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REVERSING THE TIDE: RESTORING FIRST
AMENDMENT IDEALS IN AMERICA'S SCHOOLS
THROUGH LEGISLATIVE PROTECTIONS FOR
JOURNALISM STUDENTS AND ADVISORS

*Christine Snyder, J.D.**

'Tis Education forms the Common Mind,
Just as the Twig is Bent, the Tree's Inclined.
—Alexander Pope

I. INTRODUCTION

Education is powerful, and schools play a vital role, not only in the teaching of reading, writing, and arithmetic, but also in shaping the youth of today to be the citizens of tomorrow. Schools are tasked with instilling the values that society holds most dear, for “[r]ightly called the ‘cradle of our democracy,’ our schools bear the awesome responsibility of instilling and fostering early in our nation’s youth the basic values which will guide them through their lives.”¹ Unfortunately, today’s schools are failing to instill in students some of the core values of American society, those values protected by the First Amendment. There is a First Amendment crisis in today’s schools, and if it goes unchecked, it will lead to the deterioration of First Amendment rights within the larger society.

One way to ensure the survival of the values protected by

* Christine Snyder is an attorney with the firm of Tucker Ellis LLP in Cleveland, Ohio, and a graduate of Case Western Reserve University School of Law. Prior to entering the legal profession, Snyder was a high school journalism teacher, delegate and speaker for the annual Journalism Education Association/National Scholastic Press Association high school journalism convention, and advisor to the 2004 Maryland Journalism Student of the Year.

¹ Alison Lima, Comment, *Shedding First Amendment Rights at the Classroom Door? The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 194 (2008) (citing *Krizek v. Bd. of Educ.* 713 F. Supp. 1131, 1138 (N.D. Ill. 1989)).

the First Amendment is to provide, through the educational system, opportunities for students to gain understanding of and practice in applying those values. One of the best means of providing this opportunity is through the high school journalism classroom. High school journalism classes should teach students to examine their environment critically, investigate sources of problems, and expose issues like professional journalists do. These classes should also teach the express protections of the First Amendment and how to use them effectively and responsibly to foster positive change for the entire student body.

Unfortunately, high school journalism classes in schools today often teach students the opposite lesson. As protection of free speech in schools has eroded over the last forty years—through a series of court cases—censorship of student speech has increased, and student journalists, instead of valuing free speech, press, and expression, have been taught to shy away from controversy and to stifle differing views. Similarly, when teachers assigned to advise student journalists have acted in support of their students' rights, they have been punished, threatened, and terminated.

A major study sponsored by the John S. and James L. Knight Foundation in 2004 found that students lack even a basic understanding of the First Amendment and the freedoms it protects, and it also found that schools offering classes like journalism drastically help not only the students in the classes themselves but the student body as a whole to gain a better understanding of those freedoms.² Unfortunately, even if schools offer such classes, the message is distorted or lost if school officials can arbitrarily censor school publications. It is only by ensuring that censorship has no place in student journalism, either directly through the censorship of students themselves or indirectly through pressuring teachers to influence content decisions, that we can begin to address the First Amendment crisis that is plaguing America's schools. The problem needs to be addressed because the country of tomorrow is shaped by the ideals and values of the youth of today.

This article will discuss the problem of the First

² JOHN S. AND JAMES L. KNIGHT FOUND., Future of the First Amendment Survey, SPLC.ORG (2004), <http://www.splc.org/fafuture/2004/results/results.php>.

Amendment crisis and how to reverse the tide by protecting high school journalism students and teachers. Part II examines the broader, historical development of First Amendment rights in the public high school setting by presenting a series of cases that initially established strong First Amendment protections for student and teachers and then eroded those same protections. Part III focuses on the negative impact this erosion has had on student journalists and advisors who both find themselves under attack. Part IV shows how attacks on journalism students and teachers chill speech in schools and how that chilling effect harms the entire school. Part IV also discusses the very real First Amendment crisis in today's schools and how school newspapers stand in a unique position to reverse the current trend. Finally, Part V proposes restoring the First Amendment to its rightful place of prominence in America's schools through the adoption of national legislation designed to protect both journalism students from censorship and journalism teachers from retaliation for defending students' First Amendment rights.

II. A BRIEF HISTORY OF THE DETERIORATION OF FREE SPEECH RIGHTS IN AMERICA'S PUBLIC HIGH SCHOOLS

The history of free speech rights in the high school setting over the last forty years is one of slow deterioration. In the 1960s, the courts established strong First Amendment protections for students and teachers, but subsequent court decisions slowly eroded those protections.

A. *Tinker: Setting a High Standard for Free Speech in High Schools*

Strong First Amendment protection for both students and teachers was established in the 1969 landmark case *Tinker v. Des Moines Independent Community School District*.³ In a line that has resonated since, the Supreme Court in *Tinker* stated, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴ This shows that the Court saw both students and teachers as retaining their First Amendment

³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁴ *Id.* at 506.

freedoms even in the structured and regulated environment of the school. In *Tinker*, the speech under attack was the wearing of black armbands by a group of students in protest of the Vietnam War. School administrators suspended the students when they refused to remove the armbands, and the parents brought suit.⁵

Upholding the students' First Amendment rights in *Tinker* had a two-fold impact. First, the Supreme Court established a high standard for review in student free speech cases, allowing school officials to limit the constitutional rights of students only when their speech would "materially or substantially interfere with the requirements of appropriate discipline in the operation of the school."⁶ This "substantial and material disruption" standard set a high bar for the actions of school administrators in the future. Second, the Court's ruling in *Tinker* carried with it a strong message about the role of schools in a democratic society and their purpose of instilling society's values in America's youth.⁷ This message still resonates today despite the subsequent deterioration of the *Tinker* standard, and "*Tinker* remains one of the most resounding, eloquent, and perhaps utopian statements about free expression, a marker of the significance of the relationship between academic freedom and educational rigor in our democracy."⁸ *Tinker's* message represents the ideal view of free speech and free expression for students and teachers in academic settings.

B. *The Deterioration of Tinker for Both Teachers and Students*

While *Tinker* may represent an ideal view of the place the First Amendment holds in America's schools, the reality is that since the Supreme Court ruling in *Tinker*, its high standard of protection has been continually eroded for both students and teachers.

⁵ *Id.* at 504.

⁶ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

⁷ *Id.* at 507 (quoting *W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 626, 63 S.Ct. 1178, 1179 (1943)).

⁸ Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1287 (2009).

1. *The deterioration of Tinker for student free speech rights*

Tinker set a high standard that allowed for administrative regulation of student speech only when that speech substantially or materially disrupts the school environment, but in subsequent cases, the Supreme Court has continuously identified a series of exceptions that have almost completely undermined *Tinker's* power.⁹ The first such instance comes in *Bethel School District No. 403 v. Fraser*,¹⁰ the Court made an exception when the student speech is lewd or sexually graphic.¹¹ In *Bethel*, a student was suspended after making a speech at a student assembly that contained an "elaborate, graphic, and explicit sexual metaphor."¹² In its opinion, the Supreme Court made clear that all First Amendment protections that extend to adults do not necessarily extend to students when it stated that "the First Amendment gives a high school student the . . . right to wear *Tinker's* armband, but not Cohen's jacket."¹³ *Bethel*, therefore, outlined a first exception to *Tinker's* high standard.

