Cleveland State Law Review

Volume 61 | Issue 2 Article

2013

Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance

Raul R. Calvoz

Bradley W. Davis
University of Texas

Mark A. Gooden
University of Texas

CYBER BULLYING AND FREE SPEECH: STRIKING AN AGE-APPROPRIATE BALANCE[†]

RAUL R. CALVOZ;[*] BRADLEY W. DAVIS;[**] AND MARK A. GOODEN[***]

[†] The authors would like to thank Amy Magee and Cristina Ruiz Blanton, attorneys with the Texas Association of School Boards, for their input and support in the development of this article.

[*] J.D., St. Mary's Law School, M.B.A., Univ. of Texas at Austin; Of Counsel, Tuggey Fernandez, L.L.P., Austin, Texas. The authors can be reached at rcalvoz@tuggeyllp.com.

[**] Ph.D., Univ. of Texas at Austin, M.S., Univ. of Houston at Clear Lake; Researcher in Dept. of Educational Administration, Univ. of Texas, Austin, Texas.

*** Ph.D., M.A., M.Ed., Ohio State University; Associate Professor & Director of Principalship Program, Dept. of Educational Administration, Univ. of Texas, Austin, Texas.

INTRODUCTION

WHO ARE THESE PEOPLE?

Justin Aaberg
1995–2010
Anoka, Minnesota

Alexa Berman
1994–2008
Brookfield, Connecticut

Ryan Halligan
1990–2003
Essex Junction, Vermont

Brian Head
1979–1994
Woodstock, Georgia

Kameron Jacobsen
1997–2011
Monroe, New York

Jeffrey Johnston
1990–2005
Cape Coral, Florida

Samantha Kelly
1996 – 2010
Huron Township, Michigan

Jessica Laney
1996–2012
Hudson, Florida

Jesse Logan
1990–2008
Cincinnati, Ohio

Megan Taylor Meier
1992–2006
Dardenne Prairie, Missouri

Rachael Neblett
1989–2006
Mount Washington, Kentucky

Alexis Skye Pilkington
1993–2010
West Islip, New York

Phoebe Nora Mary Prince
1994–2010
South Hadley, Massachusetts

Jamey Rodemeyer
1997–2011
Buffalo, New York

Curtis Taylor
1979–1993
Burlington, Iowa

Hope Witsell
1996–2009
Ruskin/Hillsborough, Florida

These were school children, all under the age of eighteen, who died too young. These children were not shot down in their classrooms. They did not overdose on illegal drugs. They were not killed by drunk drivers. These school children died as a result of actions committed by other school children—actions that could have been prevented by vigilant school administrators.

Some may argue that this is an overly dramatic way to begin a law review article. Yet, we find that it is sometimes easy for "formal literature"—such as scholarly articles or legal opinions—to take too sterile and academic a view of life. While academic "distance" may be conducive to clear-headed and logical analysis, it also puts a false emotional barrier between theories and the practical impacts that they ultimately have on real people. We are guilty of this ourselves. In early drafts of this article, the names you see above appeared as a footnote to the sentence:

> Media reports have described one tragic case after another of student bullying and cyber bullying leading to violence and suicides.

Upon reflection, we were at first uncomfortable with, and finally ashamed by the fact that, in dealing with a topic as critical as cyber bullying and free speech, we had literally relegated the victims to a footnote.[1]

[1] Further information on these child victims can be found in the following references. The first high profile case of cyber bullying appears to be that of Megan Meier: *MySpace Mom Linked to Missouri Teen's Suicide Being Cyber-Bullied Herself*, FOX NEWS (Dec. 7, 2007), http://www.foxnews.com/story/0,2933,315684,00.html. Numerous cases have been reported since then. *See* Matt Gutman, '*Text Rage' Leads to Alleged Brutal Teen Beating*, ABC NEWS (Mar. 19, 2010), http://abcnews.go.com/Technology/TheLaw/text-rage-leads-alleged-brutal-teen-beating/story?id=10148892 (describing teen that was almost beaten to death after flurry of text messages); Helen Kennedy, *Phoebe Prince, South Hadley High School's 'New Girl,' Driven to Suicide by Teenage Cyber Bullies*, N.Y. DAILY NEWS, Mar. 29, 2010 (describing a Massachusetts teen that committed suicide after being bullied; and the bullies were indicted); *Cyberbullying Continued After Teen's Death*, CBS NEWS (Mar. 29, 2010), http://www.cbsnews.com/stories/2010/03/29/earlyshow/main6343077.shtml

School climate is a concept that has been recognized and studied for over fifty years.[2] It has been described metaphorically thus: "Personality is to the individual what climate is to the [school]."[3] School climate consists of several elements: ecology, milieu, social system, and culture.[4] It is important because schools do not merely teach academic subjects. A critical part of the work of schools is socialization—inculcating traditions, customs and social mores in children.[5] This task is accomplished didactically to be sure, but also by modeling—namely students follow the example of teachers and administrators—and by creating an environment, a climate, that is accepting and tolerant of appropriate conduct, while rejecting inappropriate conduct. And, the Supreme Court has recognized that in dealing with school children, school administrators may prohibit and punish conduct that, in any other context done by any other citizen, would be afforded constitutional protection.[6]

(describing that after a teen's suicide, taunts on social media sites continued); Andy Birkey, *Mother of Suicide Victim Speaks Out on Bullying at Anoka-Hennepin*, MN. INDEP., Sept. 14, 2010, http://minnesotaindependent.com/64978/wcco-mother-justin-aaberg-lgbt-bullying-anoka-hennepin (describing that teen committed suicide after anti-gay bullying); Greg Cergol, *Teens Charged in Anti-Gay Bias Attack on L.I.*, NBC 4 N.Y. (Oct. 21, 2010), http://www.nbcnewyork.com/news/local/Teens-Charged-in-Anti-Gay-Bias-Attack-on-LI-104950939.html (describing teens that were charged for bullying; a bus driver and monitor fail to report the incident as well); Rheana Murray, *Cyber-Bullying, Social Media Blamed after Florida Teen Commits Suicide,* N.Y. DAILY NEWS, Dec. 12, 2012,; Bog Greene, *Why Weren't You His Friends*, JEWISH WORLD REV. (Mar. 19, 2001), http://www.jewishworld review.com/bob/greene031901.asp; *Teens Who Have Committed Suicide After Being Bullied Online*, NAT'L PUBLIC RADIO (Sept. 20, 2010), http://www.npr.org/templates/story/story.php ?storyId=130248877; *Parents Speak Out on Bullying after Son's Death*, CBS NEWS (Sept. 15, 2011), http://www.cbsnews.com/8301-500172_162-20106690/parents-speak-out-on-bullying-after-sons-death/; Sarah Anne Hughes, *Jamey Rodemeyer, Bullied Teen Who Made 'It Gets Better' Video, Commits Suicide*, WASH. POST, Sept. 21, 2011.

[2] *See generally* JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS (1958); Chris Argyris, *Some Problems in Conceptualizing Organizational Climate: A Case Study of a Bank*, 2 ADMIN. SCI. Q. 501 (1958); Benjamin Schneider & C.J. Bartlett*, Individual Differences in Organizational Climate*, 21 PERSONNEL PSYCHOL. 323 (1968).

[3] ANDREW W. HALPIN & DON B. CROFT, THE ORGANIZATIONAL CLIMATE OF SCHOOLS 1 (1963); *see also* John I. Nwanko, *The School Climate as a Factor in Students' Conflict in Nigeria*, 10 EDUC. STUD. 267 (1979).

[4] Renato Taguiri, *The Concept of Organizational Climate*, *in* ORGANIZATIONAL CLIMATE: EXPLORATION OF A CONCEPT (Renato Taguiri & George H. Litwin eds., 1968).

[5] Doninger v. Niehoff, 527 F.3d 41, 54 (2d Cir. 2008). "Local school authorities have the difficult task of teaching 'the shared values of a civilized social order'—values that include our veneration of free expression and civility, the importance we place on the right of dissent *and* on proper respect for authority." *Id.* (citing Bethel v. Fraser*,* 478 U.S. 675, 683 (1986)); *see also* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 855 (Pa. 2002).

[6] Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646 (1995) (holding individualized suspicion not required to support drug testing students to deter their drug use); New Jersey v. T.L.O., 469 U.S. 325 (1985) (rejecting probable cause requirement or need for warrants for school officials to search student); Ingraham v. Wright, 430 U.S. 651 (1977) (refusing to extend Eighth Amendment cruel and unusual punishment element to apply to corporal punishment of students); Goss v. Lopez, 419 U.S. 565 (1975) (requiring only minimal process for temporary disciplinary suspensions in schools).

One part of creating a positive school climate is teaching children to respect the rights of others.[7] A symptom of the breakdown of this respect, familiar to anyone who has attended school, is bullying.[8] Bullying is nothing new. Yet, due to the many tragic outcomes with which we began this Article, bullying, including the subset of bullying via electronic means referred to as cyber bullying,[9] has recently received a great deal of attention from lawmakers and regulators.[10]

Forty-nine states have enacted bullying legislation in some form, many of which include language specifically aimed at preventing and addressing cyber bullying.[11]

---

[7] Robert White & Nasir Warfa, *Building Schools of Character: A Case-Study Investigation of Character Education's Impact on School Climate, Pupil Behavior, and Curriculum Delivery*, 41 J. APPLIED SOC. PSYCHOL. 45, 57-58 (2011).

[8] Bullying has been defined as "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance." *Bullying Definition*, STOPBULLYING.GOV, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Mar. 21, 2013).

