaves of totalitarianism.” This sentiment was supported by the ruling in *Tinker v. Des Moines*.

Brennan concurred with the opinion that prior restraint can be exercised if a student newspaper article was “ungrammatical, poorly written, inadequately researched, biased or prejudiced” but found that this was consistent with *Tinker*. Moreover, the articles removed by Reynolds were not any of these qualifiers.

The dissent took further issue with Reynolds’ lack of warning before removing the material, as the students did not know about the restraint until the paper was already printed. Further meetings between the journalists and Reynolds were also not specific and educational enough to describe them as learning opportunities in journalistic integrity—the entire crux of White’s educational environment argument.

Brennan called restricting speech on the grounds of sensitive topics “equally impermissible” and claimed that the vague, undefined term would permit school administrators to infringe on the rights of students by abusing this language. He further denounced the majority opinion’s reach, as it would rescind student rights in the name of safety, which was too slippery a slope for Brennan to accept. His prediction would be correct, as the last 30 years of *Hazelwood* have hurt students more than any other precedent.

The clause in the majority opinion granting prior restraint to all creative outlets in public schools went beyond the exercise of the discretion by principal Reynolds. While the specific case in *Hazelwood* pertains to concerns over subject matter, confidentiality, and potential libel, the law extended prior restraint to any and all extracurricular activities in school, provided that the prior restraint could be attributed to the benefit of the learning environment. This hurdle is much easier to clear for school administrations compared to the vulgarity component of *Bethel v. Fraser* and the illicit drug use advocacy in *Morse v. Frederick*. While these two cases focus on specific exceptions to student free speech,

Hazelwood makes no such distinction and puts the discretion completely in the hands of administrators.

In Brennan’s opinion, if students were expected to successfully learn and appreciate the rights and freedoms proudly exercised by Americans, students should not be held to a different standard. No such precedent applied to the general population is comparable to *Hazelwood*. It is a unique shackle only students have been forced to bear.

Subsequent Enforcement

Hazelwood’s prior restraint power has been exercised even when the reporting of student media was thorough. In 2006, the article “Censorship 101” published in the *Alabama Law Review*, detailed numerous instances of this exact practice. The article states “[a]n Indiana principal censored an accurate story about a girls’ tennis coach who stole \$1,000 that players had paid for court time. A New York administrator banned a true report that his school of 3,600 students contained only two functional restrooms. A Florida principal fired the high school’s yearbook editor after she opposed his decision not to run a senior picture of a lesbian student who was wearing a tuxedo.”¹⁵ All of these instances would not be imposed on professional or even collegiate media, but for K through 12, their First Amendment right to freedom of the press is only a vague, intangible value meant to be appreciated but not practiced.

Fortunately for young adults, the Rehnquist Court did not extend this prior restraint to collegiate student media. But while the yoke of tyranny is removed when student journalists graduate from high school, this is not sufficient in creating a culture of reverence for a free press. Minors do not have to wait to graduate to be guaranteed a right against

¹⁵ Sanders, Chris. “Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities.” *Alabama Law Review*, 2006.

illegal searches and seizures or cruel and unusual punishment. Teenagers are guaranteed a speedy trial by a jury of their peers, protections from self-incrimination and double jeopardy, and the right to peacefully practice their faith without the law infringing upon their worship. If all of these rights are obvious endowments to the nation's adolescents, then what makes the First Amendment's protections for free speech and press so problematic and exclusive to the age of the majority?

New Voices

Thirty years later, the long arm of *Hazelwood* is still being used to silence students. In May 2018, the student journalists of Prosper High School in Prosper, Texas, fell victim to the *Hazelwood* precedent when principal John Burdett forbade the publication of any editorials in the school newspaper on the grounds of alleged inaccuracies in previous editorials and an assertion that said editorials did not represent the views of all 3,000 students at the school.

The policy reached a more national audience when faculty adviser Lori Oglesbee-Petter's contract was not renewed because of her opposition to the changes, despite her lengthy history at the school and a slew of awards for her work as an adviser. Oglesbee-Petter has not made public comments on the matter, but her students have used their platform to voice their disapproval, prompting national controversy for the prior restraint exercised by the school district.

Unfortunately, the policy is completely constitutional as the law stands right now. This is a poor model for education. The Society of Professional Journalists has publicly opposed the enforcement of this precedent because of the educational pitfalls in a resolution, saying "it is well-documented the *Hazelwood* censorship clause impedes an

educator’s ability to adequately instruct and train students in professional journalistic values and practices.”

In another resolution, the Journalism Education Association wrote in April 2010 that “[a]s journalism teachers, we know our students learn more when they make publication choices and that prior review or restraint do not teach students to produce higher quality journalism. As journalism teachers, we know the only way to teach students to take responsibility for their decisions is to give them the responsibility to make those decisions freely.”