The most substantial retreat from *Tinker's* strong standard came two years later when the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.¹⁴ In *Hazelwood*, a principal objected to six pages of the school's newspaper that contained two articles: one about pregnant high school students and the other about children of divorced parents.¹⁵ The principal removed the stories from the student paper because he felt that the subject matter of the stories was inappropriate for the age of some of the students in the school, and he was concerned about the anonymity of the students featured in the stories even though the students were not explicitly named.¹⁶

In upholding the principal's actions, the Supreme Court took a major step away from the "substantial and material disruption" standard of *Tinker*. In *Hazelwood*, the Court found

⁹ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

¹⁰ *Id.*

¹¹ *Id.* at 676.

¹² *Id.* at 675.

¹³ *Id.* at 682 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979)) (referring to *Cohen v. California*, 403 U.S. 15 (1971) finding that wearing a jacket with the words "Fuck the Draft" was constitutionally protected speech).

¹⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁵ *Id.* at 263.

¹⁶ *Id.* at 263-64.

that a school official could censor student speech if the decision to do so was “reasonably related to legitimate pedagogical concerns.”¹⁷ The Court’s decision placed great weight on the fact that the school newspaper was part of the school’s curriculum; therefore, it was designed to be a school-sponsored learning experience.¹⁸ For this reason, the school newspaper was not a public forum, and school administrators could regulate the speech in the school-sponsored activity.¹⁹

Hazelwood, while not directly overturning *Tinker*, “disemboweled the [*Tinker*] disruption standard” if the speech is school-sponsored.²⁰ Administrators no longer need to show that the speech in question would “substantially or materially” disrupt the school environment, a high standard to meet; instead, after *Hazelwood*, school administrators need only show, at least for school-sponsored speech, that the limit on speech is supported by a reasonably related legitimate pedagogical concern, a far more deferential standard. For this reason, *Hazelwood* is “unquestionably a serious step backward” from *Tinker*.²¹

The most recent Supreme Court attack on the high standard set in *Tinker* came in 2007 in *Morse v. Frederick*,²² which became popularly known as the “BONG HITS 4 JESUS” case. In *Morse*, an Alaskan high school student was suspended after displaying a sign reading “BONG HITS 4 JESUS” in view of media cameras as the Olympic torch passed his school. The principal had allowed students to gather outside the school to observe the torch pass.²³ In its ruling, the Supreme Court carved out yet another exception to the free speech rights of students. In the majority opinion, the Court found that, given the school environment’s special nature, a principal could restrict student speech that he or she reasonably viewed as

¹⁷ *Id.* at 273.

¹⁸ *Id.* at 267–70. See also William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 510 (1989).

¹⁹ *Hazelwood*, 484 U.S. at 267. See also Wohl, *supra* note 8, at 1297.

²⁰ Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1174 (2009) (quoting J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood Sch. Dist. v. Kuhlmeier*, 1988 DUKE L.J. 706, 724 (1988)).

²¹ *Id.* (citing J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood Sch. Dist. v. Kuhlmeier*, 1988 DUKE L.J. 706, 732).

²² *Morse v. Frederick*, 551 U.S. 393 (2007).

²³ *Id.* at 397–98.

promoting the use of illegal drugs.²⁴ The Court stated that deterring students from using illegal drugs is a compelling interest; therefore, the principal was justified in restricting student speech.²⁵

The strongest attack on *Tinker* came not in the majority opinion in *Morse*, but in Justice Thomas's concurring opinion. Justice Thomas directly attacked *Tinker*, stating the free speech rights it conferred on school students were too broad,²⁶ arguing that "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."²⁷ Finally, Justice Thomas clearly expressed his desire to expressly overturn *Tinker*, stating that he would embrace an opportunity to "dispense with *Tinker* altogether."²⁸ With its direct attack on *Tinker*, Thomas's concurrence in *Morse* is "the low watermark, at least to date, for *Tinker*'s continued viability."²⁹

2. *The deterioration of Tinker for teacher free speech rights*

Since *Tinker*, not only have the courts eroded First Amendment protection for students, but a series of cases has also slowly eroded protection for teachers. The courts have struggled to determine the appropriate test to apply to cases involving the First Amendment rights of teachers, and two different tests have emerged.³⁰ Under either the *Pickering-Connick* test or the *Tinker-Hazelwood* test, teachers' free speech rights are more limited than the sweeping freedom expounded in *Tinker*. In addition, in the recent case *Garcetti v. Ceballos*,³¹ the Supreme Court further limited the First Amendment protections of government employees, a group to

²⁴ *Id.* at 409–10.

²⁵ *Id.* at 408.

²⁶ Brandon James Hoover, *An Analysis of the Applicability of First Amendment Freedom of Speech Protections to Students in Public Schools*, 30 U. LAVERNE L. REV. 39, 58 (2008).

²⁷ *Morse*, 551 U.S. at 410–411 (Thomas, J., concurring). See also Calvert, *supra* note 20, at 1169.

²⁸ *Id.* at 422.

²⁹ Calvert, *supra* note 20, at 1169.

³⁰ Heather Bennett, "Pick" Erring the Speech Rights of Public School Teachers: Arguing for a Movement by Courts Toward the Hazelwood-Tinker Standard Under the First Amendment, 3 FLA. A & M U. L. REV. 41, 42 n.4 (2008).

³¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

which most teachers belong.³²

a. *The Pickering–Connick test.*

The first of the two tests that courts apply to a teacher's free speech claim is the *Pickering–Connick* Test, developed through two cases dealing with freedom of speech claims by government employees.³³ In *Pickering v. Board of Township High School*,³⁴ a teacher was fired after he sent a letter to the local paper commenting on a proposed tax increase and complaining about how the school board and the superintendent had dealt with similar proposals in the past.³⁵ The Supreme Court found that the school board violated Pickering's First Amendment rights and articulated a balancing test for such cases in the future.³⁶ The Court stated that in cases such as this, it is necessary to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."³⁷ Since the vote on the tax proposal was a matter of public concern, the balancing test weighed in favor of Pickering.

Fifteen years after *Pickering*, the Court turned to the *Pickering* balancing test in another important case involving First Amendment speech rights for government employees in *Connick v. Myers*.³⁸ *Connick* differed greatly from *Pickering* in the facts. *Connick* involved an Assistant District Attorney named Shelia Myers who, upon learning that she was going to be transferred to a different department against her wishes, circulated a survey in her office eliciting responses to questions covering transfers, office policy, and job satisfaction.³⁹ The Court, applying the analysis outlined in *Pickering*, found that Myers' speech was not protected under the First Amendment

³² *Id.*

³³ Bennett, *supra* note 30, at 44.

³⁴ *Pickering v. Bd. of Twp. High Sch.*, 391 U.S. 563 (1968).

³⁵ *Id.* at 564. See Bennett, *supra* note 30, at 44.

³⁶ Bennett, *supra* note 30, at 45.

³⁷ *Pickering*, 391 U.S. at 568.

³⁸ *Connick v. Meyers*, 461 U.S. 138 (1983).

³⁹ *Id.* at 140–41. See Zachary Martin, *Public School Teachers' First Amendment Rights: In Danger in the Wake of "Bong Hits 4 Jesus,"* 57 CATH. U. L. REV. 1183, 1193 (2008).

because it concerned only “internal office policy” and “touched upon matters of public concern in only a most limited sense.”⁴⁰ This determination shifted the balance of the *Pickering* test to the government.