[9] Unless otherwise stated in this Article, the term "bullying" is intended to include the subcategory of "cyber bullying."

[10] *See* sources cited *supra* note 1.

[11] ALA. CODE § 16-28B-4 (LexisNexis 2012); ALASKA STAT. § 14.33.200 (2013); ARIZ. REV. STAT. § 15-341 (LexisNexis 2012); ARK. CODE ANN. § 5-71-217 (2012) (declaring that cyber bullying is punishable as Class B misdemeanor); CAL. EDUC. CODE § 48900(r) (Deering 2012); COLO. REV. STAT. § 22-32-109.1 (2012); CONN. GEN. STAT. § 10-222d (2012); DEL. CODE ANN. tit. 14, § 4112D (2013); D.C. CODE § 5-B2502.3 (LexisNexis 2012); FLA. STAT. ANN. § 1006.147 (LexisNexis 2013); GA. CODE ANN. § 20-2-751.4 (2012); HAW. REV. STAT. ANN. §§ 8-19-2, 8-19-6 (LexisNexis 2012); IDAHO CODE ANN. § 18-917A (2012) (declaring bullying criminal); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (LexisNexis 2012); IND. CODE ANN. §§ 20-33-8-0.2, 20-33-8-13.5 (LexisNexis 2012); IOWA CODE ANN. § 280.28 (West 2013); KAN. STAT. ANN. §72-8256 (West 2012); KY. REV. STAT. ANN. § 525.080 (LexisNexis 2012) (proscribing as Class B misdemeanor); LA. REV. STAT. ANN. §14:40.7 (2013) (criminally sanctioning cyber bullying but relegating offenders under the age of seventeen to Title VII of the Children's Code for disposition); ME. REV. STAT. tit. 20-A, § 1001(15)(H) (2012); MD. CODE ANN., EDUC. § 7-424.3 (LexisNexis 2012); MASS. ANN. LAWS ch. 71, § 37O (LexisNexis 2012); MICH. COMP. LAWS SERV. § 380.1310b (LexisNexis 2012); MINN. STAT. ANN. § 121A.0695 (West 2013); MISS. CODE ANN. § 37-11-67 (2012); MO. ANN. STAT. § 160.775 (West 2012); NEB. REV. STAT. ANN. §§ 79-267, 79-2,137 (LexisNexis 2012); NEV. REV. STAT. ANN. §§ 388.122, 388.123, 388.135 (LexisNexis 2012); N.H. REV. STAT. ANN. §§ 193-F:3, 193-F:4 (LexisNexis 2012); N.J. STAT. ANN. §§ 18A:37-15, 18A:37-15.1 (West 2012); N.M. STAT. ANN. § 22-2-21 (LexisNexis 2012); N.Y. EDUC. LAW §§ 11(7), 12 (Consol. 2013); N.C. GEN. STAT. § 14-458.1 (2013) (declaring cyber bullying criminal); N.D. CENT. CODE §§ 15.1-19-17, 15.1-19-18 (2013); OHIO REV. CODE ANN. §§ 3301.22, 3313.666 (LexisNexis 2012); OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2012); OR. REV. STAT. ANN. §§ 339.351, 399.356 (West 2012); 24 PA. STAT. ANN. § 13-1303.1-A (West 2012); R.I. GEN. LAWS 16-21-34 (2012); S.C. CODE ANN. §§ 59-63-120, 59-63-130 (2013); S.D. CODIFIED LAWS §§ 13-32-15, 13-32-16, 13-32-18 (2012); TENN. CODE ANN. §§ 49-6-1015, 49-6-1016 (2013); TEX. EDUC. CODE ANN. § 37.0832 (West 2011); UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-102-201 (LexisNexis 2012); VT. STAT. ANN. tit. 16, §§ 11(a)(32) (2012); VA. CODE ANN. § 22.1-279.6 (2012); WASH. REV. CODE. ANN. § 28A.300.285 (LexisNexis 2012); W. VA. CODE ANN. §§ 18-2C-2, 18-2C-3 (LexisNexis 2012); WIS. STAT. § 118.46 (2012); WYO. STAT. ANN. §§ 21-4-312, 21-4-313 (2012); *see also* Sameer Hinduja & Justin W. Patchin, *State Cyber-Bullying Laws: A Brief Review of State Cyber-Bullying Laws and Policies*, CYBERBULLYING RESEARCH CTR. (Apr. 2013), *available at* http://www.cyberbullying.

The United States Congress has proposed, but failed to enact, legislation that would criminally sanction cyber bullying.[12]

The Department of Education has more aggressively entered the fray. The Office for Civil Rights (OCR) addresses bullying and cyber bullying under the auspices of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.[13] Since 2009, the OCR has maintained a national database[14] containing reports of and responses to bullying and harassment on the bases of disability, race, and gender.[15] The database allows web visitors to produce reports of bullying and harassment incidences aggregated at the state, district, and campus level.

The issue of cyber bullying is more complicated from a legal perspective than "traditional" bullying. Cyber bullying generally involves communication via electronic means. Most such communications will, by their nature, constitute "speech" as that word is understood legally. As a consequence, regulation of cyber bullying potentially raises First Amendment student free speech issues. In addition, due to the ubiquity of electronic media, cyber bullying conduct which often originates off campus can easily make its way on campus, and potentially disrupt the learning environment and/or directly affect students in that environment.[16] Free speech protections and the off campus/on campus issue are both concerns applicable to cyber bullying that are not necessarily implicated by traditional bullying.[17]

---

us/Bullying_and_Cyberbullying_Laws.pdf (cataloging cyber bullying statutes state by state). The only state currently lacking bullying legislation is the state of Montana. Although no "bullying" law exists, the Montana Department of Justice makes it clear that bullying and cyber bullying activity is prohibited under many existing laws. *For Teens & Tweens: Cyberbullying*, MONT. DEP'T OF JUSTICE, https://doj.mt.gov/safeinyourspace/for-teens-tweens-cyberbullying/ (last visited Mar. 22, 2013) (defining cyber bullying and citing numerous Montana criminal provisions potentially implicated by wrongful conduct).

[12] Bullying Prevention and Intervention Act of 2011, H.R. 83, 112th Cong. (2011) (introduced by Rep. Sheila Jackson Lee on January 5, 2011, but died in committee).

[13] Letter from Russlynn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't. of Educ., to Colleague (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. OCR also points out that the Department of Justice retains jurisdiction over bullying acts that implicate Title IV of the Civil Rights Act of 1964. *Id.* at 1.

[14] *Civil Rights Data Collection,* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T. OF EDUC., http://ocrdata.ed.gov/ (last visited Mar. 22, 2013).

[15] U. S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, SY 2011-12 CRDC DEFINITIONS: PART 1 AND PART 2 (2011), *available at* http://crdc.ed.gov/downloads/10%20SY%202011-12%20CRDC%20Definitions.pdf.

[16] James A. O'Shaughnessy, *Is Cyber-Bullying the Next "Columbine": Can New Hampshire Schools Prevent Cyber-Bullying and Avoid Liability?*, 52 N.H.B.J. 42, 44 (2011) (citing Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn 2009), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir. 2011)).

[17] *See* Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. The Right to be Let Alone in the Context of Off-Campus "Cyber-Bullying,"* 81 MISS. L.J. 189, 192 (2011). The rise of the Internet has created issues in other legal areas as well. *See* Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 566 (2002) (stating that the unique nature of Internet impacting application of community standards jurisprudence to that medium).

Cyber bullying has generally been dealt with by the courts using one of two legal analyses: the "true threats" doctrine, or the *Tinker* substantial disruption test. This law review, the *Cleveland State Law Review*, recently published *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*[18] (referred to herein as "the Threat to Speech article"), which addressed these two theories, and argued that the current evolution of cyber bullying legislation simply goes too far. For example, Hayward states

> Anti-cyber bullying laws are the greatest threat to student speech because they seek to censor it anytime it occurs, using "substantial disruption" of school activities as justification and often based only on mere suspicion of potential disruption.[19]

The Threat to Speech article advocates greater protection of student speech. While we recognize that any regulation of speech by the state[20] may raise First Amendment concerns, we are not so quick to conclude that cyber bullying regulations "chill student free speech."[21]

Our analysis of the law leads us to the conclusion that school administrators have relatively broad discretion to regulate student speech, provided those regulations either serve legitimate pedagogical ends or protect the rights of other students and the school environment. Indeed, as we will demonstrate below, the evolution of the Supreme Court's student free speech jurisprudence has followed the trend of granting more and more leeway to administrators. Contrary to the claims in the Threat to Speech article, in our opinion that leeway clearly extends to allowing regulation of speech which originates off campus but has a reasonable likelihood of making its way on campus. We also believe that, in addition to true threats and the *Tinker* substantial disruption standard described in the Threat to Speech article, school administrators may also regulate student speech consistent with the Court's holding in *Fraser*—which set what we refer to as the "fundamental values standard" —and based on the fighting words doctrine.

In order to properly analyze the current scope of constitutional protections surrounding student speech rights, it is important to understand the historic relationship between students, teachers, and administrators. Thus, we begin our analysis in Section I with an overview of the history of public schools from the perspective of regulation of student conduct. In Part I, we seek to provide historical context for regulation of student conduct by describing the state of the affairs in schools before Supreme Court intervention.

---

[18] John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85 (2011).

[19] *Id.* at 123.

