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From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports

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INTRODUCTION

"To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."—Justice Robert Jackson[1]

Sports are an essential part of American society. For example, baseball often is referred to as America's pastime.[2] Every summer, ballparks across the nation are filled with energetic fans of all ages cheering for their favorite team. Many of our childhood memories encompass little league games, high school sporting events, and watch parties for the Super Bowl and the World Cup. Our childhood idols often are sports legends, such as Hank Aaron, Babe Ruth, and Muhammad Ali. Many Americans view sports as a venue to teach cherished values, such as teamwork, dedication, and work ethic.

Despite the multitude of sports available to play and watch, football is arguably one of the most popular and lucrative sports in the world. The National Football League ("NFL") reached $14 billion in revenue in 2016 alone.[3] High school football programs are an integral part of the NFL landscape because they serve as a training ground and pipeline for children with aspirations of playing in the NFL.[4] As a result, high school student-athletes often mimic the very players they seek to become. Students wear their favorite player's jersey, team colors, and other types of paraphernalia. But what happens when students mimic their sports idol's social protests during sporting events? What happens when social activism enters the world of youth sports? High school players across the nation illuminated this issue when they began to mimic a NFL player, Colin Kaepernick, and

1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

2. Micah Chen, *America's Pastime: 20 Reasons Baseball Will Always Hail Over Football*, BLEACHER REPORT (Apr. 25, 2011), http://bleacherreport.com/articles/676720-americas-pastime-20-reasons-why-baseball-will-always-hail-over-football [https://perma.cc/ZYM3-TJMW].

3. Daniel Kaplan, *NFL revenue reaches $14B, fueled by media*, SPORTS BUSINESS DAILY J., Mar. 6, 2017, at 4.

4. *See, e.g.*, Edwin Weathersby, *NFL Pipeline: Long Beach Poly Second Among High Schools for Most Active NFL Players*, FOX SPORTS WEST (Sept. 5, 2017, 5:59 PM), http://www.foxsports.com/west/story/nfl-pipeline-long-beach-poly-second-among-high-schools-for-most-active-nfl-players-091517 [https://perma.cc/D6W4-JW7J]; Julian Sonny, *The 10 High Schools That Produce The Most NFL Players in America*, ELITE DAILY (May 27, 2014), https://www.elitedaily.com/sports/10-high-schools-produce-nfl-players-america/608500 [https://perma.cc/7M6G-WS4L].

his teammate's act of kneeling during the national anthem in protest of police brutality against African-American males.[5] Although the First Amendment protects Kaepernick's symbolic act, many high school players across the nation did not receive the same constitutional protection for mimicking his national anthem protest.[6] On the contrary, school leaders usurped the young athletes' constitutional rights by disciplining student protesters through school and game suspensions.[7] First Amendment jurisprudence clearly provides students in K-12 public schools with freedom of expression rights as long as such acts do not create a material disruption to the school learning environment.[8] Under the Material Disruption Standard, school administrators are not permitted to limit a student's First Amendment rights unless the expression causes a substantial disruption to the school learning environment or interferes with the rights of others.[9] Courts defer to

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5. Bob Cooke, *High School Athletes Join Colin Kaepernick In Anthem Protests; Angry PA Announcers Don't*, FORBES (Sept. 11, 2016, 10:05 PM), https://www.forbes.com/sites/bobcook/2016/09/11/high-school-athletes-join-colin-kaepernick-in-anthem-protest-angry-pa-announcers-dont/#65179ea77ea1 [https://perma.cc/7STT-U5QQ].

6. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); Knowles Adkisson, *In Louisiana High School Players Link Arms, But Do Not Kneel During the Anthem*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/national/in-louisiana-high-school-players-link-arms-but-do-not-kneel-during-anthem/2017/09/29/9f893f40-a564-11e7-ade1-76d061d56efa_story.html?utm_term=.91ae8c2b378e [https://perma.cc/9NLD-NSY6]. This Article highlights the controversy surrounding high school athletes being disciplined for kneeling during the national anthem. A Louisiana principal issued a letter to students threatening to suspend any student from the game or team that knelt during the national anthem. The American Civil Liberties Union of Louisiana issued a statement expressing that the principal's national anthem policy violated a 1943 Supreme Court case, *West Virginia v. Barnette*, 319 U.S. 624 (1943), which held that public schools may not coerce students to stand during patriotic rituals. This Article highlights the growing debate regarding Kaepernick being afforded his constitutional right to engage in symbolic protests during the national anthem while high school students are being denied those same rights. *See infra* Part I.A.–B.