These two cases outline the appropriate application of the *Pickering-Connick* test. First, a court must determine if the speech is related to a matter of public concern. Once that determination is made, the court applies the balancing test outlined in *Pickering* to determine if the speech rights of the teacher as a citizen outweigh the government’s interests.⁴¹ In *Pickering*, the speech was on a matter of public concern, so the balance tipped in favor of *Pickering*; whereas, in *Connick*, the opposite was true. The application of this test is a step away from the full protection of First Amendment rights under *Tinker*. By limiting teacher speech rights to only issues related to matters of public concern—and even then, applying a balancing test to determine if the teacher’s rights outweigh those of the school as a public entity—the *Pickering-Connick* test is a major step back from *Tinker*.

b. *The Tinker-Hazelwood Test.*

While some courts have chosen to apply the *Pickering-Connick* test to free speech claims of government employees, other courts have chosen to apply another test derived from *Tinker* and *Hazelwood*. As discussed above, *Tinker* held that teachers carry First Amendment protections into the school, but *Hazelwood* ruled that school officials could limit free speech rights within the school—a non-public forum—if such limitations are “reasonably related to legitimate pedagogical concerns.”⁴² Some courts have chosen to apply this test to free speech claims of teachers. For example, in *Miles v. Denver Public Schools*,⁴³ a teacher was put on administrative leave after he commented in class about a rumor circulating through the school about students engaging in sexual activity during recess.⁴⁴ The United States Court of Appeals for the Tenth Circuit, applying the *Tinker-Hazelwood* test, found that the

⁴⁰ *Connick*, 461 U.S. at 154.

⁴¹ See generally Martin, *supra* note 39, at 1198.

⁴² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁴³ *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).

⁴⁴ *Id.* at 774.

school was not a public forum⁴⁵ and had a legitimate pedagogical interest in restricting teacher speech.⁴⁶ Relying on these findings, the court determined that it would not second-guess the administrative action.⁴⁷

Like the *Pickering-Connick* test, the *Tinker-Hazelwood* test is a sharp step back from the strong First Amendment protections for teachers asserted under *Tinker*. Once a court determines that a school is not a public forum, as the court did in *Miles*, then the highly deferential standard requiring only a legitimate pedagogical concern grants wide discretion to school officials to limit the speech of teachers.⁴⁸ Again, the teacher's free speech rights under *Tinker* are severely limited.

c. *Garcetti v. Caballos*

The most recent case heard by the Supreme Court dealing with free speech rights of public employees came in 2006 in *Garcetti v. Ceballos*.⁴⁹ In *Garcetti*, Los Angeles Assistant District Attorney Ceballos claimed his First Amendment rights were violated when he was transferred and denied promotion because of two memos he wrote alleging deputy sheriffs had lied in a search warrant affidavit.⁵⁰ The Supreme Court held that employees have no First Amendment protection when their speech is "pursuant to their official duties."⁵¹ The Court reasoned that when public employees are speaking pursuant to their official duties, they are speaking on behalf of the employer, and the employer must be able to control that speech in order to "manage their operations"⁵² and ensure "the efficient provision of public service."⁵³

Again, like the *Pickering-Connick* test and the *Tinker-Hazelwood* test, the Supreme Court's ruling in *Garcetti v. Ceballos* is a serious step away from the strong protections espoused in *Tinker*, one could argue the farthest step away.

⁴⁵ *Id.* at 776. See Martin, *supra* note 39, at 1202.

⁴⁶ *Miles*, 944 F.2d at 778. See Martin, *supra* note 39, at 1202.

⁴⁷ *Miles*, 944 F.2d at 779. See Martin, *supra* note 39, at 1202.

⁴⁸ See *Miles*, 944 F.2d at 799.

⁴⁹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁵⁰ *Id.* at 410. See Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1766-68 (2009).

⁵¹ *Garcetti*, 547 U.S. at 421.

⁵² *Id.* at 422.

⁵³ *Id.* at 418. See Lee, *supra* note 50, at 1768.

Under *Garcetti*, if the speech in question is pursuant to a teacher's official duties, which one could argue encompasses nearly all speech that a teacher could engage in during the school day—then the teacher has no First Amendment protection.⁵⁴ School officials are free to control teacher speech freely and sanction teachers for speech they feel is inappropriate regardless of the context. In this sense, *Garcetti* presents the largest obstacle to date for teachers' assertion of free speech rights in a school.

This frighteningly broad interpretation of *Garcetti* can be seen in the recent case of *Weintraub v. Board of Education*.⁵⁵ In *Weintraub*, a former teacher claimed that he was retaliated against and eventually fired for filing a grievance with his union challenging the school administration's failure to discipline a student who repeatedly threw books at him in class.⁵⁶ The United States Court of Appeals, for the Second Circuit, upheld the lower court's ruling that under *Garcetti*, Weintraub has no First Amendment protections because his filing of the grievance was "pursuant to' his official duties."⁵⁷ The court reasoned that since discipline of students is one of a teacher's essential duties, Weintraub's filing of a grievance with the union, after the administration did not act to resolve the problem, was in furtherance of that duty to maintain discipline.⁵⁸

In his dissent, Judge Calabresi, argued that such a broad reading of *Garcetti* leaves teachers unprotected in almost every situation since "everything from a healthy diet to a two-parent family has been suggested to be necessary for effective classroom learning, and hence speech on a wide variety of topics might all too readily be viewed as 'in furtherance of' the core duty of encouraging effective teaching and learning."⁵⁹ What *Weintraub* shows is that *Garcetti* is proving to be an almost insurmountable obstacle for teachers wishing to assert their free speech rights in the school.

III. THE FIRST AMENDMENT IN THE HIGH SCHOOL NEWSPAPER

⁵⁴ *Garcetti*, 547 U.S. at 421.

⁵⁵ *Weintraub v. Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010).

⁵⁶ *Id.* at 196.

⁵⁷ *Id.* at 203.

⁵⁸ *Id.* at 201.

⁵⁹ *Id.* at 206 (Calabresi, J., dissenting).

SETTING

The erosion of First Amendment rights for students and teachers has had a profound impact on the high school journalism classroom. Obviously, *Hazelwood*, with its direct focus on a student newspaper, has had the biggest impact on free speech rights for student journalists. That ruling allows school officials to restrict student speech whenever the restriction is “reasonably related to legitimate pedagogical concerns.”⁶⁰ This grants broad discretion to school administrators who may wish to censor speech for any number of reasons. In addition, the vague standard has created a situation where students, journalism advisors, and school administrators are confused about just where that broad discretion ends.⁶¹ Unfortunately, this confusion often results in administrators who believe they have a broad power to restrict any speech in a school-sponsored newspaper setting.⁶² As a result, newspaper students and their advisors have found themselves under attack.

A. *Newspaper Students Under Attack*

In his dissent in *Hazelwood*, Justice Brennan outlined his fear that the decision would empower school officials to commit viewpoint discrimination by hiding behind so-called “legitimate pedagogical concerns.”⁶³ Unfortunately, Justice Brennan’s prediction has come true, and school administrators are using *Hazelwood* indiscriminately, often to save themselves difficulty and embarrassment, and “[a]dministrators with a militaristic bent have no better weapon in their arsenal than the Supreme Court’s 1998 decision in *Hazelwood*.”⁶⁴

A prime example of school officials believing *Hazelwood* grants broad power to censor indiscriminately is found in the case of *Dean v. Utica Community Schools*.⁶⁵ In *Dean*, high

⁶⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

⁶¹ Frank D. LoMonte, *Shrinking Tinker: Students are “Persons” under the Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1335 (2009).

⁶² Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 167 (2006).

⁶³ See *Hazelwood*, 484 U.S. at 287–88 (Brennan, J., dissenting).

⁶⁴ Jill Rosen, *High School Confidential*, AM. JOURNALISM REV. (June 2002), available at <http://www.ajr.org/article.asp?id=2554>.