[20] In this Article, we address only state regulation of cyber bullying in primary and secondary schools. Private school regulation requires a somewhat modified analysis as actions by those schools are not clearly "state action" implicating the First Amendment. Nor do we address post-secondary institutions, as students in colleges and universities will typically be over the age of eighteen, thus adding an additional layer to be considered vis-à-vis the First Amendment. In addition, the history of academic freedom in post-secondary education is significantly different from that in primary and secondary education, and would take us well beyond the historical analysis we provide in Part I.

[21] Hayward, *supra* note 18, at 87.

In Part II, we address Supreme Court school cases decided prior to the Court's seminal student speech case of *Tinker v. Des Moines*.[22] *Tinker* was not handed down in a vacuum, but is rather a point on a continuum of Supreme Court decisions affecting student rights. Our aim in Part II is to give a bit of color to that continuum in order to put *Tinker* into proper perspective.

Part III provides an analysis of *Tinker* and subsequent Supreme Court student free speech cases. We believe that understanding the manner in which the *Tinker* standard has—and has not—been used by the Court in subsequent decisions provides critical guidance as to the Court's likely view of cyber bullying regulation in the context of student speech rights.

In Part IV, we synthesize the key elements of Parts I, II, and III into a coherent student free speech paradigm for use by school administrators and legal counsel.

Part V then applies the paradigm to cyber bullying, and proposes two legal bases, in addition to "true threats" and *Tinker*, for the management of cyber bullying in public schools.

I. BEFORE THE COURT GOT INVOLVED

One approach to determining whether specific conduct is constitutionally protected is to examine how the law has treated that conduct historically.[23] For example, because laws punishing defamation have existed from before the time the Constitution was written, the Supreme Court has held that such laws do not violate the Constitution.[24] This approach to constitutional analysis has been summarized thus, "A universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional."[25] Applied to the topic at hand—student speech—if a long history of regulation of student speech exists, we must be very careful when we seek to alter or limit those regulations on constitutional grounds. Justice Clarence Thomas, in his concurrence in the student free speech case *Morse v. Frederick*,[26] cited this principle to argue that, "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[27]

Thomas's concurring opinion in Morse takes a strict constructionist approach to the Constitution.[28] After explaining that in early public schools, "teachers taught and students listened,"[29] Justice Thomas went on to cite a variety of court cases from

[22] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1967).

[23] Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011). *Carrigan* relied on this principle to hold that legislative recusal requirements, "commonplace for over 200 years," were constitutional. *Id.* at 2351.

[24] *Id.*

[25] *Id.*

[26] Morse v. Frederick, 551 U.S. 393, 410 (2007).

[27] *Id.* at 410-11 (Thomas, J., concurring).

[28] "The belief that the interpretation of the US Constitution should be based only on adhering to the 'original intent' of those who drafted the Constitution or the amendment in question." *Strict Construction(ism)*, THE CONCISE OXFORD DICTIONARY OF POLITICS (3d ed. 2009).

[29] *Morse*, 551 U.S. at 412 (Thomas, J., concurring).

different time periods—all of which dealt with issues stemming from disciplinary decisions in public schools. Each of these cases illustrates that the management of public schools, in particular decisions around student discipline, was rarely challenged by the courts. Furthermore, the rulings Justice Thomas reviewed show that student rights, to the extent that they existed at all, were definitely not on the same plane as adults' rights.[30]

Justice Thomas's historical survey of the purpose and administration of early U.S. public schools has merit. Our review of literature from earlier periods in U.S. public education supports Justice Thomas's notion that schools were not outlets for young people to flex their constitutional rights, but rather places of learning in which expectations were in place for the behavior of children and where deference to school rules was not expected, but demanded. Public schools were afforded great latitude in responding to student misconduct. Consider the following passage from a treatise[31] dated 1909, describing the disciplinary climate in public schools:

> The relationship between teacher and pupil on the school-grounds is very different from that existing between the same boy and a policeman in a city park or in a courthouse yard. The teacher may arrest, try, judge and punish. The policeman may only do the first.[32]

This sentiment is consistent with another work, published six years later in 1915, describing the legal disciplinary authority of the teacher over her pupils as "absolute," recognizing the teacher as "a government agent vested with authority to secure ends determined upon by the government," specifically those around ensuring an orderly learning environment and the development of future citizens.[33] As we will see, the role of schools in pursuing "ends determined upon by the government" becomes a theme of considerable prevalence in latter Supreme Court student free speech jurisprudence.

Consistent with this reasoning, in 1961 an education scholar explained that teachers and principals stand particularly in loco parentis with regards to disciplinary issues, stating that school personnel "must maintain discipline, and if a pupil disobeys their orders, it is their duty to use reasonable means to compel compliance."[34] Just four years later, the Supreme Court handed down its seminal student free speech decision in *Tinker* which, from that point forward, made the Court's jurisprudence a factor in defining student-teacher relations.

As can be seen, the history of public school tradition prior to Supreme Court intervention was one where the idea of "student rights," and "student free speech rights" in particular, was extremely limited, if it existed at all. Taking this history into account, Justice Thomas's argument in *Morse* takes on even greater strength; namely, the protection of student speech rights as "set forth in [Tinker] is without

---

[30] *Id.* at 411-20 (Thomas, J., concurring).

[31] JOHN SOGARD, PUBLIC SCHOOL RELATIONSHIPS: CHAPTERS ON THE INTERRELATIONSHIPS OF THE SCHOOL OFFICERS, THE TEACHERS, THE PUPILS AND THE COMMUNITY 23 (1909).

[32] *Id.* at 123-24.

[33] ARTHUR C. PERRY, DISCIPLINE AS A SCHOOL PROBLEM 160 (1915).

[34] REYNOLDS C. SEITZ, LAW AND THE SCHOOL PRINCIPAL 124 (1961). The doctrine of *in loco parentis* remains relevant to this day. *See* Lorillard, *supra* note 17, at 262.

basis in the Constitution."[35] While we do not advocate abrogation of *Tinker*, we do believe that a pragmatic analysis of student speech rights, and any claims that cyber bullying (or other) legislation "chills student speech," must take into account that a very strong argument can be made that student speech is not entitled to any first amendment free speech protection whatsoever. We do not take this position—but we do believe that consideration of this history adds strength to the position that school administrators have substantial leeway in reasonably regulating student speech.

We will see below that, from this initial state where student speech rights were non-existent, student rights began a slow evolution. Early Supreme Court cases dealing with schools applied the lowest "rational basis" standard of review to constitutional issues, granting school administrators substantial discretion. Over time, the Court expanded student rights, making them essentially coextensive with the constitutional rights of adults outside the schoolhouse. But, as we shall see, in its most recent decisions the Court has changed direction, returning greater discretion to school administrators.

II. THE EVOLUTION OF STUDENT FREE SPEECH RIGHTS

A. The State and Education in the 1920s

The first Supreme Court case to address public schools in any context was the 1923 decision of *Meyer v. Nebraska*.[36] In *Meyer*, the Court addressed whether a Nebraska statute prohibiting the teaching of any language other than English prior to eighth grade was an unconstitutional infringement on liberty under the Fourteenth Amendment.[37] The Court struck down the statute as unconstitutional.[38] In so doing, the Court recognized that,

> The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. . . . We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.[39]

Thus, in *Meyer*, the Court for the first time squarely addressed the state's interest in educating its citizens balanced against fundamental constitutional protections, and it held that the appropriate level of scrutiny was the lowest, rational basis test.[40] While this was not a free speech case, it does provide perspective on the view the Court took of the power of the state to regulate school related activity versus the

---

[35] *Morse*, 551 U.S. at 410-11 (Thomas, J., concurring).

[36] Meyer v. Nebraska, 262 U.S. 390 (1923).

[37] *Id.* at 396.

[38] *Id.* at 403.

[39] *Id.* at 402.

[40] *See* Bartels v. Iowa, 262 U.S. 404, 411 (1923) (holding the same as *Meyer*, its companion case).

rights of students and parents. Here, the issue in question was the power of the state in the critical area of defining curriculum. And, the Court held that the state need only show a rational relationship between a regulation and a legitimate state interest to avoid running afoul of the Constitution.

The Court next addressed primary/secondary education in *Pierce v Society of Sisters*.[41] The Oregon Compulsory Education Act, effective September 1926, required that all children attend public schools.[42] After again recognizing the power of the state to regulate schools, the Court again applied a rational basis test to find the statute unconstitutional under the Fourteenth Amendment.[43]

Thus, the Court's first two decisions dealing with schools are instructive with regard to the perceived role of the state in the process of education. Both cases recognized the state's interest in regulating education. Both cases applied the generous "rational basis" test to determine whether state action in regulating education was constitutional.

B. Student Speech and the State in the 1940s

In the 1940s, *Minersville School Dist. v. Gobitis*[44] and the decision that abrogated it, *West Virginia Board of Education v Barnette*,[45] first brought the issue of free speech in public schools before the Court. In *Minersville*, the Court addressed whether a statute requiring that students salute the American flag was constitutional.[46] The *Gobitis* children argued that saluting the flag was contrary to their religious beliefs and therefore unconstitutional under the First and Fourteenth Amendments.[47] A unanimous Court held that the religious rights guaranteed under the Constitution did not require that the statute be held unconstitutional, so long as the right to believe, assemble, and worship as one chose was not affected.[48] In so concluding, the Court once again applied a rational basis test, finding the ends of the legislation in question "legitimate."[49]

Less than three years later, however, we mark a major turning point in the Court's treatment of student rights. In *Virginia Board of Education v Barnette*, the Court again addressed the constitutionality of a state statute requiring salute to the flag.[50] The Court essentially revisited the identical issue raised in *Gobitis*. In *Barnette*, however, the statute was challenged on several additional constitutional grounds, including freedom of speech.[51] The Court explained that the act of saluting

---

[41] Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925).