To combat the encroachment upon these rights, the student-led grassroots movement New Voices USA aims to encourage lawmakers to change how high school journalists report the news, returning to a more *Tinker*-based model. As of February 2018, 14 states have passed New Voices laws, extending freedom of the press rights to high school journalists.¹⁶ The state laws do not overrule or overturn the *Hazelwood* decision but what student journalists do gain is something else to fall back on besides the First Amendment as it appears in the Constitution.

New Voices USA has active campaigns in dozens of states that still do not guarantee freedom of the press to student journalists. With assistance from the Student Press Law Center, New Voices USA is on track to avenging the gross neglect of liberty experienced by the staff of *Spectrum*. Students are not just going to wait around for these rights. Much like the Tinker children, they have a voice and they will use it to change the world that doesn’t currently reflect them.

¹⁶ “New Voices U.S.” The Legislation – New Voices U.S.

IV: THE LAST ELEVEN YEARS AND THE FUTURE

Although school districts have been hard at work restraining freedom of speech in American youth for the last 30 years, the Supreme Court has been less active in regards to student free speech. *Morse v. Frederick* was the last case pertaining to school speech to be granted certiorari, a full 11 years ago. Since then, several cases could have reached the Court and provided a chance for a new precedent, but for undisclosed reasons, were not granted certiorari.

Circuit Court Cases

Prior to the *Morse v. Frederick*'s decision in 2007, another case involving the First Amendment in schools was decided at the Second U.S. Circuit Court of Appeals, which hears cases from Connecticut, New York, and Vermont, the last of which originated this particular case.

Middle schooler Zachary Guiles wore a shirt depicting then-president George W. Bush using cocaine and alcohol to school several times over the course of three weeks. The shirt was intended as a political statement, something lacking from Joseph Frederick's banner. After several complaints from students and a parent, Guiles was ordered by a teacher to cover up the parts of the shirt containing illicit substances as it was against school dress code to wear "[c]lothing displaying alcohol, drugs, violence, obscenity, and racism."

Guiles refused to adhere to the demand and was subsequently given a referral and sent home. Upon returning, Guiles wore the shirt again, with the offending imagery covered in duct tape displaying the word "censored". Additionally, Guiles, with support from his parents, sued the school to have the referral expunged from his record on accusation that his First Amendment rights had been violated.

At the district level, the court ruled against Guiles in part, citing *Bethel v. Fraser* as a substantial enough reason to restrict inappropriate speech, including symbolic speech. However, the court also ordered the referral expunged. With neither party satisfied, both Guiles and the school appealed. The Second Circuit found more favor with Guiles, ruling that the First and Fourteenth Amendments prohibited a public school from restricting a student's right to political speech. The court also further ruled that Guiles' political message would be incomplete and watered-down if the drug-related imagery was censored, as the student was drawing attention to the president's hypocrisy on drug use. Furthermore, as Guiles had worn the shirt multiple times without substantial disruption, the Tinker test affirmed the symbolic speech was not distracting enough to warrant disciplinary action.¹⁷

The case ended there and never made its way to the Supreme Court. The school petitioned for certiorari, but the Supreme Court did not grant it. A school's choice to petition for certiorari when students win at the circuit court level is less common in a post-*Morse v. Frederick*.

According to former Student Press Law Center Director Frank LoMonte, "for a student to get their case to the Supreme Court, they have to be ok with losing every step of the way." In LoMonte's experience, school districts will not fight the decisions of upper appellate courts because appeals are costly, time-consuming, and bring a lot of bad press. The appeal process is usually forced by the losing party, so if a student wins their case at the circuit court, they are at the mercy of their school to get them to the Supreme Court.

Legal counsel for school districts also likely advise their clients not to shoot for the Supreme Court as a change in precedent could overturn previous case rulings, including

¹⁷ *Guiles v. Marineau*, 461 F.3d 320 (2d. Cir. 2006)

Hazelwood. For all the faults of *Hazelwood*, schools understand that without that tool, administrators will become vulnerable to being unable to exercise their authority on students. The law as it stands now heavily benefits schools over students and most school districts are keen to keep it that way.

