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Cover Page Footnote

I extend my greatest thanks and love to my wife, Debbie Russo, for proofreading and commenting on drafts of this article along with everything else that she does in our life together, not just for me but also for our children and grandchildren. I would also like to thank Paul T. Babie, Professor of Property Theory and Law, University of Adelaide, Adelaide, Australia; William E. Thro, General Counsel, University of Kentucky; and Larry Smith, Clinical Faculty, Department of Educational Leadership, School of Education and Health Sciences, University of Dayton, for their thoughtful comments on drafts of this paper.

I dedicate this to the memory of my dear friend Gerry Allen, loving husband and dad, as this wonderful man of great faith "fought the good fight" St. Paul wrote about in his second letter to Timothy as he battled against the scourge of cancer. May God bless Gerry and his family always.

THE SUPREME COURT AND STUDENT FREE SPEECH: A RETROSPECTIVE LOOK AT *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT* AND ITS PROGENY

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I. INTRODUCTION

Tinker v. Des Moines Independent Community School District ("*Tinker*") was a watershed moment both in public education and in the history of free speech in the United States.[1] Moreover, *Tinker* stands out not only because its holding reverberated well beyond elementary and secondary schools, but also because it helped to shape attitudes toward free speech and expression among generations of students even after they graduated. In fact, as can be seen in ongoing First Amendment litigation in schools, *Tinker* continues to make its impact felt a half-century after it was resolved.

Tinker remains noteworthy both because it was the initial case in which the Supreme Court recognized the First Amendment free speech rights of students in public schools and because it turned out to be a high point for student free speech protection.[2] In *Tinker*, the Court found that, absent a

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[1] *See generally* 393 U.S. 503 (1969). For representative, albeit a bit dated, commentary on *Tinker*, see, e.g., Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445 (2000); John W. Johnson, *Behind the Scenes in Iowa's Greatest Case: What is not in the Official Record of Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 473 (2000). For a brief review of student free speech highlighting the Supreme Court cases discussed in this manuscript, see Charles J. Russo, *Tinker at 50: A Status Check on Student Expression*, 85 SCH. BUS. AFF. 38 (2019).

[2] A year before resolving *Tinker*, in *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968), the Supreme Court upheld the free speech rights of teachers in public schools to speak on matters of public concern. The Court subsequently narrowed the speech protections afforded public

reasonable forecast of material and substantial disruption, education officials could not discipline students for wearing black arm bands protesting American military action in Vietnam.[3]

In only three subsequent cases addressing student speech, the Supreme Court restricted the scope of the protections it enunciated in *Tinker*. Following *Tinker*, which focused on student dress, the Court established standards for reviewing the spoken word in *Bethel School District No. 403 v. Fraser*, the written word in *Hazelwood School District v. Kuhlmeier*, and student expressive activity in a school-supervised event in *Morse v. Frederick*.[4]

Given the rate at which technology advances, coupled with ongoing litigation in this area, it is surprising that the Justices have yet to address a

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employees and, by extension, teachers in public schools, in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (ruling that if a teacher demonstrates that protected conduct about a school matter was a substantial or motivating factor in the nonrenewal of his contract, the board to be given the opportunity to show that it would have not re-employ him absent the protected conduct), *on remand*, Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ., 670 F.2d 59 (6th Cir. 1982) (affirming that the board demonstrated that it would not have renewed the teacher's contract). *See also* Connick v. Myers, 461 U.S. 138 (1983) (upholding the dismissal of a former district attorney by considering whether the speech involved a matter of public concern by examining its content and form along with the context within which it was expressed and, if speech deals with a matter of public concern, balancing the employees' interests as citizens in speaking out on such matters against those of public employers in promoting effective and efficient services); Garcetti v. Ceballos, 547 U.S. 410 (2006) (affirming that where an assistant district attorney criticized his superiors publicly in his official capacity rather than as a citizen for First Amendment purposes, the Constitution did not protect his speech from employer discipline in the form of his dismissal). *But see* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (applying Pickering to teachers who expressed themselves during private conversations supervisors); Ayers v. Western Line Consol. Sch. Dist., 592 F.2d 280 (5th Cir. 1979) (affirming that where a motivating factor behind a board's not rehiring a teacher was her exercise of protected speech in criticizing school officials, it violated her rights because it would not have terminated her contract but for her having spoken out). Three years later, in *Healy v. James*, 408 U.S. 169 (1972), the Supreme Court essentially extended *Tinker* to higher education, noting that officials at a state university could not refuse to recognize a student group based on unsubstantiated fears that the organization's philosophy might cause it to engage in disruptive behavior. For a review of this case, see Lewis Bogaty, *Beyond Tinker and Healy: Applying The First Amendment to Student Activities*, 78 COLUM. L. REV. 1700 (1978). *See also* Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973) (reinstating a student at a state university after officials expelled her on the basis that the regulation forbidding her from distributing a newspaper on campus containing what they considered to be lewd language was an impermissible content-based prohibition rather than a reasonable time, place, and manner restriction).

[3] *Tinker*, 393 U.S. at 514.

[4] *See generally id.*; *Bethel*, 478 U.S. 675 (1986); *Hazelwood*, 484 U.S. 260 (1988); *Morse*, 551 U.S. 393 (2007). For representative commentary on *Bethel*, see David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181 (2002); David Schimmel, *Lewd Language Not Protected: Bethel School District v. Fraser*, 33 EDUC. L. REP. 999 (1986). For representative commentary on *Hazelwood*, see Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008); Susannah Barton Tobin, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217 (2004); W. Wat Hopkins, *Hazelwood v. Kuhlmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521 (2009). For representative commentary on *Morse*, see David Schimmel, *Morse v. Frederick: Did the Supreme Court Weaken or Strengthen Student Freedom of Expression?*, 226 EDUC. L. REP. 557 (2008); Joanna Nairn, *Free Speech 4 Students? Morse v. Frederick and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239 (2008); Francisco M. Negrón, Jr., *A Foot in The Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech after Morse v. Frederick*, 58 AM. U. L. REV. 1221 (2009).

dispute involving student speech and expressive activity involving social media and other forms of technology, such as cell phones. Perhaps the Justices have opted to allow issues to percolate in the lower courts due to the combination of the speed at which technology seems to advance coupled with the fact-specific nature of the cases.

In being prudent by watching to see what transpires, the Justices seem to be setting a wise course, because in light of how rapidly technology advances, it is conceivable that changes could render a case moot between the time they grant *certiorari* and render a written judgment. Consequently, this Article highlights representative litigation in the lower courts involving the free speech rights of students who use social media and other forms of technology.

Section II of this Article sets the stage for discussing student free speech rights. In light of the importance of the Supreme Court's opinions on student expressive activities in the fifty years since *Tinker*, Section III focuses on the litigation in which the Justices established the principles regulating the speech rights of students, along with illustrative cases from lower courts.[5] Section IV offers practical suggestions, annotated by appropriate case citations, for school boards, educational leaders, and their lawyers, as they work on their student speech codes. Finally, the Article ends with a short conclusion.

II. PROLEGOMENA

Well aware of the need for citizens to be able to speak freely in the newly created democratic republic known as the United States, Congress enacted the First Amendment in 1791 as part of the Bill of Rights.[6] According to the relevant language in the First Amendment, "Congress shall make no law . . . abridging the freedom of speech . . . ."[7] Even though the First Amendment facially applied to Congress, the Supreme Court eventually extended it to the states via the Fourteenth Amendment.[8]

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[5] For a commentary on the importance of *Tinker*, see Mark Walsh, *Landmark Case on Student Free Speech Still Resonates 50 Years Later*, EDUC. WEEK (Feb. 27, 2019), https://www.edweek.org/ew/articles/2019/02/21/landmark-case-on-student-free-speech-still.html.

[6] For a discussion of the Framers' attitudes toward the need for free speech, see RONALD ROUTNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 23–25 (5th ed. 2013).

[7] U.S. CONST. amend I.

[8] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating the convictions of Jehovah's Witnesses for allegedly violating a state statute against soliciting funds without the prior approval of public officials). *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (invalidating a board policy requiring students to salute the American flag). The *Barnette* Court explained:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures[—]Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of

In public schools, the First Amendment protects the rights of students, for example, not to speak by not having to salute the flag or to be able to wear black armbands to school to protest American involvement in Vietnam.[9] Conversely, the First Amendment does not protect students' rights to make an obscene speech at a school-sponsored event; print articles in a school-sponsored newspaper, published as part of the course curriculum, when school officials deem their content inappropriate; display a banner that a principal interpreted as promoting illegal drug use at a school-sponsored event; or misuse social media and the internet.[10]

In the wake of World War I, the Supreme Court created essentially two tests for reviewing state-imposed limits on free speech. In *Schenck v. United States*, when a dispute over national security emerged during World War I, the Court reasoned that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[11] In so doing, the Justices enunciated the clear and present danger test, noting that "[t]he question . . . is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger."[12] Under this test, the chance of disruption alone is insufficient for the government to limit free speech.[13] Rather, public officials cannot limit speech absent an explicit concern it may harm the public welfare.[14]

Prior to *Tinker*, courts long deferred to the authority of school officials to control disruptive student expressive activity.[15] In a trilogy of early cases that Justice Thomas cited in his concurrence in *Morse v. Frederick*, courts upheld the actions of educational officials who disciplined students for using profane language, disciplined students for making distracting sounds in class, and expelled a student who refused to apologize for making critical statements in a school speech.[16] In the previous paragraph of his dissent, Justice Thomas referred to the earliest published opinion on student discipline wherein the Supreme Court of Vermont upheld a teacher's

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> Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. *But see* Barron v. Mayor and City Council of Baltimore, 32 U.S. 243 (1833) (refusing to apply the Bill of Rights to the states because its history indicated that it was limited to the federal government).

[9] *See Barnette*, 319 U.S. 624 at 637. *See generally Tinker.*, 393 U.S. 503.

[10] *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 396 (2007). *See, e.g.*, *infra* Section III.E.i. for a review of litigation involving technology in and around schools.

[11] 249 U.S. 47, 52 (1919) (upholding convictions, under the Espionage Act of 1917, of individuals who passed out leaflets urging men not to register for the draft, who could have their speech restricted if, as it did here, it presented a "clear and present danger").

[12] *Id.*

[13] *See id.*

[14] *See id.* at 52.

[15] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

[16] *Morse*, 551 U.S. at 415 (Thomas, J., concurring); *see generally* Deskins v. Gose, 85 Mo. 485 (Mo. 1885); Vanvactor v. State, 15 N.E. 341 (Ind. 1888); Wooster v. Sunderland, 148 P. 959 (Cal. 1915).

use of corporal punishment on a pupil who, in the presence of his classmates, made a disparaging remark about the educator.[17]

Acknowledging the inappropriateness of the clear and present danger test for educational settings, the Supreme Court created a different measure for schools.[18] As discussed in greater detail below, and as reviewed in *Tinker*, the Justices recognized the authority of educators to limit student free speech as long as school officials believe that student expressive activities are likely to result in reasonable forecasts of material and substantial disruptions in school settings.[19]

III. LITIGATION ON STUDENT EXPRESSIVE ACTIVITIES

A. Tinker v. Des Moines Independent Community School District

i. Facts and Judicial History

A product of its tumultuous times, *Tinker* was litigated during the social and political upheaval of the 1960s.[20] *Tinker* began when the principals of the schools in Des Moines, Iowa, learned that two male high school students and the sister of one of them, a pupil in junior high school, planned both to wear armbands to school and fast on Monday, December 16, 1965.[21]

On learning of the students' plans, the principals met on Saturday, December 14, 1965, adopting a rule, of which the plaintiffs were aware, "that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[22] "On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day."[23]

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[17] *See generally* Lander v. Seaver, 32 Vt. 114 (1859).

