2014

The Basic Logic of Post-Tinker Jurisprudence

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CARDOZO LAW REVIEW
de•novo

THE BASIC LOGIC OF POST-*TINKER* JURISPRUDENCE

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Tinker v. Des Moines Independent Community School District[1] is rightly regarded as a landmark student speech case. At this point, however, it is fair and important to ask about the likely consequences of radically abandoning *Tinker* and the succeeding case law.[2] What might it mean, at this historical point, to abandon *Tinker* along with its qualifying and limiting cases? The discussion below briefly pursues this question and endorses a radical abandonment of *Tinker* and the succeeding cases as binding case law.

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1 393 U.S. 503 (1969) (limiting public school student speech in cases of substantial disruption or credible threats thereof, or involving speech that violates the rights of others).

2 Among the more prominent cases qualifying or limiting *Tinker* are *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (limiting some instances of vulgar, lewd, indecent, or patently offensive speech); *Hazelwood School Dist. v. Kuhlmeier*, 488 U.S. 260 (1988) (limiting some instances of "curricular" student speech that might reasonably be perceived to bear the school's approval), and *Morse v. Frederick*, 551 U.S. 393 (2007) (very roughly, allowing limitations of some public school student speech thought to advocate the consumption of illegal drugs). For a sampling of recent lower court opinions further limiting Tinker in various ways, see R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1 (2014). *See also* R. George Wright, *Doubtful Threats and the Limits of Student Speech*, 42 CAL. DAVIS L. REV. 679 (2009); R. George Wright, *Tinker and Student Free Speech Rights*, 41 IND. L. REV. 105 (2008); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulation*, 31 S. ILL. L.J. 175 (2007).

This is not an anti-student speech conclusion. It is instead a recognition of the importance of allowing public schools, if they so choose, and within other constitutional and statutory bounds, to focus, substantively and symbolically, more on educational outcomes, educational equality, or other dimensions of the vital basic mission of contemporary public schools.[3]

The idea of "radically" abandoning *Tinker*, as conceived herein, requires explicit clarification. What should be envisioned is not merely the overruling of *Tinker* itself. A radical abandonment of *Tinker* requires much more. Radically abandoning what we might call the *Tinker* regime also involves somehow overruling all of the case law that is intended either to support, to clarify, or to limit or narrow *Tinker*'s potential scope.[4] With *Tinker* off the books as binding authority, the justification for the subsequent case law either confirming or confining *Tinker* loses much of its point and appeal.

The story of how cases such as *Fraser*, *Kuhlmeier*, and *Morse* have cumulatively limited *Tinker* itself is well known.[5] With each such limiting case, it also becomes clearer how many important questions were left unresolved by *Tinker*. And the accumulating case law below the Supreme Court level has, in some instances, anticipated further limitations on Tinker, or further exposed the murkiness of the *Tinker* case in one context or another. School districts and public schools are currently left to largely guess at the application of *Tinker*-regime law on such matters as computer text and visual messages physically within and outside of school grounds; the proliferation of various sorts of arguably inappropriate messages; clothing and jewelry as purported speech in various contexts; content-neutral limitations on student speech; the scope of the various sorts of rights of non-speakers as a limitation on student speech; minimum age and what we might call "minimum content" requirements for speakers; and the recurring general problem of distracting speech that falls short of disruption, disturbance, disorder, or violation of the rights of others.

Let us assume the abandonment, through one mechanism or another, of the mandated *Tinker* regime. How might the public schools then choose to react? A state or city, a democratically responsible public school administration, or even a single public school could then freely decide that fulfilling a public school's basic missions may require less emphasis on some currently *Tinker*-protected, or arguably

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[3] An initial sense of some of the essential civic-related purposes and functions of the public schools can be derived from the classic public school desegregation case of *Brown v. Board of Education*, 347 U.S. 483 (1954). A highly condensed elaboration of the range of legitimate, if not utterly pressing, education-related concerns faced by many public school educators today is found in the two paragraphs immediately preceding the Conclusion below.

[4] *See supra* note 2.

[5] *Id.*

protected, student speech. More precisely, there could then be less emphasis on planning for and administratively addressing such matters and more emphasis on any of a number of other areas of general educational and administrative concern.

The thinking on the part of such a jurisdiction, system, or school need not be that there is some direct conflict between *Tinker*-protected student speech (and its broadly defined administration) and one or more fundamental purposes the school should serve. The idea might instead be that the broad *Tinker* regime, including its various often unintended effects on speakers and listeners, involves at least some degree of student, teacher, or administrator distraction—conscious or sub-conscious—from optimally promoting the vital purposes of the public schools.

Such school authorities could certainly grant that *Tinker*-protected speech, and even its litigation, may itself often serve one or more of the basic purposes of public schooling. Free speech litigation, at its best, can involve a teachable moment. But a school or district could also quite reasonably imagine that the broad overall *Tinker*-speech regime involves unintended and subtle but significant direct or indirect costs in other vitally important pedagogical values. Perhaps not all public school administrations need concern themselves with such value tradeoffs, or find the tradeoffs especially severe. But the crucial point is that, at a minimum, some school administrations reasonably could, and that they should be allowed greater regulatory leeway at the federal free speech constitutional level.

