Brigham Young University Education and Law Journal

Volume 2009 | Number 1 Article 2

Spring 3-1-2009

Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education

Curtis G. Bentley

STUDENT SPEECH IN PUBLIC SCHOOLS: A COMPREHENSIVE ANALYTICAL FRAMEWORK BASED ON THE ROLE OF PUBLIC SCHOOLS IN DEMOCRATIC EDUCATION

Curtis G. Bentley[1]

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
~ Justice Fortas[2]

"I wish, therefore, wholly to disclaim any purpose on my part to hold 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."
~ Justice Black[3]

I. INTRODUCTION

Ever since the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[4] the fact that public school students retain First Amendment speech rights while in school has become generally—although not universally—accepted. Nevertheless, the problem of how to balance concern for student expression with the teaching and discipline requirements of public schools remains a thorny problem for which the Supreme Court has been unable to devise a comprehensive and coherent answer. Notwithstanding the continued assertion of the few who argue that the First Amendment provides no protection for student speech in public schools,[5] the difficult question is no longer whether public

1. J.D., J. Reuben Clark Law School, Brigham Young University, 2008.
2. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
3. *Id.* at 526 (Black, J., dissenting).
4. 393 U.S. 503 (1969).
5. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J.,

school[6] students have First Amendment free speech rights while in school, but what is the nature and extent of the rights that accompany them past the schoolhouse gate?

Even though nearly forty years have passed since the Supreme Court issued its opinion in *Tinker*, the constitutional standard announced in that case remains the focus of the spirited debate over student free speech rights in public schools.[7] The debate has simply been magnified by the Court's three subsequent public school student free speech cases, which have all upheld school limitations on student expression while ostensibly leaving the *Tinker* standard intact. The debate over what *Tinker* actually says, or should say, was reignited in 2007, when the Court issued its decision in *Morse v. Frederick*, the so-called "bong hits for Jesus" case. After *Morse*, it is clear that *Tinker's* holding was not as broad as many have supposed.

Many had assumed, and continued to assume until *Morse*, that the rule laid down in *Tinker* established a presumption in favor of student speech that could only be overcome if the school could show that the speech disrupted the educational process.[8] Under such a rule, schools could only prohibit speech if they could show that the speech interfered with the other students' ability to learn whatever was being taught at the time.[9] And, indeed, this interpretation of the holding is

---

concurring). While Justice Thomas concurred in the Court's finding that the school's punishment for the speech at issue in *Morse* was constitutional, he argued that the original understanding of the First Amendment provided no protection for student speech.

6. The term "public schools" is used throughout this article to refer to both primary (elementary) schools and secondary (high) schools. Colleges and universities are referred to as "institutions of higher education."

7. *See, e.g.*, Heather K. Lloyd, Comment, *Injustice in our Schools: Students' Free Speech Rights are not Being Vigilantly Protected*, 21 N. ILL. U. L. REV. 265 (2001); Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586 (2002); Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 637 (2005); Jennifer L. Specht, Note, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006).

8. *See* Bruce C. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 391 n.47 (1995) (setting out the broad interpretation of *Tinker* and collecting cases where courts applied it prior to *Hazelwood*).

9. The Ninth Circuit's opinion in *Bethel Sch. Dist. v. Fraser*, 755 F.2d 1356, (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986), provides a good example of the application of the broad interpretation of *Tinker*. The Ninth Circuit found the disciplinary actions of the school district unconstitutional, noting that the student speech at issue did not materially disrupt the educational process and rejecting the school district's other

consistent with the result in *Tinker*, since the students' mere wearing of black armbands caused no significant disturbance in the classroom.[10] This reading of the Court's opinion will be referred to through the balance of this article as the broad interpretation of *Tinker*.

Although the broad interpretation of *Tinker* is consistent with its result, it is not mandated by the language used by the Court. I argue that, not only was the broad interpretation not mandated by the *Tinker* decision, it is an incorrect application of the First Amendment and inconsistent with the Court's other First Amendment jurisprudence. The broad interpretation, ignoring important differences in context and method, essentially applies the same presumption in favor of speech by children in public schools that exists for adults in a higher education setting.[11] By doing so, the broad interpretation ignores both the differences in context between public school and higher education as well as the different ways in which each type of institution serves the democratic values that First Amendment protection exists to promote.

The Court's subsequent public school student free speech decisions in *Bethel School District v. Fraser*,[12] *Hazelwood School District v. Kuhlmeier*,[13] and especially *Morse*, indicate that the broad interpretation was not adopted by the Supreme Court in *Tinker*. The Court's holdings in these cases are welcome developments. Yet, despite its rejection of the broad interpretation of *Tinker* in *Morse*, the Supreme Court offered no comprehensive approach to public school student free speech rights in its place. In this article, I outline a comprehensive approach that I believe is most consistent with both the purpose of the First Amendment, as well as the Court's conception of the First Amendment as an essential support to constitutional democracy rather than an individual self-expressive right.

Specifically, I contend that, although the First Amendment

---

argument that its interest in maintaining civility in the school environment justified its actions. *Id.* at 1359–64.

10. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.").

11. *See* discussion *infra* Part IV.

12. 478 U.S. 675 (1986).

13. 484 U.S. 260 (1988).

protects student expression in public schools, it does so only for expression that a Court can find to be reasonably necessary to the public school's role in democratic education.[14] Drawing on the work of Professor Amy Gutmann,[15] I argue that the basic content of such an education, at least in public schools, is the inculcation in young students of the essential democratic values of nonrepression and nondiscrimination. I assert that First Amendment protection for student speech in public schools gives way against the regulatory actions of public school officials unless it cannot reasonably be said that the school's actions further the aims of democratic education.[16]

Part II of this article provides a brief discussion of each of the Court's four primary public school student free speech cases.[17] Next, Part III advances the argument that the purpose of the First Amendment is utilitarian; that it exists to enable democratic self-government rather than conferring a natural right to self-realization through expression. Part III also shows how the Supreme Court's First Amendment jurisprudence has largely proceeded consistently with this view, and therefore that an instrumental approach to student speech in public schools would be more consistent with the Court's broader First Amendment jurisprudence than its current ad hoc, post-*Tinker* framework. Building on this utilitarian view of free speech protection, Part IV briefly discusses both the nature of democratic education and the role of different educational institutions in that process. While acknowledging that both public schools and institutions of higher education have important roles to play in the process of democratic education, those roles will be differentiated, and how democratic principles and skills are taught differently in each context will be discussed. Part V applies the principles discussed in Parts

---

14. The term "democratic education" is used in this article to refer to the school's responsibility for instilling democratic values and the instruction of democratic skills required for effective individual participation in the enterprise of self-government.

15. I adopt Professor Gutmann's concept of democratic education as set out in her important book titled by the same name. Amy Gutmann, Democratic Education (Princeton University Press) (1987); *see also infra* Part IV.

16. In this article, I do not address the possible effects that the hybrid rights doctrine mentioned by Justice Scalia in *Employment Division v. Smith*, 494 U.S. 872 (1990) might have on student speech that implicates religion.

17. Although some of the controversial student speech occurring in public schools has the potential to implicate other First Amendment values -especially freedom of religion—and therefore might potentially be protected at a greater level under the hybrid rights doctrine, the hybrid rights doctrine is outside the scope of this article.

III and IV, and sets out the broad outline of a comprehensive theory of First Amendment protection of student speech in the public school context. Finally, Part VI contains a brief conclusion.

II. THE SUPREME COURT'S PUBLIC SCHOOL FREE SPEECH CASES: FROM *TINKER* TO *MORSE*

Prior to 1969, the Supreme Court had never held that public school students possessed free speech rights while in public school.[18] The long-time assumption was that, under the doctrine of *in loco parentis*,[19] students possessed no more right to free speech in school than they did at home. Essentially, schools were viewed as the agents of parents in teaching and disciplining students, and courts granted them a similar level of deference.[20] From the *in loco parentis* perspective, public schools, even though they were public, were locally controlled and looked at more as an extension of the home than as an extension of the state.[21] According to this view, the First Amendment was not implicated in student speech at all, since there was no state action.

As states began to assert more control over the public

---

18. *See* Morse v. Frederick, 127 S. Ct. 2618, 2633 (2007) (Thomas, J., concurring) (noting that "*Tinker* effected a sea of change in students' speech rights, extending them well beyond traditional bounds."); *see also* Fiona Ruthven, Note, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 IOWA L. REV. 931, 936 (2003) (noting that the Court had not recognized student free speech rights until *Tinker*).

