Free Speech in Public Schools: Politics, Prose and Profanity from 1967 to the Present

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Reflections on Tinker: A School Lawyer’s Lament

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Justice Abe Fortas, author of the Supreme Court’s majority opinion in Tinker v. Des Moines Independent Community School District, was no stranger to controversy, but one wonders whether he could have anticipated the confusion and dissension swirling around his opinion in legal circles and academia nearly 50 years later. The Court’s later student speech decisions have done little to clarify matters, prompting one frustrated lower court to observe: “The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case.” For us school lawyers, no area of the law poses a greater challenge in navigating our clients to a safe harbor.

All are familiar with Tinker’s requirement that student-initiated speech can be regulated only by “a showing that the students’ activities would materially and substantially disrupt the work and

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2 The Senate had recently denied Justice Fortas confirmation as Chief Justice in the wake of Chief Justice Earl Warren’s resignation, and he would resign from the Court several months later following a scandal. See Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left Of Tinker?, 48 DRAKE LAW REV. 527, 528 (2000) (“Chemerinsky”).

3 Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011).
discipline of the school."\(^4\) Yet courts and scholars still wrestle with the most basic aspects of the Court’s holding,\(^5\) starting with how much deference Tinker affords school officials who suspect disruption is afoot.

Many assume that the Court intended that disruption be assessed by an objective standard, where school officials’ good faith counts for little. This is understandable, given the Court’s emphasis on the evidential burden that a district must shoulder,\(^6\) and the dissenting opinions of Justices Black\(^7\) and Harlan\(^8\) strongly criticizing the majority’s reluctance to defer to school officials’ good faith judgments. Others have argued that Justice Fortas intended a far more deferential standard, finding hints in his opinion that the district might well have prevailed had it offered more than lame speculation,

\(^4\) Tinker, 393 U.S. at 513.


\(^6\) Id. at 509.

\(^7\) Id. at 515 (Black, J., dissenting).

\(^8\) Id. at 526 (Harlan, J., dissenting).
and a suspicious double standard calling its good faith into question.\(^9\)
Still others argue that the majority intended a rigorous evidential burden, but that the lower courts have ignored that requirement, and for the most part granted the sort of deference advocated in Justice Black’s dissent.\(^{10}\)

One justification for greater deference is that school officials must make judgments quickly in the face of rapidly unfolding developments, with incomplete information and no opportunity to consult with legal counsel. This predicament is evident in the lower courts’ attempts to reconcile Tinker with the “heckler’s veto” doctrine.\(^{11}\)

Recently, the Ninth Circuit barred students from wearing shirts displaying the American flag on Cinco de Mayo for fear that other students would react violently.\(^{12}\) As the panel’s majority read Tinker, it does not matter who is to blame for the disruption, because it is unrealistic “[t]o require school officials to precisely identify the source of a violent threat before taking readily-available steps to

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\(^9\) In Tinker, the school permitted other students to wear other symbols of “political or controversial significance,” such as political campaign buttons, and even the Iron Cross, traditionally a symbol of Nazism. Tinker, 393 U.S. at 510.

\(^{10}\) See, e.g., Chemerinsky, supra.

\(^{11}\) “The term ‘heckler’s veto’ is used to describe situations in which the government stifles speech because it is ‘offensive to some of [its] hearers, or simply because bystanders object to peaceful and orderly demonstrations.’ Bachellar v. Maryland, [397 U.S. 564, 567 (1970)](internal citations and quotation marks omitted).” Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 778, n. 7 (9th Cir. 2014), cert. den. 135 S.Ct. 1700 (2015).

\(^{12}\) See Dariano, supra.
quell the threat[].”\textsuperscript{13} The dissent complained that by allowing the hecklers to veto peaceful students’ expression, the court created a split with the Seventh\textsuperscript{14} and Eleventh Circuits,\textsuperscript{15} which have held that otherwise permissible speech cannot be suppressed based solely on the violent reaction of its audience. The Supreme Court could have resolved this standoff but denied certiorari,\textsuperscript{16} leaving the issue unresolved.