[18] *See generally Tinker*, 393 U.S. 503.

[19] *See generally id.*

[20] *See generally Tinker*, 393 U.S. 503. For a discussion of this tumultuous time period, see ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 2 (2015). Hartman stated:

> The sixties gave birth to a new America, a nation more open to new peoples, new ideas, new norms, and, new, if conflicting, articulations of America itself. This fact, more than anything else, helps explain why in the wake of the sixties the national culture grew more divided than it had been in any period since the Civil War.

Id.

[21] *Tinker*, 393 U.S. at 504 ("Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school."). Mary Beth Tinker continues to speak out on student free speech. *See* Wayne Baker, *Oakwood State of the Schools address touts progress*, DAYTON DAILY NEWS (Jan. 15, 2020), https://www.daytondailynews.com/news/local-education/oakwood-state-the-schools-address-touts-progress/T9Fr0EdHRjjuveT9oBn2xM/ (reporting that "Tinker is an American free speech activist known for her role in the 1969 Tinker v. Des Moines Independent School District Supreme Court case.").

[22] *Id.*

[23] *Id.*

On being suspended, the students, through their fathers, unsuccessfully sued the school board along with various officials seeking both to enjoin the policy and recover nominal damages.[24] The federal trial court in Iowa, differentiated the case before it from a similar dispute from Mississippi wherein the Fifth Circuit decided that educational officials

> 'cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'[25]

Accordingly, the court dismissed the complaint in favor of the school officials.[26] On further review, an equally divided, en banc panel of the Eighth Circuit affirmed in favor of the defendants.[27] The plaintiffs then appealed to the Supreme Court, which agreed to hear the case, reversing in favor of the students.[28]

ii. Supreme Court Rationale

Writing for the Supreme Court in its seven-to-two judgment, Justice Abe Fortas began his substantive analysis by declaring that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[29] He added that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[30] Acknowledging that school officials "sought to punish [the] petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners," Justice Fortas sought a middle ground to balance the rights of students to speak against the duty of educators to preserve safe and

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[24] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972–93 (S.D. Iowa 1966).

[25] *Id.* at 973 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[26] *Id.*

[27] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967).

[28] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505, 514 (1969). Relying on this language, an appellate court in Ohio affirmed that school officials did not violate a student's First Amendment and due process rights in expelling him after they discovered a binder referring to the Columbine shooting. N.Z. v. Madison Bd. of Educ., 94 N.E.3d 1198, 1120 (Ohio Ct. App. 2017). This led to the excluding of a number of students on an emergency basis, pending an investigation, during which time they received multiple bomb threats. *Id.* The court was of the opinion that educators acted properly because "school officials retain some authority consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools." *Id.* (quoting Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 833 (W.D. Tenn. 2013) (internal quotation marks omitted). *See also* Defoe v. Spiva, 625 F.3d 324, 331 (6th Cir. 2010) (affirming the authority of school officials to ban displays of the Confederate flag because they reasonably forecasted that failure to act would have resulted in a substantial disruption of, or material interference with, schoolwork and school discipline).

[29] *Tinker*, 393 U.S. at 506. Justice Fortas was joined in full by Chief Justice Warren and Justices Brennan, Douglas, and Marshall. *Id.* at 503, 514–15.

[30] *Id.* at 506.

orderly learning environments wherein they can discipline students who misbehave in schools.[31]

As to the case before the Supreme Court, Fortas described *Tinker* as involving "direct, primary First Amendment rights akin to 'pure speech' [not concerning] . . . speech or action that intrudes upon the work of the schools or the rights of other students."[32] In other words, because the arm bands were, like other forms of clothing and apparel, "pure speech," meaning that the messages they communicated largely depended on the perceptions of those who viewed them, he afforded them the highest level of protection under the First Amendment.[33]

Justice Fortas then determined that before school officials could limit student expressive activity, they had to be able to show that the steps they took were motivated by "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[34] Thus, Justice Fortas concluded that "[c]ertainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[35]

iii. Concurrences

Justice Stewart, in a brief, one paragraph concurrence, agreed with the Supreme Court.[36] Even so, he offered his views separately because he did not agree with what he described as "the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[37]

In another brief, one paragraph concurrence, Justice White made two points.[38] First, he thought it necessary to express his agreement "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."[39] Second, Justice White did not agree with the Court's

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[31] *Id.* at 508. Justice Fortas noted that:

> Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

Id.

[32] *Id.* at 508–09.

[33] *Id.* at 505–06.

[34] *Id.* at 509.

[35] *Id.*

[36] *Id.* at 514–15 (Stewart, J. concurring).

[37] *Id.* at 515.

[38] *Id.*

[39] *Id.* (White, J., concurring).

full reliance on *Burnside*, but went no farther in justifying his position.[40]

iv. Dissents

Justice Black's strident dissent feared that the Supreme Court conferred too much power on students.[41] He posited that insofar as the presence of the black armbands distracted other students from their studies, the majority's opinion interfered with the duty of school officials to regulate student speech by giving students the upper hand.[42] To this end, Justice Black maintained that students "can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[43]

In his brief dissent, Justice Harlan agreed that school officials have the authority to discipline students.[44] Justice Harlan was, though, unwilling to afford educators "the widest authority in maintaining discipline and good order in their institutions."[45]

v. *Tinker* Distinguished

A year after *Tinker*, the Sixth Circuit reviewed a policy from a school in Ohio.[46] In light of serious racial tensions present in a high school, educational officials enforced a longstanding policy to prevent students from wearing buttons, badges, scarves, and/or other items identifying themselves as supporters of causes or bearing messages unrelated to school activities.[47] Refusing to invalidate the forty-year-old rule, originally designed to reduce divisions created within the student body by fraternities and sororities, the court relied on evidence that students increasingly tried to wear buttons and badges expressing racially inflammatory messages leading to disruptions.[48] Pointing out that the longstanding rule was enforced uniformly, the Sixth Circuit agreed it was acceptable because it helped school officials to educate students in an atmosphere free from racial tensions.[49]

Shortly thereafter, the Fifth Circuit invalidated a rule designed to prevent students from wearing black armbands to school in a protest over events in Vietnam, where officials were unaware of potential disruptions and

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[40] *Id.*

[41] *Id.* at 526 (Black, J., dissenting).

[42] *Id.* at 517–18, 525–26.

[43] *Id.* at 518 (Black, J., dissenting).

[44] *Id.* at 526 (Harlan, J., dissenting).

[45] *Id.*

[46] Guzick v. Drebus, 431 F.2d 594, 596 (6th Cir. 1970).

[47] *Id.*

[48] *Id.* at 597. The trial court wrote that "[t]he rule has never been published; nevertheless, it has been applied uniformly and consistently for at least forty years." Guzick v. Drebus, 305 F. Supp. 472, 476 (N.D. Ohio 1969).

[49] *Guzick*, 431 F.2d at 597.

none occurred.[50] Viewed together, along with *Tinker*, these cases stand for the proposition that school officials can adopt and implement dress code policies that are clearly written without being vague or overbroad (the bane of policies) especially those involving dress, as long as students have notice that they are in place and are applied uniformly.

vi. Post-*Tinker* Litigation

Following *Tinker*, numerous cases dealt with issues of student dress. Rather than trace the full array of topics under student speech, this section briefly identifies illustrative cases from the seemingly countless number of suits that emerged. If courts are satisfied that school officials demonstrated that student dress will result in a reasonable forecast of material and substantial disruption, their policies are upheld, such as in disputes involving students wearing symbols of the Confederate, whether flags or other items.[51]

Given changes in sexual attitudes and behaviors, it should not be surprising that issues involving sexuality emerged in relation to how students express themselves through the ways in which they dress for school. On the one hand, in California, a student unsuccessfully challenged his suspension for wearing a t-shirt displaying the message, "homosexuality is shameful."[52] On appeal, the Ninth Circuit affirmed that officials did not violate the student's rights to freedom of speech and religion because they had the right to prevent him from wearing the t-shirt insofar as it was inconsistent with the school's basic educational mission which included teaching tolerance and civic responsibility.[53] After the Supreme Court vacated the Ninth Circuit's judgment as moot, a federal trial court rejected the request of the plaintiff's sister to reconsider the ban on the t-shirt.[54] The Ninth Circuit ultimately

[50] Butts v. Dallas Indep. Sch. Dist., 436 F.2d 728, 732 (5th Cir. 1971). For a later case involving black armbands, see *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752 (8th Cir. 2008) (affirming that disciplining students for wearing black armbands to school, protesting the implementation of a dress code policy, violated their First Amendment rights).

[51] For cases upholding bans on the Confederate flag, see *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972); Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013); Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988); Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734 (8th Cir. 2009). *But see* Castorina *ex rel.* Rewt v. Madison Cty. Sch. Bd., 246 F.3d 536 (6th Cir. 2001) (finding that school officials violated the rights of a student for suspending him for wearing a t-shirt displaying the picture of a country music singer on the front and the phrase "Southern Thunder" on the back that also included a Confederate flag); Bragg v. Swanson, 371 F. Supp. 2d 814, 818 (S.D. W. Va. 2005) (striking down a policy prohibiting "items displaying the Rebel flag" under the "racist language and/or symbols or graphics" as unconstitutionally overbroad). For other bans on items associated with the Confederacy, see, e.g., *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009) (upholding a ban against purses displaying the Confederate flag) and *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010) (upholding a ban against wearing a Confederate Flag shirt and belt buckle to school).

[52] Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1100 (S.D. Cal. 2004) (original capitalization emphasis omitted).

[53] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1192 (9th Cir. 2006).

[54] *See generally* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2006). *See also* Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1102 (S.D. Cal. 2007).

rejected the latter claim as moot because the student graduated.[55]

Conversely, a federal trial court in Ohio enjoined school officials trying to prohibit a student from wearing a t-shirt expressing his religious convictions; the front of the shirt displayed Bible verses while the messages on his back read "Homosexuality is a sin! Islam is a lie! Abortion is murder!"[56] The court rejected the claim that officials could restrict the student's message as plainly offensive speech.[57] Rather, the court ruled in favor of the student because officials failed to prove that the t-shirt caused a material disruption of school activities, that there was a reasonable likelihood it might have caused such a disruption, or that it invaded the rights of others.[58]

The Seventh Circuit later prevented school board officials in Illinois who sought to prevent students from wearing t-shirts with the message "Be Happy, Not Gay" because there was no reason to think that their doing so would have created a substantial disruption.[59] After multiple rounds of litigation, the court affirmed an award of nominal damages in favor of the students.[60]

In Minnesota, the federal trial court enjoined a principal from preventing a student from wearing a sweatshirt displaying the message "Straight Pride" to school.[61] The court observed that insofar as the student and his parents demonstrated the strong likelihood of success on the merits of their claim that the principal acted unreasonably, they were entitled to the injunction.[62]

Finally, a federal trial court in Tennessee forbade officials in a public high school from preventing a student from wearing a t-shirt displaying the message "Some People Are Gay, Get Over It."[63] The court emphasized that insofar as the ban on apparel referencing lesbian, gay, bisexual, and transgender ("LGBT") issues was unnecessary to avoid a material and substantial interference with schoolwork or discipline, officials violated the student's right to free speech.[64]

B. Bethel School District No. 403 v. Fraser

i. Facts and Judicial History

In *Bethel School District No. 403 v. Fraser* ("*Bethel*"), the Supreme

[55] Harper v. Poway Unified Sch. Dist., 318 F. App'x 540, 541 (9th Cir. 2009).
[56] Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).
[57] *Id.* at 971.
[58] *Id.* at 974–75.
[59] Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 6770 (7th Cir. 2008).
[60] Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 882 (7th Cir. 2011).
[61] Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1069 (D. Minn. 2001).
[62] *Id.* at 1071–72.
[63] Young v. Giles Cty. Bd. of Educ., 181 F. Supp. 3d 459, 461 (M.D. Tenn. 2015).
[64] *Id.* at 464.