19. Translated from Latin, *in loco parentis* means "in the place of a parent." Black's Law Dictionary 803 (8th Ed., 2004). For an examination of the traditional view of public schools as extensions of parental authority rather than traditionally public institutions, *see Morse*, 127 S. Ct. at 2631-42 (Thomas, J., concurring) (discussing doctrine of *in loco parentis* in American educational history); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1987) (discussing the traditional view of public school as a "natural extension of family life and parental interests" and that schools were "recipients of delegated parental authority"); DAVID J. BLACKER, DEMOCRATIC EDUCATION STRETCHED THIN: HOW COMPLEXITY CHALLENGES A LIBERAL IDEAL 22 (State University of New York Press) (2007).

20. *See Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring) ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed" (quoting 1 William Blackstone, Commentaries on the Laws of England 441 (1765) (internal quotation marks omitted))).

21. *See* Hafen, *supra* note 18, at 671–74.

schools, especially by employing the schools as tools to achieve racial integration and by standardizing curricula, many began to question the local, in loco parentis, view of public schools.[22] It became increasingly clear that the public school system was an arm of the state and that, despite a tradition of local control, they were very much a part of the institutional structure that was being questioned on university campuses and elsewhere during the era.[23] It is almost inconceivable that these changing views of the school system did not contribute to the Supreme Court's recognition of student speech rights in *Tinker*.

A. Tinker v. Des Moines Independent School District

Tinker involved a school's response to the decision of three students to wear black armbands, while at school during the holiday season, as a protest against American involvement in Vietnam. Before the students began their silent protest, the Des Moines school district was advised of their plans and announced that any student wearing the armbands to school would be suspended until they were willing to return to school without the armbands. The three students nonetheless wore the armbands to school and were accordingly suspended until their protest ended following New Years Day.[24]

In its opinion, the Court claimed that it had recognized, for almost fifty years prior to *Tinker*, the First Amendment rights of both teachers and students.[25] It also noted, however, that it had repeatedly recognized and upheld the "comprehensive authority" given to public school officials to "prescribe and control conduct."[26] After setting out these two competing recognitions, the Court adopted a balancing approach that the Fifth Circuit had earlier employed in the case:

> A student[] . . . may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the

22. *See id.* at 674 (noting that the use of public schools as "state agents in the desegregation of society" beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), caused people to begin seeing public schools as "arms of the federal government" rather than local agents).

23. *Id.* at 677–80; *see also* Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 701–04 (1988).

24. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

25. *Id.* at 506.

26. *Id.* at 507.

> requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason–whether it stems from time, place, or type of behavior–materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[27]

Focusing on the silent nature of the protest, the Court held that the school district's actions violated the students' rights to free speech. Although it recognized that even a silent protest had the potential to ignite disruptive argument over an issue, the Court did not feel that the district had demonstrated that such a disruption was likely, and saw the district's actions as primarily motivated by "an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam."[28]

Many viewed the language used by the *Tinker* court as establishing a broad presumption in favor of student speech that was only overcome when the speech was disruptive to the teaching going on in the classroom.[29] Although this is perhaps the most natural reading of the case's language, *Tinker* could be read more narrowly as well, especially given some of the facts of the case. Because *Tinker* involved speech that advocated a specific viewpoint on a current and salient political issue, it involved political speech—the type of speech that the Court has always viewed as the central reason for the First Amendment's existence.[30] Additionally, since the armbands were clearly aimed at showing support for the anti-Vietnam War movement, the district's response smacked of viewpoint discrimination, a type of discrimination that the Court had recognized as extremely suspect in its other First Amendment jurisprudence.[31] Finally, the two concurring and the dissenting

---

27. *Id.* at 512–13 (internal citations omitted, second alternation in original).

28. *Id.* at 510.

29. *See* Hafen, *supra* note 22, at 689 ("[T]he dominant assumption in most school speech cases has been that *Tinker* established a constitutional presumption against limitations on student expression—rebuttable only upon a showing of material (usually physical) disruption of schoolwork or clear invasions of the rights of others.").

30. *See, e.g.*, McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 346 (1995).

31. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First

opinions in the case all express some level of discomfort with the broad language used by the *Tinker* court,[32] suggesting that, despite the fact that the decision was 7-2, there was a much narrower consensus, if any, on the broad interpretation. The extent of *Tinker's* reach was left to subsequent Supreme Court cases to define.

B. Bethel School District v. Fraser

The Court waited almost fifteen years before it opined again on the extent of student free speech rights in public schools. When it did, it chose *Bethel School District v. Fraser* as the vehicle. In *Fraser*, a student was disciplined for a speech he gave advocating a particular candidate for student government at a high school assembly.[33] While the content of the student's speech could not fairly be classified as obscene,[34] the speech

---

Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citation and internal quotation marks omitted).

32. Thus, even though the result in *Tinker* was 7–2, absent the concurring and the dissenting votes, the majority opinion itself only received the unqualified support of five Justices. Both of the concurring opinions expressed reservations about the broadness of the majority's holding. *See Tinker*, 393 U.S. at 514–15 (1969) (Stewart, J., concurring) ("Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."); *Id.* at 515 (White, J., concurring) ("While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966), a case relied upon by the Court in the matter now before us."); *Id.* at 525–26 (Black, J., dissenting) ("This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold 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."); *Id.* at 526 (Harlan, J., dissenting) ("I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns-for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.").

33. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677–78 (1986).

34. *Id.* at 687 (Brennan, J., concurring) (reproducing the content of the speech

was essentially a sexual metaphor and caused substantial disturbance among the students present during the assembly.[35]

Even though the speech caused a substantial disturbance, the Supreme Court declined the invitation to simply apply the *Tinker* rule to the facts in *Fraser*. Perhaps this was because the speech occurred in an assembly, where teachers were not explicitly teaching, rather than in the classroom. Instead, the Court distinguished *Tinker* and *Fraser* based on the sexual nature of the student's speech and its incompatibility with the values-teaching mission of public schools:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. . . . 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. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[36]

Even though the Court officially rested its holding in *Fraser* on the "vulgar" nature of the student's speech, the opinion contained numerous statements by the Court regarding the appropriateness of deferring to educational authorities in matters relating to the educational mission of the schools, and even quoted with approval from Justice Black's dissenting opinion in *Tinker*.[37] However, even though the general tenor of the Court's opinion in *Fraser* suggested the Court was distancing itself from the broad interpretation of *Tinker*, the two decisions were ostensibly distinguished by the content of the speech, and therefore the broad interpretation of *Tinker*

---

and contending that it is no more obscene or offensive than much prime time television content).

35. *Id.* at 678.

36. *Id.* at 685–86.

37. *Id.* at 686 ("I wish therefore, . . . to disclaim any purpose . . . to hold 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.") (quoting *Tinker*, 393 U.S. at 526 (1969) (Black, J., dissenting) (internal quotation marks omitted)).

was not foreclosed in cases where the speech at issue was not indecent or vulgar.

C. Hazelwood School District v. Kuhlmeier

The Supreme Court made a more substantial shift away from the broad interpretation of *Tinker* in its next student free speech case: *Hazelwood School District v. Kuhlmeier*.[38] *Hazelwood* involved a school's censorship of two student-written articles on student pregnancy and divorce for the school newspaper. The school principal censored the articles on the ground that they dealt with subjects that were inappropriate for public school children.[39]

The Supreme Court upheld the censorship in *Hazelwood*, even though there was no credible argument that it was lewd or vulgar like the speech in *Fraser*, or that it was likely to cause a substantial disruption of the educational process under the *Tinker* standard. Instead, the Court employed an analytical tool that it had used in its adult free speech cases: public forum analysis. In other free speech cases, the Court has accorded more First Amendment protection to speech that occurs in a public forum.[40] In *Hazelwood*, it examined whether or not a public school student newspaper could legitimately be considered a public forum. The Court stated that "school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public."[41]

Ultimately, the Court concluded that the student newspaper at issue in *Hazelwood* was not a public forum, and that the student articles were not entitled to the broad protection that its prior decisions had accorded to speech in public forums. In fact, the Court determined that some readers might assume that the school newspaper bore the imprimatur of the school. Thus, the speech at issue was not purely student expression, but a combination of student and government

38. 484 U.S. 260 (1988).

39. *Id.* at 262–64.