[42] *Id.* at 530.

[43] *Id.* at 536.

[44] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

[45] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[46] *Gobitis*, 310 U.S. at 600.

[47] *Id.* at 592.

[48] *Id.* at 600.

[49] *Id.* at 599.

[50] *Barnette*, 319 U.S. at 626.

the flag was clearly speech, and that the converse, the refusal to salute, also constituted expression of a belief or idea.[52]

Finding that the statute implicated "speech," the Court applied the "clear and present danger test," and found the statute unconstitutional. [53] The clear and present danger test was the standard then applicable to free speech of this kind.[54] Thus, the Court applied the same standard to student speech as applied to adult speech outside the schoolhouse.[55] Under the rule in *Barnette*, students in public schools had the same free speech rights as adults in other contexts.[56]

It is worthy of note that in reaching its decision, the Court pointed out that

> the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly.[57]

As we shall see below, this focus on interference with the rights of others and maintaining order in school would become and remain a key concept in the Court's student free speech jurisprudence.[58]

C. Buttons and Armbands

The *Barnette* flag saluting decision was handed down in 1943.[59] The Court issued no student free speech decisions in the 1950s. However, in 1951, the Court changed the free speech (not student speech) landscape with its decision in *Dennis v.*

---

[51] *Id.* at 630. Interestingly, one of the complaints referenced in the opinion was that the then-popular "Bellamy Salute" was too much like Nazi salute. *Id.* at 628 n.3; s*ee also Children Saluting the American Flag with the Bellamy Salute in 1941, or as its Unofficial Nickname, the Nazi Salute*, PHOTOS OF WAR (Sep. 28, 2012), http://photosofwar.net/history-pictures-world-war-images/children-saluting-the-american-flag-with-the-bellamy-salute-in-1941-or-as-its-unofficial-nickname-the-nazi-salute/. The Bellamy Salute was abandoned, replaced by the now common right hand-over-the-heart, as mandated by Congress. Act of June 22, 1942, Pub. L. No. 623, ch. 435, § 7, 56 Stat. 377, 380, H.R.J. Res. 303, 77th Cong. (1942) (enacted).

[52] *Barnette*, 319 U.S. at 633.

[53] *Id.*

[54] *Id.*

[55] The "clear and present danger" test was first articulated by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919). The Court applied the test well into the 1940s. *See* Thornhill v. Alabama, 310 U.S. 88 (1940); Bridges v. California, 314 U.S. 252 (1941). The test was reformulated by the Court into a balancing test in *Dennis v. United States*, 341 U.S. 494 (1951).

[56] James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1347-48 (2000) (stating that, in *Barnette*, "[t]he Court . . . refused to view the rights of students as somehow different or separate from the rights of citizens in general").

[57] *Barnette*, 319 U.S. at 633.

[58] *See infra* Part III.A; *see also* Lorillard, *supra* note 17, at 204 (pointing out that collision of rights concept from *Barnette* would reappear in the Court's jurisprudence).

[59] *Barnette*, 319 U.S. at 624.

United States.[60] In *Dennis*, the Supreme Court abandoned the clear and present danger test for free speech cases. The Court replaced it with a balancing test, that test being: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[61]

Thus, in dealing with student speech cases, lower courts now had two potential paths to follow: (1) apply the clear and present danger test, consistent with student free speech precedent as represented by *Barnette*; or (2) logically, extend the Court's application of the *Dennis* balancing test to student free speech. It was the application of the *Dennis* balancing test by lower courts that led to a conflict in the circuit courts, which in turn would result in the Supreme Court's seminal pronouncement on student free speech—seminal in that it distinguished free speech rights in schools from those in other contexts. Both lower court decisions involved forms of political protest in public schools – one political buttons, the other armbands.

1. Political Buttons

The Fifth Circuit dealt with student free speech in the related cases *of Burnside v. Byars*[62] and *Blackwell v. Issaquena County*.[63] Both cases involved challenges to the prohibition of students wearing political buttons to school.[64] Of the two, *Burnside* was decided first.

In September 1964, students at Booker T. Washington High School in Mississippi began wearing buttons bearing the words "One Man, One Vote" on their perimeter surrounding the letters "SNCC" which stood for the Student Nonviolent Coordinating Committee—a non-violent Civil Rights protest group.[65] Upon learning of this, the school principal banned the buttons, despite the fact that they were worn peaceably and created no disruption in the school day.[66] Several children who wore the buttons after the ban was imposed were suspended from school, and brought suit alleging violation of their right to free speech.[67] The district court found no violation of the students' free speech rights, and the students appealed to the Fifth Circuit.[68]

---

[60] *Dennis*, 341 U.S. 494.

[61] United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

[62] Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[63] Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[64] *Burnside*, 363 F.2d at 747; *Blackwell*, 363 F.2d at 751. An image of the *Burnside* buttons can be found at: *Student Skype with History:* Tinker v. Des Moines *to Trayvon Martin*, MCCOMB LEGACIES NEWS & UPDATES (May 17, 2012), *available at* http://mccomblegacies.org/blog/2012/05/students-skype-with-history-tinker-v-des-moines-to-trayvon-martin/. The *Blackwell* button can be found at: http://www.crmvet.org/tim/tim65b.htm.

[65] *Burnside*, 363 F.2d at 746.

[66] *Id.* at 747.

[67] *Id.*

[68] *Id.* at 746.

The court of appeals in *Burnside* reviewed the prohibition of political buttons in school under the Supreme Court's free speech standard as articulated in *Dennis*.[69] The "evil" to be regulated in the Fifth Circuit's opinion was disruption to the maintenance of an orderly program of classroom learning.[70] Because the wearing of buttons did not actually disturb the decorum of the classroom, the Fifth Circuit held that the prohibition of the buttons by the school violated the students' first amendment right to free speech.[71]

In the related decision of *Blackwell v. Issaquena County*, the Fifth Circuit considered a case that was virtually identical to *Burnside* factually, with one critical exception. In *Blackwell*, there was evidence of multiple instances of disruption of school activities as a result of buttons being brought to school.[72] The Fifth Circuit applied the same analysis as in *Burnside*. However, because in *Blackwell* there was evidence that the wearing of buttons had in fact caused a disruption at the school, the court held that the prohibition did not violate student free speech rights.[73]

Thus, the Fifth Circuit, applying *Dennis v. United States* to student speech, measured the regulation of student free speech rights by the same standard as the rights of all other citizens. In both cases, the court weighed the state's interest in maintaining an appropriate academic learning environment against student free speech rights. In one case it found that no disruption had occurred, and held the regulation unconstitutional. In the second case, as disruptions did in fact occur, the regulation was held appropriate and constitutional.

But, it could be argued that in either of these two cases school officials could have "anticipated" a disruption to the school environment. The Fifth Circuit's decisions were not based on an anticipation of disruption, but on a post hoc analysis that found actual disruption in one case, and no disruption in the other. Is an actual disturbance required in order for schools to constitutionally regulate speech? This is the question that was implicitly addressed and answered by the district court in *Tinker*.

2. Armbands

Tinker v. Des Moines[74] is the student speech case that was ultimately heard by the United States Supreme Court and set the standard for the regulation of student speech in public schools. Like the Fifth Circuit cases of *Burnside* and *Blackwell* that preceded it, *Tinker* involved political speech by students.

In *Tinker*, the speech in question involved the wearing of black armbands to protest the Vietnam War.[75] School officials learned of a student plan to wear the armbands, and promulgated a regulation prohibiting the wearing of armbands on

---

[69] *Id.* at 748.

[70] *Id.*

[71] *Id.* at 749.

[72] Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[73] *Id.* at 754.

[74] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966), *rev'd*, 393 U.S. 503 (1969).

[75] *Id.*

school grounds. Despite notification of the regulation, the students wore the armbands, and were suspended as a result.[76]

The procedural history of *Tinker* in the lower courts is interesting on several levels, the first being the brevity of analysis of the legal issue in question. The substance of the district court opinion is barely two pages in length.[77] On appeal, the Eighth Circuit affirmed en banc, without opinion.[78]

In addition to brevity, it is of interest to note that the decision by the district court was handed down after *Burnside* and *Blackwell*. In fact, the district court recognized the Fifth Circuit's holding in its opinion, and explicitly chose not to follow it.[79] Though the district court was under no obligation to follow *Burnside* and *Blackwell*, factually, *Tinker* and the Fifth Circuit cases are analogous. Like the Fifth Circuit, the district court in *Tinker* applied the *Dennis v. United States* free speech standard.[80] And, like the Fifth Circuit, the district court focused on the state's interest in maintaining an appropriate educational environment as weighed against the students' free speech rights.[81] Where the decisions differ is on the question of actual versus anticipated disruption. The Fifth Circuit's holdings in *Burnside* and *Blackwell* were different because the court based its decision on the fact that in one case disruption of the school environment had occurred, while in the other it had not. The district court in *Tinker* opined that actual disruption should not be the standard, but rather:

> School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. [82]

Thus, the district court's decision was that reasonable anticipation of disruption of the school environment was sufficient to allow for regulation of otherwise protected speech.

Once the Eighth Circuit Court of Appeals affirmed this holding, en banc and without opinion as stated above, the Supreme Court was faced with a conflict in the circuits. The Fifth Circuit required a showing of actual disruption of the school environment in order to regulate student speech. The Eighth Circuit allowed regulation if such actions were reasonably calculated to prevent a disruption.