⁶⁵ *Dean v. Utica Comm. Schs.*, 345 F. Supp. 2d 799 (E.D. Mich. 2004).

school junior and student journalist Katy Dean decided to write an article for the school paper on a recent lawsuit against the school. The suit involved a claim by members of the local community that the diesel fumes from the school district's bus lot was causing cancer for those who lived close to the lot.⁶⁶ In this case, Katy Dean did everything a good journalist should do. She researched information on the chemicals at issue; she interviewed the Frances family, members of the community who claimed to be affected by the fumes; and she called school district officials for interviews.⁶⁷ Despite her diligence, Principal Richard Machesky directed the newspaper's advisor not to print the article, claiming that Dean's use of a pseudonym for the family suing the district and weak scientific evidence made the story incomplete and inaccurate.⁶⁸

In a scathing opinion, Judge Tarnow rejected each of the school district's claims and stated that citing "inaccuracies" in Dean's article "simply cannot disguise what is, in substance, a difference of opinion with its content."⁶⁹ Furthermore, the court pointed out that "defense counsel conceded that Dean's article would not have been removed from the *Arrow* if it had explicitly taken the district's side with respect to the Frances' lawsuit."⁷⁰ Finally, the court found that the "[d]efendant's explanation that the article was deleted for legitimate educational purposes such as bias and factual inaccuracy is wholly lacking in credibility in light of the evidence in the record."⁷¹

The court in *Dean* flatly rejected the district's claim that the Katy Dean's article was rejected for legitimate educational purposes, a victory for school press freedom,⁷² but what this case also shows is schools' willingness to turn to *Hazelwood* as an excuse to censor speech indiscriminately, as Justice Brennan feared when *Hazelwood* was decided.

Dean is far from the only example of school officials censoring student press speech by claiming legitimate pedagogical concerns. The Student Press Law Center, an

⁶⁶ See Rosen, *supra* note 64.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Dean*, 345 F. Supp. 2d at 813.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

organization dedicated to helping student journalists and their advisors fight censorship, reports that calls to the center for assistance combating administrative censorship increase each year, and it expects a continuation of that trend.⁷³ Unfortunately, in most cases, the students, unlike Katy Dean, do not assert their rights to take their censorship issue to court.⁷⁴ Instead, they simply avoid controversial topics and cave under administrative pressure.⁷⁵ While cases like *Dean* show that students can win the fight if they seek legal recourse against unfair administrative censorship, the uncertainty left in the wake of the *Hazelwood* decision leaves many uncertain of their rights and afraid to confront such powerful opposition.

B. Newspaper Advisors Under Attack

It is not only the students who feel the brunt of administrative wrath when proposed articles conflict with what school officials feel is appropriate subject matter. School administrators often directly confront the faculty advisor of the school publication. In *Dean*, the journalism advisor was Gloria Olman, a veteran journalism teacher for over thirty years.⁷⁶ Despite being named the Dow Jones Journalism Teacher of the Year, being inducted into the Michigan Journalism Hall of Fame, and leading Utica High's newspaper staff to hundreds of awards, Olman was not immune. It was Olman who was called before Utica's principal and ordered not to print Katy Dean's article.⁷⁷ Olman eventually resigned as journalism advisor at Utica High School,⁷⁸ stating that "the kids are now carrying this battle on their own."⁷⁹

Journalism teachers often find themselves in a precarious position, trapped between their roles as advisors for their students and employees tasked with following the orders of their supervisors, the school principals. In *Dean*, Olman said she was "shocked" when her principal ordered her not to print

⁷³ See Rosen, *supra* note 64 ("The advocacy group reports that it is up 41% from the year before—a year that also broke a record").

⁷⁴ See *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Overcoming Hazelwood*, SPLC REP. MAG. (Winter 2004-05), available at http://www.splc.org/news/report_detail.asp?id=1166&edition=34.

⁷⁹ Rosen, *supra* note 64.

the article on the diesel fumes and responded, "You are censoring us."⁸⁰ This shows that at that moment, Olman saw her role as a representative of the newspaper staff. By using the word "us," she was including herself with the students and felt the administration's attack on the article was censorship. Her statements to her students following her encounter with her principal illustrate how Olman's dual roles conflict. Olman stated that when her students were "angry and upset" at the administration's order to remove the article, Olman responded, "I am his employee and I follow [his] orders."⁸¹ Olman found herself at odds with both the principal and the students, not being able to blindly do as directed by her boss, but at the same time not being able to directly disobey her boss either. This conflict of interest has the potential to trap journalism teachers between defending their students' First Amendment rights and risking their livelihoods.

Olman's situation is not a unique one, as many journalism teachers face the conflict between risking their jobs and speaking out against censorship. Administrators often exploit the precarious position of the journalism advisor as yet another way to control the content in student newspapers.⁸² Jim Ewert, legal counsel for the California Newspaper Publishing Council, explains that school officials can "lean on advisers [sic] to do what they legally cannot."⁸³ Using the employer/employee relationship, school administrators can force advisors to do the censoring for them, and if advisors refuse, they can punish the advisor with no legal consequences.⁸⁴ In a case like this, it is simply a matter of a school employee not performing his or her duty instead of the larger and more complex issue of suppression of First Amendment rights of students. Since this indirect attack is often more appealing to administrators, it is not surprising that journalism teachers often find themselves "under fire," either through threats of termination or retaliation for defending their students' First Amendment

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Karl Gillespie, *New California Law Will Protect Journalism Students by Protecting their Advisors*, THE PALY VOICE, Oct. 15, 2008, available at <http://palyvoice.com/2008/10/15/node-20103/>.

⁸³ *Id.*

⁸⁴ *Id.*

protections.⁸⁵

Administrators exploiting advisors' positions as employees in order to censor student speech has created a gap in the law.⁸⁶ School officials can avoid what would otherwise be a sticky issue of suppression of free speech by instead putting pressure on their employees, the journalism advisors, to do the censoring for them. As a result, many advisors, like Arkansas advisor Margaret Sorrows, are "walking a fragile line between pleasing her boss and standing up for what she believed were her students' First Amendment rights."⁸⁷

Sorrows faced the choice of either instituting new rules for the newspaper staff laid down by the principal or lose her job.⁸⁸ Those new rules included the principal having prior review of all story ideas, interview questions, and completed stories before the paper goes to print—rules that directly conflicted with the school's policy.⁸⁹ Despite her principal's insistence on the new rules, Sorrows said she was going to follow the district rules that did not call for prior review.⁹⁰ Sorrows said, "I'm willing to support my students. These aren't my First Amendment rights,"⁹¹ highlighting once again the awkward and troubling position in which advisors, like Sorrows, find themselves in. Her job was threatened for standing up for students' rights. Her First Amendment rights had not been violated, but, as a defender of her students, she risked her job.

It is important to note that not all administrators view high school journalists with contempt and look for ways to stifle students' free speech rights. Vincent Barra, principal at Lakewood High School in Lakewood, Ohio, supports the staff of the student newspaper regardless of the subject matter they print.⁹² Barra wants the students to think critically and truly examine events and circumstances at the school and not just make the student paper a "PR vehicle for the school where nothing but achievements are covered."⁹³ This freedom has

⁸⁵ Seth D. Berlin & Sinclair Stafford, *Teach Your Children: High School Students and the First Amendment*, 13 COMM. LAW. 13, 14 (2008).

⁸⁶ Karl Gillespie, *supra* note 82.