7. Christine Hauser, *High Schools Threaten to Punish Students Who Kneel During the National Anthem*, N.Y. TIMES (Sept. 29, 2017), https://www.nytimes.com/2017/09/29/us/high-school-anthem-protest.html?mcubz=1 [https://perma.cc/C9SJ-J9N6].

8. Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U.L. REV. 1167, 1168 (2009); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

9. *Tinker*, 393 U.S. at 513.

school administrators' discretion in determining whether a student's conduct has caused a material disruption to the school learning environment.[10]

This Article examines the intersection of high school sports, social protest, and the law. Although the majority of public discourse has centered on professional sports,[11] it is imperative also to consider the impact of national anthem protests on high school athletics—especially in light of the "Kaepernick Effect." The Kaepernick Effect refers to the wave of student-athletes who, during school athletic events, are mimicking NFL player Colin Kaepernick's act of kneeling during the national anthem in protest of the treatment of black Americans and people of color.[12] The students, like Kaepernick, are attempting to utilize sporting events as a platform for social activism.[13] Because high schools are an essential part of the pipeline to professional sports, the appropriateness of social activism in the school context is a crucial part of this national debate.[14] This Article argues that student-athletes have the constitutional right under the First Amendment to engage in protests during patriotic rituals, such as the national anthem. Thus, any subsequent discipline is unconstitutional. The Supreme Court has stated that "[t]he vigilant protection of First Amendment freedoms is nowhere more vital than in our nation's public schools" because public schools serve as a training ground for our nation's future leaders and promote the preservation of our democracy.[15] Overzealous school administrators cannot be allowed to infringe on students' First Amendment freedoms under the guise of school discipline. It is vital to our democracy that public schools promote a marketplace of ideas by encouraging students to express their diverse perspectives openly as opposed to proselytizing them to ascribe to a particular orthodoxy.[16] Although national anthem protests performed by students could cause a material disruption to school sporting events because of opposition from spectators, the preservation of First Amendment rights should supersede any limitations on those rights which are enforced to avoid discomfort or thwart the dissemination of unpopular views.

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10. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008).

11. *See infra* notes 34, 37–38 and accompanying text.

12. *See* discussion *infra* Part I.A.

13. *See* discussion *infra* Part I.B.

14. Jamilah King, *Why high school players protesting the national anthem is great patriotism*, MIC (Sept. 16, 2016, 9:43 PM), https://mic.com/articles/154333/why-high-school-players-protesting-the-national-anthem-is-great-patriotism#.iuY5Tzpfj [https://perma.cc/U8UZ-GZJ2]; *see also supra* note 4.

15. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

16. *The Brave New World of Fear: Public Education*, 15 LEGAL NOTES EDUC. 1 (2003).

The existing *Tinker* Material Disruption Standard,[17] which has served as the guiding principle for determining whether a school official may limit symbolic speech rights for students in K-12 schools, should be interpreted differently to better protect students' free speech rights when the conduct in question occurs outside of the school learning environment. Under the current *Tinker* standard, school authorities may limit First Amendment freedom of expression if the symbolic speech causes a material disruption to the school learning environment or interferes with the rights of others.[18] This criterion is highly subjective because a material disruption to one school administrator may not be classified as such by another. As a result, the application of the *Tinker* Standard in relation to national anthem protests during K-12 sporting events has been inconsistent, leaving students' free speech rights to the whims of capricious school administrators.[19] Furthermore, the *Tinker* Material Disruption Standard should be interpreted narrowly to apply only to symbolic speech that occurs within the school learning environment. The current interpretation of the *Tinker* standard is antithetical to the spirit and purpose of