Court tackled another form of student expression, the spoken word, in a dispute from Washington.[65] The case arose when a student made a nominating speech for a peer who was running for a position in student government even though before he did so, he ignored suggestions from two of his teachers not to use the offending language because he could face punishment for doing so.[66] The speech included graphic sexual language that caused a substantial disruption in his unsuspecting, captive audience.[67] Consequently, the student served the first two days of his three-day suspension for violating board policy and had his name removed from the list of possible speakers at his graduation.[68] Even so, the student was elected by a write-in vote to serve as a graduation speaker.[69]

The student and his father then filed suit in a federal trial court in Washington under Section 1983, alleging that school officials violated his civil rights and right to free speech by disciplining him for the nominating speech he delivered.[70] In an unreported opinion, the court granted the plaintiffs' request for "$278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies."[71] After the Ninth Circuit affirmed in favor of the plaintiffs, the Supreme Court agreed to hear an appeal,

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[65] *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

[66] *Id.* at 678.

[67] Justice Brennan's concurrence repeated parts of the speech:

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687 (Brennan, J., concurring).

[68] *Id.* at 679.

[69] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985) (noting that "a member of the Honor Society and the debate team and the recipient of the 'Top Speaker' award in statewide debate championships for two consecutive years, was also informed that his name would be removed from a previously approved list of candidates on the ballot for graduation speaker").

[70] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 679 (1986). 42 U.S.C. § 1983 offers protection to those whose civil rights have been violated by public officials, including educators. Under this far-reaching statute:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. The statute was originally known as section 1983 of the Ku Klux Klan Act of April 20, 1871, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

[71] *Bethel*, 478 U.S. at 679.

reversing in favor of school officials.[72]

ii. Supreme Court Rationale

As author of the Supreme Court's opinion in its seven-to-two judgment in his penultimate case on the High Court, Chief Justice Burger, following his review of the facts and judicial history, cited *Tinker* but differentiated it.[73] Burger reasoned that the armbands in *Tinker*, a form of pure speech, were passive, nondisruptive expressions of political positions, rather than lewd, obscene speech lacking any political viewpoints the student delivered as a nominating speech to an unsuspecting captive audience prior to a student election.[74] Against the background of *Tinker*, the Chief Justice turned to examine the level of protection the First Amendment affords student speech at a school assembly.[75]

Briefly reviewing the history of public education in the United States, the Chief Justice explained that school officials have the duty to inculcate "fundamental values of 'habits and manners of civility' essential to a democratic society."[76] Conceding the need to be tolerant of different points of view, Chief Justice Burger emphasized that there is a limit to doing so.[77] To this end, he noted that insofar as "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," educators had the authority to discipline the student for violating school rules, particularly where he delivered the speech after being advised not to do so.[78]

In sweeping language, the Chief Justice specified that the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[79] In so doing, he acknowledged that the Court has placed limits on speakers' First Amendment rights if individuals seek to deliver sexually explicit speeches to audiences containing children.[80]

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[72] *Fraser*, 755 F.2d at 1357; *Bethel*, 478 U.S. at 687.

[73] *Id.* at 675. *Bethel* was handed down on July 7, 1986, the same day as *Bowsher v. Synar*. *Compare id. with* 478 U.S. 714 (1986). In *Bowsher*, Chief Justice Burger, "on the final day of his final Term on the bench," wrote the opinion which "invalidat[ed] the central feature of the Balanced Budget and Emergency Deficit Control Act of 1985, better known as the Gramm-Rudman-Hollings Act." Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L. J. 699, 703–04 (1986). Chief Justice Burger delivered the opinion of the Court, with White, Powell, Rehnquist, and O'Connor joining. *Bethel*, 478 U.S. at 676. Justice Blackmun concurred in the result, and Justice Brennan filed an opinion concurring in the judgment. *Id.* Justice Marshall and Justice Stevens filed dissenting opinions. *Id.*

[74] *Id.* at 680.

[75] *Id.* at 681.

[76] *Id.*

[77] *See id.*

[78] *Id.* at 683.

[79] *Id.*

[80] *Id.* at 684.

Once again, the Chief Justice distinguished *Tinker* from the case at bar insofar as the former addressed a political issue while *Fraser* simply did not.[81] Commenting that the First Amendment allows educational officials to discipline students for making vulgar, lewd speeches to unsuspecting audiences that both had no place in such an assembly and was inconsistent with the school's mission, Justice Burger held that the educators acted within the scope of their authority in disciplining the speaker.[82]

Rounding out his judgment, in the final paragraph of his opinion, Chief Justice Burger rejected as meritless the student's claim that he did not know he could have been disciplined for his speech.[83] Moreover, the Chief Justice thought that the two-day suspension the student served did not give rise to the full range of procedural due process rights to which he might otherwise have been entitled.[84] Chief Justice Burger thus concluded that insofar as educators warned the student against delivering the speech he did, the judgment of the Ninth Circuit had to be reversed in favor of the school board and educators.[85]

iii. Concurrences

In his brief concurrence of just over 100 words, Justice Blackmun agreed with the Ninth Circuit that the issue of damages for the student's being denied the opportunity to speak as originally intended was moot because he graduated by the time the Supreme Court resolved the case.[86]

Justice Brennan's concurrence agreed that school officials did not exceed the scope of their authority in disciplining the student for speaking as he did.[87] Even so, while remarking that the student was voted in as a speaker, he considered the punishment a bit harsh in light of the circumstances but did not suggest what school officials could have done in the alternative.[88]

iv. Dissents

In his one paragraph dissent, Justice Marshall agreed with Justice Brennan's concurrence. Yet, he dissented because he was of the view that school officials failed to demonstrate that the student's speech was

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[81] *Id.* at 685.

[82] *Id.*

[83] In an interview, Fraser later claimed that "no teacher told me that it violated school policy." David L. Hudson, Jr., *Matthew Fraser Speaks Out on 15-Year-Old Supreme Court Free-Speech Decision*, FREEDOM F. INST., (Apr. 17, 2001), https://www.freedomforuminstitute.org/ 2001/04/17/matthew-fraser-speaks-out-on-15-year-old-supreme-court-free-speech-decision/ (reporting that he became the speech coach at Stanford University).

[84] *Bethel*, 478 U.S. at 686.

[85] *Id.* at 686–87.

[86] *Id.* at 687 (Blackmun, J., concurring). In fact, Fraser did speak at graduation because his classmates conducted a write-in vote campaign to make it possible for him to do so. *Id.* at 679.

[87] *Id.* at 690 (Brennan, J., concurring).

[88] *Id.* at 687.

disruptive.[89]

Justice Stevens began his dissent by quoting the then scandalous words Rhett Butler, played by Clark Gable, spoke to Vivian Leigh's Scarlett O'Hara in *Gone with the Wind* to illustrate how the edge has been taken off of what the fictional character said in light of changing societal mores.[90] He went on to concede that school officials had the right to discipline students for the use of inappropriate language.[91] Regardless, Justice Stevens would not have upheld the penalties because he was convinced that the speaker lacked fair notice of the rules or an awareness of what the consequences of his actions would have been should he have continued on to use the language for which he was punished.[92]

v. Post-*Bethel* Litigation

A divided Sixth Circuit affirmed that educational officials in Tennessee could disqualify a student who was running for the position as student council president.[93] Officials rendered the student ineligible for office because not only was his speech at a school-sponsored assembly insulting to both his peers and an assistant principal, but it was also disruptive.[94]

Citing to *Hazelwood*'s rationale that as long as the actions of educators are reasonably related to legitimate pedagogical concerns, student speech in school-sponsored activities is entitled to less protection than in other circumstances, the panel agreed with officials on two grounds.[95] First, the court was persuaded that educational officials did not violate the student's First Amendment rights because he spoke discourteously and rudely about an assistant principal during his speech.[96] Further, because teaching the student about civility was a legitimate pedagogical concern, coupled with the fact that educators did not attempt to compel him to say anything he did not wish to say, the court rejected his contention that they violated his limited rights to free speech.[97] Second, relying on its own precedent in the context of interscholastic sports, the court contended because being president of the student council, like being on a sports team, is a privilege rather than a right,

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[89] *Id.* at 690 (Marshall, J., dissenting).

[90] *Id.* at 691 (Stevens, J., dissenting) (the quote was "Frankly, my dear, I don't give a damn.").

[91] *Id.*

[92] *Id.* at 691–92.

[93] Poling v. Murphy, 872 F.2d 757, 763–64 (6th Cir. 1989). The dissenting member of the court did so because in viewing the student's speech as political, he thought it should have been evaluated under *Tinker*, not *Hazelwood*. *Id.* at 765 (Merritt, J., dissenting).

[94] *See generally id.*

[95] For a full discussion of *Hazelwood*, see *infra* Section III.C. *See also Poling*, 872 F.2d at 762–64.

[96] *Id.* at 760. Although the student was disqualified from becoming president of the student body, he "was subsequently to become president of his senior class." *Id.* at 758.

[97] *Id.* at 762–64.

he was not entitled to any more procedural due process than he received.[98]

In a more recent case involving speech during an extracurricular activity, a federal trial court in New York reached a similar outcome.[99] The court granted the defendant school's motion for summary judgment in response to a student's claim that his being barred from participating in the second night of a school-sponsored variety show, due to a comment he made during its opening night, violated his First Amendment and due process rights.[100] The court began by noting that the student lacked a protected property interest in participating in the show.[101] Next, echoing both *Bethel* and *Hazelwood*, the court held that insofar as the student's unapproved comments about the superintendent officials could limit what he said because even though it was open to the public, it was a school-sponsored event insofar as it occurred after school hours, the show was performed at the school, it was produced and directed by the school's assistant principal, and school faculty and officials approved all of the acts such that he suffered a de minimis deprivation not entitled to relief.[102]

Two cases involved a different form of speech for which students were disciplined. In the first, a federal trial court in Indiana rejected the claims of a student with an unblemished disciplinary record who was suspended for five days for repeating the racially charged words a peer directed at her in a dispute over a place on a line in the school cafeteria.[103] The upshot was that the student had to take a final examination from which she would have been excused but for the disciplinary mark on her record.[104]

Rejecting the student's request to enjoin school officials from requiring her to take second-semester final examinations, the court pointed out that educators and about ninety peers in the school's cafeteria clearly heard her disruptive speech.[105] The court thus denied the student's allegation that officials violated her right to freedom of speech, despite her claim that she only repeated language someone else directed at her because the vulgar, lewd language she repeated was not entitled to protection, regardless of the

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[98] *Id.* at 764. According to the court, "'[t]he privilege of participating in interscholastic athletics . . . [is] outside the protection of due process.' The privilege of participating in a student council election seems no different." *Id.* *See also* Hamilton v. Tenn. Secondary Sch. Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976), *abrogated on other grounds by*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 190 F.3d 705 (Mem.) (6th Cir. 1990). For an often cited case upholding the principle that insofar as participating in extracurricular activities is a privilege, not a right, students have diminished expectations of procedural due process, see *Palmer v. Merluzzi*, 868 F.2d 90, 91, 96 (3d Cir. 1989) (upholding a student's sixty-day suspension from his football team, ending his career and allegedly harming his chance of receiving an athletic scholarship to college, because he admitted to smoking marijuana and consuming beer in his school's radio station, because participation on a sports team is a privilege rather than a right).