40. *See, e.g.*, Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

41. *Hazelwood*, 484 U.S. at 267 (internal quotation marks and citations omitted).

speech.[42] Referring back to both *Fraser* and *Tinker*, the *Hazelwood* court stated that:

> 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 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 hear the imprimatur of the school.
>
> . . . .
>
> . . . Educators are entitled to exercise greater control over this second form of student expression . . . . Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," . . . from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students" . . . In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics . . . A school must also 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," . . . Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[43]

Again, even though *Hazelwood* did not explicitly overrule *Tinker*, it further distanced itself from the *Tinker* court's commitment to broad student free speech rights in two ways: (1) it recognized that a substantial amount of speech that occurs in the public school system in which students are involved is not pure student speech like that at issue in *Tinker*;

---

42. Some state legislatures have attempted to overrule this portion of the Supreme Court's holding by passing statutes that assign students all responsibility for the content of student newspapers. For a discussion of these laws, *see* Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006).

43. *Hazelwood*, 484 U.S. at 270–73 (citations omitted).

and (2) it focused again on the need of the schools to teach "the shared values of a civilized social order" and serve as the "principal instrument" in socializing children.[44] While ostensibly leaving it intact, *Hazelwood* continued the Court's subtle redefinition and limitation of *Tinker*. While Hazelwood is most often cited for upholding a school's right to determine the content of speech that bears its imprimatur, it is also significant in its express recognition of the importance of public schools as a "principal instrument" of socialization and the relevance of this mission in free speech cases. *Hazelwood* suggested that the Court's approach to the First Amendment in public schools, rather than being characterized as extending a broad presumption in favor of student speech, was more accurately characterized by a more limited holding that balances the uncertain speech rights of students against the strong interest of the state in using the public schools to socialize children according to fundamental societal values.

D. Morse v. Frederick

The Court waited nearly twenty years following *Hazelwood* to once again clarify the rule set out in *Tinker*, in light of its subsequent decisions in *Fraser* and *Hazelwood*. In *Morse*, the principal of a school suspended a student for refusing to take down a 14-foot banner reading "BONG HiTS 4 JESUS" that he was displaying with other students during an off-campus, school-approved activity.[45] The Ninth Circuit, applying the broad *Tinker* standard of substantial disruption, held that the principal's actions violated the student's First Amendment speech rights.[46]

The Supreme Court, in an opinion authored by the newly confirmed Chief Justice Roberts, reversed the Ninth Circuit, primarily by clarifying the standard in *Tinker*.[47] Although he acknowledged the official distinctions the Court had made between *Tinker*, *Fraser*, and *Hazelwood*, the Chief Justice distilled the cases down to the basic principle "that the

44. *Id.* at 272 (citation omitted).

45. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

46. *Id.*

47. The way the Court reinterpreted *Tinker* was by rejecting the broad interpretation of the case, which viewed the "substantial disruption" standard as the only standard the government could use to justify personal (i.e. not school-sponsored) speech in public schools. *See id.* at 2627.

constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[48] The Chief Justice viewed the Court's public school student free speech decisions subsequent to *Tinker* as making clear that the broad interpretation of *Tinker* did not provide the only means for restricting student speech.[49] Instead, the Court reasoned that, independent of any particular disruption in the educational process, "[t]he special characteristics of the school environment . . . and the governmental interest in stopping student drug abuse" justified the principal's actions in *Morse*.[50]

Morse is a significant decision on at least two different levels. First, it provides a general glimpse into how the new Roberts Court is likely to evaluate First Amendment issues. Second, and more relevant to this article, it is significant because it contains an explicit rejection of the broad interpretation of *Tinker*.[51] *Morse* makes clear that, while *Tinker* is still good law insofar as it holds that student speech constituting a substantial disruption to the educational process (i.e. the classroom learning environment) is without First Amendment protection, it does not provide the only valid justification for the restriction of speech.[52] Since the broad interpretation of *Tinker* viewed the "suhstantial disruption" standard as the sole justification for restricting student speech,[53] *Morse* foreclosed that interpretation once and for all.

Even though the *Morse* court rejected the broad interpretation of *Tinker*, it declined to set out another comprehensive framework for analyzing puhlic school student free speech claims. Instead, it simply created a rule for another narrow class of cases: those in which student speech can be reasonahly interpreted as advocating the use of illegal drugs.[54]

---

48. *Id.* at 2626 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

49. *Id.* at 2627.

50. *Id.* at 2629 (citation and internal quotation marks omitted).

51. *See supra* note 46.

52. *Morse*, 127 S. Ct. at 2627.

53. *See supra* notes 49–50 and accompanying text.

54. The speech at issue in Morse—the "BONG HiTS 4 JESUS" banner—provided the Supreme Court with a golden upportunity to embrace the hybrid rights doctrine. The inclusion of the word "Jesus" in the banner opened the door for a claim that the speech should be accorded greater protection because it had a religious component. The viability of this argument was probably damaged by the plaintiff's assertion that the speech was meaningless, nevertheless, the religious overtones provided an opportunity for the Court to embrace the hybrid rights doctrine, which it declined to do.

Essentially, what remains after *Morse*, *Hazelwood*, and *Fraser* is a series of ad hoc rules applicable to specific situations, with *Tinker* remaining as the analytical backdrop that has been largely ignored by the Court in the forty years since the decision was issued. In other words, the Court's public school speech trilogy since *Tinker* has abandoned any pretenses of a comprehensive theory of how the First Amendment applies in public schools. I argue for a different approach—one that provides a coherent framework through which to evaluate the free speech rights of students in public schools. I argue that the Court should give substantial deference to public school decisions to regulate speech when the decision is necessary to accomplish what I contend is the principal First Amendment purpose of public schools: educating new generations of citizens prepared to engage in the democratic processes of self-government.

The following sections set out the justifications for this approach, as well as the reasons why it is compatible with the Court's general approach to the First Amendment. I begin with a brief discussion of the Court's conception of the First Amendment, move to a discussion of the role of the public schools in democratic education, and finish by setting out the contours of a public school student free speech rule consistent with these realities.

III. THE SUPREME COURT'S INSTRUMENTAL APPROACH TO THE FIRST AMENDMENT

Over the last thirty years there has been a substantial amount of debate over the purpose of the First Amendment. Although the debate is nuanced and complex, it is ultimately, when distilled to its essentials, one between those who believe that the First Amendment constitutionalizes a natural right to self-expression (the "self-realization view")[55] and those who believe that it exists solely as a societal safeguard necessary to ensure effective democratic government (the "instrumental view").[56] Courts' opinions on this question have obvious implications for all types of First Amendment analysis. A court

55. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982).

56. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

sympathetic to the self-realization view of the First Amendment sees the right of free speech to be a natural right accorded to all individuals and, all other things being equal, will be more likely to find the speech protected in all situations. While the self-realization view does not necessarily mean that expression receives absolute protection simply because it has been expressed,[57] it gives analytical weight to the act of expression that is discounted hy those with an instrumental perspective. Conversely, a court that subscribes to the instrumental view will find speech protected only when, considering the context in which the speech occurs, protecting that speech furthers important societal values, especially democratic self-government.[58]

Consistent with the opinions of Professor Meiklejohn[59] and Judge Bork,[60] among others, I believe that the instrumentalist approach[61] reflects both the wisest approach to the protection of the freedom of speech, and the view of the purpose of the First Amendment most consistent with the structure of American government set out by the Constitution. Although a comprehensive examination of the pros and cons of the different approaches to the First Amendment is beyond the scope of this article, the following paragraphs provide a limited discussion as to the implications of each approach, its consistency with current First Amendment doctrine, and justifications for adopting the instrumental view.

A. The Self-Realization View

Although the "self-realization" view is instrumental in the sense that it values speech because of its contribution to an

---

57. *See, e.g.*, Brian C. Murchison, *Speech and the Self-Realization Value*, 33 Harv. C.R.-C.L. L. Rev. 443, 502 (1998) (noting that the self-realization view does not "mean that speech should win in each litigated case" but simply "proposes that First Amendment analysis attend more self-consciously to the speaker's development through expression" in addition to "the benefits of the challenged speech for citizen-listeners and the engines of democracy").

58. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2366–67 (2000) ("[C]ourts applying democratic theory have been clear that the First Amendment protects only speech pertinent to self-determination.").

59. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Brothers) (1948).

60. *See* Bork, *supra* note 55.