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 513 (1969). In *Tinker*, the Court emphasized that students do not shed their constitutional rights at the schoolhouse door. Under the *Tinker* standard, schools may not limit students' First Amendment freedom of expression rights unless: (1) the expression causes a substantial disruption to the school learning environment; and (2) interferes with the rights of others. *Id.*

18. *Id.*

19. Evie Blad, *Can schools punish students for protesting the national anthem?*, PBS (Oct. 7, 2016), http://www.pbs.org/newshour/updates/schools-students-protesting-national-anthem/ [https://perma.cc/RK7G-6XCT]. Whether students who choose to kneel during the national anthem are disciplined largely depends on whether the school administrator approves of the symbolic conduct, with little consideration for the students' First Amendment rights. For example, students attending Parkway High School in Louisiana who choose to kneel during the national anthem will be punished by being removed from the team, whereas students attending Centerville High School in Ohio are permitted to kneel during the national anthem without fear of disciplinary action. The principal of Centerville High stated, "I personally am disheartening [sic] when people [kneel during the national anthem] but that's because I choose to stand so that people have the right to freedom of expression and if they choose to kneel then that's what I'm standing for." Dana Smith, *High school on students kneeling during national anthem*, WDTN (Sept. 29, 2017, 6:15 PM), http://wdtn.com/2017/09/29/high-school-on-students-kneeling-during-national-anthem/ [https://perma.cc/4P9Z-KVA7]; s*ee also* Jacob Bogage, *Louisiana high school will kick students off team if they don't stand for national anthem*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/09/28/louisiana-high-school-will-kick-students-off-team-if-they-dont-stand-for-national-anthem/?utm_term=.5c2e87159f4a [https://perma.cc/NC9J-NLYR].

the First Amendment and leaves students' constitutional freedoms to the abuse of discretionary power by school authorities.

This national anthem controversy is representative of the vicissitudes of political controversy that have inundated the K-12 landscape as school authorities struggle to strike a balance between patriotism and constitutional freedoms. Students' symbolic speech rights in K-12 public schools—both inside and outside of the classroom setting—must be clarified. This Article proposes a new K-12 standard that applies the full protections of the *Spence* Test[20] for student-initiated symbolic speech with the Material Disruption Standard from *Tinker v. Des Moines*.[21] Currently, the *Spence* criteria is used primarily in the context of adult freedom of expression cases and the *Tinker* Standard is applied exclusively to the K-12 schooling context.[22] Because the *Spence* standard is used to ensure that adults like Kaepernick receive the full protections of the constitution, we should extend the same level of protection to students in K-12 schools to safeguard their freedom of expression rights.[23]

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20. Spence v. Washington, 418 U.S. 405, 415 (1974).

21. *Tinker*, 393 U.S. at 513.

22. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 403–04 (1989) (citing *Spence*, 418 U.S. 405 in the context of freedom of expression of an adult violating an anti-flag desecration statute); Laura Prieston, Note, *Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas*, 52 B.C. L. REV. 375, 383 (2011) ("At present, the holding of Tinker has not been overruled and still protects the First Amendment free speech rights of students in public schools.").

23. The *Tinker* Material Disruption Standard is too narrow and thus fails to safeguard students' free speech rights. The *Spence* Test, however, promotes expansive free speech rights but fails to consider the "special characteristics" of schools in assessing First Amendment rights. If students truly do not shed their constitutional rights at the schoolhouse door, then the theoretical gap between *Tinker* and *Spence* must be addressed by the adoption of my proposed new constitutional theory, the *Tinker-Spence* standard. *See generally Tinker*, 393 U.S. at 506 ("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."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."); Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 590 (2002) ("When considering the constitutionality of a school speech regulation, one need only ask, 'As a matter of constitutional law, would the expression be protected if it was made by an adult in an analogous situation?' If the answer is yes, then ask, 'Is the school context different in relevant ways so that the same protections ought not apply?' This approach respects students as constitutional persons, promotes the value of