The day-to-day environment in our public schools, and even their very role in American society, have evolved since the 60’s making the disruption analysis more complicated still. Justice Fortas viewed students’ interaction with each other outside of class as an integral part of their education, and regarded the public school classroom as “peculiarly the marketplace of ideas.”\textsuperscript{17} To Justice Black, in dissent, school was where teachers were paid to impart knowledge, and immature students “at their age . . . need to learn, not teach.”\textsuperscript{18} Despite their disagreement on how students should conduct themselves at

\textsuperscript{13} 767 F.3d at 778.

\textsuperscript{14} See Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 882 (7th Cir. 2011)(student wore a t-shirt to school on the Day of Silence bearing the slogan, “Be Happy, Not Gay.”).

\textsuperscript{15} See Holloman ex re. Holloman v. Harland, 370 F.3d 1252, 1275 (11th Cir. 2004)(student silently held up a fist rather than reciting the Pledge of Allegiance).

\textsuperscript{16} Dariano, 135 S.Ct. 1700 (2015).

\textsuperscript{17} Tinker, 393 U.S. at 512-13.

\textsuperscript{18} Id. at 522 (Black, J., dissenting).
school, the boundaries between the school community and the outside world were fairly well defined back then.

Those boundaries are far hazier today. Public schools no longer function as institutions unto themselves, but are enmeshed in a web of social service agencies serving a wide range of student needs beyond academic education. The Internet has blown the doors off the schoolhouse, and social media have become an intoxicating distraction to students and staff throughout the day. The boundaries of acceptable behavior have changed as well. Our rancorous discourse in the public square has trickled down to our children, normalizing disrespect for teachers and administrators that surely would have been deemed “disruptive” in times past. What passes for a “disruption” today may look far different than what Justice Fortas had in mind.

*Tinker*’s application to off-campus expression also remains in dispute. So far, the Second, Fourth, Fifth, Eighth and Ninth Circuits have applied *Tinker* to off-campus expression.\(^\text{19}\) The Third Circuit is still scratching its head,\(^\text{20}\) and the remaining circuits have not yet addressed the issue.


\(^{20}\) See *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219-20 (3d Cir. 2011)(en banc)(Jordan, J., concurring)(*Tinker*’s applicability to off-campus speech remains unresolved); see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 & n. 8 (3d Cir. 2011)(en banc) (assuming,
But even among those courts that have extended *Tinker*’s reach beyond the school property line, there is no agreement on what must be shown. The Fourth Circuit considers the “nexus” between speech and the school community.21 To the Eighth Circuit, what matters is the “reasonable foreseeability” that speech would find its way back to the school.22 The Ninth Circuit applies both the “nexus” and “reasonable foreseeability” tests.23 The Fifth Circuit has not yet adopted any particular test, but has found jurisdiction to regulate off-campus speech at least where a student “intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher . . . .”24

What’s more, anti-bullying legislation, now in effect in most states, has forced courts to confront the “very real tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech[.].”25 There may be “no constitutional right to be a

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21 *Kowalski*, 652 F.3d at 573.

22 *S.J.W. v. Lee’s Summit R-7 School Dist.*, 696 F.3d 771, 777 (8th Cir. 2012).

23 *C.R.*, 835 F.3d at 1150.

24 *Bell*, 799 F.3d at 396.

25 *Zamecnik*, 636 F.3d at 877 (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001)).
bully[,]”26 but “[t]here [also] is no categorical ‘harassment exception’ to the First Amendment's free speech clause[.]”27

Fortunately, Tinker itself recognized other students’ right “to be secure and to be let alone.”28 In fact, most courts have had little difficulty distinguishing pure speech expressing hurtful viewpoints29 from ad hominem intimidation that compromises students’ physical or psychological well-being,30 but most bullying cases have involved attacks against specific students, thus making the task easier. 31 Until the Supreme Court resolves the impasse between the circuits on how to treat the heckler’s veto, however, it remains unclear whether schools can suppress pure speech that does not target individuals specifically, but is so offensive that it still may cause a violent reaction among other students.