[99] Vetrano v. Miller Place Union Free Sch. Dist., 369 F. Supp. 3d 462, 466, 471 (E.D.N.Y. 2019).

[100] *See generally id.*

[101] *Id.* at 471.

[102] *Id.* 472–74.

[103] *See generally* Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1996).

[104] *Id.* at 791.

[105] *Id.* at 791–93.

context.[106] The court also rejected the plaintiff's claim that officials violated her right to equal protection in suspending her for the same amount of time as the peer with whom she had a verbal altercation over the incident. Absent evidence of an intent to discriminate against the plaintiff or to single her out for the content of the words she repeated, the court rejected her claim that she was treated unfairly even though she had an unblemished record up to that point while the other student had an extensive disciplinary history.[107]

The second case arose in South Dakota where a student received a two-and-one-half day suspension along with a two percent reduction in her nine weeks grade for each class she missed because a secretary who overheard heard her utter an expletive to herself in the school office reported it to the principal, who then subjected her to discipline on account of what she said.[108] Rather than challenge the suspension through school channels, the student's father unsuccessfully filed suit alleging that school officials violated her First Amendment rights.[109] Granting the defendants' motion for summary judgment, the court upheld the student's suspension even though it did not create a disturbance insofar as she violated a rule against using profane or inappropriate language of which she was aware, emphasizing that educational officials have the right to maintain standards of civility and decency in schools.[110]

C. Hazelwood School District v. Kuhlmeier

i. Facts and Judicial History

Hazelwood School District v. Kuhlmeier involved a controversy over what students in Missouri could publish in a newspaper they wrote and edited as part of a journalism class for which they received academic credit.[111] The dispute arose over what was scheduled to be the May 13, 1983 edition of the newspaper when the teacher who taught the course in which it was produced left his job to work in private industry on April 29, 1983.[112] Consistent with the usual practice, the new teacher submitted the page proofs to the principal for approval prior to publication.[113]

On reviewing the newspaper, the principal was concerned about two of the articles.[114] The first article detailed the experiences of the pregnancies of three of the school's students, and the second contained a student's critical

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[106] *Id.* at 798.
[107] *Id.* at 796–97.
[108] Anderson v. Milbank Sch. Dist. 25-4, 197 F.R.D. 682, 685 (D.S.D. 2000).
[109] *Id.*
[110] *Id.* at 684–86, 688–89.
[111] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[112] *Id.* at 263.
[113] *Id.*
[114] *Id.* at 262.

comments about her father over his part in the divorce of her parents.[115] Even though he was unaware that the teacher removed the name of the student in the latter story, the principal thought that her parents should have been given an opportunity to respond to these remarks or to consent to their publication.[116]

Because the principal did not think there was time to make the necessary changes he requested, he gave the moderator two options.[117] The first choice was rather than publish the scheduled six-page edition, he could remove the two pages containing the offending stories, meaning that the undesired stories and others that were not objectionable would be removed, in a four-page edition.[118] The second option was not to publish the edition.[119]

When the moderator selected the first option, the students unsuccessfully filed suit in a federal trial court in Missouri.[120] On appeal, the Eighth Circuit reversed in favor of the students on the ground that school officials violated their First Amendment rights because the newspaper was a forum for students rather than a curricular publication.[121] When school officials sought further review, the Supreme Court agreed to intervene, reversing and remanding in their favor.[122] The Court determined that under the circumstances, because the newspaper was prepared as part of a class, coupled with the need to protect the privacy of the students and parents in the articles, school officials had the authority to act as they did.[123]

ii. Supreme Court Rationale

Writing for the Supreme Court in its five-to-three judgment, after reciting the facts, Justice White relied on the Court's precedent, recognizing that students in public schools "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[124] Moreover, he

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[115] *Id.* at 263.
[116] *Id.*
[117] *Id.* at 263–64.
[118] *Id.* at 264.
[119] *Id.* at 263–64.
[120] *Id.* at 264.
[121] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986).
[122] *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 479 U.S. 1053 (1987). The Court remanded the dispute to the Eighth Circuit which, in turn, returned the dispute to a federal trial court in Missouri. Kuhlmeier v. Hazelwood School Dist., 840 F.2d 596 (8th Cir. 1988). There is no further judicial history in the dispute. *Hazelwood*, 484 U.S. at 264–66.
[123] *Id.* at 268–70.
[124] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). Justice White was joined by Chief Justice Rehnquist along with Justices Stevens, O'Connor, and Scalia. *Hazelwood*, 484 U.S. at 261. Justice Brennan, joined by Justice Marshall, dissented. *Id.* at 277. There were only eight members on the High Court bench for *Hazelwood* because "[w]hen Lewis Powell retired in 1987, Reagan was unsuccessful in his effort to appoint his ideal choice, Judge Robert Bork, but Powell's ultimate replacement [was] Judge Anthony Kennedy from the . . . Ninth Circuit . . . ." Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1119 (1994). *Hazelwood* was argued on October 13, 1987. *Hazelwood*, 484 U.S. at 260. Justice Kennedy "took his seat on February 18, 1988." *Current Members*, SUPREME CT. OF THE U.S.,

indicated that students do not lose their right to express their opinions in school absent the fear on the part of educators that their doing so would "substantially interfere with the work of the school or impinge upon the rights of other students."[125] At the same time, he hastened to add that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,'" highlighting that they must be "applied in light of the special characteristics of the school environment."[126]

Justice White next addressed whether the student newspaper could be deemed a public (or open) forum, finding that it was not because public schools lack the characteristics of traditional open fora, such as streets and parks.[127] He maintained 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,' or by some segment of the public, such as student organizations."[128]

Justice White continued on to explain that the newspaper was neither an open forum nor did it become one by past practice because the school board's curriculum policy made it clear that it did not intend to create such a forum.[129] In so doing, he wrote that the curricular guidelines specified that producing the newspaper was part of a course, taught by a faculty member, during class hours, and was designed to teach students about journalism.[130] In addition, Justice White indicated that the course teachers selected the editors and assigned stories to members of the newspaper's staff.[131] Viewed collectively, Justice White was satisfied that these elements made it clear that because the newspaper was curricular in nature, school officials had the discretion to not publish the disputed articles.[132]

Rejecting the evidence the Eighth Circuit relied on in treating the newspaper as a public forum as "equivocal at best," Justice White agreed that the curriculum guide did grant students some discretion in writing the newspaper.[133] However, he observed that, pursuant to a school board policy, final decision-making about publication rested with the teacher and principal because students were participating in an academic class for which they

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https://www.supremecourt.gov/about/biographies.aspx (last visited Feb. 16, 2020). Therefore, Justice Kennedy played no part in its resolution. *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

[125] *Id.* (quoting *Tinker*, 393 U.S. at 509).

[126] *Id.* (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)); *id.* (quoting *Tinker*, 393 U.S. at 506).

[127] *Id.* at 267.

[128] *Id.* (citations omitted).

[129] *Id.* at 270.

[130] *Id.* at 268.

[131] *Id.*

[132] *Id.* at 270.

[133] *Id.* at 269.

received grades.[134] Consequently, Justice White distinguished *Hazelwood* from *Tinker* because the issue was not so much the right of students to speak as it was the duty of educators to avoid promoting particular student views.[135]

Justice White continued on, reflecting that

> [e]ducators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[136]

Again distinguishing *Tinker* from *Hazelwood*, Justice White decided that the standard used to consider whether educators can discipline students was inapplicable in situations where officials did not want to lend a school's name and resources to disseminate student speech essentially by providing it with the "imprimatur of the school."[137] Rather, in key language mirroring the rational basis test used in equal protection analysis, Justice White explained that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[138] The significance of this language is that if educators meet this standard, whether dealing with student expressive activities or other areas, their actions are likely to withstand challenges.

In the final section of his opinion, Justice White turned to the role of the principal, upholding his authority to remove the first column in light of its possible identification of unnamed pregnant students along with references to sexual activity deemed inappropriate for some younger readers.[139] Justice White also ruled that the principal had the discretion to remove the second article due to his concerns over the student's unilateral criticism of her father over the divorce of her parents.[140]

Rounding out his analysis, Justice White emphasized that under the short time frame he had to act in considering whether to allow the two disputed articles to be published, the principal exercised his judgment reasonably.[141] Further buttressing his analysis, Justice White suggested that the principal may have had the concern that the student in the class who wrote

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[134] *Id.* at 268–69.
[135] *Id.* at 270–71.
[136] *Id.* at 271.
[137] *Id.* at 271–73.
[138] *Id.* at 273.
[139] *Id.* at 274–75.
[140] *Id.*
[141] *Id.* at 275–76.

"and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper."[142] Justice White thus concluded by stating that school officials had not violated the First Amendment rights of the students.[143]

iii. Dissent

In a strident dissent, Justice Brennan, joined by Justice Marshall, and Justice Blackmun, argued that the majority should have applied *Tinker* when reviewing *Hazelwood*.[144] To this end, he contended that the principal "violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose."[145] Amazingly though, in referring to the actions of the principal as censorship, Justice Brennan ignored the legal issues associated with the possible invasion of privacy charges the pregnant students could have raised and potential for a defamation suit associated in the story about the father's divorce.[146]

Justice Brennan continued on to distinguish disruptive speech with that which is at odds with messages that conflict with the positions of the school board and educators.[147] Yet, in doing so, he ignored the fact that as a curricular activity, students needed to be taught the boundaries of responsible journalism, such as the need to validate sources and speak with both sides of a controversy in an attempt to ensure fairness before disseminating stories that might result in litigation. Even if he would have been willing to concede that officials had some right to act, Justice Brennan disagreed with the way the principal acted, ignoring how late in the school year it was, suggesting that he should have searched for alternative options rather than simply delete the stories and the pages on which they were contained.[148]

iv. Post-*Hazelwood* Litigation

Disputes involving student newspapers continued post-*Hazelwood*.

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[142] *Id.* at 276.

[143] *Id.* Courts have reached different outcomes over whether *Hazelwood* applies in higher education. *See* Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that Hazelwood has little application to this case."). *But see* Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006) ("*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.").

[144] *Hazelwood*, 484 U.S. at 277, 282.

[145] *Id.* at 278.

[146] *Id.* at 278–81.

[147] *Id.* at 279–80.

[148] *Id.* at 282.