⁸⁷ See Rosen, *supra* note 64.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

allowed the students to question and report on subjects that other principals might squash. For example, the newspaper students at Lakewood High School published an article about the football coach's son being allowed to play despite having been caught with alcohol.⁹⁴ While this article certainly would cast a poor light on the coach and the school, the staff was free to print the piece, which won second place honors from the Ohio Society of Professional Journalists.⁹⁵

Unfortunately, principals like Barra are more the exception than the rule. Most principals are more concerned with community perception and protecting the image of the school.⁹⁶ They want innocuous stories or, even better, stories that praise the school.⁹⁷ Certainly, "[i]f it pushes buttons, if it challenges authority, if it highlights the unsavory truths about life at school, it's often a matter of time before someone wants to put a lid on it."⁹⁸ Each of these examples demonstrates how many school officials are far more concerned with their image in the greater community than the protection of free speech rights for student journalists.

This also shows a lack of belief on the part of some principals that students, despite being young and inexperienced, can, with the right freedom and guidance from strong advisors, achieve great things. Like the students at Lakewood High School, students are capable of producing well-written, well-researched pieces that can even compete against professionals. Unfortunately, this will never be the case if the majority of principals express the same ideas as Principal William Wakefield of Plainfield High School in Indianapolis. Wakefield suspended a school journalist who captured an on-the-scene photo of a student prank.⁹⁹ Wakefield justified his actions against the student by stating, "Just because they're in a journalism class, they think they're the Washington Post—I don't agree with this."¹⁰⁰ Wakefield's statement here shows how some administrators do not respect student journalists and do

⁹⁴ *Id.*

⁹⁵ *Id.* (The article competed and won against articles by professional journalists, showing that students can accomplish great things when they are free to try).

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

not view the role of student journalists as deserving of the same respect as professional journalists.

IV. THE IMPACT OF THESE ATTACKS ON STUDENTS' UNDERSTANDING OF THE FIRST AMENDMENT

Administrators' attempts to stifle student expression—either directly by censoring student journalists, or indirectly by threatening journalism advisors—negatively impacts the school environment in several ways. First, in many cases, the actions of school officials serve to chill future speech by causing students and advisors to shy away from sensitive topics to avoid confrontation. Second, administrators' actions send the opposite message to the student population than what society holds by teaching students that the protections afforded under the First Amendment are not strong. Finally, administrative oversight of student newspapers, and the chilling effect it may produce, can lead to misconceptions in the school community about the realities of school life.

A. *The Chilling of Speech in the High School Newspaper Setting*

A dangerous implication of the censorship of students' free speech, especially in the high school newspaper setting, is that it often has lasting effects. While several of the examples highlighted in this paper thus far show students and advisors who have fought administrative censorship, it is more than likely that many students and advisors succumb to the pressure of a principal's demands. While the numbers are impossible to determine because cases where students do not even try to combat censorship are not reported, requests for help from the Student Press Law Center have steadily increased since the mid-nineties.¹⁰¹ The real question is, "How many student papers don't even try to print controversial topics because they know they can't, where it's pep rallies and teacher profiles all the time?"¹⁰² The concern expressed here is that student journalists and their advisors, faced with administrative pressure and censorship will choose to cave to the pressure and self-censor instead of fighting back. Students

¹⁰¹ See Rosen, *supra* note 64.

¹⁰² *Id.*

may only choose safe topics like pep rallies and teacher profiles, and advisors who feel that their jobs are at risk if they antagonize school officials may choose to steer students in safer, more innocuous directions.

This “chilling” of speech in the school will create a situation where the school newspaper turns into exactly what Principal Barra at Lakewood High School seeks to avoid.¹⁰³ The newspaper will become just an extension of the school, a public relations tool that will only cast the school in a positive light to both the student body and the larger community.¹⁰⁴

B. Teaching Our Children that the First Amendment Is Weak

One result that follows from the chilling of free speech, especially in the context of high school journalism, is that students may learn the opposite lesson of that which the course was likely designed to teach. Journalism teachers are tasked with teaching the First Amendment and good journalistic practices in these classes, yet students often learn a very different lesson. Students learn through the actions of those around them just as much as, if not more than, they do from organized and prepared lessons. When students watch their teacher submit under administrative pressure or listen to their principal lecture on how a particular article topic should be shelved for fear of the impact it may have if published, students internalize the wrong message. While, ideally, our society stands for the proposition “that those who enjoy the blessings of a free society must occasionally bear the burden of listening to others with whom they disagree,”¹⁰⁵ schools are teaching these young journalism students to fear speech that might be unsettling or upsetting. This is not the way to prepare the Bob Woodwards of tomorrow. “You don’t want to teach them in their formative years, ‘Oh, always be worried about what the powers that be will do if you print that.’”¹⁰⁶ The danger is that the rampant censorship at work in today’s newspaper classrooms will create a generation of journalists who blindly print what they are expected and permitted to say

¹⁰³ See Rosen, *supra* note 64.

¹⁰⁴ *Id.*

¹⁰⁵ Lima, *supra* note 1, at 195 (citing *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976)).

¹⁰⁶ See Rosen, *supra* note 64 (quoting Mark Goodman, former Director of the Student Press Law Center).

and never question or criticize those in power.

C. Schoolwide Impact of Censorship of Student Journalists

The chilling of speech in the high school newspaper classroom also has an impact on the general population of the school. The student body, as a whole, is also harmed by unchecked censorship of the student press in three distinct ways: (1) a distortion on the “marketplace of ideas” within the school environment;¹⁰⁷ (2) an impairment in the development or students’ understanding and acceptance of differing ideas, and (3) a misunderstanding of the First Amendment as a core value in American society.

1. The distortion of the marketplace of ideas

The first impact that unchecked censorship of student journalism has on the school population as a whole is that it distorts the “marketplace of ideas” in the microcosm of the school. Justice Holmes stated that the First Amendment protected all types of speech because the truth of an idea can only be determined in the marketplace of competing ideas.¹⁰⁸ In this “marketplace,” ideas compete for favor, and for this reason, even unpopular views are protected. It is only through having all the information available that real truth will be found. If ideas are prevented from reaching the marketplace, then the marketplace is distorted, and society may not be able to reach the real truth.

In the smaller society of the school, the student press fills the role that the professional press fills in the larger society. If the student paper has been primarily fluff stories and profiles in the past, then censorship of a new, controversial article would probably have little effect, since the students do not expect investigatory or critical journalism from that source. Contrastingly, when the student paper appears to be a forum for student expression but is not, a misperception by the audience—in this case the student body of the school—distorts the marketplace of ideas.¹⁰⁹ This is true because students who

¹⁰⁷ The “marketplace of ideas” concept is credited as originating in Justice Holmes’s dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁰⁸ The “marketplace of ideas” concept is credited as originating in Justice Holmes’s dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁰⁹ See William Buss, *School Newspapers, Public Forum, and the First*

expect their school papers to inform them of current issues or problems and expect the paper to voice concerns or differing views may misapprehend that there are no differing views or pressing issues if those views are silenced.¹¹⁰ This is the distortion of the marketplace, and it may occur anytime “the school presents a point of view and makes no forum available for the expression of differing views.”¹¹¹ Overall, the danger is that the student body as a whole will not be exposed to all the ideas necessary to create a true marketplace of ideas, yet they may think that they have been so exposed.

2. *A narrow-minded view of the world*

The second impact that unchecked censorship of student journalism has on the school population as a whole is that since students are not adequately and consistently exposed to differing viewpoints and ideas, they will neither welcome nor seek out differing viewpoints in the future. It is always important to remember that schools’ primary function is to prepare the young people of today to be effective citizens tomorrow. Most students develop the skills they need to be responsible members of society while in school. Students are “unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”¹¹² Instead, schools are tasked with the job of developing in students the skills that they will need to be effective citizens, including the ability to hear, accept, and articulate differing viewpoints.