III. *TINKER* AND PROGENY

The brief history provided thus far helps us to place the Supreme Court's decision in *Tinker*, which we analyze below, in context. The earliest Supreme Court cases involving public schools gave administrators substantial latitude, and applied a

---

[76] *Id.*

[77] *Id.* at 972-73.

[78] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (1967), *rev'd*, 393 U.S. 503 (1969).

[79] *Tinker*, 258 F. Supp. at 973.

[80] *Id.* at 972.

[81] *Id.*

[82] *Id.*

rational basis test to regulations affecting schools. This treatment was consistent with the historical relationship between students and administrators in U.S. public schools, a history which we have seen gave administrators substantial control over students. The first flag saluting case—*Gobitis*—maintained this tack, allowing regulation of student speech in the interests of pedagogy.

As noted above, the Court reversed this direction just three years later. In abrogating *Gobitis*, the Court addressed virtually identical facts, but held that student speech rights were subject to the same standard as the speech rights of all other categories of citizens in all other contexts. This holding is remarkable when one considers that the Court essentially held that the free speech rights of a first grader in her public school classroom are the same as those of any other citizen. This expansive view of the free speech rights of school children was revisited by the Supreme Court in *Tinker*.

A. Tinker v. Des Moines

In *Tinker*, the Supreme Court pared back its expansive interpretation of student free speech rights. It did so in several ways. First, after a short paragraph defining the wearing of armbands as "speech," the Court began its discussion by stating that

> First amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[83]

Although the more often quoted line from *Tinker* is the second sentence, we shall see that it is the qualifying language regarding the "special characteristics of the school environment" that has dominated the Court's subsequent schoolhouse jurisprudence.

A second paring back of student rights is found in the wording of the *Tinker* standard, a standard that has been called the touchstone for all cases dealing with student free speech rights.[84] The Court's key language is worth quoting in full:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars*, supra, at 749. But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (C. A. 5th Cir. 1966).[85]

---

[83] Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 506 (1969).

[84] Hayward, *supra* note 18, at 104.

[85] *Tinker*, 393 U.S. at 513.

Applying this standard, the Court found that banning students from wearing armbands to protest the Vietnam War was unconstitutional.[86]

This standard is called the "substantial disruption test." This, however, is a misnomer at least in part—the standard is not only about disruption of the school environment. In articulating the *Tinker* standard, the Court twice mentions interference with the rights of others. While the Court cites both *Blackwell* and *Burnside* in support of this standard, each of those cases focused only on the disruption of a school environment component of the test. Likewise, the district court in *Tinker* analyzed the case only in light of the need to maintain "a scholarly, disciplined atmosphere within the classroom."[87] Although not cited by the Supreme Court, it is the Court's prior precedent in *Barnette*—the second flag saluting case—which forms the basis for this standard, and includes two elements: disruption of the environment or interference with the rights of others.[88] Recall *Barnette*:

> the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly.[89]

Thus, under *Tinker*, the Court protected student speech only if it does not: (1) disrupt the classroom; or (2) invade the rights of others.[90]

Finally, the Court pared back student speech rights in the manner in which it applied the new student free speech standard to the facts. In articulating the test, the Court speaks of actual disruption, which is the standard applied in *Burnside* and

---

[86] *Id.* at 514.

[87] *Tinker*, 258 F. Supp. at 972.

[88] Lorillard, *supra* note 17, at 209-10 (pointing out that although standard is clearly disjunctive, courts seldom apply second prong alone).

[89] Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[90] *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1122-23 (C.D. Cal. 2010) (citing Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1169 (9th Cir. 2006)) (conducting "rights of others" analysis under *Tinker* to uphold ban on t-shirt attacking homosexuality), *vacated as moot*, 549 U.S. 1262 (2007), *remanded*, 485 F.3d 1052 (9th Cir. 2007). A number of legal scholars advocate use of *Tinker's* second "rights of others" prong to address cyber bullying. *See* Joe Dryden, School Authority Over Off-Campus Student Expression in the Electronic Age: Finding a Balance Between a Student's Constitutional Right to Free Speech and the Interest of Schools in Protecting School Personnel and Other Students from Cyberbullying, Defamation, and Abuse 151 (Dec. 2010) (unpublished Ed.D. dissertation, University of North Texas) (on file with UNT Digital Library) ("Through the full application of *Tinker's* first and second prongs an appropriate balance can be achieved between a student's constitutional right to free speech and the interests of schools in protecting school personnel and other students from cyber bullying, defamation, and abuse."); Martha McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of* Tinker *Stand Alone?*, 240 ED. L. REP. 1, 1 (2009) ("Courts should give more credence to *Tinker's* second prong."); Matthew I. Shiffhauer, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J.L. COMM. 731, 763 (2010) ("*Tinker's* 'rights of others prong' can provide the necessary middle-ground and prevent courts from rendering the 'substantial disruption' prong meaningless.").

Blackwell. Yet, in applying the standard and reversing the district court, the Court speaks repeatedly of anticipation or foreseeability of disruption, stating:

> [O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.[91] Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. . . .[92]
>
> Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. . . .[93]
>
> [T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. . . .[94]

Thus, the outcome of *Tinker* is that school administrators may regulate student speech if the regulation aims at preventing a foreseeable: (1) material or substantial disruption in the school environment; or (2) invasion of the rights of others.[95] Anticipation of a disruption or of an invasion of the rights of another is sufficient to allow administrators to act.[96] The Court left much to administrator's discretion.

B. Bethel v. Fraser

The next case to bring the issue of student speech before the Supreme Court was the 1986 decision of *Bethel v. Fraser*.[97] *Fraser* involved an allegedly vulgar and offensive speech[98] given by a student that the school found to violate a school

---

[91] *Tinker*, 393 U.S. at 509.

[92] *Id.* (emphasis added).

[93] *Id.* at 511 (emphasis added).

[94] *Id.* at 514 (emphasis added).

[95] *See* Saxe *ex rel.* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (stating that schools may regulate speech under *Tinker* if they reasonably believe "that speech will cause actual, material disruption").

[96] *See* Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007); LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

[97] *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675 (1986).

[98] Justice Brennan's concurrence sets out the speech in full:

> 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.

regulation against obscene and profane language and gestures.[99] The student was suspended, and brought suit alleging violation of his right to free speech.[100] Applying the *Tinker* standard, both the district court and the court of appeals found that the student's free speech rights were violated by the punishment.[101] The Supreme Court reversed.[102]

In *Fraser*, the Court relied on two considerations in reaching its decision. The first was the function of the public schools—to "prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[103]

The second consideration was the "sensibilities of *Fraser's* fellow students."[104] In this regard, the Court recognized the "obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech."[105] This second consideration is strikingly similar to the allowance under *Tinker* for regulation of student speech when it "collides with the rights of others."[106] Based on these two considerations, the Court found the suspension was an acceptable response to *Fraser's* speech.[107]

The Court also distinguished *Tinker*, pointing out that the speech involved in *Fraser* was not political speech.[108] And, most importantly, the Court clarified the fact that *Tinker* limited the free speech rights of students, emphasizing that those rights were not coextensive with the free speech rights of adults in other contexts:

> [T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[109]

Summing all these arguments in one sentence, the Court stated, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior," which the Court also referred to as

---

[99] *Id.* at 678.

[100] *Id.* at 679.

[101] *Id.*

[102] *Id.* at 687.

[103] *Id.* at 681.

[104] *Id.* at 682.

[105] *Id.* at 684.

[106] Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 509 (1967).

[107] *Bethel*, 478 U.S. at 687.

[108] *Id.* at 680.

[109] *Id.* at 682-83 (citing Thomas *ex rel.* Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (concurring in result).

"fundamental values."[110] As we shall argue below, the regulation of speech under *Fraser's* "fundamental values standard" is one tool available to administrators in protecting victims of cyber bullying.[111]

C. Hazelwood School District v. Kuhlmeier

Two years after *Fraser*, the Court again addressed student speech in *Kuhlmeier*,[112] which involved an issue arguably at the heart of free speech—the publication of a newspaper. In this case, it was a high school newspaper. The principal of Hazelwood East High School refused to publish two articles, written by students—one concerning three students' experience with pregnancy, the other about divorce.[113] The students brought suit alleging violation of their right to free speech.[114] The Eighth Circuit applied *Tinker* and found for the students, as there was "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school."[115]

The Supreme Court refused to apply the *Tinker* analysis to *Kuhlmeier*. Rather, the Court distinguished the question of whether a school must tolerate student speech due to free speech concerns (*Tinker*) from the question of whether the First Amendment requires schools to affirmatively promote particular speech by students.[116] It held that activities falling under this second category, such as a school newspaper, a school theatrical production, etc. which are activities bearing the imprimatur of the school, may be regulated so long as the school's "actions are reasonably related to legitimate pedagogical concerns."[117] Again, the Court applied a rational basis test to the school environment.

The Court directly quoted from *Fraser* regarding student rights in schools not being coextensive with adult rights.[118] Moreover, the Court characterized *Fraser* as

---

[110] *Id.* at 681. As the Court stated in full:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

[111] *See infra* Part V.

[112] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[113] *Id.* at 263.

[114] *Id.* at 264.

[115] *Id.* at 265.

[116] *Id.* at 270-71.

[117] *Id.* at 273.