For example, a student editor sued educational officials, alleging they violated his free speech rights when they retracted printed copies of the school newspaper containing his editorial critical of immigration due to parental complaints about its content, even though the superintendent had not read the essay.[149] An appellate court in California, relying on *Tinker*, *Fraser*, and *Hazelwood*, reversed an earlier order to the contrary, and held that the officials violated his constitutional and statutory rights to freedom of speech.[150] According to the court, even though the editorial "communicate[d] [the student's] viewpoint in a disrespectful and unsophisticated manner," it was protected speech because it was unlikely to have created a disruption at the high school.[151]

On the other hand, in a case from New York, students challenged their principal and superintendent for refusing to allow them to publish a cartoon depicting stick figures in sexual positions in the high school's newspaper.[152] The Second Circuit affirmed the case, reasoning that because the newspaper was a limited public forum, school officials had the authority to act as they did.[153] Relying largely on *Hazelwood*, the court agreed that officials had no obligation to print the cartoons it described as lewd insofar as their actions were reasonably related to the legitimate pedagogical concern that the cartoon would have undermined their concerted efforts to stress the seriousness of sexual relations among students.[154]

A different issue arises when student newspapers accept advertising. In the first post-*Tinker* case citing it in a school context, a federal trial court in New York granted students' request for declaratory and injunctive relief when officials rejected their request to publish a paid advertisement about American policy in Vietnam.[155] The court commented that insofar as it appeared that the newspaper, as a forum for dissemination of ideas open to free expression of ideas in news and editorial columns and letters to editor, included articles on war and the draft, there was no logical reason to forbid it from printing a paid advertisement on the same topic.[156]

Conversely, more than twenty years later, relying on *Hazelwood*, the Ninth Circuit affirmed that because student publications were not open fora, and officials in Nevada did not create limited-purpose fora by opening them up for advertisers, educators could apply reasonable editorial control over the content of a student newspaper.[157] Accordingly, the court asserted that by

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[149] Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 508, 511–12 (Cal. Ct. App. 2007).
[150] *Id.* at 515–16, 527.
[151] *Id.* at 521.
[152] R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 540 (2d Cir. 2011).
[153] *Id.* at 540–42.
[154] *Id.* at 535.
[155] Zucker v. Panitz, 299 F. Supp. 102, 102–03, 105 (S.D.N.Y. 1969).
[156] *Id.* at 104–05.
[157] Planned Parenthood of S. Nev. v. Clark Cty. Sch. Dist., 941 F.2d 817, 819, 823–24 (9th Cir. 1991).

excluding advertisements from a range of organizations, including, as here, a group focused on family planning, they kept their limited open forum intact.[158]

A dispute arose in Massachusetts when student editors refused to modify their newspaper and yearbook policy under which they agreed to refrain from publishing political or advocacy advertising, including those for candidates for student government.[159] The First Circuit affirmed that officials were not liable for refusing to publish advertisements promoting sexual abstinence because the student policy did not involve state action.[160]

A federal trial court in Ohio rejected a male student's free speech claim when school officials disciplined him for writing a sexually related message in the yearbook of a female friend.[161] Relying in part on *Fraser*, the court recognized the right of officials to prevent students from engaging in vulgar or offensive speech, including sexual innuendo.[162]

In New Hampshire, a father and son sought to enjoin editors of the high school's yearbook when they refused to include a portrait of the latter holding a skeet shotgun in his class picture.[163] The plaintiffs rejected the proposal the editors offered, namely to include the picture in the community sports section of the yearbook.[164] Refusing to enjoin the editors, the federal trial court decreed that because the content-neutral high school yearbook policy, barring use of any props as part of senior portraits, precluded the likelihood that the plaintiffs would prevail on a claim that the editors violated his First Amendment rights.[165]

D. Morse v. Frederick

i. Facts and Judicial History

In *Morse v. Frederick*, the Supreme Court considered the free speech rights of students at school-supervised events.[166] *Morse* began when a high school principal suspended a student who was at a parade near his school watching the Olympic Torch as it passed through Juneau, Alaska.[167]

The principal allowed students and staff who supervised the event to leave class to watch the relay as an approved school event.[168] On seeing the

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[158] *Id.* at 826–28.
[159] Yeo v. Town of Lexington, 131 F.3d 241, 242 (1st Cir. 1997).
[160] *Id.* at 242–43.
[161] Doe v. DePalma, 163 F. Supp. 2d 870, 871, 874 (S.D. Ohio 2000).
[162] *Id.*
[163] Douglass v. Londonderry Sch. Bd., 372 F. Supp. 2d 203, 204 (D.N.H. 2005).
[164] *Id.* at 206.
[165] *Id.* at 211–13.
[166] Morse v. Fredrick, 551 U.S. 393, 396 (2007).
[167] *Id.* at 397.
[168] *Id.*

student, who arrived late, with friends, unfurl a fourteen-foot banner which read "BONG HiTS 4 JESUS," because she interpreted it as advocating illegal drug use, the principal ordered him to stop doing so.[169] All of the students other than the plaintiff complied with the principal's order put the banner away.[170] The principal confiscated the banner and ordered the student to come to her office at which time she suspended him from school for ten days.[171] The student appealed his suspension to the superintendent who reduced it to time served at that point, eight days.[172]

In response, the student filed suit challenging his suspension under Section 1983, alleging that the principal violated his First Amendment right to free speech, seeking a declaratory judgment, an injunction to remove the reference to the ten-day suspension from his school records, damages, and other relief.[173] The federal trial court in Alaska, in an unreported order, granted motions for summary judgment in favor of the principal and school board on the basis that they did not violate the student's constitutional rights and that, even if they did, they had qualified immunity that protected them from liability.[174]

On further review, the Ninth Circuit reversed in favor of the student because it was convinced that his actions did not rise to the level of a *Tinker* type risk of substantial disruption.[175] The court also noted that insofar as the student's right to display the banner was clearly established, the principal was not entitled to qualified immunity from personal liability.[176] Subsequently, the Supreme Court agreed to hear an appeal.[177] Reversing in favor of the principal and board, the Court upheld the right of school officials to restrict speech that they consider to be promoting drug use, thereby clarifying the free speech rights of students at school-supervised events.[178]

ii. Supreme Court Rationale

As author of the Supreme Court's six-to-three judgment, Chief Justice Roberts began his substantive analysis by reviewing its precedent in student speech cases, borrowing from each of its three prior judgments in this

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[169] *Id.* at 397–98.

[170] *Id.* at 398.

[171] Although the Supreme Court did not review these facts, the record revealed that rather than go straight to the principal's office the student retrieved his books and went to class. Frederick v. Morse, No. J 02-008 CV(JWS), 2003 WL 25274689, at *1 (D. Alaska May 27, 2003). When he did go see the principal, the student refused to name those who were with him. *Id.* On being suspended, the student claims that the principal raised his suspension from five to ten days because he quoted Thomas Jefferson on freedom of expression. *Id.*

[172] *Morse*, 551 U.S. at 398.

[173] *Frederick*, 2003 WL 25274689 at *1–4.

[174] *Frederick*, 2003 WL 25274689 at *1.

[175] Frederick v. Morse, 439 F.3d 1114, 1123 (9th Cir. 2006).

[176] *Id.* at 1125.

[177] *See generally id.*

[178] Morse v. Frederick, 551 U.S. 393, 409–10 (2007).

area.[179] He reasoned that although "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" neither are "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[180] As such, Chief Justice Roberts noted that the rights of students "must be 'applied in light of the special characteristics of the school environment.'"[181] Chief Justice Roberts explained:

> Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.[182]

The Chief Justice rejected the student's claim that this was not a school speech case because the events occurred during the class day as a school-sanctioned event that was supervised by teachers and administrators.[183] In addition, acknowledging that the message on the banner was cryptic and conceding that the boundaries of what constitutes school speech can be close ones, Chief Justice Roberts pointed out that this was not the situation in *Morse*.[184] Instead, he remarked that the principal's interpretation of the sign as promoting or advocating the smoking of marijuana was justifiable, a position that the dissent disputed.[185] Chief Justice Roberts thus viewed the question before the Court as whether a principal may restrict student speech at a school event.[186]

By answering his previous question in favor of granting the principal the authority to act as she did in a manner consistent with the First Amendment, Roberts specified that *Tinker* made it clear that the free speech rights of students must be considered in light of the "special characteristics" of the school environment.[187] Reviewing the Court's next speech case, *Bethel*, Chief Justice Roberts indicated that it generated two principles.[188]

First, Chief Justice Roberts interpreted *Fraser* as standing for the

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[179] *Morse*, 551 U.S. at 396 (2007). Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito. *Id.* at 395. Justice Thomas filed a concurring opinion. *Id.* at 410. Justice Alito filed a concurring opinion which Justice Kennedy joined. *Id.* at 422. Justice Breyer, concurring in the judgment, dissented in part. *Id.* at 425. Justice Stevens's dissenting opinion was joined by Justices Souter and Ginsburg. *Id.* at 433.

[180] *Id.* at 396 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *id.* at 396–97 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986)).

[181] *Id.* at 397 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

[182] *Id.*

[183] *Id.* at 400–01.

[184] *Id.* at 409.

[185] *Id.* at 402.

[186] *Id.* at 403.

[187] *Id.*

[188] *Id.* at 404–05.

proposition that the constitutional rights of students are not coextensive with those of adults in other places.[189] Second, he declared that *Fraser* made it clear that *Tinker* was neither absolute nor the only basis for restricting student speech.[190] At the same time, Chief Justice Roberts distinguished *Fraser* from *Hazelwood* insofar as the disputed banner in the case at bar could not reasonably have been viewed as having the school's approval.[191] Drawing on these principles in determining that that the Court's Fourth Amendment jurisprudence realized the important, and perhaps even compelling, interest of educators to deter student drug use, Chief Justice Roberts decided that the principal acted properly in disciplining the student's having displayed the banner.[192]

Nearing the end of his order, Chief Justice Roberts rejected the board's argument that the principal had the authority to ban the banner under the *Fraser* "patently offensive" standard.[193] He did so because he feared that applying this standard would have granted school officials too much authority.[194] Chief Justice Roberts was then satisfied that the principal acted out of the legitimate concern of preventing the student from promoting illegal drug use.[195]

In the final substantive paragraph of his order, Chief Justice Roberts found that when the student unfurled that banner, communicating a pro-drug message in violation of board policy, had the principal failed to intervene, her inaction would have sent a strong message to students about the seriousness of the dangers of illegal drug use.[196] Chief Justice Roberts ended by writing pithily that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[197]

iii. Concurrences

Justice Thomas penned a lengthy concurrence in which he expressed his displeasure with *Tinker*.[198] He maintained that insofar as the First Amendment does not confer any justifiable defense for the free speech rights of students, *Tinker* has no basis in the Constitution.[199] In harsh criticisms of *Tinker*, he posited that "[i]n the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public

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[189] *Id.* at 404.
[190] *Id.* at 405.
[191] *Id.*
[192] *Id.* at 406–10.
[193] *Id.* at 409.
[194] *See id.* at 409.
[195] *Id.* at 410.
[196] *Id.* at 409–10.
[197] *Id.* at 410.
[198] *Id.*
[199] *Id.*

schools."[200] Justice Thomas concluded that he joined the majority "opinion because it erodes *Tinker*'s hold in the realm of student speech . . . by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."[201]

Justice Alito, joined by Justice Kennedy, authored a separate concurrence in which he agreed with the majority to the extent that it restricted speech advocating illegal drug use.[202] However, Justice Alito would have gone no further, as he refused to extend such a ban to, for example, political or social issues.[203]