27 Saxe, 240 F.3d at 204.
28 Tinker, 393 U.S. at 508.
29 Saxe, 240 F.3d at 215-16.
30 See, e.g., Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007) ("Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As Tinker clearly states, students have the right to be secure and to be let alone. Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.")
Student free speech law continues to be a welter of confusion. The ongoing balkanization of the law in each of the circuits, as the Supreme Court continues to deny certiorari in important cases, is not a productive use of judicial resources and only serves to generate more unnecessary litigation.

By its very nature, this litigation often involves headline-making facts, and the unpredictability of results certainly heightens the drama when we are called upon to defend our school district clients in a high-profile case. Our primary responsibility as school lawyers, however, is not to win these cases but to help our clients avoid them altogether by conforming their conduct to clearly established law. We can only hope that, in the years ahead, the Supreme Court will see fit to resolve Tinker’s unresolved questions, and develop a cohesive, explainable legal standard so we can provide our clients the guidance they deserve.
I. Introduction and Overview

Over the past generation, the civil rights of young people underwent an extreme pendulum shift, in which courts and legislatures largely abdicated their role in protecting individual rights against government overreaching. Recently, however, there are signs that – as with all pendulum swings – a correction is underway.

Outside of the schoolhouse, individual liberties are recognized as so foundational to our American way of life that compelling societal imperatives – even solving serious crimes – must yield. Away from the schoolyard, bedrock constitutional principles reliably elevate civil rights over government efficiency. In a judgment-call First Amendment case where boundaries are unclear, all benefit of the doubt goes to the speaker and not the regulator. Speakers are held responsible only for the direct consequences of their words, not how agitated listeners overreact to them. Contemporary school-speech jurisprudence inverts these presumptions.

Consider how, nearly 50 years ago, Justice Abe Fortas balanced the interests of student speakers and government regulators:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk … and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength(.)

By contrast, consider how Judge Richard Posner of the federal Seventh Circuit weighed those interests in a school-speech case controlled by *Tinker* 40 years later:

A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense. The contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable.

*Nuxoll v. Indian Prairie Sch. Dist.*, 523 F. 3d 668, 671 (7th Cir. 2008).

In less than half a century, Justice Fortas’ “hazardous freedom” gave way to a very different set of priorities. Gone was the sense that students faced peril from overzealous content-motivated discipline; instead, the source of their peril was each other, and the school disciplinarians their rescuers. But the pendulum did not stop swinging there. Consider how the federal Fifth Circuit dismissed as frivolous the case of a teen sexual-assault victim who was disciplined for refusing to perform a cheer celebrating the athletic performance of the athlete under criminal investigation for her rape: “In her capacity as cheerleader, H.S. served as a mouthpiece through which [the district] could disseminate speech – namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, [the district] had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit.”¹ The pendulum’s path was complete: Students transformed from citizens-in-training into government mouthpieces.

With a growing body of research documenting the life-changing detriments of out-of-school discipline, it is no longer possible to shrug off “just” a suspension as too insignificant to dignify with judicial oversight.² It is now so well-accepted that discipline differentially impedes

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the educational progress of disabled students and students of color that the Attorney General and Secretary of Education took the unprecedented step of jointly calling for schools to stand down from ruinous “zero tolerance” disciplinary practices. The law is, fitfully, catching up with this realization.

II. Recent Developments in Student-Rights Law

A. Social media privacy statutes

Five states – Louisiana, Michigan, New Hampshire, Rhode Island and Wisconsin – have enacted statutes since 2012 protecting K-12 students against invasive social-media “fishing expeditions” by their schools. While details vary, the core function of the statutes is the same: School employees (including both public and private institutions) may neither demand students’ login information nor force students to log into social media for purposes of inspecting the nonpublic portions of social-networking pages. (Exceptions exist for cases in which students are using school-issued devices or accounts, and each statute recognizes that the non-secured public portions of students’ accounts remain fair game for inspection.) A sixth state, Illinois, enacted more modest protection requiring only that schools first notify parents before searching a student’s account. These statutes were prompted by high-profile cases in which school disciplinarians overreached to pry into their students’ off-campus personal activities. In an

prison-pipeline-how-horseplay (quoting New York City task force report that concluded “punitive measures disproportionately target minority and special education students, putting them at a greater risk for dropping out, court involvement, and incarceration”).