Suppose, then, that the Court allowed those public schools that wished to broadly abandon *Tinker*, and its burgeoning problems of planning, administration and occasional litigation, to do so. Such judicial permission would, of course, not free the public schools from compliance with, among other requirements, relevant state constitutional and statutory laws; the equal protection of the laws; the Establishment and Free Exercise of Religion Clauses; procedural due process at least at the level of rationality; and other applicable sources of law. To at least some degree, the broad abolition of *Tinker*—as a uniform administrative requirement, and not as a model for voluntary local adoption—would allow public schools so inclined to enhance their focus, substantively and symbolically, on one or more arguably neglected basic functions of such schools.

Again, the point is not that broadly protecting student speech—letting students say what they wish under *Tinker*—or attempting to implement the broader *Tinker* regime invariably tends to directly impair the fulfillment of a school's vital functions. The point is instead that nothing, including the broad *Tinker* regime, is without its various costs, especially, but not limited to, persons and groups with any special

burdens or vulnerability.

The recommendation is thus to largely trust public schools, school districts, or broader jurisdictions, in their widely varying circumstances, to reasonably prioritize their various scarce resources and goals, subject to appropriate legal constraints and to democratic electoral accountability. Thus there is little value in trying to catalog here all of the educational aims a school might consider vital, but not yet optimally achieved. Merely for the sake of illustration, though, consider the following options, in light of the fact that many schools and districts consistently rank below—perhaps quite substantially below—the relevant national medians, where the national medians themselves may not be considered impressive in their own right.

Thus a particular school, school district, city, or even a state might legitimately choose to focus more on educational equality in various forms, on graduation rates, on curricular enhancement, or on genuinely meaningful outcomes assessments. A school district might be motivated by unflattering geographic, even international-level, comparisons. More particularly, schools might also seek to remedy various perceived deficiencies in broad civic education. Perhaps even more basically, schools might wish to upgrade stagnant or plainly unsatisfactory achievement levels in vital curricular subjects, including vocabulary, reading comprehension, mathematics, or science at any or all grade levels. Broad and genuine preparedness for college could be reasonably seen as a crucial priority. Or a school might seek to more intensively promote "soft" job skills, or the skills realistically necessary for effective job performance and for teamwork in business or other public settings. General civility in social interaction is also quite clearly a legitimate matter of concern.

Additionally, the use or misuse by students of social media and communication devices, of various sorts and in various contexts, is of increasing concern for some schools. Cyberbullying, however defined, may be of special concern in this context. Even more elementally, (non-fatal) physical bullying, various forms of victimization, theft, and violence of various sorts could, for some schools, be considered unresolved problems deserving of greater sustained administrative attention. It would thus be reasonable for at least some public school jurisdictions to judge the broad *Tinker* student speech regime, and particularly its required planning and pro-active implementation, to not be worth its various direct and indirect costs, however subtle, intangible, and unintended those costs may have been.

CONCLUSION: A POST-*TINKER* FUTURE

Suppose the Supreme Court were to broadly abandon *Tinker* and related student speech rules—the entire *Tinker* regime—as a matter of mandatory federal constitutional free speech law. With what legal regime might the Court then replace *Tinker* and its associated case law?

One possibility would be to adopt some complex, multi-factor, specific and inevitably incomplete replacement rule, as supposedly required, in all its gradually emerging and evolving detail, by the federal Constitution. Or the Court might provide even less guidance for public school administration and for litigation than at present by insisting on some sort of multi-stage, burden-shifting test, or on a vague, readily manipulable generalized balancing test.

For the reasons suggested above, however, abandoning the broad *Tinker* regime in favor of other, independent constitutional and statutory limits at the federal and state levels seems more advisable. This is again not an anti-student speech option. Any state or school district that regrets the continuing erosion of *Tinker* itself might, subject to proper constraints, retain school speech policies reflecting *Tinker* itself, and perhaps even reject one or more judicial limitations on *Tinker*. States, districts, or public schools, on the other hand, that are more sensitive to matters such as equality or broad student competencies and performance and to the various indirect and unintended costs of the *Tinker* regime should, equally, feel free to appropriately depart from that regime.

As a matter of procedural due process, though, all jurisdictions should then at least generally articulate and publicize—subject to ongoing democratic electoral scrutiny—their own basic substantive student speech policies, along with the basic internal administrative processes by which such policies are to be implemented.

At this point in our history, it is no longer credible that *Tinker*, along with its various unending refinements, qualifications, and limitations, amounts to the only constitutionally permissible approach to student speech, as schools seek with mixed success to more cost-effectively discharge their vital and multi-faceted basic mission. Certainly the broad *Tinker* regime itself, enforced now for more than forty years, has absorbed administrative attention without, in many instances, meaningfully contributing to the various crucial goals of public education.