Justice Breyer concurred in part, joining in the judgment of the Court, and dissented in part.[204] He would have limited the case to holding that qualified immunity barred the student's claim for monetary damages and would have gone no further.[205] Moreover, Justice Breyer considered it to be "unwise and unnecessary" to review the First Amendment question because he was not convinced that school officials acted properly.[206]

iv. Dissent

Justice Stevens's dissent was joined by Justices Ginsburg and Souter.[207] He argued that the student's attention-grabbing, "nonsense banner," which he designed to afford him a rare opportunity to appear on national television, was protected speech that neither violated a permissible school rule nor advocated conduct that was either illegal or harmful to students.[208] If anything, Justice Stevens contended that allowing school officials to punish the student did "serious violence to the First Amendment."[209] At the same time, he agreed with the majority that the principal should not have been liable but failed to provide a rationale justifying his position.[210]

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[200] *Id.* at 421.
[201] *Id.* at 422.
[202] *Id.*
[203] *Id.*
[204] *Id.* at 425.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 433.
[208] *Id.* at 435.
[209] *Id.*
[210] *Id.* at 434. On a final note, it is worth mentioning a comment Justice Stevens made that can, at best, be described as his questionable use of free speech as he again apparently sought to titillate. *See id.* at 446; *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 691 (Stevens, J., dissenting) (referencing Rhett Butler's parting words to Scarlett O'Hara in *Gone with the Wind*). At worst, Justice Stevens exceeded the bounds of judicial decency in his abuse of his right to all but unfettered free speech from the bench by mocking the Catholic faith. *Morse*, 551 U.S. at 446. Justice Stevens misused his platform as a jurist to express his own views, emoting that "I find it hard to believe the Court would support punishing [the student] for flying a 'WINE SiPS 4 JESUS' banner—which could quite reasonably be construed either as a protected

v. Remand

On remand, the Ninth Circuit, vacated its earlier judgment, returning the case to the federal trial court in Alaska.[211] Although there is no further judicial record in the dispute over the board's claim for attorney fees, it "settled with Frederick and his lawyers for $45,000."[212]

E. Student Use of Technology

Technology in its various forms, such the internet and cell phones,

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religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would." *Id.*

Justice Stevens's statement should be troubling to educational leaders who are responsible for maintaining safe and orderly learning environments and the attorneys who work with them because Justice Stevens's words all but invite students to display such a disrespectful, mocking attitude to the sincerely held religious beliefs of Roman Catholics and perhaps other Christians in their school communities. *See id.* Further, Stevens's words should cause consternation among members of the legal community because his irrelevant remark, gratuitously making light of Catholic teachings, was totally uncalled for given the speech issue before the Supreme Court.

It certainly may be argued that one might be able to make such an exaggerated point as Justice Stevens did in a hypothetical question during a class discussion in a law school class or among a group of lawyers in appropriate academic environments. Even so, it is puzzling at best why Justice Stevens chose to pen such a disrespectful statement demonstrating religious bigotry against Roman Catholics, in particular, coupled with his clear disregard and lack of respect for their long-held belief that the sacramental wine becomes the blood of Christ at the moment of consecration during a Mass. *See id.* Stevens's comment calls to mind a pithy quote about anti-Catholic bigotry. According to Peter Steinfels, "[i]t has been many years since the poet and essayist Peter Viereck called anti-Catholicism 'the anti-Semitism of the intellectuals.'" Peter Steinfels, *Beliefs*, N.Y. TIMES (May 3, 1997), https://www.nytimes.com/1997/05/03/us/beliefs-908789.html. Viereck's actual words were that "Catholic-baiting is the anti-Semitism of the liberals." PETER VIERECK, SHAME AND GLORY OF THE INTELLECTUALS 45 (1953). While Viereck's words are often misquoted, as reflected by Steinfels's words, the spirit of his comment remains true. *See also* MARK S. MASSA, ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE 7 (2003) (identifying anti-Catholicism as the "anti-Semitism of the intellectuals"). The Catechism of the Catholic Church explains that:

> [B]y the consecration of the bread and wine there takes place a change of the whole substance of the bread into the substance of the body of Christ our Lord and of the whole substance of the wine into the substance of his blood. This change . . . [is] fittingly and properly called transubstantiation.

THE CATECHISM OF THE CATHOLIC CHURCH § 1376 (2d ed. 1993) (citations omitted). Further, "[t]he Eucharistic Presence of Christ begins at the moment of consecration and endures as long as the Eucharistic species subsist." *Id.* § 1377 (internal citations omitted). Surprisingly, a recent study reveals that most Catholics do not accept transubstantiation. Gregory A. Smith, *Just one-third of U.S. Catholics agree with their church that Eucharist is body, blood of Christ*, PEW RES. CTR: FACT TANK, NEWS IN THE NUMBERS (Aug. 5, 2019), https://www.pewresearch.org/fact-tank/2019/08/05/transubstantiation-eucharist-u-s-catholics/?utm_source=Pew+Research+Center&utm_campaign=910989fab0-EMAIL_CAMPAIGN_2019_08_07_12_11&utm_medium=email&utm_term=0_3e953b9b70-910989fab0-399916797.

Rather than treat the beliefs, values, and sensitivities of Roman Catholics as disrespectfully as he did, he would have been better advised not to adopt such an approach in illustrating whatever preposterously unclear point he was trying to make. By writing derisively about sacramental wine, Justice Stevens took the low road. In other words, he treated beliefs going to the heart of what it means to be Roman Catholic as an object of derision to be mocked at will in making his unprofessional, bigoted remark, offering his odious comment unworthy of the dignity of a Supreme Court Justice of the United States. In reviewing Justice Stevens's comment, one must wonder whether Justices should have such absolute freedom of speech to malign the good faith religious beliefs of others from their perches on judicial benches.

[211] *See generally* Frederick v. Morse, 499 F.3d 926 (9th Cir. 2007).

[212] Mark Walsh, *Settlement Reached in 'Bong Hits 4 Jesus' Case*, EDUC. WEEK (Nov. 7, 2008), https://blogs.edweek.org/edweek/school_law/2008/11/settlement_reached_in_bong_hit.html?r=522197689.

continues to become an increasingly important tool in schools.[213] Moreover, as litigation arises, often over student misuse of these fora, the courts have reached markedly different outcomes over the extent to which educators can punish pupils for breaking school rules if they speak or express themselves inappropriately via these platforms.[214] Due to the relative dearth of litigation on the use of other forms of technology, such as cell phones, for First Amendment issues, but for a review of the limited litigation on sexting, this section focuses on social media.[215]

i. The Internet and Social Media

A recent Pew Research Center Report, *Teens, Social Media & Technology 2018*, conducted in the United States during March and April 2018 provides evidence of the major role social media plays in schools.[216] According to this report, "95% of teens now report they have a smartphone or access to one. These mobile connections are in turn fueling more-persistent online activities: 45% of teens now say they are online on a near-constant basis."[217] Moreover, "[t]oday, roughly half (51%) of U.S. teens ages 13 to 17 say they use Facebook, notably lower than the shares who use YouTube, Instagram or Snapchat," which are used by eighty-five percent, seventy-two percent, and sixty-nine percent of American teenagers, respectively.[218]

A growing body of litigation is emerging in the United States has involved student use, and misuse, of social media.[219] Perhaps the earliest case arose in Missouri where a federal trial court granted a student's request for a preliminary injunction to prevent officials from subjecting him to unspecified

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[213] For discussions of the role of technology in schools, see, e.g., Feng Liu et al., *Explaining Technology Integration in K-12 Classrooms: A Multilevel Path Analysis Model*, 65 EDUC. TECH RES. & DEV. 795 (2017) and *Use of Technology in Teaching and Learning*, U.S. DEP'T OF EDUC., https://www.ed.gov/oii-news/use-technology-teaching-and-learning (last visited Feb. 16, 2020).

[214] *See infra* Section III.E.i.

[215] A.F. v. Kings Park Cent. Sch. Dist., 341 F. Supp. 3d 188, 201 (E.D.N.Y. 2018). An unusual case arose in New York where a federal trial court granted a school board's motion for summary judgment after officials suspended two students for one day after they received a text message on their cell phones in their homes, after school hours, containing a video of two minors engaged in sexual activity. *See generally id.* Neither student possessed the text message in school or on school property as both deleted it right after receiving. *Id.* The court upheld the suspensions because, insofar as the lawyers for the students failed to make an adequate allegation that that the actions of school officials had an objective chilling effect on their speech, they failed to state First Amendment retaliation claims. *Id.* Cases involving cell phones typically involve searches under the Fourth Amendment. *See, e.g.*, Jackson v. McCurry, 303 F. Supp. 3d 1367, 1378 (M.D. Ga. 2017) (granting an assistant principal's motion for qualified immunity for a Fourth Amendment claim based on his warrantless search of text messages on student's cell phone). *But see* Gallimore v. Henrico Cty. Sch. Bd., 38 F. Supp. 3d 721, 725 (E.D. Va. 2014) (rejecting an associate principal's motion for qualified immunity in the face of the claim she violated the Fourth Amendment when she searched his cell phone because reasonable administrator could have expected to discover marijuana in a student's cell phone). *See also infra* Section III.E.ii.

[216] Monica Anderson & Jingjing Jiang, *Pew Research Center Report on Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

[217] *Id.*

[218] *Id.*

[219] *See infra* Section III.E.i.

penalties because he posted vulgar and insulting comments critical of the school, its administration, and its teachers on his personal homepage.[220] Ruling that absent evidence the student's posts were disruptive, school officials could not discipline him for placing them on his homepage simply because they were either upset by or disliked what he wrote insofar as punishing him would have violated his right to free speech.[221]

Courts uphold sanctions against students who misuse social media sites, such as the now functionally defunct Myspace along with Facebook, Instagram, Snapchat, and Twitter, when they are convinced these are what jurists often refer to as "true threats" that can result in reasonable forecasts of material and substantial disruptions and/or harm to those in schools.[222] By way of illustration, courts have upheld punishments against students for such infractions, such as posting rap videos on Facebook and YouTube containing explicit and threatening language directed at coaches; mocking classmates on Twitter and YouTube; "joking" on Facebook about a bombing that created problems at school; using instant messaging to communicate with a friend about the student's desire to bring weapons to school to harm others; sending friends violent and threatening instant messages from home about a student's plans to conduct a shooting at school; "tweeting" a message to a peer threatening to stab her with a knife in school insofar as educators provided her with adequate due process before she was excluded from school; posting videos of shootings on Instagram; and a student posting two pictures of himself wearing a trench coat and beanie, the first while posing with an assault rifle, the second without the weapon but accompanied by language about who he would shoot if he wanted to make an impact at school.[223] At the same time,

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[220] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998) ("It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.").

[221] *Id.* at 1181; *see also* Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (enjoining a principal from suspending a student who created a group on Facebook encouraging her peers to express dislike of a named teacher at her school, on the basis that she engaged in protected free speech because the remarks were published off-campus, were not accessed at school, and did not cause any disruption in school; the court also highlighted the fact that the posting was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior); People *ex rel.* R.C., 411 P.3d 1105, 1105 (Colo. Ct. App. 2016) (refusing to treat a photo on Instagram of a male sex organ superimposed over the face of a male peer as disruptive).

[222] For a case not involving technology, see *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 712 (9th Cir. 2019) (affirming a grant of summary judgment in favor of a school board when it expelled a student once educators discovered a hit list in the journal he created off-campus, in which he named peers who must die, as a genuine threat because he had access to firearms). *See also* J.R. v. Penns Manor Area Sch. Dist., 373 F. Supp. 3d 550, 554 (W.D. Pa. 2019) (granting a school board's motion to dismiss after officials expelled a student for having a discussion with peers in school about "who they would shoot if they were to do a school shooting" because officials took the threat seriously).