105 Ill. Comp. Stat. § 75/15.

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especially egregious case, the principal of a Minnesota middle school forced a 12-year-old girl to log into her personal Facebook account so that he could read private chat messages written during out-of-school hours, because a classmate’s mother had complained that the girl was using sexually explicit language in a chat with her son.6

B. Student journalists’ rights statutes

Over the past two years, statutes protecting student journalists against the worst abuses of school censorship authority have become law in Illinois, Maryland and North Dakota.7 These statutes are a response to the U.S. Supreme Court’s 1988 ruling, Hazelwood School District v. Kuhlmeier,8 which stripped away all meaningful constitutional protection for student expression in the “curricular” setting, when a student uses a school-provided vehicle as a means of expression. Although Hazelwood took place in the context of a class-produced newspaper in a public high school, its core holding – that student expression may freely be censored so long as the school can identify a justification “reasonably related to legitimate pedagogical concerns” – has since been applied to graduation speeches, musical performances, and even to the choice of commemorative tiles in walkways and walls.9

The Hazelwood “mouthpiece mentality” – that students have an enforceable duty to promote a favorable public image of their schools – has led to well-documented excesses, including such heavy-handed reprisals against journalism educators that California was

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compelled in 2009 to enact explicit statutory protection against retaliatory personnel actions.\textsuperscript{10}

As a growing body of research documented the detrimental impact of uncontrolled school censorship on civic and journalism education, policymakers began to respond. In 2015, North Dakota became the eighth state with a statute that blunts the impact of \textit{Hazelwood} by giving students in public institutions at the K-12 and college levels the ability to choose the (lawful and non-disruptive) content of school-supported journalistic media. Illinois and Maryland followed suit in 2016, bringing the number to ten,\textsuperscript{11} and bills are pending in 2017 in Indiana, Missouri and Washington. These proposals can be expected to multiply given the national alarm over young readers’ documented inability to discern “fake” from real news, and the recognized linkage between meaningful journalism in schools and preparedness for civic life.\textsuperscript{12} As the American Society of News Editors stated in an August 2016 resolution calling on states to enact censorship protection for student journalists, “a free and independent student media is an essential ingredient

\textsuperscript{10} See Robert J. Lopez, “New California law protects school journalism advisors,” \textit{Los Angeles Times}, Jan. 4, 2009 (reporting that, over a three-year period, “at least 15 high school journalism advisors have lost their jobs or been reassigned by administrators who perceived stories as critical”).


\textsuperscript{12} See Sue Shellenbarger, “Most Students Don’t Know When News Is Fake, Stanford Study Finds,” \textit{The Wall Street Journal}, Nov. 21, 2016) (quoting Stanford University study of online news consumption habits of 7,804 students). In one recent survey of high school students in Missouri and Kansas, published online at http://civicsandjournalists.org/, University of Kansas researchers found that students who participated in journalism in a school environment supportive of First Amendment values graduated with a markedly higher sense of “civic efficacy,” as measured by their belief that they could use their advocacy skills to bring about positive change, than students who worked in a climate where press freedom was devalued.

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of a civically healthy campus community, conveying the skills, ethics and values that prepare young people for a lifetime of participatory citizenship.”

C. Cyberbullying criminal statutes

In the wake of a string of highly publicized tragedies in which students subjected to online cruelty took their own lives, 18 states responded with statutes criminalizing “cyberbullying.”13 The constitutionality of these statutes is in question after recent rulings in North Carolina and New York striking down overly broad prohibitions that criminalized offensive or annoying online behavior alongside constitutionally unprotected threats and harassment.

In a 2014 ruling, the New York Court of Appeals found that a county ordinance outlawing broad categories of undesirable online speech was so unconstitutionally overbroad that it could not be judicially salvaged.14 The ordinance created a misdemeanor punishable by a year in jail for “disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm.”15 Even the prosecution conceded that the ordinance proscribed a significant amount of constitutionally protected speech, including “embarrassing” photos and “hate mail.” The ruling resulted in vacating the conditional guilty plea of a 16-year-old high-schooler who had created a Facebook page spreading sexual gossip about named classmates.