Following *Guiles*, subsequent cases of student speech reached the circuit level but failed to advance past it. In 2013, the Third U.S. Circuit Court of Appeals, which includes New Jersey, Delaware, and the case's originating state of Pennsylvania, ruled in favor of students who were disciplined for wearing "I [Heart] Boobies" bracelets during their school's breast cancer awareness month activities. The court ruled the bracelets were not distracting in of themselves, nor were they considered lewd enough to be compared to Matthew Fraser's endorsement speech.¹⁸

Similar to the *Guiles v. Marineau* case, the decision ended in student victory. However, unlike the previous case, the Easton Area School District sought certiorari from the Supreme Court. The school district thought the Third Circuit's decision was vague enough to conflict with *Morse v. Frederick* and that the decision drew more on the concurring opinion of Justice Samuel Alito instead of the majority opinion. However, without comment or explanation, the Supreme Court did not grant Easton Area School District certiorari, cementing a win for the students' right to wear the bracelets but withholding the courtesy for the Supreme Court to decide if it would apply to all American students in public education.

Both cases pertained to symbolic speech on school grounds and resulted in student victories. However, another landmark case for the circuit court level differs from both of

¹⁸ *B.H. v. Easton Area School District*, 702 F.3d 655 (3d. Cir. 2013)

these. Coming from the Fifth U.S. Circuit Court of Appeals, arguably the most conservative circuit court in the nation, a loss for both student speech and a chance for a new precedent ended in 2015 with the case *Bell v. Itawamba*.

Bell v. Itawamba

In 2011, a high school student, Taylor Bell, was enrolled at Itawamba Agricultural High School in Itawamba County, Mississippi when he wrote, performed, and posted a video of a rap song to his personal Facebook and YouTube accounts. In the rap, Bell made several statements of an accusatory manner against two teachers at his school for perceived inappropriate conduct with female students. Bell was suspended and transferred to an alternative school for the rap, despite the video being filmed and posted entirely off campus.

Upon appeal to the district and circuit courts, Bell ultimately lost both times, as both courts determined the video was enough to constitute harassment and the court was correct to “forecast a substantial disruption at Bell’s school, based on the threatening, intimidating, and harassing language in [his] rap recording.”¹⁹

Bell initially found success at the circuit level, as the three-judge panel found the rap to not be adequate disruption under the Tinker test. However, after the school sought *en banc* review for the concern of school violence, the school board won the case. The majority opinion also determined the school had proper reason to discipline Bell’s off-campus speech because the speech was directed at two school employees.

In the dissenting opinions of Bell’s case, several justices argued Bell’s speech should not be considered threatening, but rather whistleblowing for bringing the alleged

¹⁹ *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015)

inappropriate behavior by the subjects of the rap. Justice James L. Dennis further warned that the majority opinion would “[allow] schools to police their students’ Internet expression anytime and anywhere — an unprecedented and unnecessary intrusion on students’ rights.”

This 2015 decision was tailor-made for a new Supreme Court precedent, as it visited new facets of school speech (off campus speech, Internet usage, and whistleblowing) previously not included in any Supreme Court precedent outside of the Tinker test. Unfortunately, Bell’s request for certiorari was denied by the Supreme Court on February 29, 2016. The Court is not obligated to defend or explain their decision to reject requests for certiorari.

The Court’s decision to not take Bell’s case is the greatest injustice to school speech law since *Morse v. Frederick*. The Court only needs four votes to grant certiorari—and since the Court at the time only constituted eight justices following the death of Antonin Scalia—only half of the justices needed to see merit in a further look. It is curious why this four-vote threshold could not be met.

It’s difficult to know for sure, but the Supreme Court may have been more receptive to the case had it arisen in 2018 in the context of the #MeToo movement, in which women have called out abusive behavior by people in power, much like Taylor Bell did in his rap song.

The *Bell* case was a prime opportunity for the Court to lay down a precedent not just for students but for all citizens exercising their First Amendment rights in opposition to powerful men who used their positions to sexually harass women. Sadly, Taylor Bell’s

video was ahead of its time just enough to finish at the circuit level instead of advancing to the highest court in the land.

Besides the whistleblowing component, the *Bell* case also signaled a new era where schools would not be contending with armbands, speeches, school papers, shirts, bracelets, or banners, but the Internet. In the last 11 years, the way students communicate and express themselves is becoming increasingly more and more digital. To date, not a single Supreme Court precedent involving student speech rights has concerned itself with the Internet, outside of the Tinker test's application.

How Young People Communicate

This is where the lack of a precedent is so problematic for the law and why denying Taylor Bell certiorari was a failure on the Court's part. In a Pew study conducted in 2014 and 2015, 94 percent of high school students use mobile devices to go online every day. Furthermore, 71 percent admit to using several social media platforms every day. This is where the majority of school speech is happening today and virtually none of it happens on servers or infrastructure within the jurisdiction of the school. Nevertheless, schools have still exercised their authority in policing this speech.