[118] *Id.* at 266 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

standing for the proposition that "the school was entitled to 'disassociate itself' from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education."[119] Thus, to the extent that the student speech involved may be perceived as bearing the imprimatur of the school, the rational basis test applies to school regulations.[120]

D. Morse v. Frederick

The most recent Supreme Court decision on student speech was handed down in 2007.[121] *Morse* involved suit brought by a high school student who was suspended for orchestrating the unfurling of a banner at a school-sponsored event.[122] The banner bore the phrase "BONG HiTS 4 JESUS."[123] The case was appealed to the Supreme Court from a decision by the Ninth Circuit which, applying *Tinker*, found that the student's speech could not be regulated because it did not create a risk of substantial disruption.[124]

The Court began by conducting an analysis of its prior student free speech precedent, from which it drew two key principles: (1) the "rights of students in public school are not coextensive with the rights of adults in other settings;" and (2) "*Tinker* is not the only basis for restricting student free speech."[125] The Court emphasized that the nature of the rights of students should be "what is appropriate for children in school."[126]

Given the foregoing premises, the Court framed the issue in *Morse* as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[127] In analyzing the issue, the Court reviewed statistics regarding student drug abuse, Congressional action aimed at drug abuse prevention, and school board policies across the nation aimed at conveying to students the message that using illegal drug use is harmful.[128] The Court noted the peer pressure aspect of drug abuse, and that "students are more likely to use drugs when the norms in school appear to tolerate such behavior."[129] Based on the state's important interest in preventing drug abuse in youths, the Court held that school regulation of student speech at a school event, "when that speech is reasonably viewed as promoting illegal drug use" is acceptable.[130]

---

[119] *Id.* at 266-67.

[120] *Id.* at 273.

[121] Morse v. Frederick, 551 U.S. 393 (2007).

[122] *Id.* at 396.

[123] *Id.* at 396-97.

[124] *Id.* at 399.

[125] *Id.* at 404-05.

[126] *Id.*

[127] *Id.* at 403.

[128] *Id.* at 407-08.

[129] *Id.* at 408.

[130] *Id.* at 410.

IV. THE CURRENT STATE OF STUDENT FREE SPEECH RIGHTS

As we have seen, prior to the Supreme Court's entry into the arena of public schools, administrators had practically carte blanche discretion in educating and disciplining students. And, as Justice Thomas argued, there is no evidence that the Framers were thinking of the rights of children in public schools when they drafted the First Amendment.[131] Thus, protection of student free speech, from a strict construction perspective, is likely unjustifiable.

That said, it is a practical fact that the adult citizens of tomorrow are the students of today. And an understanding of the concept of free speech, as well as evolution of the habits of minds that devolve from this freedom and the zealous debate it protects, cannot be granted to students whole cloth upon graduation. An appreciation for the freedom to express one's opinion, and the growth in terms of personal opinions and character that it fosters, must be introduced to students over time, and in an age appropriate manner.[132] This is a process that is primarily, though not exclusively, the province of schools.

Yet, while we may entrust this process to schools, history has taught us that we should not do so blindly. Just as schools have historically been given broad discretion in forming children into responsible citizens, history also teaches that nowhere are citizens more vulnerable to indoctrination. In schools, they are not only a captive audience, but of tender age when values, and prejudices, can be inculcated to greatest benefit—or harm.[133] Thus, while the Framers may not have had students in mind when they defined the protections of free speech, the practical reality is that such protections must begin somewhere. And, the Court's jurisprudence has—by fits and starts to be sure—circumscribed practical limits to what the state can and cannot do.

As we have seen, at the outset, there was simply no protection of student speech. From "protecting nothing," the Court moved to "protecting everything." The high point in the protection of student speech came at the start—when the Court abrogated *Gobitis* and for the first time recognized student free speech rights in public schools. In that case—*Barnette*—the Court made the free speech rights of students in public schools co-extensive with those of adults in any other context. While this may be ideal, such broad protection is inconsistent both with the practical realities of the ages of children in schools and schools' obligations "to inculcate habits and manners of civility."[134] From that point forward, the Court has engaged in a slow retreat from this broad protection of student speech.

---

[131] *Id.* at 410-11.

[132] Algeria Ford, *Chalk Talk—School Liability: Holding Middle Schools Liable for Cyber-Bullying Despite Their Implementation of Internet Usage Contracts*, 38 J.L. & EDUC. 535, 536-37 (2009) (citing Satariano v. Sleight, 129 P.2d 35, 39 (Cal. Dist. Ct. App. 1942)) (discussing that schools owe an obligation to maintain children safe, and must exercise degree of acre commensurate with the immaturity of their charges).

[133] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 511 (1967) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.").

[134] Vernonia Sch. Dist 47j v. Acton, 515 U.S. 646, 655-56 (1995) (citing Bethel v. Fraser, 478 U.S. 675, 681 (1986)).

In *Tinker*, the Court articulated essentially the same standard as *Barnette's*—protection of the school environment and of the rights of others—but clearly stated that student speech rights must be considered "in light of the special characteristics of the school environment,"[135] essentially taking into account the ages of children in schools and school's obligations "to inculcate the habits and manners of civility."[136] The Court's application of the substantial disruption standard further weakened "student rights" by making it clear that anticipated disruption was sufficient to justify state action. Subsequent student speech cases have further reduced the scope of protected student speech—*Fraser* removed obscene and lewd speech from protection and introduced the notion of inculcation of "fundamental values;" *Kuhlmeier* eliminated speech bearing the imprimatur of the school from protection; *Morse* further allowed restriction of speech at any school event (regardless whether it might bear the imprimatur of the school) if that speech promotes illegal drug use. With each case it has heard, the Court has reduced the scope of protected student speech.

Yet, the Court and commentators have warned against an approach to free speech analysis that declares new areas of speech "unprotected" based upon "an ad hoc balancing of relative social costs and benefits."[137] How do we, and more importantly school administrators, measure what is constitutionally acceptable regulation of student speech? The Supreme Court's most recent student free speech case provides two key points of departure: (1) the "rights of students in public school are not coextensive with the rights of adults in other settings;" and (2) "*Tinker* is not the only basis for restricting student free speech."[138] Parting from this basis, the Court in *Morse* found that school administrators may constitutionally regulate student speech that encourages illegal drug use.

Given our analysis of Supreme Court cases above, we extract the following paradigm to guide school administrators in the area of student free speech:

> (1) Free speech rights of students should be "what is appropriate for children in school."[139] The "rights of students in public school are not coextensive with the rights of adults in other settings."[140] This means not only that children are to be treated differently from adults, but that children of different ages should be treated in a manner which is age-appropriate.[141] In other words, when it comes to free speech, schools are different from other contexts.
>
> (2) Student speech that may substantially disrupt the school environment or invade the rights of others may be prohibited. *Tinker's* substantial

---

[135] *Tinker*, 393 U.S. at 506.

[136] *Fraser*, 478 U.S. at 681.

[137] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

[138] Morse v. Frederick, 551 U.S. 393, 404-05 (2007).

[139] *Id.*

[140] *Id.*

[141] *See* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 674 (7th Cir. 2008) (Posner, J.) (pointing out the difference between adult debates on social issues versus debates among children).

> disruption test provides one of several bases for regulating student speech.[142] School administrators may regulate student speech if the regulation aims at preventing a foreseeable:[143] (a) material or substantial disruption in the school environment; or (b) invasion of the rights of others.[144]
>
> (3) School administrators may regulate student speech in order to protect the educational environment and the inculcation of fundamental values.[145] School administrators also have the power—beyond *Tinker*—to regulate student speech.[146] They have "the power and indeed the duty to inculcate the habits and manners of civility."[147] This includes taking reasonable steps to protect the educational environment and process.

V. FREE SPEECH AND CYBER BULLYING

The Supreme Court has yet to review a cyber bullying case. As the Threat to Speech article correctly asserts, the courts that have dealt with student bullying or cyber bullying and free speech claims can be divided into essentially two primary lines of analysis.[148] In situations where the conduct in question involved aggressive language and threats of violence, the courts have applied the "true threats" doctrine, which holds that threatening words are not protected speech.[149] In cases where no

---

[142] *Morse*, 551 U.S. at 404-05.

[143] "School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) (citing LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act.")).

[144] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (stating that school may regulate speech under *Tinker* if it reasonably believes "that speech will cause actual, material disruption").

[145] We are not the first to focus on the Court's "inculcation of values" approach to education. *See, e.g.*, Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1274 (1991) ("The Supreme Court currently views the work of the schools to be the inculcation of values."). *See generally* C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 381-84 (1989); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 85-86 (1996); William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 973-78 (1987).

[146] *Morse*, 551 U.S. at 404-05.

[147] Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 655 (1995) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[148] Hayward, *supra* note 18, at 111-17.

[149] D.J.M. *ex rel.* D. M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 764-65 (8th Cir. 2011) (stating that student's instant messages outside of school, which threatened killing of ex-girlfriend and others, constituted true threats); Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007) (stating that school official's authority to regulate student speech is much broader than the bounds of the true threats doctrine); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868-69 (Pa. 2002) (applying true threats doctrine to cyber bullying YouTube video); D.C. v. R.R., 106 Cal. Rptr. 3d 399, 425-26 (Ct. App. 2010) (finding that

true threat was alleged or found to exist, courts have applied *Tinker* and analyzed the speech to determine if there was a substantial disruption to the school environment, an imposition on the rights of others, or both.[150]

Thus, in dealing with cyber bullying, as a general rule courts will apply either the true threats doctrine or *Tinker*.[151] Both of these approaches clearly have merit. On this point, we agree with the Threat to Speech article.