[223] Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015); Dunkley v. Board of Educ. of Greater Egg Harbor Reg'l High Sch. Dist., 216 F. Supp. 3d 485 (D.N.J. 2016); R.L. v. Central York Sch. Dist., 183 F. Supp. 3d 625, 630 (M.D. Pa. 2016); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756 (8th Cir. 2011); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1065 (9th Cir. 2013); C.Y. v. Lakeview Pub. Schs., 557 F. App'x. 426, 427 (6th Cir. 2014); A.N. v. Upper Perkiomen Sch. Dist., 228 F. Supp. 3d 391, 393 (E.D. Pa. 2017); McKinney *ex rel.* K.P. v. Huntsville Sch. Dist., 345 F. Supp. 3d 1071, 1073 (W.D. Ark. 2018). Five days later, the court rejected the student's request to enjoin his 365-day expulsion and for other forms of relief. McKinney *ex rel.* K.P. v. Huntsville Sch. Dist., 350 F. Supp.

courts enter judgments in favor of students if educators fail to demonstrate that their activities were true threats or disruptive.[224]

A related case arose in Nebraska where the state's highest court dismissed the appeal filed on behalf of a student, who failed to comply with state statutory requirements, when she challenged her suspension because it lacked subject matter jurisdiction to review the dispute.[225] The case arose when officials suspended the student for fifteen days upon learning that she used her cell phone to post a message on an unnamed social media site suggesting that there might be a shooting at school.[226] The court agreed that officials had the authority to suspend the student because her posting caused a substantial disruption at school.[227]

Courts reach similar results in disputes over whether students used inappropriate language when posting messages on social media sites. In Pennsylvania, a federal trial court enjoined officials from removing a cheerleader from her team for posting a picture, taken off campus, on Snapchat of her and a friend as they held up their middle fingers with profane language superimposed on the image.[228] The court decided that insofar as the student had a First Amendment right to express herself away from school, she would have suffered an irreparable harm if she were removed from the team.[229]

A year later, the federal trial court in Utah refused to enjoin school

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3d 757, 762 (W.D. Ark. 2018). *See also* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567 (4th Cir. 2011).

[224] Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015) (refusing to treat a student's comment that his teacher "needs to be shot" as a "true threat"); T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch., 807 F. Supp. 2d 767, 790 (N.D. Ind. 2011) (invalidating the suspensions of students on a high school volleyball team, who posted videos of scantily clad female members on both Myspace and Facebook, in rejecting the board's claim that if others viewed the photographs there would have been substantial school disruptions).

[225] J.S. v. Grand Island Pub. Schs., 899 N.W.2d 893, 899 (Neb. 2017).

[226] *Id.* at 896.

[227] *Id.* at 897–99.

[228] B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019). For an article on this topic, see Allan G. Osborne & Charles J. Russo, *Can Students be Disciplined for Off-campus Cyberspeech: The Reach of the First Amendment in the Age of Technology*, BYU EDUC. L. J. 331, 344 (2012).

[229] *B.L.*, 376 F. Supp. 3d at 444. For two earlier cases, both from Pennsylvania, decided on the same day and reaching the same outcome involving students and Myspace, see *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (affirming that educators violated the First Amendment rights of a student they suspended for using his grandmother's home computer to create a fake internet profile of his principal, rejecting their defense that they could punish him for lewd and offensive expressive conduct outside of school) and J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (finding that educational officials violated the First Amendment rights of an eighth-grader, who used her home computer to create a fake profile of her principal, suggesting that he was, among other things, a sex addict and a pedophile, because she took specific steps to try to keep the profile "private" so only her friends could access it, and it was so outrageous as to not be taken seriously; the court rejected the educators' claim that the posting could reasonably have led to a forecast of a substantial disruption of, or material interference with, school activities). *But see* S.J.W. ex rel. Wilson v. Lee's Summit Sch. Dist., 696 F.3d 771 (8th Cir. 2012), *reh'g and reh'g en banc denied* (2012) (invalidating an injunction that overturned the long-term suspensions and transfers of twin brothers to an alternative school for posting offensive entries online, including one naming a female peer, because they had not suffered an irreparable harm).

officials from dismissing a high school student from her cheerleading squad for violating a team policy by posting an eight-second video on Snapchat in which she used inappropriate language.[230] The court was satisfied that the student received a sufficient explanation and instruction on the topic before posting the video and then deleting it thirty minutes after putting it online because she did not think it was appropriate.[231] The court also rejected the student's claim that she would have suffered an irreparable harm because officials offered her various options to gain reinstatement to the team.[232]

ii. School Reactions to Student Sexting: Forecasting Issues the Supreme Court May See Down the Road

A tragic case involving sexting, the practice of sending naked photos of oneself, mostly involving cell phones, occurred in Ohio after an eighteen-year-old high school student e-mailed a nude photograph of herself to her boyfriend, who apparently passed it on to four of her friends, who apparently forwarded it to other students.[233] Over the following weeks, hundreds of teenagers in local high schools viewed the student's picture, apparently on their cell phones.[234] As a result of being subjected to bullying and humiliating taunts, even at her graduation, the student took her own life in July of 2008.[235]

In response to the parents' Title IX and Section 1983 suits, a federal trial court in Ohio denied the board's motion for summary judgment because questions of fact remained about whether school officials did all they could to protect the student who committed suicide.[236] The court did grant the board's motion for summary judgment with regard to the parents' negligent infliction of emotional distress charge on the basis that the board and individual school officials were entitled to immunity.[237]

In an early case, the Supreme Court of Alabama affirmed a grant of

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[230] Johnson *ex rel.* S.J. v. Cache Cty. Sch. Dist., 323 F. Supp. 3d 1301, 1309 (D. Utah, 2018).

[231] *Id.*

[232] *Id.* at 1315.

[233] For an article on point, see Charles J. Russo, Allan G. Osborne, & Kelli Jo Arndt, *Cyberbullying and Sexting: Recommendations for School Policy*, 269 EDUC. L. REP. 427 (2011).

[234] Cindy Kranz, *Family Wants Tougher Law*, CINCINNATI ENQUIRER, (March 22, 2009), at A1 (reporting on the suicide of an eighteen-year-old in suburban Cincinnati, Ohio, who after e-mailing a nude photo of herself to a boyfriend ultimately committed suicide).

[235] *Id.*

[236] Logan v. Sycamore Cmty. Sch. Bd. of Educ., No. 1:09-CV-00885, 2012 WL 2011037 (S.D. Ohio 2012). Earlier, the court ruled that a police officer involved in the case was entitled to qualified immunity. Logan v. Sycamore Cmty. Sch. Bd. of Educ., 780 F. Supp. 2d 594, 595 (S.D. Ohio 2011). According to the portion of Title IX at issue, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2019); *see also supra* note 70 and accompanying text.

[237] *Logan*, 2012 WL 2011037 at *18–21. For a tragic incident from Florida, see Andrew Meacham, *A Shattered Self Image*, ST. PETERSBURG TIMES (Nov. 29, 2009), at 1 A (reporting on the suicide of a thirteen-year-old in the Tampa, Florida area who took her life three months after sending a picture of her naked breasts to a male she liked who then forwarded the image to others, resulting in her being harassed at school).

summary judgment in favor of officials who expelled female ninth-graders for taking nude photographs of themselves and e-mailing them to male friends.[238] The court ruled that the students failed to produce evidence that officials breached their registration contracts, invaded their rights to privacy, and/or violated their rights to due process.[239]

In a similar case, the Third Circuit affirmed that a district attorney in Pennsylvania could not require high school students who sexted pictures of themselves to write papers explaining why their behavior was inappropriate rather than face criminal charges with potentially lengthy sentences.[240] The court explained that the district attorney could not impose such a penalty because in doing so, he violated their First Amendment rights to be free from compelled speech.[241]

iii. Parting Reflections on Technology in Schools

Technological innovations in communications, particularly via such portable, hand-held devices as smart phones and tablets, along with laptop computers, makes it easier for all, including students, to be in constant contact with one another. As such, it should not be surprising that students have devised unanticipated and unintended uses for technology. Many of these unintended uses of technology raise potential significant First Amendment speech claims with legal implications for educational leaders and the attorneys with whom they work in devising policies governing the parameters of student speech in cyberspace. Consequently, challenges arise in light of all but impossible task of seeking to monitor student uses of technology, particularly if it involves the (mis)use of their own personal devices that has led to some dire consequences and a growing body of litigation on sexting and cyberbullying.[242]

As noted in the brief preceding discussion of student use, and misuse, of technology, the courts are doing their best as they struggle to provide consistent guidance for educators and their lawyers as they seek to regulate student use, and misuse, of technology.[243] On the one hand, as reflected on in the introduction, one might be tempted to wish that the Supreme Court would step into the fray to provide guidance. Yet, on the other hand, even if the Court were to intervene, it remains to be seen how valuable such precedent would be in light of the rapid growth in technology giving rise to novel First

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[238] S.B. v. Saint James Sch., 959 So. 2d 72, 81, 101 (Ala. 2006).

[239] *Id.* at 91.

[240] Miller v. Mitchell, 598 F.3d 139, 142–43 (3d Cir. 2010).

[241] *Id.* at 151. *See also* State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) (affirming the criminal conviction of an eighteen-year-old high school senior for sending two pictures, including one of his genitals, to a fourteen-year-old female in his school).

[242] *See, e.g.*, *supra* notes 234 and 237 discussing the suicides of students who were harassed by peers when it became known that they had engaged in sexting.

[243] *Supra* Section III.E.i. *See, e.g.*, *supra* note 229 for seemingly conflicting outcomes.

Amendment claims that might render its judgment all but moot on the day it is handed down.

IV. RECOMMENDATIONS FOR PRACTICE

Clearly, educational leaders, working in conjunction with their school boards and Attorneys, must develop policies to assist them in meeting their duty to maintain safe and orderly school environments that are open and inviting to all students. At the same time, policies must safeguard the rights of students to free speech and expression. Yet, in the highly charged and increasingly politicized world within which American public schools operate, educators and students often find themselves in the forefront of the battle over the right to free speech and expression. As this fight rages on, educators, boards, and their lawyers are charged with the difficult task of balancing the two sometimes conflicting ends of keeping schools safe while protecting the rights of students to free speech on controversial topics. In walking a fine line between supporting the right to free speech but not letting students harm the sensitivities of others, the trick for educators is developing policies to safeguard the rights of all students.