61. For an instance where the Supreme Court has articulated this approach, see *infra* notes 79–80 and accompanying text.

individual's understanding and creation of their person and character, it is non-instrumental in practical effect. Because no outsider can determine what speech contributes to another's self-realization and what speech does not, the observer is forced into one of two situations: (1) either assume that all speech is self-expressive; or (2) take the speaker at his word when he claims that the speech has self-expressive value.[62] If all self-realizing speech is protected, taking the first position would result in no prohibitions of speech. The second approach would yield similar results, because upon any challenge. a speaker could simply assert the self-expressive value of his speech and have it protected. While less strict (and more realistic) applications of the self-realization view recognize situations where other values would trump self-realization, even such less-restrictive applications of the self-realization principle would necessarily be ad hoc, since it is extremely difficult to see how a court would be able to objectively assess the self-realizing value of different types of speech. Therefore, even though it is highly unlikely that any judicial recognition of the self-realization value would give absolute primacy to the right of self-realization through expression,[63] the inherently subjective nature of self-realization ensures that the merit of individual free speech claims will always remain subject to ad hoc comparisons of subjective intent against objective values.

Additionally, any type of significant application of the self-realization view would hinder the Court in its attempts to assign differential value to different types of speech, as well as require it to give less weight to the context in which the speech occurred, since a primary criterion for protection would be whether the speech contributed to individual self-realization. Even if the impairment were lessened by viewing self-realization as a secondary or tertiary consideration in the analysis, it is nonetheless an impairment. Such impairments are at odds with some of the Court's most fundamental analytical approaches to the First Amendment, which are based on content and context rather than an individual's

62. While this reliance on subjective intent need not be complete –i.e. a court could attempt to assess the self-realizing value of speech objectively—it must be substantial. To say that there is an objective standard available to assess the self-realizing potential from any particular act of expression is to essentially render the self-realization concept meaningless.

63. To hold otherwise would be inconsistent with the repeated recognition of the courts that the First Amendment does not provide absolute protection for speech.

subjective view of the value of the speech.[64]

B. The Instrumental View

In contrast to the self-realization view, the instrumental view of the First Amendment would extend constitutional protection to expression only when necessary to further the end of democratic self-government.[65] The nature of the instrumental view of constitutional rights generally was well described by Professor Bork in 1971:

> Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.[66]

There are two primary advantages of the instrumental approach to the First Amendment, when compared with the self-realization view. First, it is the view most consistent with the original understanding of the First Amendment, as well as the structure of American government.[67] Second, it provides a role for the courts in interpreting the First Amendment value of speech, rather than surrendering that to the individual based on his own subjective views regarding the value of his

---

64. *See, e.g.*, Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (extending the lesser "time, place, manner" protective standard to commercial speech); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (application of the public forum doctrine, which accords greater protection to speech occurring in a public forum).

65. While the instrumental view potentially encompasses more ends than simply democratic self-government, I focus on a version of the instrumental view that views that as the only permissible end that First Amendment protection should further. Thus, my references to "the" instrumental view are actually a particular variant of the instrumental approach to the First Amendment—albeit the most widely accepted one. For ends that other proponents of the instrumental view generally, see *infra* note 77 and accompanying text.

66. Bork, *supra* note 55, at 17.

67. *See, e.g.*, Valerie M. Fogelman & James Etienne Viator, *The Critical Technologies Approach: Controlling Scientific Communication for the National Security*, 4 BYU J. PUB. L. 293, 347-78 (1990) (setting out arguments regarding the original understanding of the First Amendment and adopting the self-government interpretation).

expression.[68] Additionally, the instrumental view of the First Amendment not only ensures that speech that advances the process of democratic self-government can be allowed, it also allows (but does not require) speech that undermines democratic processes to be restricted.

Admittedly, the instrumental view of the First Amendment articulated here leaves certain types of speech, that the vast majority of us find valuable, unprotected from the legislative majority.[69] This certainly does not mean, however, that the instrumental view itself prohibits any type of speech; it simply places control over unprotected speech in the hands of the elected branches, allowing them to regulate as they see fit. In short, it does not propose to allow the courts to save the people from themselves, except in those cases where refusing to do so would foreclose, or meaningfully impinge on, the rights of democratic change for the minority. The structure of the Constitution and the nature of democratic government make clear that the First Amendment reaches this far. It is not clear that it reaches any further, and need not be extended to.

C. Reasons for Adopting an Instrumental Approach to the First Amendment Focused on Democratic Self-Government

The apparent bright-line nature of the instrumental view—that judicial protection exists only for political speech—is one of its most attractive attributes. Some of the attraction evaporates under close scrutiny, however. Stating the proposition that only political speech is protectable through the courts only begins the judicial inquiry. The next question is: what constitutes political speech? This is, undoubtedly, a difficult inquiry. Political speech could be defined very broadly, as Professor Meiklejohn suggests,[70] or very narrowly, as

68. Again, even though no viable self-realization approach to the First Amendment would protect speech solely based on the subjective contention of the speaker that it contributes to his personal self-fulfillment, the self-realization approach grants what I view as an impermissible influence on the speaker's subjective beliefs.

69. Depending on one's definition of "political speech." *See* Fogelman & Viator, *supra* note 66, at 357 n. 414, for examples of how some commentators have defined political speech; things such as advertising and expressive behavior such as dancing or musicianship could potentially be without protection.

70. Professor Meiklejohn's basic thesis was that "the First Amendment . . . forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation." Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256. He then went on to state that he viewed the freedom to vote, the freedom to

favored by Judge Bork,[71] and it is not immediately clear whether one definition is more correct than the other. For example, a narrow definition of political speech may exclude folk songs, even though such a song may convey a particular political message as (or more) effectively as a speech given on the National Mall. On the other hand, a broad definition could provide protection for rather meaningless pop music or abstract art sculptures.

Thus, the concept of political speech is potentially capacious indeed, leaving ample room for judicial discretion—presumably the very thing that the instrumental approach to the First Amendment is supposed to best prevent.[72] Rather than discrediting the instrumental approach, however, perhaps all that this malleability means is that, in the case of the First Amendment, as in all other cases, it is impossible to eliminate judicial discretion. This reality, however, is not a reason to cease trying to cabin such discretion according to what "neutral principles"[73] we can fairly see in the Constitution. For the reasons described above, I take the position that the First Amendment provides judicial protection only for political speech.[74] As discussed in the following subsection, the Supreme Court generally agrees with this view. I leave a comprehensive definition of political speech to other commentators[75] and find it sufficient, for the purposes of this article, to advance a theory of what the concept means in the context of public schools in Part IV below.

---

educate and obtain education, the freedom to engage in the achievements of philosophy and the sciences, the freedom to create and access literature and the arts, and the freedom to engage in public discussion of public issues *Id.* at 256–57.

71. Bork defines political speech as "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions, and speech addressed to the conduct of any governmental unit in the country." Bork, *supra* note 55, at 29. Bork excludes, however, "speech advocating forcible overthrow of the government or violation of law." *Id.* at 29–30.

72. The difference between the Meiklejohn definition (which includes almost everything) and the Bork definition (which is narrow indeed), shows the malleability of the term.

73. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

74. I leave to other commentators the majority of the task of defining what political speech is, although I do, in Part IV, *infra*, discuss what I believe it is in the context of public school education.

75. *See, e.g.*, Fogelman & Viator, *supra* note 66, at 357–58 n. 414 (setting forth how leading commentators have defined political speech).

D. The Supreme Court's Position

As between the instrumental and self-realization views of the First Amendment, the Supreme Court has come down in favor of the instrumental conception.[76] While the Court has recognized, and given some weight to, the role of the First Amendment in an individual's ability to develop their faculties of retaining freedom of mind,[77] the Court has declined to adopt the self-realization view as its guiding analytical approach in free speech cases. If the Court had adopted the self-realization model, one would not expect the Court to accord lesser or greater value to different types of speech.[78] Yet, that is precisely what the Court has done, by according commercial speech less value than political speech,[79] while according no protection at all to other types of highly expressive and arguably self-actualizing speech (e.g. obscenity).[80] Indeed, even the Court's approach to artistic expression—perhaps the place where it would be most likely to adopt a self-realization approach to speech—has been focused primarily on the effect of the expression on the audience rather than its expressive value to the speaker.[81]

---

76. *See* O. Lee Reed, *A Free Speech Metavalue for the Next Millenium: Autonomy of Consciousness in First Amendment Theory and Practice*, 35 AM. BUS. L.J. 1, 8–9 (1997) ("The value of speech as an individual right has not been emphasized in constitutional case law although, ironically, the Lockean view of 'unalienable' natural rights was considered 'self evident' in the Declaration of Independence.") (citations omitted).

77. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

78. Fogelman & Viator, *supra* note 66, at 364 ("[S]elf-realization theories cannot be reconciled with modern first amendment jurisprudence, which treats speech not equally but hierarchically").

79. *See, e.g.*, Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (extending the lesser "time, place, manner" protective standard to commercial speech).

80. Miller v. California, 413 U.S. 15, 23 (1973) (noting that obscenity is unprotected by the First Amendment).

81. *See* Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 441–42 (1999) ("Although members of the Supreme Court have perceived that the Constitution recognizes the intangible value of speech to the individual, the Court's approach toward freedom of expression has been dominated by audience-oriented terminology and justifications. . . . Under these standards, artistic expression will be evaluated based on its social value, as embodied in the perceived substance of its contribution to

Although it has generally favored an instrumental approach to the First Amendment, the Supreme Court has not come down as clearly in favor of the particular version of the instrumental view that I have set out here—the self-government variant. The Court has viewed the purpose of the First Amendment more broadly than just the enabling of effective democratic government.[82] There is no doubt, however, that a primary concern of the Court in the First Amendment context is with political speech and self-government. For example, in *West Virginia v. Barnett*,[83] the Supreme Court set out its view of the purpose underlying the First Amendment. Citing the Spanish Inquisition and the Russian practice of exiling dissidents to Siberia as examples of the fruits of attempts at forced unity, the Court stated that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. . . . It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[84] Many other Supreme Court decisions confirm this view.[85]

Thus, even though the Court has not yet adopted the specific conception of the First Amendment advocated for in this article, both sound principles of constitutional interpretation and the Court's prior First Amendment decisions support at least these propositions: (1) in the United States, free speech rights are not absolute, but context-dependent; (2) a core purpose of the First Amendment is to enable effective democratic self-government;[86] and (3) self-realization through expression is not a core principle of the

---

the public debate.").

82. The best example is the Court's repeated references to the "truth-seeking" function served by the First Amendment through an open marketplace of ideas. While the "marketplace of ideas" theory of free speech protection certainly encompasses political speech, the Court has viewed it more broadly than that.

83. 319 U.S. 624 (1943).

84. *Id.* at 641.

85. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); Burson v. Freeman, 504 U.S. 191, 222 (1992) (Stevens, J. dissenting); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting); Meyer v. Grant, 486 U.S. 414, 420 (1988); Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 255 (1986).

86. *See, e.g.*, EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989) (noting that speech facilitating self-government is at the "core . . . of the First Amendment freedoms."); *accord supra* notes 83–84 and accompanying text.

First Amendment.[87] Accordingly, if it is to be consistent with the Court's broader First Amendment jurisprudence, any approach to student speech in public schools should focus primarily on the context and core values served by the First Amendment. I argue that the primary value that the First Amendment is directed at is the furtherance of constitutional democracy.

The adoption of the instrumental approach to the First Amendment has implications for student speech in public schools. Unless there is no meaningful difference between the public school and adult educational context, the free speech rights of public school students are likely to be different than those for adults. Additionally, the free speech context of student rights should be examined with a view to how that educational setting furthers the democratic purposes that are at the acknowledged core of the First Amendment. The following section addresses the role of educational institutions in preparing citizens for democratic government.

IV. THE NATURE OF DEMOCRATIC EDUCATION AND THE ROLE OF EDUCATIONAL INSTITUTIONS IN PROMOTING IT

Applying the instrumental approach to the First Amendment question of student speech in public schools would allow school authorities to regulate student speech so long as the regulations did not frustrate the school's educational role in sustaining self-government. This immediately begs the following question: what is the role of the public schools in sustaining democratic government? In this section, I argue that the educational mission of the public schools, at least as far as is relevant to First Amendment analysis, is to prepare students to he good citizens in democratic society. I refer to this type of education, as have others who have done research in this field, as "democratic education."

In this section, I draw heavily on the work of Professor Amy Gutmann. Before proceeding, it is important to note that Gutmann's work on democratic education is just as much about allocating decisions regarding who should educate and who should be educated as it is about what the content of that

87. *See supra* notes 77–80 and accompanying text.

education should be.[88] Although I disagree with Gutmann in a number of respects,—probably, ironically, including the extent of the free speech rights of public school students[89]—nevertheless, I view her conception of democratic education as a useful tool for evaluating the context in which First Amendment doctrines are applied. At the risk of stating the obvious, my use of Gutmann's conception of democratic education neither implies that I accept her arguments regarding control of the primary educational system nor attempts to represent her views on how the principle of democratic education should influence the Supreme Court's analysis of First Amendment claims by public school students. With this caveat out of the way, this section focuses both on what democratic education is, as well as the roles that public schools play in its processes. It also differentiates the democratic educational role of the public schools from the role played by institutions of higher learning in democratic education.

A. What is Democratic Education?

Broadly speaking, democratic education is the teaching, both in curricular and noncurricular ways, of the essential values underlying constitutional democracy.[90] Early in America's history, the importance of education to effective government was recognized by Thomas Jefferson, who believed that basic education was required to sustain self-government. According to Jefferson, "[i]f a nation expects to be ignorant *and free*, in a state of civilization, it expects what never was and what never will be."[91] He believed that citizens needed to be educated in order to exercise their democratic rights in ways

---

88. Gutmann, *supra* note 14, at 11 (noting that her theory of democratic education is meant to provide ways of resolving both the problem of "who should have authority to make decisions about education, and . . . what the moral boundaries of that authority are.").

89. *See* Amy Gutmann, *What is the Value of Free Speech for Students*, 29 ARIZ. ST. L.J. 519 (1997).

90. James L. Mursell defines "democratic education" as "education that is expressly planned and conducted to support, perpetuate, enlarge, and strengthen the democratic way of life . . . ." JAMES L. MURSELL, PRINCIPLES OF DEMOCRATIC EDUCATION 4 (W. W. Norton & Company, Inc.) (1955).

91. Michael Boucai, Note, *Caught in a Web of Ignorances: How Black Americans are Denied the Equal Protection of the Laws*, 18 NAT'L BLACK L.J. 239, 282 (2004) (quoting Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816) (emphasis added)).

that preserve liberty and hedge against government corruption.[92] Jefferson even set out the content of the Jeffersonian version of democratic education, albeit in a general way: education that "enable[s] every man to judge for himself what will secure or endanger his freedom."[93] Other early prominent Americans took similar positions.[94]

Two of the most significant advocates of public education in America—Horace Mann and John Dewey—focused on the relationship between democracy and education. Dewey was particularly influential, and believed that "education must operate in view of a deliberately preferred social order."[95] In other words, he viewed the primary responsibility of public schools as teaching students the citizenship skills that would enable them to be effective participants in a democratic republic. Horace Mann also viewed democratic education as absolutely essential to the maintenance of democratic society:

> However elevated the moral character of a constituency may be, however well informed in matters of general science or history, yet they must . . . understand something of the true nature and functions of the government under which they live. That any one who is to participate in the government of a country, when he becomes a man, should receive no instruction respecting the nature and functions of the government he is afterwards to administer, is a political solecism.[96]

Mann advocated for the public schools taking a key role in democratic education:

> In regard to the extent of the education to be provided for all, at the public expense, . . . under a republican government, it seems clear that the minimum of this education can never be

---

92. Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 141 (2000) (citation omitted).

93. Walter Karp, *Why Johnny Can't Think: The Politics of Bad Schooling*, HARPER'S, June 1985, at 70 (quoting Letter from Thomas Jefferson to John Tyler (May 26, 1810)).

94. *See* Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 774–77 (1995) (setting out views of prominent Americans regarding democratic education).

95. John A. Dewey, *The Underlying Philosophy of Education*, *in* THE EDUCATIONAL FRONTIER 287, 291 (William H. Kilpatrick ed., 1933).

96. *See* Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1178 (2003) (citation omitted).