We disagree with Hayward, however, regarding the degree of discretion administrators have over student speech which originates off campus.[152] In addition, we believe that two other approaches—beyond true threats and *Tinker*—consistent with our three-part paradigm above, are available to schools dealing with cyber bullying: the *Fraser* fundamental values standard, and the fighting words doctrine. These approaches, we believe, address a gap between the true threats doctrine and *Tinker* – a gap into which much cyber bullying conduct falls.

---

posting on a non-school website was a true threat and therefore not protected speech under the First Amendment); s*ee also* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624-26 (8th Cir. 2002) (holding that non-internet letter threatening another student written outside of school was found a true threat and sufficient to support expulsion of authoring student). *See generally* Watts v. United States, 394 U.S. 705 (1969) (establishing parameters of the true threats doctrine); Lorillard, *supra* note 17, at 198.

[150] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (stating that MySpace page created by senior in high school attacking another student was potentially disruptive under *Tinker*); *D.J.M.*, 647 F.3d at 765 (finding student's instant messages outside of school, which threatened killing of ex-girlfriend and others, constituted foreseeable substantial disruption under *Tinker*); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (finding that a student who posted vulgar, deceptive message about cancellation of school event on blog (off campus) could be punished by school under *Tinker* due to potential substantial disruption on campus); *Wisniewski*, 494 F.3d at 38-39 (applying *Tinker* to find eighth grader's instant messaging of icon depicting shooting of teacher was not protected constitutionally); R.S. *ex rel.* S.S v. Minnewaska Area Sch. Dist. No. 2149, No. 12-588, 2012 U.S. Dist. LEXIS 126257 (D. Minn. Sept. 6, 2012) (holding that a sixth grader's posting that she "hated" a school employee on Facebook wall, outside of school hours and inaccessible from school, was not likely to cause substantial disruption under *Tinker*); Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (finding that a Facebook group created off campus criticizing teacher did not rise to level of potential disruption sufficient to satisfy *Tinker*); *J.S.*, 807 A.2d at 868-69 (finding that a student speech created off campus, and posted on website, that included derogatory, profane, offensive, and threatening statements directed toward one of the student's teachers and his principal could be punished under *Fraser* as lewd and under *Tinker*).

[151] *But see* Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 203-10 (2012) (Can.) (proposing additional legal standards courts should consider in dealing with cyber bullying including sexual harassment and the affirmative duty to respond, the employee speech standard and defamation, and regulating impact, not content).

[152] Hayward argues that "[w]hile campus speech is governed under the *Tinker* tetralogy, the extent to which school officials can regulate off-campus speech is unclear." Hayward, *supra* note 18, at 108.

A. Off-Campus Speech

Given the fact that cyber bullying involves the use of electronic media, it is not uncommon for cyber bullying speech to originate off campus. What then is the authority of administrators to deal with this speech?

While the Threat to Speech article argues that the courts are in disarray regarding the application of *Tinker* to speech that originated off campus,[153] two clear lines of cases exist in this regard.[154] There are those cases, comprising the majority, which apply *Tinker*, regardless of whether the speech originated on or off campus.[155] This line of cases holds that, so long as there is an actual or potential substantial disruption on campus, the *Tinker* standard is satisfied.[156]

The second line of cases, which is a small minority, seeks to establish a sufficient "nexus" between off campus speech and the school campus before applying *Tinker*.[157] Generally, these cases hold that if it is reasonably foreseeable that off campus speech will make its way on campus, the nexus standard is met and *Tinker* applies.[158]

There is arguably a third category of cases involving situations in which students engage in off campus speech and go to extraordinary but ultimately unsuccessful lengths to keep that speech from reaching campus. Only one case we have found

---

[153] *Id.* at 108-10.

[154] *J.C. ex rel. R.C. v. Beverly Hills* provides an exhaustive analysis of court decisions addressing this issue. J.C. *ex rel. R.C.* v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1102-08 (C.D. Cal. 2010).

[155] *See* Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 970-71 (5th Cir. 1972) (applying *Tinker* to student-published underground newspaper which made its way onto campus); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying *Tinker* to derogatory top-ten list distributed off campus and via email which was brought to campus by one recipient); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding *Tinker* applied to website created off campus containing mock obituaries of students); Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* where website created off campus containing criticism of school officials was accessed by student at school); O.Z. v. Bd. of Trs., No. CV 08-5671 ODW, 2008 WL 4396895, at *4 (C.D. Cal. Sept. 9, 2008) (applying *Tinker* to student disciplined for video created off campus and posted to internet that depicted murder of a teacher); Pangle *ex rel.* Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 285-86 (Or. Ct. App. 2000) (applying *Tinker* to student-written underground newspaper disseminated on campus).

[156] *See* cases cited *supra* note 155.

[157] Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008); Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-40 (2d Cir. 2007); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

[158] *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 39-40; *see also* Laura Pavlik Raatjes, *School Discipline of Cyber-Bullies: A Proposed Threshold That Respects Constitutional Rights*, 45 J. MARSHALL L. REV. 85, 92-93 (2011) (stating that most courts will apply *Tinker* if it is likely that disruption will occur on campus).

addressed this fact situation, which is clearly an exceptional circumstance.[159] In that situation, the court found that *Tinker* did not apply.[160]

To be clear, so long as there is a reasonable potential for disruption of the school environment, no court has refused to apply *Tinker*. This is hardly a state of disarray. Yet, even in cases where *Tinker* might be inapplicable, we believe two additional legal theories can be constitutionally applied by administrators to deal with cyber bullying.

B. The Fraser *Fundamental Values Standard*

Fraser was the first student free speech first case decided by the Court after *Tinker*, and notably did not apply the *Tinker* analysis.[161] *Fraser* focused on the responsibility schools have to inculcate fundamental societal values in children as a justification for regulation of student speech—in the case of *Fraser*, vulgar speech. As the Court stated:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. . . . The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.[162]

In summary, schools are responsible for teaching fundamental values, and American democratic fundamental values "disfavor the use of highly offensive or highly threatening" language.[163]

How are schools to accomplish this task if they do not have some discretion in regulating student speech? The very act of regulating student speech is a lesson to students with regards to what is, and what is not, acceptable dialogue in a civilized, democratic society. Schools teach by regulating. To prohibit schools from regulating speech would be tantamount to prohibiting schools from teaching and inculcating these critical fundamental values. The Supreme Court recognized this in *Kuhlmeier* when it stated "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[164]

The point bears repeating, for it is at the crux of the tension between free speech claims and the mission of public schools. Schools teach what is appropriate and

---

[159] Thomas *ex rel.* Thomas v. Bd. of Educ., 607 F.2d 1043, 1045-46 (2d Cir. 1979).

[160] *Id.* Even in this case, the court pointed out "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." *Id.* at 1058 n.13 (Newman, J., concurring).

[161] O'Shaughnessy, *supra* note 16, at 47 (noting that the Court did not apply the *Tinker* standard in *Fraser*).

[162] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[163] *Id.*

[164] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

inappropriate by prohibiting conduct and speech which, though it may be constitutionally protected in our society when spoken outside of schools, is offensive and counter to the fundamental values schools seek to inculcate. The practicality of this concept is obvious; the Seventh Circuit provided an excellent example, in applying *Fraser*:

> In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth.[165]

Such statements by the Jewish or Christian child do not rise to the level of true threats. And, depending on the circumstances, may not rise to the level of creating a substantial disruption in the school or impose on the rights of other students under *Tinker*. But, no rational adult would argue that school administrators are prevented from prohibiting such speech by students—although such speech is clearly protected when spoken by adults outside the school context.

Under *Fraser*, school administrators have broad discretion in regulating student speech provided the regulation is aimed at teaching the bounds of appropriate social behavior and inculcating fundamental values. This is what we referred to above as maintaining an appropriate school climate.[166] Several courts have extended *Fraser's* application beyond school-sponsored events,[167] and have applied it to hold that the display of confederate flags at school could be regulated,[168] and that school officials could prohibit a student from wearing Marilyn Manson t-shirts to school.[169] Neither of these could be constitutionally prohibited off campus.

---

[165] Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996).

[166] *See supra* Introduction.

[167] *See* Denno *ex rel.* Denno v. Sch. Bd. of Volusia Cnty., Fla., 218 F.3d 1267, 1274-76 (11th Cir. 2000) (extending *Fraser* to non-school function activities); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (extending *Fraser* to hold school officials may regulate lewd, obscene, and vulgar speech even if it does not occur during a school sponsored event); *see also* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868-69 (Pa. 2002) (noting that student speech created off campus, and posted on website, that included derogatory, profane, offensive, and threatening statements directed toward one of the student's teachers and his principal could be punished under *Fraser* as lewd and under *Tinker*).

[168] *Denno*, 218 F.3d at 1275-76 (using *Fraser* precedent to bar display of confederate flag in school even absent potential disruption); West *ex rel.* T.W. v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233-34 (D. Kan. 1998) (applying *Fraser* to hold that drawing and display of confederate flag be prohibited and such conduct disciplined), *aff'd*, 206 F.3d 1358 (10th Cir. 2000).

[169] Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000) (holding that under *Fraser*, a high school could prohibit wearing of offensive though not obscene Marilyn Manson t-shirt).

Fraser creates a more flexible reasonableness standard than *Tinker* that balances the student's right to "advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior."[170] We refer to this as the *Fraser* "fundamental values standard." And, at least one court has applied this standard to cyber bullying conduct, finding that a student website, created off campus, that included derogatory, profane, offensive and threatening statements directed toward one of the student's teachers, could be proscribed and punished under *Fraser*.[171]

C. Cyber Bullying as Fighting Words

The First Amendment has no application when what is restricted is not "protected" speech.[172] The Supreme Court has defined a number of categories of speech that are of such little value as to not be entitled to first amendment protection, such as inciting imminent lawless action (falsely shouting fire in a crowded theater),[173] obscenity,[174] defamation, child pornography,[175] and fighting words.[176] This third category—the fighting words doctrine—is arguably applicable to cyber bullying.