As a precursor to discussing the content of policies, educators should keep in mind that the First Amendment does not prohibit students from expressing points of view that may be controversial or unpopular. Consequently, educators need to be as clear as possible when attempting to identify the tricky nexus between free speech and harming or insulting others when discussing such controversial topics and issues involving politics, and human sexuality, and individual lifestyle issues. Aware of the various forms student expressive activities can take, the following suggestions are offered as food for thought for boards, educational leaders, and their attorneys as they revise their policies addressing student speech and expression:

Seek Parental Input and Support

Aware of the importance of parental involvement, the far-reaching Federal Every Student Succeeds Act, which, speaks of "parent and family engagement," rather than parental involvement, obligates all local school boards receiving federal financial aid to devise policies on this important topic.[244] Consequently, as an initial matter, when devising or revising

[244] *See, e.g.*, Cornelia A. Reece, Marlys Staudt, & Ashley Ogle, *Lessons Learned from a Neighborhood-Based Collaboration to Increase Parent Engagement*, 23 SCH. CMTY. J. No. 2, 207, 207 (2013); Patricia A. Spradley, *Building Parent Capacity*, AASA SCH. ADMIN'R (Aug. 2019), http://my.aasa.org/AASA/Resources/SAMag/2019/Aug19/Spradley.aspx; *Parental Involvement Policy*, OHIO DEP'T OF EDUC., http://education.ohio.gov/Topics/District-and-School-Continuous-Improvement/Federal-Programs/Elementary-and-Secondary-Education-Act/Parental-Involvement-Policy (last visited Feb. 6, 2020); Charles J. Russo, *An Overview of the Every Student Succeeds Act*, DEP'T OF EDUC. LEADERSHIP AT ECOMMONS, https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1164&context=eda_fac_pub (last visited Feb. 16, 2020). Pursuant to the Every Student Succeeds Act, "[e]ach local educational agency [or school board]

policies, educational leaders would be wise to seek input from parents.[245]

Seeking parental input is important because their support is crucial in helping to direct the education of their children, as well as in helping them to learn the importance of following reasonable rules governing personal conduct. Thus, before revising or adopting policies dealing with the broad topic of student speech and expression, educational leaders would be well advised to sound out parents to see whether they will be supportive of policies or rules, especially those dealing with the personal appearances of their children.

While certainly not wishing to grant them a "heckler's veto," if parents are unwilling to support speech policies, however widely defined, educational leaders may want to consider gaining their support and involvement before acting. Ultimately, if parents are uncooperative, disputes over school rules can unnecessarily consume a great deal of district time, energy, and money.

Seek Wide Variety of Perspectives

Assuming school boards do not contract out the duty of writing policy for their districts, policy writing, reviewing, and revising teams should include a wide range of individuals in order to ensure that a wide variety of perspectives are taken into consideration. Teams should include a board member, building and district level administrators, a teacher, the board's attorney, a parent, and possibly a community member. Further, depending on the issue, it might be wise to include a student, preferably from an upper grade in secondary school, to try to evaluate how policies will be viewed by those who are subject to their provisions.

Allow Discretion

In order to allow administrators and teachers to preserve their discretion by using their own independent professional judgments when implementing and enforcing policies, it is better for policy writers to use "may," signifying that educators have an option whether to sanction students. Using "may" rather than "shall" or "must" terms, essentially establishing largely discredited zero tolerance policies, educators leave themselves open to violations of equal protection due to unequal enforcement should they not

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that receives funds under this part shall develop jointly with, agree on with, and distribute to, parents and family members of participating children a written parent and family engagement policy." 20 U.S.C. § 6318(a)(2) (2019).

[245] For an interesting take on the role of parents, see Charles J. Russo, *Proceed With Caution When Imposing Dress Restrictions on Parents*, 23 SCH. L. BRIEFINGS ISSUE 3, 4 (2019). For a story on the underlying controversy that arose when Carlotta Outley Brown, principal of a high school in Houston, Texas, instituted a dress code for parents who entered the school, see R.A. Schuetz and Jacob Carpenter, *HISD Principal Sets Dress Code - for Parents*, HOUSTON CHRON. (April 23, 2019), at A1.

discipline every student infraction of the same nature, and of which they are aware, in the same way.[246] It almost goes without saying, but educational leaders should remind teachers to apply policies consistently to avoid charges of favoritism.

Use Clear, Precise Language

Regardless of what aspects of student speech policies address, they should use clear, concise language carefully defining the limits on what students may and may not do in expressing themselves at school and at school-related activities. The most significant threat to speech and expression policies, however broadly defined, is the charge of being vague and/or overbroad.[247] More specifically, using clear, precise language in describing what students may do or say when expressing themselves is crucial. For example, when dealing with dress codes, rather than say something as open-ended as "students should dress modestly," policies should describe specifically what students may wear such as "shirts and blouses must reach the midpoint between one's shoulder and elbow," "no bare midriffs are allowed in school," and/or "no flip-flops may be worn in school."

At the same time, because no policy can cover every issue involving student expressive activities, particularly in light of how rapidly technology and fashions in clothing change, policies should judiciously employ such language as "this includes . . . but is not limited to . . . ." By recognizing that it is difficult at best to describe all that may be done pursuant to a policy and using such expansive language, courts tend to defer to educators when dealing with otherwise well-crafted up-to-date policies because they realize that the fact-specific nature of disputes, coupled with how rapidly change occurs,

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[246] *See, e.g.*, Charles J. Russo, *Has Time Expired for Zero Tolerance Policies?*, 79 SCH. BUS. AFF. 33 (2013); Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 EDUC. L. REP. 1 (2003); Philip T.K. Daniel, *Bullying and Cyberbullying In Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation*, 268 EDUC. L. REP. 619, 621 (2011).

[247] For a discussion of vagueness, see *A.F. by Fenton v. Kings Park Cent. Sch. Dist.*, 341 F. Supp. 3d 188, 197 (E.D.N.Y. 2018). "Grounded in due process principles, the void-for-vagueness doctrine provides that [n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." New York State Rifle and Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015) (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961) (internal quotation marks omitted) (citations omitted). "[T]he vagueness doctrine requires crafting both civil and criminal laws 'with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them.'" Kramer v. New York City Bd. of Educ., 715 F. Supp. 2d 335, 355, (E.D.N.Y. 2010) (quoting Thibodeau v. Portuondo, 486 F.3d 61, 65 (2d Cir. 2007)). For such a case, see *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003) (vacating and remanding the denial of a student's motion for summary judgment in his attempt to enjoin the enforcement of the portion of the school board dress code banning messages relating to weapons as overbroad because there was no evidence that clothing students wore, displaying weapons, caused a disruption in school). For another case reaching the same outcome, see *Schoenecker v. Koopman*, 349 F. Supp. 3d 745, 754 (E.D. Wis. 2018) (enjoining a principal from disciplining a student who wore shirts depicting weapons because he lacked a reasonable belief that they would have created a threat of substantial disruption at school).

make it almost impossible to set precise limits.

Scope of the Policy

Policies should make it clear that they apply on school grounds, property adjacent to school grounds, at school-sponsored, and school-related events and activities (whether on or off school grounds), at school bus stops, or on school buses.

Policies should specify that off-campus behavior, whether mocking the way one dresses verbally or online by making improper postings on social media is punishable if it creates a hostile environment at school for the victim, infringes on the rights of the victim, or can result in the creation of a material and substantial disruption to the educational process or school operations.

Special Rules for the Use of Social Media

Especially with social media, policies need to distinguish carefully between violations that occur in school and those that take place off campus so that policies are not struck down as vague and overbroad. Based on mixed results to date, disputes over the extent to which school officials can discipline students for misbehavior that does not originate in school, but has an effect on the school, is one that is likely to receive increased judicial attention.

Policies should explain that off-campus postings viewed by victims are punishable if they create hostile environments in schools for victims, infringe on their rights, or create actual or potential material and substantial disruptions in schools. School officials should craft these provisions narrowly.

Range of Possible Sanctions

Policies should include a range of possible sanctions for students for first, second, and repeat violations of their provisions. Policies should identify possible sanctions including loss of privileges and suspensions for more serious offenses leading to parental conferences to determine why students are unwilling to cooperate. Of course, some forms of misbehavior may be so severe as to not warrant graduated discipline but can lead to immediate suspensions and/or expulsions.

Reporting Crimes

Policies should make it clear that incidents may be reported to law enforcement authorities if there is evidence that crimes have been committed.

Incentives for Compliance

Policies should reward students who comply with policies by, for

example, providing them with free lunches or allowing them "dress down" days if schools have a dress code and other kinds of policies.

Notice to Parents, Students, and Faculty

Policies should require students, their parents, and teachers, to sign receipts acknowledging that they have received copies of all policies at the beginning of each school year. This can provide concrete proof that students, and their parents, were put on notice that specified violations are subject to discipline. Policies should be included in student handbooks, discussed in assemblies, and reviewed in classes. Policies should be posted on board websites and in materials sent home to parents so they can be informed about what rules their children must follow. Officials should communicate policies to faculty and staff at meetings as well as by including them in their handbooks so that they are aware of "the rules" by which students must live.

Regular Review of Policies

Educational leaders, their boards, and other educators should meet annually with their teams to review, and possibly update, their policies to ensure compliance with the latest developments in state and federal laws, regulations, and case law. Moreover, boards should include a notation at the end of each policy, noting the last time it was reviewed, even if they did not make any changes.

Such review sessions are better scheduled during summer retreats rather than in the immediate aftermath of controversies. For instance, as demonstrated in *Tinker*, where the principals instituted a new rule on Saturday and sought to enforce it two days later on Monday, not acting immediately in making policy changes is generally a wise approach.[248] Allowing some time to pass can allow cooler heads to prevail while everyone reflects on possible alternatives if policies are less than successful.

Being current is especially important because, given how rapidly fads in student expressive activities change, in the event litigation ensues, being up-to-date can go a long way to convincing courts that educators have done their best to keep their policies current and on the cutting edge of changes in the law.

V. CONCLUSION

In examining *Tinker* and its progeny, it is evident that the Supreme Court and lower courts have continued to narrow the scope of the free speech rights of students they first enunciated in *Tinker*, even in conceding that each of the later cases applied different standards. Of course, all students should

[248] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

be safe at school, but at what cost? That is, legitimate questions can be raised about the extent to which free speech in school can be restricted over controversial topics, and whether policies should prohibit all discussion of such issues for fear of upsetting some students.

If anything, it seems that by banning issues, or one side of an issue, even those that are unpopular and/or distasteful, and not fully addressing the substance of controversial topics in schools by permitting open exchanges of conflicting ideas is counterproductive.[249] More specifically, if educators fail to facilitate the free exchange of ideas in schools, however controversial they may be, they are merely setting the stage for later disputes at other times and in other places, perhaps without the structures in place that are typically present in schools to help keep student participants safe.

Given the many forms student expressive activities can take in and around schools, from dress, to the spoken word, to speech at school activities, to the written word both in print and in the virtual world of online social media, it is important for educational leaders and their boards, in conjunction with their attorneys, to have policies in place regulating student expression. By carefully implementing sound policies, school boards and educational leaders, with the assistance of their teachers to enforce the rules, can help to avoid unnecessary conflict leading to litigation so that they can better focus their energies on providing quality education for all children in their districts.

[249] As Justice Brandeis mused, it may be that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (National Home Libr. Found. Ed. 1933)). By allowing topics out of the mainstream to be made known, people may more readily reject such unsound views. Perhaps the best-known applied example of such an approach, highlighting the value of free speech and having unsound ideas put into the open where they can be tested and hopefully rejected, albeit not in a school context, occurred in 1977. As odious as the marchers' views were, and continue to be, the American Civil Liberties Union defended the free speech rights of Neo-Nazis to march in Skokie, Illinois, a suburb of Chicago, inhabited mostly by members of the Jewish faith, where one in six persons was a Holocaust survivor. Henry Gass, *Free-speech challenge: Can First and Second Amendments be Exercised Simultaneously?*, CHRISTIAN SCI. MONITOR (Aug. 25, 2017), https://www.csmonitor.com/USA/Justice/2017/0825/Free-speech-challenge-Can-First and-Second-Amendments-be-exercised-simultaneously. The march eventually occurred in Chicago. *See Commentary: Jones might be in for a Constitutional Surprise* (Sept. 3, 2018, 10:28 AM), https://www.providencejournal.com/news/20180903/commentary-jones-might-be-in-for-constitutional-surprise.