> less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge; such an education . . . as is indispensable for the civil functions of a witness or a juror, as is necessary for the voter in municipal affairs; and finally, for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.[97]

He viewed America's public school system as the place where basic republican principles that "form[ed] the common basis of our political faith" could be taught to all students without the extremism and distortion of party politics.[98]

Democratic education is education that is aimed at the reproduction and improvement of democratic society and the preservation of democratic government.[99] Professor Gutmann has stated that "[b]ecause being a democratic citizen entails ruling, the ideal of democratic education is being ruled, then ruling."[100] In other words, democratic education is education designed to instill in its students, through an educational structure, the primary dualistic value of constitutional democracy: the concurrent submission to, and exercise of, authority.[101]

Although Jefferson's "democratic" education was probably aimed at the reproduction of his own version of what America should be, the basic principle underlying his advocacy of democratic education is accepted by many: the need for a democratic society to instill in its citizens democratic values and the basic skills necessary to exercise them.[102]

---

97. Julie Underwood, *Choice, the American Common School, and Democracy, in* DEVELOPING DEMOCRATIC CHARACTER IN THE YOUNG 174 (R. Soder, J.I. Goodlad, & T.J. McMannon, eds., 2001) (quoting Horace Mann).

98. Lawrence Arthur Cremin, The American Common School: A Historic Conception (1951).

99. Gutmann, *supra* note 14, at 45 (stating that the aim of democratic education is "conscious social reproduction") (emphasis omitted).

100. *Id.* at 3.

101. *See* ARISTOTLE, THE POLITICS 362–63 (1981 ed.) ("The good citizen should know and have the capacity both to rule and be rule, and this very thing is the virtue of a citizen."). Another commentator defined a liberal democratic education as "one committed to the development of those capacities that permit individuals to frame, pursue, revise and protect their own conception of the good as interdependent members of a liberal democratic community." David Hogan, *The Logic of Protection: Citizenship, Justice, and Political Community, in* CITIZENSHIP EDUCATION AND THE MODERN STATE 52 (Kerry Kennedy, ed., The Farmer Press) (1997).

102. *See* Mursell, *supra* note 89, at 4; *see also* Gutmann, *supra* note 14, at 173 (setting out that both values inculcation and democratic skills are permissible goals of democratic education).

> The broad agreement on the general proposition, however, masks a substantial dispute over what are the essential principles of democratic government and what types of educational means are appropriate for teaching them.[103] One possible answer to the question, "what is the necessary content of a democratic education?" is that a democratic education must be value free in order to be consistent with the democratic ideals of freedom of conscience and choice. While there is no doubt that freedom of conscience and choice are both important (and even essential) values that should be protected in a meaningfully democratic society, a democratic education cannot promote these values by simply being value free. The fact that both teaching *and* learning are inherent in the process of education suggests that education necessarily involves value choices: "If we urge critical thinking, then we value rationality. If we support moral reasoning, then we value justice. If we advocate divergent thinking, then we value creativity. If we uphold free choice, then we value autonomy or freedom. If we encourage 'no-lose' conflict resolution, then we value equality."[104]

Thus, if education is to be education in any meaningful sense—meaning if it is to involve teaching and learning—it must necessarily involve value choices. The façade of value-neutral education does not save us here—nor would we want it to, as attempts by instructors to appear value-neutral could lead to the development of an impermissible subjectivism in children.[105]

The mere fact that value choices are involved, however, does not mean that any value or idea that is consistent with democratic principles should be taught as part of a democratic

---

103. Gutmann, *supra* note 14, at 53–70 (discussing the content of democratic education from amoral, liberal neutrality, conservative moralism, and parental choice perspectives).

104. *Id.* at 55 (quoting Howard Kirschenbaum, *Clarifying Values Clarification: Some Theoretical Issues*, *in* MORAL EDUCATION . . . IT COMES WITH THE TERRITORY 122 (David Purpel and Kevin Ryan eds., 1976)) (emphasis omitted); *see also id.* at 41 ("Cultivating character is a legitimate—indeed, an *inevitable*—function of education.") (emphasis added).

105. *See* Bitensky, *supra* note 93, at 778–79:

> First, it remains questionable whether it is even humanly possible to teach without at least unconsciously transmitting the values of the teacher or school. Second, values clarification and cognitive moral development may encourage in children a false subjectivism or relativism, giving rise to the logical inference that no one set of values can be right. Such a viewpoint presumably would allow the child to conclude that apartheid is as acceptable as racial equality and integration, or that fascism is an acceptable alternative to democracy.

education. In other words, the teaching of the majority view about which particular kind of democratic government is best may not be a democratic education even though its *content* is wholly consistent with democratic ideals. Indeed, if an education seeks to instill a value set beyond that which is necessary for the education of good democratic citizens, it becomes an undemocratic education; one that is inconsistent with the basic values underlying democracy. It is undemocratic in the sense that it becomes no more than an indoctrination of one specific set of values among other sets equally compatible with the essential principles of democratic government—an attempt by a certain group of individuals to force their conception of the good life on everyone else.[106] This "single value" approach to democratic education is the opposite—and equally untenable—extreme to the value-free approach.

What becomes clear, then, is that democratic education involves the teaching and inculcation of that specific and limited set of values that are essential for the preservation of effective self-government.[107] Obviously, the debate regarding what constitutes the essential principles of a democratic education is ongoing and extremely complex.[108] Even a brief summary is beyond the scope of this article. For the purposes of this article, however, I do adopt a particular view of the content of democratic education espoused by Professor Amy Gutmann in her book *Democratic Education*. Gutmann contends that the content of a democratic education is the instilling of values and the teaching of moral reasoning that is designed to ensure that each student receiving a democratic education be enabled to participate in the collective re-creation of the society of which they are a part.[109] Specifically, Gutmann believes that a democratic education should seek to teach:

> democratic virtue: the ability to deliberate, and hence to participate in conscious social reproduction . . . [A] democratic state defends a degree of professional authority over

106. *See* Gutmann, *supra* note 14, at 44 (noting that democratic education involves the teaching of the "value of critical deliberation" which involves "educating children to deliberate critically among a range of good lives and good societies" compatible with democratic principles).

107. *Id.* at 63.

108. *See, e.g.*, TEACHING DEMOCRACY BY BEING DEMOCRATIC (Theodore L. Becker & Richard A. Couto eds., Praeger Publishers) (1996); Blacker, *supra* note 18; Gutmann, *supra* note 14; Hogan, *supra* note 98.

109. Gutmann, *supra* note 14, at 39.

> education . . . to the extent necessary to provide children with the capacity to evaluate those ways of life most favored by parental and political authorities.[110]

Gutmann asserts that teaching of deliberation involves the inculcation in students of two values: nonrepression and nondiscrimination—each of which are necessary and the combination of which is sufficient for democratic education.[111]

Although the principle of nonrepression suggests limits on the authority of the majority to exercise control over other individuals, it does not mandate individual freedom from regulation by others. To so define it would essentially equate nonrepression with license.[112] The idea that a necessary condition of democracy is the right to do as one pleases is incompatible with the very process of democratic self-government, which involves, through deliberation, both the submission to, and the exercise of, authority at the same time. Indeed, nonrepression viewed as a right to do as one pleases would be most consistent with anarchy, one of the states of affairs that constitutional democracy is meant to avoid.[113]

If nonrepression does not mean the right to do what one wants without societal restraint, what does it mean? In the context of democratic education, nonrepression is best viewed as:

> [p]revent[ing] the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society. Nonrepression is not a principle of negative freedom. It secures freedom from interference *only to the extent that it forbids using education to restrict rational deliberation or consideration of different ways of life.*[114]

While the principle of nonrepression can be viewed as the deliberative value applied to ideas, the principle of

---

110. *Id.* at 46 (emphasis omitted).

111. *Id.* at 44-47.

112. The American Heritage Dictionary defines "license" as "[l]ack of due restraint; [e]xcessive freedom." The American Heritage Dictionary, *available at* http://www.answers.com/license&r=67 (last visited: Jan. 10, 2009).

113. The American Heritage Dictionary defines "anarchy" as "1. Absence of any form of political authority. 2. Political disorder and confusion. 3. Absence of any cohesive principle, such as a common standard or purpose." The American Heritage Dictionary, *available at* http://www.answers.com/anarchy&r=67 (last visited: Jan. 10, 2009).