By censoring student expression in the student media, schools are taking away an important learning experience for students, and the impact could be severe. If students are not exposed to different views on issues, society “cannot expect them to be tolerant or even informed of other viewpoints as they become adult participants in our democracy.”¹¹³ They will become citizens who absorb whatever they are told in sound bites without question, and “find little use for news and, in particular, in-depth news coverage that allows for critical

Amendment, 74 IOWA L. REV. 505, 526 (1989).

¹¹⁰ *Id.* at 526.

¹¹¹ *Id.* at 525.

¹¹² Berlin & Stafford, *supra* note 85, at 16 (quoting Judge Posner in *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).

¹¹³ *Id.* at 15.

thinking about controversial issues.”¹¹⁴ We may already see this breakdown of traditional, in-depth news coverage, as droves of Americans, especially young people, look to sources like Jon Stewart and Stephen Colbert for their news.¹¹⁵ While these sources provide an important and entertaining function in society, they hardly constitute hard-hitting and thorough journalism. As more and more graduating classes leave their high schools never, or at least rarely, being exposed to truly critical and analytical journalism, they will be unlikely to insist on the same as adults.

3. *A weak understanding of the First Amendment*

A third negative impact of administrative censorship of the student press is that it removes one of the few means of conveying an understanding of the rights conferred under the First Amendment from the school. There is strong evidence that students “generally show little knowledge of, or appreciation for, the First Amendment and the rights it protects.”¹¹⁶ This evidence came in the form of a massive survey sponsored by the John S. and James L. Knight Foundation in 2004 that polled “100,000 high school students, 8,000 teachers, and 500 administrators about their attitudes toward the freedoms protected by the First Amendment.”¹¹⁷ The results showed a disturbing view of free speech rights in America. For example, students were asked if they agree or disagree with the following statement: “Newspapers should be allowed to publish freely without government approval of stories.” A frighteningly large 49% either disagreed with this statement or stated that they did not know if they agreed with this statement.¹¹⁸ In the minds of those students who disagreed, the Washington Post or New York Times should have to submit their stories to the government for prior review. Another question asked if it is legal to burn the American flag in protest; a staggering 75% of students responded no.¹¹⁹ The

¹¹⁴ *Id.* at 14.

¹¹⁵ See generally Maureen Dowd, *America's Anchors*, 1013 ROLLING STONE (2006), available at http://davidlavery.net/Courses/1010/Readings/America's_Anchors.pdf.

¹¹⁶ Berlin & Stafford, *supra* note 85, at 13.

¹¹⁷ *Id.*

¹¹⁸ Knight Survey, *supra* note 2.

¹¹⁹ *Id.*

Knight survey, overall, showed a glaring lack of understanding of the First Amendment for today's students.¹²⁰

While adults also do not have a perfect understanding of the First Amendment and the freedoms it protects, a yearly survey conducted by First Amendment Center shows adults have a better grasp of these freedoms.¹²¹ While the questions asked of adults in the First Amendment Center's survey are not the same as those in the Knight survey, some questions do find comparisons. For example, the First Amendment Center survey conducted the same year as the Knight survey shows that nearly 80% of adults see the press as having a "government watchdog role."¹²² This response would seem to imply that a smaller percent of adults would feel the government should be allowed to review news stories prior to print. Similarly, while 75% of students did not believe flag burning was legal,¹²³ 51% of adults in the First Amendment Center's survey said they would not support an amendment to the Constitution prohibiting flag burning.¹²⁴ This shows that not only are adults aware that flag burning is currently legal, the majority would not support a change making it illegal. That is far different from the 75% of students who believe it already is illegal to burn the flag.¹²⁵

The Knight Survey identified the lack of courses teaching the values protected under the First Amendment as a likely cause for the survey's results.¹²⁶ In schools that offered classes that focus on First Amendment protections, especially journalism classes, the students' responses to survey questions improved.¹²⁷ When asked whether people should be allowed to express unpopular opinions, the students' responses in the affirmative jumped nearly 20% for those students who have participated in student media classes or classes dealing with the First Amendment.¹²⁸ What this shows is that students who

¹²⁰ See generally *id.*

¹²¹ See Paul K. McMasters, *2004 State of First Amendment Survey Report*, FIRST AMENDMENT CENTER, (June 28, 2004), <http://www.firstamendmentcenter.org/analysis-2004-state-of-first-amendment-survey-report>.

¹²² *Id.*

¹²³ Knight Survey, *supra* note 2.

¹²⁴ McMasters, *supra* note 121.

¹²⁵ Knight Survey, *supra* note 2.

¹²⁶ Berlin & Stafford, *supra* note 85, at 13.

¹²⁷ *Id.* (referencing Knight Survey).

¹²⁸ Knight Survey, *supra* note 2 (showing an affirmative answer with 68% of

take journalism or other First Amendment classes have a better understanding of the First Amendment and the rights it protects.

This directly relates to the danger of unchecked censorship by school officials of student press freedoms, for if school administrators are permitted to stifle the free expression of student journalists, their actions will undo the benefits journalism classes foster. As previously discussed, if student journalists who either have their own expression squashed by administrative censorship or observe an administrator pressure their advisor into avoiding controversial topics, those students learn the opposite message, a message that says they should be fearful of questioning authority or discussing unpopular ideas. The benefits of the journalism classroom in the fostering of an understanding of the First Amendment are undone, and these students, even though they are enrolled in a journalism class, will probably not respond to questions, like those in the Knight Survey, much differently than those students who have had no exposure to such a First Amendment class. The benefits that the Knight Survey points out would only truly be realized in schools that have media or other types of First Amendment classes where students and teachers are actually allowed to discuss and practice those freedoms freely.

Sadly, the Knight Survey also showed that school administrators have a very restrictive view of students' First Amendment rights. While 80% of principals agreed that newspapers should be allowed to publish freely without government approval of stories,¹²⁹ when it came to the student press there was a drastic change. Only 25% of principals agreed that students should be allowed to report on controversial topics without approval from school authorities.¹³⁰

V. REVERSING THE TIDE: PROTECTING THE FUTURE OF THE FIRST AMENDMENT THROUGH LEGISLATION DIRECTED TOWARD HIGH SCHOOL JOURNALISM TEACHERS AND STUDENTS

One way to address the real problem of the First

students with no exposure to media or other type of First Amendment class, but an 87% affirmative with students who did have exposure to a media or First Amendment class).

¹²⁹ *Id.*

¹³⁰ *Id.*

Amendment crisis in today's schools is to restore strong protections for student journalists and their advisors. As Part I showed, the courts are not the answer since "the Supreme Court's decisions over the last forty years since *Tinker* have been clear: there is great deference to school officials in regulating speech in official school activities."¹³¹ While some courts, like the United States District Court for the Eastern District of Michigan in *Dean v. Utica*, expound the necessity for a free student press in the development of free-thinking citizens,¹³² other cases since *Tinker* have eroded *Tinker's* strong standard.

The First Amendment crisis in today's schools is happening now, and society cannot rely on court results that are inconsistent, confusing, and slow. For that reason, legislation is a more viable option for prompt, effective, and powerful solutions. More specifically, national legislation that protects student journalists everywhere in the country from administrative censorship and protects advisors from retaliation and termination for supporting students will constitute a major first step in reversing the tide of deteriorating understanding of the First Amendment and the freedoms it protects for America's youth. Such legislation should be modeled after state legislation, like the Journalism Teacher Protection Act in California, and Congress, by tying such legislation to federal school funding initiatives, can find authority to legislate an otherwise traditionally state issue.