13 A state-by-state compilation of statutes is available online at http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf.
15 Id. at 6.
The North Carolina Supreme Court followed suit in 2016, invalidating a state statute making it a misdemeanor to post “private, personal, or sexual information pertaining to a minor” online with an intent to “intimidate or torment.” Overturning a lower-court decision that declared the statute to be a content-neutral regulation only incidentally burdening speech, the justices unanimously found the law to be content-based and, applying strict scrutiny, an insufficiently tailored remedy for the intended harm.

**D. Recent Supreme Court developments**

Students also stand to be unforeseen beneficiaries of recent Supreme Court rulings fortifying First and Fourth Amendment liberties in the out-of-school setting. In *Riley v. California*, the Court overturned a conviction based on information gleaned from an unjustifiably invasive search of the contents of a motorist’s cellphone during a routine traffic stop. And in *Agency for International Development v. Alliance for Open Society, Inc.* the Court struck down as unenforceable a contractual requirement that recipients of discretionary government grants forfeit their First Amendment rights and agree to express only messages consistent with federal policy.

Both issues – the authority of law enforcement to search cellphones and the ability to condition receipt of a discretionary government benefit on a contractual waiver of free-speech rights – have special salience in the school setting. Both rulings counsel in favor of caution when school authorities impose consequences on students based on the contents of confiscated

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17 *Id.* at 820-21.
19 133 S. Ct. 2321 (2013).
cellphones, or require students to sign “good behavior contracts” as a condition of using school technology or participating in extracurricular activities.

III. Social Media Discipline: The Unresolved Issue

Until its 2015 ruling in the case of a vengeful ex-husband prosecuted for threats posted to social media,20 the Supreme Court had never used the word “Facebook” in a published opinion, even though the platform had been around for 11 years with more than 1.5 billion worldwide users. This lag in the development of legal norms in the realm of social media reflects the Court’s conservatism in wading into evolving issues where generations of technological change are measured in months and not decades. As a consequence, school disciplinarians lack clear guidance on the boundaries of punitive authority when students are speaking off campus on their personal time using personal devices, leaving the lower courts to develop an evolving framework (and, in the first generation of cases, to absolve school employees of financial liability on the grounds of qualified immunity in an unsettled area of the law).21

What can be said confidently is that speech realistically portending violence against others on campus, even when intended jokingly, will be regarded as punishable regardless of where it is published, based on the speech’s ripple effect in disturbing school operations, while speech that is merely critical of the performance of school employees – even crudely worded

21 See, e.g., Doninger v. Niehoff, 642 F. 3d 334 (2d Cir. 2011) (extending qualified immunity to principal who disciplined student blogger for using coarse term to describe administrators); Ryan v. Mesa Unif. Sch. Dist., No. 2:14-cv-01145 JWS (D. Ariz. July 18, 2016) (granting qualified immunity to coach who disciplined student athletes for Twitter post during overnight trip that was interpreted as fomenting divisiveness among teammates); see also Yeasin v. Durham, No. 2:16-CV-02010-JAR. (D. Kan. Dec. 1, 2016) (holding, in college context, that qualified immunity foreclosed damages against administrators who expelled student for violating a no-contact order against a former girlfriend on the grounds of Twitter posts that referenced her indirectly).

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mockery – will be protected against disciplinary action. Beyond that, the boundaries of school punitive authority remain indistinct and evolving. The growing consensus is that some type of “Tinker-plus” standard will govern the exercise of school control over student expression on social media outside of school premises and functions.