In 2014, Reid Sagehorn of Rogers High School in Rogers, Minnesota, was suspended for seven weeks after jokingly tweeting "actually yeah" in response to the question if he ever made out with a teacher from school. Sagehorn had no previous behavioral problems and was even a member of the school's chapter of the National Honor Society. Sagehorn sued for perceived violations of his First Amendment rights and subsequently won a settlement of \$400,000. Federal Judge John R. Tunheim ruled that

since Sagehorn's tweet was posted off campus, after school hours, and not from a school computer, the school had no authority to discipline Sagehorn.

Sagehorn's case ended more favorably than Taylor Bell's, but neither student is alone in the policing of student speech by school administration and the Court's silence will only guarantee that similar cases become routine, decided by a patchwork of precedent, until the Court hears such a case for the nation's students as a whole. Matthew Fraser, Cathy Kuhlmeier, and Joseph Frederick were all punished for actions during official school functions and mediums, but their successors have not used the same environments. The precedents as they stand now should not automatically apply when the circumstances have radically changed.

The lack of precedent is not just bad for students. It is also bad for school administrators. When the law is unclear, schools will waste time and taxpayer money funding lawsuits that could otherwise be avoided if the law explicitly stated that students have a right to free speech. If Elk River School District had a clear enumeration of Reid Sagehorn's rights, there would not have been a \$400,000 settlement, on top of legal fees. If Taylor Bell had legal protection for his off-campus speech, Itawamba County School District could have saved a lot of money fighting him in the courts and turned their attention elsewhere—perhaps to the school employees accused of sexually harassing underage students.

The Supreme Court has no excuse for not granting certiorari to relevant cases from the circuit courts on the subject. The longer the law remains ambiguous on any subject is a terrible circumstance, but particularly where students are concerned; It will hurt the nation as a whole. Students are not waiting for the Court to make up its mind on the matter, either.

The last 11 years have seen unprecedented technological advancement in the field of communication and no one embraces the use of such technology better than young people.

The students of Marjory Stoneman Douglas High School in Parkland, Florida, made this abundantly clear with the 2018 March For Our Lives, which grew to its total scope and magnitude because of social media activism from young people. According to *Newsweek*, more than 2 million people participated in demonstrations against gun violence across the country, which were predominantly organized and communicated through social media channels. March For Our Lives is one of the largest protests in American history in terms of number of participants and had disproportionately more participants under 18 than protests of comparable size, such as the Women's March.

The future of school speech is online and off campus. The Supreme Court already ruled unanimously that the First Amendment applies to the Internet in *Reno v. ACLU* in 1997²⁰. It is high time the Supreme Court be given the chance to extend the same courtesy to students.

²⁰ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (June 1997)

V. CONCLUSION

It is of paramount importance that the Supreme Court hear a case pertaining to school speech and it would be even more preferable if the case centers on digital, off campus speech. And should the Court hear a case of this nature, the justices should rule on the side of *Tinker* and less on the side of *Hazelwood*.

The greatness of *Tinker* has lasted nearly fifty years because it embodies the spirit of the First Amendment and the American Experiment. Outside of matters of national security, there is nothing gained from the suppression of free speech by the government that outweighs the importance of instilling the values of a nation in our children. If America is to retain the title as a bastion of freedom of expression, the courtesy must be extended to the most vulnerable of its people and there is no better demographic to represent its vanguard than America's schoolchildren.

While overturning the *Hazelwood* ruling may be a fever dream reserved for idealists, ensuring future precedents frame *Hazelwood* as the exception instead of the rule will be a victory for public education and America's youth. The most effective route for this sentiment is for the Court to safeguard the First Amendment rights of minors on the Internet outside of school property and school hours.

The likelihood of this success is dubious, as the conservative, originalist wing holds a firm grasp on the Supreme Court and the remaining justices of the liberal wing continue to age. But the rights of our children need not be a partisan issue. Republican Justices Harry Blackmun and John Paul Stevens opposed the majority rulings in *Hazelwood v. Kuhlmeier* and *Bethel v. Fraser* respectively. The same can happen today.

A 5-4 majority is the most vulnerable of majorities on the Supreme Court. A single vote can change the direction of the law for decades to come and that is why a future case concerning school speech at the Supreme Court is more uncertain than anything else. But in order for the ruling to pass, the case must be granted. America's current and future schoolchildren are counting on the Court to extend their inalienable First Amendment rights to the schoolhouse gate. And the rest of the country is counting on young people to not drop the ball with the gift of protest and rabble-rousing.

I leave the audience with some wise words from Second U.S. Circuit Court of Appeals Judge Learned Hand's "Spirit of Liberty" speech, spoken during a naturalization ceremony in New York City in 1944.

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."

The speech of students today is the narrative of America tomorrow. Free thought should take charge in setting the standard for the people we want to be remembered as. Students are not waiting for the courts to catch up because they are too busy setting the stage for generations to come.

It all starts at the schoolhouse gate.