A. *Legislation to Protect Student Journalists from Administrative Censorship*

One way to protect free expression for students and increase awareness and understanding of the First Amendment in schools is to protect freedom of the student press. While *Hazelwood* was a major blow to high school journalism classes, some states have decided to take the interpretation out of the hands of the courts and to reinstate strong protection for student press rights through the passage of legislation. One such state is California, which has one of the strongest provisions protecting student speech and, especially,

¹³¹ Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 831 (2009).

¹³² *Dean v. Utica Cmty. Sch.*, 345 F.Supp.2d 799, 804 (E.D. Mich. 2004).

school publications and their journalists.¹³³

Sections 48907 and 48950 of the Education Code of California provide for broad protection for student expression, especially in the student press context.¹³⁴ Section 48907(a) first extends to all students protection for all forms of expression, including distribution of petitions and the “wearing of buttons, badges, and other insignia.”¹³⁵ Then, Section 48907(a) specifically addresses student speech in the press context by protecting “the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities.”¹³⁶ The specific wording extending protection, even in cases where the publication is school-sponsored, gets around the school-sponsored speech distinction in *Hazelwood*. Here, even if the student newspaper is funded by school funds, the newspaper still has *Tinker*-like protections and is not limited by the *Hazelwood* decision. Section 48907(a) does put some limits on speech by providing that “expression shall be prohibited which is obscene, libelous, or slanderous,”¹³⁷ but these are the same reasonable restrictions that are placed on professional publications.

Additional portions of Section 48907 describe the roles of student journalists and outline actions that school officials must and must not take. Section 48907(c) explains the role that pupil editors play in deciding on and editing the content of student publications and also discusses the role that the advisor plays in maintaining professional standards for the publication.¹³⁸ It is important to note that this section draws a clear distinction between the roles of the students and the advisor over the making of content decisions. While the advisor serves as a guide for the students and is there to assure the quality of the publication, it is the students, and not the advisor, who make all substantive content decisions. Section 48907(d) and (e) offer another strong protection for student

¹³³ Robert J. Lopez, *New California Law Protects School Journalism Advisors*, L.A. TIMES, (Jan. 4, 2009), available at <http://articles.latimes.com/2009/jan/04/local/me-advisors4>.

¹³⁴ CAL. EDUC. CODE §§ 48907, 48950 (West 2009).

¹³⁵ *Id.* § 48907(a).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* § 48907(c).

journalists by removing a powerful tool from the school administrator's arsenal. Section 48907(d) clearly states that there "shall be no prior restraint of material prepared for official school publications," and Section 48907(e) defines "official school publications" as "material produced by pupils in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee."¹³⁹ These provisions, collectively, restore the freedoms expressed in *Tinker* to students and undo the damage *Hazelwood* did to student publications across the country.

Perhaps one of the strongest statements in the California Education Code, for all students and not just student journalists, comes in Section 48950(a):

A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.¹⁴⁰

This is as close to the ruling in *Tinker* as legislation can get since it essentially says that students maintain their constitutional rights even when they enter "the schoolhouse gate."¹⁴¹

While legislation is the quickest, most effective, and most consistent way to restore First Amendment protections to student journalists, it sadly is a rare solution. To date, only six states—Arkansas, Colorado, Iowa, Kansas, Massachusetts, and Oregon—have joined California in passing legislation that extends stronger protections than *Hazelwood* offers.¹⁴² More states could follow the lead of these few states and extend stronger protections to student journalists, but even then, there would be the inconsistent application of the First Amendment across the country, and students in different states would

¹³⁹ *Id.* §§ 48907 (d)–(e).

¹⁴⁰ *Id.* § 48950 (a).

¹⁴¹ See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁴² See ARK. CODE ANN. §6-18-1201 (1995); see also COLO. REV. STAT. § 22-1-120 (1990); see also IOWA CODE § 280.22 (1989); see also KAN. STAT. ANN. §§ 72.1504 - 72.1506 (1992); see also MASS. GEN. LAWS ANN. ch. 71, § 82 (1988); see also OR. REV. STAT. § 336.477 (2007).

internalize different messages about the strength of free speech protections in society. The only real, consistent, and strong solution is for federal legislation, modeled after state statutes like California's, to send a clear message that we, as a society, value the protections afforded by the First Amendment and wish to instill those same strong values in our young people by allowing them to experience these protections first hand. A federal statute codifying the strong message of *Tinker* would remedy the confusion that has developed as a result of the Court's interpretations in cases like *Hazelwood*.

B. Legislation to Protect Advisors from Retaliation and Termination

While legislation protecting the First Amendment rights of student journalists to publish free of administrative censorship is a positive step in restoring an understanding of the First Amendment through America's schools, it is an imperfect solution if school officials can still take advantage of the loophole in the law and censor indirectly by threatening and pressuring faculty advisors to influence and control content. Legislation protecting the student is, therefore, only a partial solution. That legislation needs to be paired with legislation that protects the advisors as well, as is the case in the California statute. In January of 2009, the Journalism Teacher Protection Act became law in California.¹⁴³ The law protects the advisors from termination and pressure and "closes a loophole in state law that for years has ensured free speech rights for students but failed to guarantee protections for advisors."¹⁴⁴ The law completes protection by removing a means of indirect censorship from the administrators' arsenal.

The relevant provision of the California Education Code reads,

An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article 1 of the California

¹⁴³ CAL. EDUC.CODE §§ 48907, 48950 (2009); see also Lopez, *supra* note 133.

¹⁴⁴ Lopez, *supra* note 133.

Constitution.¹⁴⁵

With this provision, teachers in California can now feel free to stand up for their students' free speech rights, which will foster free speech, press, and expression within the schools and, as a result, foster a better understanding of the First Amendment among future generations of Americans.

The statute provision thoroughly covers all anticipated actions a school official may take to pressure journalism advisors into controlling content in school publications. Thus, this provision should alleviate the fear that many advisors constantly carry with them. For example, journalism advisors like Paul Kandell of Palo Alto High School, who stated, "[a]ny day some story could come to me and my students that would put me in a bad position . . . [w]ithout some security, teachers like me would lose their jobs."¹⁴⁶ Now, advisors like Kandell should feel added protection from retaliation for doing their jobs. Unfortunately, legislation like the Journalism Teacher Protection Act is even rarer than state legislation that protects free speech for students. Only one other state, Kansas, provides similar protection for advisors.¹⁴⁷ Kentucky twice had similar legislation under consideration, but in both instances, the proposed bills failed to make it out of the committee stage.¹⁴⁸ Without such legislation, even if state, or ideally federal, legislation protects the First Amendment rights of students, overbearing principals will likely still be able to censor student publications indirectly by pressuring advisors to avoid controversial issues or influence student journalists. What is needed is comprehensive protection to make sure that loophole is closed. Ideally, the best solution is federal legislation protecting both students and advisors. With these protections in place, the First Amendment will again gain a foothold in today's schools, and as the Knight Foundation survey showed, the benefits of courses like journalism, that truly teach First Amendment values will spill over into the school population as a whole.¹⁴⁹

¹⁴⁵ CAL. EDUC. CODE § 48907(g).

¹⁴⁶ Lopez, *supra* note 133.

¹⁴⁷ Kansas Student Publication Act, KAN. STAT. ANN. §§ 72.1504 - 72.1506.

¹⁴⁸ See H.R. 43, 2009 Leg. Reg. Sess. (Ky. 2009); see also H.R. 367, 2010 Leg. Reg. Sess. (Ky. 2010).

¹⁴⁹ JOHN S. AND JAMES L. KNIGHT FOUND., Future of the First Amendment Survey, SPLC.ORG (2004), <http://www.splc.org/fafuture/2004/results/results.php>.