In the most recent appellate iteration, the en banc Fifth Circuit dealt with the case of a whistleblowing student rap musician, who composed and recorded a song laced with profanity and racial slurs to call attention to what he believed to be credible accounts of sexual misconduct by coaches at his Mississippi high school. The majority opinion, upholding the school’s exercise of punitive authority as lawful, found that online speech could be punished “when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher.” The ruling adds a limiting gloss on Tinker requiring proof of intent and proof that a school employee was targeted for serious harm. This heightens the school’s burden beyond the Tinker standard that applies to in-school speech, which may be interdicted or punished if there is a reasonable apprehension of an imminent substantial disruption. Counsel for the expelled student, Taylor Bell, petitioned the Supreme

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22 An illustrative case in the first category is D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F. 3d 754 (8th Cir. 2011), involving a student suspended for a series of instant messages transmitted to a friend describing in detail how he would go about a school shooting, including identifying how he would obtain a firearm and whom he would target. In the second category are cases such as Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010), in which a school overstepped the First Amendment by suspending a student for creating a Facebook discussion group devoted to venting distaste for “the worst teacher I’ve ever met”.


25 Tinker, 393 U.S. at 514.

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Court to review the ruling, but the Court – voting just days after the death of Associate Justice Antonin Scalia – declined to accept the case.26

It is impossible to reliably forecast where the Supreme Court will come down when, inevitably, a social-media speech case lands on the docket. The justices have been generally protective of technologically aided speech, rebuffing regulators’ attempts to consign new forms of media to a lesser-protected category. As the Court stated in Brown v. Entertainment Merchants Association, “whatever the challenges of applying the constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”27 And the Court has recognized that a school’s authority over speech diminishes when the speaker is outside of the “captive listener” setting of the school day.28 Much will depend on the pivotal vacant seat and, most especially, whether the facts presented resemble true “cyberbullying” speech without a redeeming element of public concern, or whether the speech can be understood as addressing the performance of school employees.

27 131 S. Ct. 2729, 2733 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).
28 In Morse v. Frederick, 127 S.Ct. 2618, 2626 (2007), Chief Justice Roberts rationalized the diminished free-speech protection afforded to a student speaker in an earlier case, Bethel Area Sch. Dist. v. Fraser, 478 U.S. 675 (1986), because the student, Matthew Fraser, was speaking to a captive in-school audience during a school-organized event. “Had Fraser delivered the same speech in a public forum outside the school context,” the chief justice wrote, “it would have been protected.”
IV. CONCLUSION

Central to the Fifth Circuit’s resolution of the Taylor Bell case was Judge Rhesa Hawkins Barksdale’s conviction that epidemic school violence requires affording administrators a free hand to respond with punishment:

Greatly affecting this landscape is the recent rise in incidents of violence against school communities. ... School administrators must be vigilant and take seriously any statements by students resembling threats of violence ... as well as harassment and intimidation posted online and made away from campus. This now-tragically common violence increases the importance of clarifying the school’s authority to react to potential threats before violence erupts.29

These assertions are, by any objective measure, false. There has been no “recent rise” in incidents of school violence. To the contrary, reports of crime victimization at school, and reports by students of feeling unsafe at school, are at historic lows.30 Indeed, every indicia demonstrates that today’s students are better-behaved that their parents’ generation was – less likely to abuse hard drugs, less likely to become pregnant outside of marriage, less likely to engage in high-risk sexual behavior.31 “Get-off-my-lawn” policymaking by legislators and judges unencumbered by research calls to mind the first admonition of computer programming logic: Garbage in, garbage out.

Since the time of Hazelwood, the evolution of the law governing students’ rights has been clouded by reliance on myths and demonization. Consequently, young people are the one

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29 Bell, 799 F.3d at 393.
30 See U.S. Bureau of Justice Statistics, Indicators of Crime and School Safety: 2015 (May 2016) at 24-26, available at https://www.bjs.gov/content/pub/pdf/iscs15.pdf (showing that reports of violent offenses against students have been on a steady downward trend since the federal government began collecting statistics and that reports of violent victimization at school have declined 82 percent since 1992).
demographic group in America whose legally protected rights are objectively worse off than they were 40 years ago. There are hopeful signs that students are, belatedly, joining the contemporary “rights revolution” that has seen disabled people, gays and lesbians, and other historically stigmatized groups shed their second-class citizenship status. As members of the Bar whose first commitment is not to rationalize our clients’ worst misjudgments but to justice and the rule of law, we have the opportunity to reimagine our legal system in a way that spares another generation from what President George W. Bush memorably called the “soft bigotry” of our own low expectations.