The Supreme Court has defined fighting words as follows:

> The test is what [a person] of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.[177]

The test requires an analysis of both the content of the words and the context in which they are used. The test also measures the reaction of the addressee based on those of an objective, reasonable person.[178]

---

[170] *Denno*, 218 F.3d at 1273-74; *see* Lorillard, *supra* note 17, at 212 (citing *J.S.*, 807 A.2d at 868 (finding if court solely applied *Fraser*, there would be "little difficulty in upholding the School District's discipline")) (arguing that *Fraser* legal theory is best match to cyber bullying cases).

[171] *J.S.*, 807 A.2d at 868-69.

[172] Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011) (determining that voting of a legislator is not speech); *see, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not speech).

[173] Schenck v. United States, 249 U.S. 47, 51-53 (1919).

[174] *See Roth*, 354 U.S. at 476.

[175] New York v. Ferber, 458 U.S. 747, 765 (1982).

[176] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Beauharnais v. Illinois, 343 U.S. 250, 253 (1952).

[177] *Chaplinsky*, 315 U.S. at 573.

[178] *Id.*

One state supreme court has applied this doctrine to find that bullying between children constituted unprotected fighting words. In *Svedberg v. Stamness*,[179] the North Dakota Supreme Court reviewed a free speech challenge to the issuance of a restraining order against a fourteen-year-old child for harassment. In *Svedberg*, the defendant and his friends had engaged in incessant teasing, calling Svedberg "Dumbo," had constructed large snow figures with big ears around the neighborhood, and on one occasion the defendant stated to Svedberg, "You had better watch it Dumbo or I will kill you."[180] Based on this conduct, the district court issued a restraining order under the North Dakota Criminal Code,[181] finding "that there are reasonable grounds to believe that the respondent has engaged in disorderly conduct."[182] The defendant challenged the issuance of the restraining order, arguing that his words were protected speech.[183]

The North Dakota Supreme Court reviewed the free speech challenge in light of the fighting words doctrine.[184] In so doing, the court pointed out that, in determining what an objective addressee would do in the given context, it was appropriate to take into account the age of the addressee.[185] As the court stated:

> No one would argue that a different reaction is likely if a thirteen-year-old boy and a seventy-five-year-old man are confronted with identical fighting words. Accordingly, we hold that to determine what constitutes fighting words, a court must consider both the content and the context of the expression, including the age of the participants.[186]

Based on this analysis, the court found that words in question were fighting words not subject to constitutional protection.[187]

Were a court to apply the fighting words doctrine to cyber bullying, its "context" analysis must take into account two important issues. [188]

First, as we are dealing with cyber bullying at the elementary and secondary school levels, the age of the parties involved is a factor. Scientific studies have confirmed what common sense indicates, that children go through a process of maturation that includes development of rationality.[189] The free speech rights of a

---

[179] Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

[180] *Id.* at 679-80.

[181] N.D. CENT. CODE § 12.1-31.2-01(5)(d) (2013).

[182] *Svedberg*, 525 N.W.2d at 679-80.

[183] *Id.*

[184] *Id.* at 683.

[185] *Id.* at 684.

[186] *Id.*

[187] *Id.*

[188] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (pointing out that a statement made with "disarming smile" may not constitute fighting words while same expression made in different context may); New York v. Ferber, 458 U.S. 747, 778 (1982) (Stevens, J., concurring) (stating analysis of content and context needed for fighting words to be found).

[189] Colleen Creamer Fielkow, *Bullies, Words, and Wounds: One State's Approach in Controlling Aggressive Expression Between Children*, 46 DEPAUL L. REV. 1057, 1078 (1997)

senior in high school should not be the same as a second grader's. The courts have also recognized that the level of constitutional protection of free speech varies with the age of the students involved, and so should what constitutes fighting words.[190] Consequently, an application of the fighting words doctrine to cyber bullying must take into account the ages of those involved.

Secondly, in applying the fighting words doctrine to cyber bullying, we are by definition speaking of speech that takes place in, or imposes itself into, the public school, which we have seen is "fundamentally different from other contexts."[191] Interestingly, *Svedberg* did not address regulation of speech in the school context, but rather regulation of speech by children under a criminal statute outside of school. If the bullying actions in *Svedberg* constituted fighting words outside the public school context, under the more flexible constitutional conditions in the public school context such conduct could be legitimately prohibited and/or punished in a public school.

VI. CONCLUSION

> "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[192] —John Milton

Free speech rights of students are not amendable to a one-size fits all blanket protection. As children grow in age and maturity, their ideas (and the speech they use to express those ideas) mature as well. A second grader's mis-directed chant of "four-eyes" is not entitled to the same protection as a high school senior's silent protest of war by wearing a black armband.[193] There is no marketplace of ideas in

---

(citing DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS (1989)) (analyzing data on the development of rationality in children); Paul C. Magnusson, *Student Rights and the Misuse of Psychological Knowledge and Language, in* SCHOOLING AND THE RIGHTS OF CHILDREN 92-114 (Vernon F. Haubrich & Michael W. Apple eds., 1975) (reviewing courts' use of developmental data to analyze children's rights).

[190] *Svedberg*, 525 N.W.2d at 684 (citing obvious difference in reactions between a seventy-five year old man and a teenager). *Compare* Papish v. Univ. of Mo. Bd. of Curators, 410 U.S. 667, 671 n.6 (1973) (per curiam) (holding that expelling graduate student for distributing newspaper containing "indecent" political speech was unconstitutional), *with* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding high school could censor newspaper articles by students without infringing on the constitution). *See also* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008) (citing difference between adult debates on social issues versus debates among children); *cf.* City of Houston v. Hill, 482 U.S. 451, 462 (1987) (holding that trained police officer must exercise a higher degree of restraint than the average citizen in the face of fighting words).

[191] *See supra* Part III; *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002) (finding public school harassment policy constitutional, though would not have been outside school context).

[192] JOHN MILTON, AREOPAGITICA 50 (John W. Hales ed., 1st ed. 1875).

[193] *See* Dryden, *supra* note 90, at 167 (distinguishing between expressions about matters of public concern deserving of free speech protection and offensive, malicious, and defamatory expression); Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 283 (2008) (arguing that cyber

second grade, or if there is, it is very small. Context is clearly as important as content when taking into account prohibitions of student speech.

The Supreme Court's student free speech jurisprudence recognizes that schools are different from other contexts, and that children are different from adults. These differences are at the heart of the Court's analysis of student speech rights. Consistent with these differences, the evolution of student speech rights demonstrates a willingness by the Court to grant greater latitude to public schools in regulating speech provided that regulation is aimed at appropriate pedagogical ends: preventing foreseeable disruption in the school environment or invasion of the rights of others; inculcating fundamental values; protecting the educational process. To achieve these ends, we have shown that school administrators have several tools available to them to constitutionally regulate student speech: the true threats doctrine, the *Tinker* substantial disruption test, the *Fraser* fundamental values standard, and the fighting words doctrine. These doctrines cover a broad spectrum of student speech—from outright threats, to potentially disruptive speech, to speech that is inappropriate to the educational environment and the fundamental values it seeks to inculcate.

There is no doubt that speech that would otherwise be protected outside of the school context may be constitutionally regulated in public schools. School administrators must grapple, daily, with where to draw the line. When speech occurs on campus, or makes itself felt on campus, we believe that good faith adherence to three concepts will resolve most constitutional doubts:

> (1) Free speech rights of students should be "what is appropriate for children in school."
> (2) Student speech that may substantially disrupt the school environment or invade the rights of others may be prohibited.
> (3) School administrators may regulate student speech in order to protect the educational environment and the inculcation of fundamental values.

Among the many memories that most of us take from our early school days, two are probably common to most of us. The first is of instances of experiencing or witnessing teasing or bullying behavior. The second is of rules, regulations, prohibitions, and restrictions imposed by school administrators that seemed, at the time, excessive or unfair. It is likely that most of us have looked back with chagrin on both of these memories: on memories of teasing and bullying, with regret at not having done more to stop them; on memories of "unfair" restrictions with a more understanding and mature perspective.

If we are fortunate, most of us have not had to deal—either as children or adults—with the extreme consequences of bullying—student deaths. We began this article memorializing children who died as a result of bullying behavior. They were school children, all under the age of eighteen, who died too young. They left behind moms and dads, grandparents, brothers, sisters, friends—all of whom, years from now, will continue to remember them. Their smiles will be missed. Their laughter will be remembered. The promise of their amazing potential will never be realized. And all of the loved ones they left behind will ask themselves, repeatedly—what if? Could we have done more? How could we have prevented the unbearable tragedy of

---

bullying rarely addresses matters of public concern and should not be entitled to constitutional protection).

their premature deaths? We believe school administrators have the power, indeed the obligation, to do more.

Let there be no mistake. We believe, as Milton argued, that free speech and debate is the primary, fundamental, and irreplaceable liberty vital to any true democracy. And we abhor any regulation by the state that infringes on this right – be it the right to free speech of an adult or a child. But, we recognize that we live in an imperfect world, full of grey areas, and that close calls will sometimes fall on the wrong side of "the line." If school administrators from time to time err on the side of protecting a child victim of cyber bullying versus protecting the free speech rights of a bully, as adults we believe that we can live with that. And so can the victims.