114. Gutmann, *supra* note 14, at 44 (emphasis added).

nondiscrimination derives from the application of the deliberative value to people. Thus, according to Gutmann, nondiscrimination is "the distributional complement to nonrepression."[115] In order to be effective in promoting conscious social preservation of democracy, and to be truly democratic, democratic education must involve all citizens of the particular democracy.[116] If not, democratic education does not serve the ends that it exists to serve: promoting the values of democratic self-government underlying constitutional democracy, since "[t]he effect of discrimination is often to repress, at least temporarily, the capacity and even the desire of these groups to participate in the processes that structure choice among the good lives."[117] Accordingly, "[a]pplied to those forms of education necessary to prepare children for future citizenship [i.e. democratic education] . . . , the nondiscrimination principle becomes a principle of nonexclusion."[118]

Once the two basic principles comprising democratic education are set out, the question immediately becomes how are these to be taught? A concomitant question is whether they can be effectively taught in the same way to children as to adults. The following section deals with this question by examining how the principles of nonrepression and nondiscrimination can be effectively taught to children and adults in the context of public schools and institutions of higher education.

B. Differences in Context, Aim, and Method: The Different Roles of Public Schools and Institutions of Higher Learning in Democratic Education

Once one has accepted the basic premise of democratic education—that it is necessary and acceptable to teach students certain essential values in the interest of perpetuating and improving democratic self-government—the next question obviously becomes how that is to be accomplished. One might assume that democratic education would be most effective if it were democratic in *means* as well as in *content*; indeed, it

115. *Id.* at 45.
116. *Id.*
117. *Id.*
118. *Id.*

would seem a reasonable assumption that the best way to teach basic democratic values would be by the most democratic means possible.[119] This assumption immediately encounters problems, however, since the most democratic means of education may not always be the most effective way of conveying a desired message.[120] A lack of effectiveness in teaching the underlying value itself might undercut the effectiveness of any learning of the value derived from the way the teaching is done. For example, a teacher who attempts to teach using methods that promote maximum freedom of conscience and choice among students may find that she has lost all control over the content of her course. Indeed, her very democracy in teaching could result in the students learning and internalizing rather anti-democratic principles, even though her intention was to do it in a democratic way.[121] In any event, since democracy involves the concurrent exercise of and submission to political authority, even educational structures that are somewhat hierarchical are not necessarily anti-democratic.

Common sense suggests that concerns over the undermining nature of democratic teaching methods may be less valid when the students are adults and more relevant when the teacher's pupils are young students. Other things being equal, adults are more likely to show respect for the teacher and her basic aims even if she surrenders some control over the content and educational methods of the course to her students. Additionally, adults may be more likely to recognize the dissonance between a democratic message and anti-

119. *See, e.g.*, TEACHING DEMOCRACY, *supra* note 107. Although this argument has been around for a long time, *see* EUGENE C. BROOKS, EDUCATION FOR DEMOCRACY (Lyman P. Powell ed., Rand McNally & Company) (1919), it is increasingly common in the context of social studies and citizenship education. *See, e.g.*, DEMOCRATIC SCHOOLS, LESSONS IN POWERFUL EDUCATION (M.W. Apple & J.A. Beane, eds., 2007).

120. *See* Gutmann, *supra* note 14, at 91 (noting that "[t]he disciplinary virtues—the imparting of knowledge and instilling of emotion along with intellectual discipline—are also among the purposes of democratic education, and apparently they are not always most effectively taught by the most democratic methods, especially among those students least committed to learning."); *see also* Bitensky, *supra* note 93, at 777–94 (setting forth research that suggests children have a limited capacity to develop values simply through the process of moral reasoning, and that hierarchical pedagogical methods may be the optimum means of instilling foundational values).

121. While the possibility of learning anti-democratic principles exists in this situation, the greater danger is the learning of anti-democratic attitudes and values, especially those related to respect and submission to authority, which are very much a part of the essential values of democracy.

democratic methods. On the other hand, younger students, especially those in public school, are unlikely to show the same level of respect as well as be less likely to sense the inconsistency involved in using hierarchical teaching methods to teach democratic principles. Indeed, there is substantial research suggesting that, if simply left to their own amidst a sea of ideas and values, children lack the moral reasoning skills to choose a set of acceptable fundamental values. If the values inculcation process is to succeed, some significant level of hierarchical instruction is necessary.[122]

Ultimately, however, it is difficult to say at what point either authoritarianism or democracy in method becomes so excessive that it undermines the ultimate goal of democratic learning.[123] The best that can be said is that some combination of the two is required to obtain the most effective results. Given this reality, and the relative expertise of educators in this matter, some deference should be accorded their pedagogical decisions regarding which particular teaching methods are most likely to best fulfill the legitimate aims of a democratic education.

The timing of values inculcation is also of concern in democratic education. Particularly important is the question regarding the ages at which democratic values and skills are most effectively taught and the question as to whether the concept of democratic education is conceptually and temporally severable. In other words, does it contain multiple components that are best taught at different times in a person's life? One view on this question would accept the premises and conclusions contained in the following chain of reasoning:

(1) democratic education is concerned solely with the inculcation of democratic values;

(2) these values must be inculcated, if at all, when children are young; and

(3) therefore the enterprise of democratic education must be undertaken solely by the public schools.

This view shortchanges the purpose of democratic education, however. As discussed previously, the end of democratic education is not just the inculcation of basic

122. *See* Gutmann, *supra* note 14, at 90–91; *see also* Bitensky, *supra* note 93, at 777–94 (discussing research regarding children's limited ability to learn through an open process of moral reasoning).

123. Gutmann, *supra* note 14, at 91.

democratic values, but is ultimately the preparation of citizens to be effective and responsible civic participants.[124] Though important, values inculcation is just one part of this larger goal. While it is probably true, as commentators have noted, that democratic *values* must be inculcated, if at all, while a child is young,[125] this does not mean that democratic education ends when children leave the public schools. Instead, democratic education changes when adults enter institutions of higher learning. Instead of being focused on *values inculcation*, it is focused on the *development of skills* necessary for effective employment of those values within the democratic system. These skills include the ability to clearly formulate and express one's opinion, to listen and comprehend the opinion of others, and to defend one's opinion in the face of arguments against it.[126] In short, they encompass the ability to persuade and be persuaded.

From the acceptance of the premise that public schools and institutions of higher learning play different roles in the democratic education process follows the conclusion that they are likely to have to use different methods to accomplish their purposes. The process of instilling values is very much different than the process of teaching skills. It is different both because values inculcation is accomplishable primarily among the young, and because values inculcation is probably not best fostered by an open democratic dialogue with students. Indeed, such an apparent lack of structure (from a child's view) could very well leave younger children confused and unable to discern between arguments over competing viewpoints and the fundamental principles that underlie the reason for employing a particular teaching method.

In contrast, the development of the critical reasoning and persuasive skills necessary for effective *participation* in the democratic system is best accomplished in an open forum

---

124. *Id.* at 173 ("Schooling does not stop serving democracy, however, when it ceases to be compulsory—or when all educable citizens reach the democratic threshold. Its purposes change.").

125. *Id.* at 173–74 n.4 (citing research regarding the reduced effectiveness of values inculcation at the higher education level).

126.There is . . . another, equally complex and intellectually more challenging way in which students can be taught to understand the moral demands of democratic life. While not a substitute for character training, learning how to think carefully and critically about political problems, to articulate one's views and defend them before people with whom one disagrees is a form of moral education to which young adults are more receptive and for which universities are well suited. *Id.* at 173.

where ideas, both controversial and not, can be expressed and examined through dialogue with others. Unlike the values inculcation that occurs in primary schools, democratic skill development is probably not effectively accomplished in a hierarchical situation in which students are expected to listen to and learn from an authority figure.[127] Among adults in a higher education context, a free-wheeling, open dialogue is likely to further democratic education while not hindering values inculcation.[128] The teaching and acceptance of these basic democratic values is likely to have been accomplished, if at all, at the primary education stage. Such principles have likely been deeply embedded, if they ever will be, in the students' characters by the time they enter institutions of higher learning.[129] Additionally, essential values are less likely to be undermined in an open battle of arguments, given adult students' greater capacity to distinguish between mere argument and basic principles.[130]

Recognition of the different democratic educational purposes served by public schools and universities is essential to assessing the validity of the educational methods that can be legitimately employed in aid of democratic education in each context. In public schools, where the democratic education concern is primarily with values inculcation, the goal of instilling a specific set of values—i.e. nonrepression and nondiscrimination—combined with the limited ability of students to discern between principle and argument likely requires a more hierarchical approach than would be necessary, or justified, if the interim goals and students were different, as they are in the higher education context.[131]

Thus, even though such hierarchical methods would be

---

127. *Id.* at 59 (noting that the nondemocratic type of paternalism necessary for values inculcation is not justifiable in the adult education context).