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On August 5, 2013, fourteen judges of the 3rd Circuit Court of Appeals weighed in on the issue of whether or not students have a constitutional right to wear bracelets bearing the words: I (heart) BOOBIES: KEEP A BREAST. The bracelets were designed to support a good cause—raising awareness of breast cancer, and encouraging young girls to get over the embarrassment of discussing such things. But any mention of body parts in a junior high school can cause a commotion. And so some teachers expressed concerns about these bracelets, and asked their bosses, the school administrators, what they should do.

The administrators in the Pennsylvania school district huddled up and made a decision. They informed the students that such bracelets would not be permitted. Two students directly disobeyed this directive and were issued minor disciplinary consequences in conformity with the Code of Conduct. And a few years later, after hours of work by numerous lawyers and advocacy groups, generating thousands of dollars of fees, the esteemed judges issued a mammoth ruling, overturning the decision of the local school officials. The First Amendment, according to the nine-person majority, protected this expression of free speech. Five judges dissented. B.H. v. Easton Area School District, 725 F.3d 293 (3rd Cir. 2013).

How did we get here? Why so much time, energy and resources spent on an issue that could have been left to local school officials?

To understand, we have to go back to the 1960s and the upheaval in the country over the War in Vietnam. In December, 1965, Bobby Kennedy called for a truce in Vietnam over the Christmas holidays. Mary Beth Tinker, an 8th grader, along with her older brother and another student, decided to show support for the proposed truce by wearing black armbands to school. The parents of the students were fully supportive, even though they knew that their children would be engaging in a minor league version of civic disobedience. The principal of the school had gotten wind of the plans the day before, and had issued a directive that there were to be no black armbands in the school setting.

The protest armbands caused some talk in the school. While the War in Vietnam eventually became very unpopular, that was hardly the case in December, 1965. Moreover, Des Moines, Iowa, was not a hotbed of anti-war activity. Thus it is not surprising that there were some students, and faculty members, who found these armbands to be offensive. Perhaps even more, there were faculty members disturbed about the student’s direct defiance of the principal’s orders. If students did not have to obey the principal, they did not have to obey the teacher. Where would this lead?

It led to the U. S. Supreme Court. In February, 1969, the Court issued its decision in Tinker v. Des Moines Independent Community School District. Public schools have not been the same since.
By a 7-2 margin, the Court ruled that Mary Beth Tinker had a constitutional right to defy her principal. There had been some talk in the school, but nothing approaching any major disruption. Bells rang. Buses ran. Teachers taught. Students learned. Justice Fortas, writing for the majority, paid lip service to the “special characteristics” of the school, but that’s all it was. He held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The “Tinker Test” was established: student free speech was protected unless school officials could reasonably forecast that there would be a “material and substantial” disruption of school, or an interference with the rights of others. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Many hailed the decision. Few noted that it marked the beginning of an erosion of respect for authority in the public schools.

The next time student free speech came before the High Court the issue was vulgarity. Mary Beth Tinker and her friends used their constitutional rights in support of an important cause—peace in Vietnam. But the next plaintiff—Matt Fraser—used this precious constitutional right to justify his vulgar and offensive speech nominating his friend for an office in the student council. Fraser was clever enough to deliver a speech that contained not a single inappropriate word. But the overall effect, the innuendo and double entendre, combined with the graphic gestures he used, converted his speech into “an elaborate, graphic, and explicit sexual metaphor,” according to the Supreme Court. Fraser lost his case, 7-2. Thus the first exception to the Tinker Test: if speech is vulgar, lewd or indecent in the school setting, it can be prohibited, even when there is no major disruption. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

Students also lost the next two cases that came before the Supreme Court. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) the Court held (5-3) that schools could censor their own publications, such as student newspapers, based on any “legitimate pedagogical concerns.” Even though students wrote the newspaper, it could be perceived as bearing the school’s approval. So school censorship was permitted.