C. *Congressional Authority for Federal Legislation of Student and Teacher Free Speech Rights*

Historically, Congress has relied on the tax and spending power to pass legislation for the general welfare of the country. The first clause of Article I, Section 8 of the United States Constitution states, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁵⁰ Since its drafting, there has been debate over the extent to which these powers to tax and spend extend. James Madison argued that these powers only extend to matters related to the powers enumerated in Article I, Section 8, while Alexander Hamilton argued that Congress had the power to spend for the “general welfare” and that power extends beyond the enumerated powers.¹⁵¹ In *United States v. Butler*, the Supreme Court, while striking down the Agricultural Adjustment Act as unconstitutional, adopted Hamilton’s view.¹⁵² Justice Roberts, writing for the Court, wrote that “the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”¹⁵³ The Court went on to state that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹⁵⁴ Under *Butler*, Congress can spend federal funds for more than just to further the enumerated powers.¹⁵⁵

The next case that extended Congress’s power to spend in the general welfare came one year after *Butler*. In *Steward Machine Company v. Davis*, the Supreme Court upheld the provisions relating to unemployment compensation in the

¹⁵⁰ U.S. CONST. art I, § 8, cl.1.

¹⁵¹ Michael D. Barolsky, *High Schools are not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*. 76 GEO. WASH. L. REV. 725, 731–32 (2008).

¹⁵² *United States v. Butler*, 297 U.S. 1 (1936).

¹⁵³ *Id.* at 65-66.

¹⁵⁴ *Id.* at 66.

¹⁵⁵ *Id.*

Social Security Act of 1935.¹⁵⁶ In doing so, the Court found a distinction between the coercion of state governments to enact legislation and tempting the states to do so.¹⁵⁷ Coercion is impermissible under the Constitution, but temptation is not. Therefore, Congress can place conditions on the spending of federal funds, and if states accept the funds, they are, in essence, under a contractual obligation to fulfill those conditions.¹⁵⁸

Finally, in *South Dakota v. Dole*,¹⁵⁹ the Supreme Court upheld Congress's power to condition the receipt of federal funds for transportation on a state's making the minimum drinking age twenty-one. In *Dole*, the Court recognized the power of Congress contained in the spending power, and stated that "incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"¹⁶⁰ The Court went on to state that this power is not without its limits and outlined four limits.¹⁶¹ The Court determined that in order to not go beyond the scope of the spending power, (1) congressional legislation must be in pursuit of the general welfare of the United States; (2) the condition must be unambiguous; (3) the money must be related to the federal interest; and (4) the condition cannot conflict with any other constitutional provision.¹⁶² In addition, the Court again recognized that there is a point when government legislation can move from temptation to coercion when it commented that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."¹⁶³ These circumstances would again be beyond the scope of the spending power. Under these cases, and even with the limits expressed in *Dole*, Congress has

¹⁵⁶ *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

¹⁵⁷ *Id.* at 589; see Barolsky, *supra* note 151, at 732–33 (2008).

¹⁵⁸ *Steward*, 301 U.S. at 592, 597.

¹⁵⁹ *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁶⁰ *Id.* at 206 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

¹⁶¹ *Id.* at 207–08.

¹⁶² *Id.* see Barolsky, *supra* note 151, at 733; see Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*. 27 T. JEFFERSON L. REV. 337, 353 (2005).

¹⁶³ *Dole*, 483 U.S. at 211 (1987).

broad power to legislate spending and limit states' acceptance of federal funds on conditions, and the Court has created a very deferential standard.¹⁶⁴

It is under this broad spending power that Congress could pass legislation to protect the free speech rights of student journalists and protect the teachers that advise them. Education has traditionally been a state function, and the regulation of education is not covered under the enumerated powers of Congress. However, through conditioning the acceptance of federal funds for education on the protection of First Amendment rights for students and their advisors, Congress could use the spending power to achieve the same ends.

This would not be the first time that Congress has passed legislation on education and conditioned federal spending on the institution of federal educational objectives. The largest and most recent example of Congress using its power under the Spending Clause to shape nationwide educational policy came with the passage of No Child Left Behind (NCLB) in 2001.¹⁶⁵ NCLB is an expansive educational program that conditions the acceptance of federal funds for education on the states' implementation of a system of accountability for students, teachers, and schools.¹⁶⁶ NCLB requires testing in multiple subject areas at various stages throughout all students' educational careers, and provides a framework of goals and benchmarks that schools must meet.¹⁶⁷ In addition, states must create means of measuring if schools meet Adequate Yearly Progress toward overarching goals, and states must create a plan for intervening if schools are failing.¹⁶⁸ The entire program of NCLB is based on Congress's authority under the Spending Clause to attach conditions to funds given to the states.¹⁶⁹ This is clear in the U.S. Department of Education's statement that "there are no federal education 'mandates.' Every federal education law is conditioned on a state's decision to accept

¹⁶⁴ See Barolsky, *supra* note 151, at 733–34.

¹⁶⁵ No Child Left Behind Act of 2001, 20 U.S.C. §§ 6311-7941 (2003) [hereinafter NCLB].

¹⁶⁶ *Id.* See Austin, *supra* note 162, at xx.

¹⁶⁷ NCLB *supra* note 165. See also Austin *supra* note 162, at 377.

¹⁶⁸ NCLB *supra* note 165. See also Austin *supra* note 162, at 377.

¹⁶⁹ Barolsky, *supra* note 151, at 728.

federal program funds.”¹⁷⁰

Using a model similar to NCLB, although far less expansive, Congress may condition the acceptance of federal educational spending, or some portion thereof, on the implementation of state policies that protect the free speech rights of student journalists and their advisors. Under the *Dole* test, this legislation would be in the general welfare and sufficiently related to the governmental interest in providing an education to all students that fosters strong citizenship. In crafting such legislation, Congress would have to be sure that the conditions contained in the legislation are sufficiently clear to pass the ambiguity test in *Dole*. Through the conditional Spending Power recognized by the Supreme Court, Congress has the power to pass national legislation to protect student journalists and their advisors from administrative censorship and pressure and begin to restore the First Amendment in America’s schools.

VI. CONCLUSION

The absence of understanding concerning the First Amendment is a real problem in today’s schools. Administrative suppression of students’ speech, either through direct censorship of student journalists or indirect censorship through pressure on advisors, is a major contributor to the problem. Forty years ago *Tinker* called for strong protection for free speech for students and teachers; however, the strong stance of *Tinker* has eroded into a mess of confusing tests and unclear standards leaving students, teachers, and administrators unsure of where they stand.

This mess has resulted in widespread censorship by administrators who feel empowered to silence student voices simply because what those students are saying would reflect negatively on the school and the administration. Administrators also feel empowered to bully teachers who try to defend students and student free speech rights. In this atmosphere, those students and teachers often feel powerless to fight administrative suppression because students do not

¹⁷⁰ *Ten Facts About K-12 Education Funding*, U.S. DEPT OF EDUC. (June 2005), <http://www.ed.gov/about/overview/fed/10facts/10facts.pdf>. See also Austin, *supra* note 162, at 352.

understand the rights they can assert and teachers fear for their jobs.

If protecting free speech in America's high schools is to succeed, complete protection is needed. Ideally, the best solution would be federal legislation that protects not only the students' free speech rights, but also the rights of their advisors to stand up for those students' rights. Federal legislation, modeled after state legislation in California, would cover both students and teachers and is the best way to completely and consistently protect the First Amendment in all of America's schools. By passing such legislation, Congress would not only protect student journalists, but also ensure the survival of the First Amendment as a core American value for future generations.