128. *See id.* at 172–93 (discussing the democratic purposes of higher education generally).

129. *See id.* at 173 ("Higher education should not be necessary for inculcating basic democratic virtues, such as toleration, truthtelling, and a predisposition to nonviolence. I doubt whether it can be. If adolescents have not developed these character traits by the time they reach college, it is probably too late for professors to inculcate them . . . .").

130. *See* Bitensky, *supra* note 93, at 781–94 (discussing the greater capacity of adults to engage in the process of moral reasoning).

131. Gutmann, *supra* note 14, at 59 (noting that "democratic paternalism toward children" does not "undermine[] the possibility of a genuinely democratic society" in the same way that "nondemocratic paternalism towards adults" does).

incompatible with the purposes of democratic education in the higher education context, they may nonetheless be the most effective (and most democratic possible) methods for achieving the values inculcating purpose that public schools exist primarily to serve, and are therefore not inconsistent with basic democratic principles when used in that context. Understanding how these contexts and purposes establish the universe of acceptable teaching methods and missions is essential to understanding how the Supreme Court would interpret student First Amendment free speech rights in public schools when applying the educational mission standard that I advocate for here.

Although I believe that common sense notions of the mental and emotional capabilities of children and adults, in addition to educational research, support the basic contention that the purposes of democratic education are unlikely to he accomplished through exclusively democratic means in public schools, I make no claim that one particular pedagogical method is always most effective in any one situation. Indeed, I believe that the differences in context, aim, and method evident between public schools and universities teach that the opposite is true. And it is the reality of these differences that justifies extending some level of deference regarding pedagogical *methods* to the educational experts themselves. The following section focuses on how I believe this deference as to choice between hierarchical and democratic methods can be reconciled with the First Amendment rights of public school students.

V. THE DEMOCRATIC EDUCATION APPROACH TO STUDENT SPEECH IN PUBLIC SCHOOLS

As the previous paragraphs make clear, I disagree with the broad interpretation of Tinker, given its narrow focus on classroom discipline and disregard for what I view as the primary purpose behind the First Amendment. I also believe that the Court's decisions in *Fraser*, *Hazelwood*, and *Morse* were correct and played important roles in implementing minor corrections in the *Tinker* standard. Ultimately, however, they did not go far enough. What was attractive about the broad interpretation of Tinker was its comprehensiveness. Upon its implicit abandonment by the Court, we are left with nothing resembling a comprehensive First Amendment approach to

public education. I argue that a democratic education approach can, and should, fill the gap. The Supreme Court's instrumental approach to the First Amendment combined with the role of the public schools in democratic education suggests how the Court should approach the question of student free speech rights in public schools: that students possess a judicially enforceable right to speak only when it is clear that repression of their speech could not reasonably serve the goals of democratic education.

The approach derived from this principle would essentially create a presumption of constitutionality for school regulations of speech. Under this theory, courts would uphold a public school's regulation of student speech unless a student could show that the restriction of their speech could not reasonably serve one of the twin essential values of democratic education: nonrepression and nondiscrimination. Admittedly, this standard shifts the burden of proof from the school to the student, which is not an insignificant change. Nevertheless, the shift is an important one because it recognizes that school regulation of the educational environment itself serves important First Amendment and civic interests[132] by creating an environment in which democratic values inculcation can take place, and acknowledges the relative expertise of educators in choosing those educational methods best designed to achieve the educational goals of democratic education.

Ultimately, my approach extends a limited degree of deference to educators regarding their chosen *method* of democratic education, while not according any deference to schools on the permissible *content* of democratic education. The limited deference accomplished by means of the presumption shift is only accorded to public school educators' decisions on how these values are best taught. The twin goals of nonrepression and nondiscrimination are absolute values. Expertise is no answer for a restriction that clearly contravenes either of these essential values. Such a restriction would be unconstitutional as nothing more than an educator's attempt to impose a non-fundamental value or idea upon a student.

The democratic education standard for public school student speech also serves the self-government purpose of the First Amendment better than would the broad standard the

132. For thoughtful commentary on this point, *see* Hafen, *supra* note 18.

Supreme Court set out in *Tinker* because it acknowledges both the role of the student and the school in the promotion of First Amendment values. It considers the learning environment as a whole when applying the First Amendment, rather than focusing primarily on the student. This approach is more consistent with what I believe to be, and what the Supreme Court has generally held to be,[133] the correct view of the First Amendment: that it confers a collective, rather than an individual, right aimed at enabling democracy rather than enabling expression itself. Importantly, this standard also ensures that public school teachers are not required to surrender substantial control over classroom curriculum to their students. It would allow teachers to regulate speech that has no discernible value as far as democratic education is concerned, regardless of whether it constituted a physical disruption of the classroom environment.

I turn next to two possible objections to the democratic education approach to student speech in public schools. First, some may object that even the inculcation of the basic (and widely accepted) values of nonrepression and nondiscrimination essentially constitutes viewpoint discrimination, which the Supreme Court nearly always strikes down as violative of the First Amendment.[134] Although even the limited type of values inculcation that occurs in democratic education is viewpoint discrimination in the sense that these values are taught as superior to other alternative perspectives, it is not the type of viewpoint discrimination that the Constitution prohibits. Indeed, the entire purpose of the Constitution and its Bill of Rights is to place certain values—and therefore viewpoints—beyond the control of the majority.[135] It is a charter of shared values—democratic values—that are non-negotiable absent the process of constitutional amendment. It would indeed be odd to hold that the First Amendment, the purpose of which is to enable the structure of democratic government set up by the Constitution, would forbid the inculcating of the values necessary to sustain

133. *See* discussion in Part III.D, *supra*.

134. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394 ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citation and internal quotation marks omitted).

135. Furhman v. Georgia, 408 U.S. 238, 268–69 (1972).

the very government it exists to support. Indeed, the Supreme Court has recognized the legitimacy of values inculcation in public schools in prior cases.[136]

Another potential objection with the democratic education approach to public school student free speech is that it is likely to restrict more student speech than the broad *Tinker* standard would. While this is probably true, it is not necessarily the case. Under the *Tinker* standard, disruption of the teaching environment is itself a sufficient justification for a school to prohibit expression. While it is certain that, in the vast majority of cases, a physical disruption of the learning environment is harmful to a school's efforts in democratic education, it is not inevitably so. In any event, even if this approach leads to a reduction in the *amount* of judicially protectable speech, it ensures both that the value of the speech that is protected and the value of the type of education facilitated are of the highest nature, rather than protecting any type of speech or facilitating any type of education in which a student or school chooses to engage. The democratic education standard for First Amendment protection requires schools to look at their practices in curtailing speech from a new perspective: one of fundamental values rather than merely classroom discipline. Therefore, even as it allows public school teachers to retain control of the education that occurs in their classrooms, it requires them to engage in the vital process of democratic education, which the broad *Tinker* standard does not.

Finally, despite what are certain to be claims to the contrary,[137] it is significant that the democratic education approach to student speech in no way *requires* the censorship of any more speech than would the broad *Tinker* (or any other) standard. School districts, individual teachers, or administrators are always free to allow speech that they could, under the democratic education standard, constitutionally prohibit. As Justice Thomas noted in *Morse*, students, parents, or otherwise interested citizens who disagree with a particular

136. *Fraser*, 478 U.S. at 685–86; *Hazelwood*, 484 U.S. at 270–73.

137. Those advancing such claims are likely to adopt the perspective of Lord Acton: that power corrupts and absolute power corrupts absolutely. Therefore, they would argue, even though there is no requirement of regulation, the practical effect of a lesser standard of judicial protection will be more regulation of student speech. They are probably correct. I simply contest the proposition that the Constitution grants the judiciary protective power here.

school board's, administrator's, or teacher's approach to free expression may always seek a change in the political or administrative leadership. There are means in place to allow them to do that. Additionally, parents remain free to choose to send their children to private and charter schools or to educate them at home if they remain concerned about the schools' approach to free speech.[138]

VI. CONCLUSION

The Supreme Court has struggled for nearly forty years in its attempt to balance the free speech rights of public school students against the necessity that the public schools be able to effectively educate. In this article, I have suggested an approach that I believe strikes the appropriate constitutional and policy balance in dealing with this difficult question. While much in need of further definition and refinement, the democratic education approach to the question of First Amendment rights public schools provides the right framework within which the Court should analyze the issue.

138. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).