In *Morse v. Frederick*, 551 U.S. 393 (2007) the Supreme Court entered the theater of the absurd, trying to decipher the meaning of a 15-foot banner, held by students at a school sponsored event, which read: BONG HITS 4 JESUS. The banner was held at a parade through Juneau, Alaska as the Olympic torch passed through on its way to the Winter Olympics. The kids holding the banner were not trying to stop the War in Vietnam. They were not nominating their friend for student council. They were not writing for the school newspaper. They just wanted to get on TV! The plaintiff acknowledged this in the subsequent legal proceedings. The principal, viewing the banner as a distraction from the festivities, ripped the banner down and suspended the ringleader of the students. By the slimmest of margins (5-4) and only after pages and pages of angst and effort to decipher what this inscrutable banner meant, the Court upheld the principal’s decision.
So students are on a losing streak on free speech issues before the Supreme Court, but as the “boobies case” indicates, the damage has already been done. The damage is to the authority and discretion of local school officials. When judges have the right to second guess decisions of school officials regarding minor disciplinary offenses, we have lost something important.

Of course, this is part of a larger trend—the erosion of respect for authority figures at all levels of our society. But no one has paid a bigger price for this erosion than the assistant principal of a public school.

Over the last several decades we have also learned that too much respect, too much trust for authority figures, is a dangerous thing. Respected and trusted clergy have sexually abused children, and higher ups in the church have covered it up. The same is true with coaches and teachers in both public and private schools. Respected and trusted business leaders have been exposed as greedy robber barons. And let’s not get started with the failures of our political leaders.

But consider the context. Mary Beth Tinker was not facing expulsion from school. She was not the victim of discrimination on the basis of race, sex, religion, disability, national origin or sexual orientation. She was only told that she could not wear a particular symbol to school. Joseph Frederick was not faced with any serious consequences arising from his “Bong Hits” prank. The principal ordered short term disciplinary consequences. This is the type of bump in the road that is discussed with much enthusiasm at the ten-year high school reunion. It’s no big deal.

But the Tinker Test allows lawyers to make it into a very big deal. The Tinker Test allows judges to second guess such minor decisions, all in the very worthy cause of protecting the right of free speech under the First Amendment. Thus all parties can wrap themselves in the cloak of self-righteousness, convinced that they are protecting important freedoms. But perhaps it is time that we noticed the cost of such judicial oversight.

The Tinker Test has eroded the authority of local school officials, even when dealing with inconsequential matters that can and should be left to their discretion. Consider the boobies bracelets. Some school districts have allowed them. Some have prohibited them. Some have required the students to turn them inside out while at school. What’s wrong with a little diversity in how we handle such things? This is not a big deal. What’s wrong with letting each community decide for itself?

But that won’t happen now. With the 3rd Circuit’s decision the word will go out to school officials all over the country, that this is now a settled matter of free speech. And school officials will then have to deal with the fallout, as kids push boundaries with bracelets and t-shirts expressing their love for all of the other body parts that might be cancerous: prostates and testicles and rectums, oh my!!
I confess I have an attitude. I went to Catholic school. We had no constitutional rights whatsoever. No free speech. No due process. What we had, though, was a right to an education, and a group of teachers and principals who held that as a higher priority than our “right” to express our views at any time on any matter. It was orderly and disciplined and no one would think of openly defying the teacher or principal. I got a good education, and still had plenty of avenues and plenty of time in which to express my opinions under the protective banner of the First Amendment.

What’s wrong with that?

The War in Vietnam has left a long trail of consequences in its wake. The Tinker Test is one such consequence. Perhaps it is time that we looked at it with fresh eyes. In this century, ubiquitous technology allows students to express their views on everyone and everything at any time. There will be no lack of free expression in this generation. So what’s wrong with carving out a zone in the public school, during the school day, where we empower our educators to say: not here; not now. What’s wrong with supporting their decisions, even when we disagree with them? What’s wrong with telling our young people: “You are here to learn what we have to teach, and that is important enough that your constitutional rights can wait.”

What’s wrong with that?