In *Spence v. Washington*, the Court held that symbolic speech qualifies for First Amendment protection if: (1) the actor/speaker intends to convey a particular message; and (2) it is likely that those who witness the activity will understand what the speaker intends to convey by his or her behavior.[24] Lower courts have adapted this two-part criteria, known as the *Spence* Test, to ascertain whether expressive conduct qualifies as symbolic speech.[25] Concomitantly, the *Tinker* Material Disruption Standard permits school authorities to infringe on students' freedom of expression rights if the symbolic speech causes a material disruption to the school learning environment or infringes on the rights of others.[26] The proposed new constitutional standard, the *Tinker-Spence* Test, combines aspects of the *Spence* Test and *Tinker* Material Disruption Standard to safeguard students' freedom of expression rights while still considering the special characteristics of K-12 schools.[27] Under the proposed *Tinker-Spence* Test, symbolic speech in K-12 public schools is protected if:

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consistency, employs a broad base of legal precedent, and leads to relatively consistent results. Lower courts follow this approach in some areas of student rights, but not in others . . . .").

24. *Spence*, 418 U.S. at 415.

25. James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 7 (2008) ("The appealing functionality of *Spence*'s test has made it the more common approach used by the lower courts to identify whether expressive conduct will be treated as symbolic speech.").

26. *Tinker*, 393 U.S. at 514.

27. Several landmark Supreme Court cases that address free speech rights in K-12 schools consider the "special characteristics of schools" when determining the deference afforded to school administrators to limits students' First Amendment rights. Although the Court does not define explicitly the "special characteristics" referenced, one can infer that the Court is referring to the attendees, which consists of minors who collectively may be considered a vulnerable population. *See generally* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (discussing that the Court's inquiry is shaped by the educational context in which it arises). The Court stated, "First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Id.*; Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 853 (1982) ("While students' First Amendment rights must be construed 'in light of the special characteristics of the school environment,' *ibid.*, the special characteristics of the school library make that environment especially appropriate for the recognition of such rights."); *Tinker*, 393 U.S. at 506 ("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. This has been the unmistakable holding of this Court for almost 50 years.").

(1) The actor/speaker intends to convey a particular message;
(2) Those who witness the activity likely understand what the speaker intends to convey by his or her behavior;
(3) Symbolic speech does not interfere with the rights of others; and
(4) Symbolic speech does not involve peer coercion of other students to participate.

This Article offers a prospective path toward safeguarding students' First Amendment free speech rights in K-12 schools by bridging the doctrinal gap between *Tinker* and *Spence* through the adoption of the *Tinker-Spence* Standard. In doing so, this Article seeks to make an important contribution to constitutional scholarship by clarifying and better safeguarding students' freedom of expression rights in K-12 schools.

Part I discusses Colin Kaepernick's contentious national anthem protest and the controversy that followed, as high school students began to mimic his social activism. Part I also highlights the intersection of social activism and sports and the implications of this relationship for public school students. Part II provides an overview of free speech jurisprudence in K-12 schools. Part III critiques the inadequacy of current law and proposes the adoption of a new constitutional standard, the *Tinker-Spence* Test, to K-12 school environments to govern students' symbolic speech rights. This Article concludes with a brief discussion of the importance of promoting civic education through the preservation of student freedom of expression rights.

I. SOCIAL ACTIVISM ENTERS THE WORLD OF HIGH SCHOOL SPORTS: THE COLIN KAEPERNICK EFFECT

Historically, social activism and social movements have been used as a catalyst for social, cultural, and political change.[28] Social movements are premised on the belief that a group of individuals with similar values on a particular issue can change the status quo through action and advocacy.[29] Some displays of social activism are more controversial than others.[30] For example, Breanna Stewart, a member of the Seattle Storm Women's National Basketball Association ("WNBA") team, engaged in social activism by wearing a t-shirt to the Nickelodeon Kids Choice Sports Awards with the words "Wild Feminist" printed on the front to help bring attention to gender

28. Stacey B. Steinberg, *#Advocacy: Social Media Activism's Power to Transform Law*, 105 KY. L.J. 413, 420 (2017).

29. *Id.* at 421.

30. Mitchell Nemeth, *Using Sports As a Platform for Social Activism*, MERION WEST (Oct. 21, 2017), http://merionwest.com/2017/10/21/using-sports-as-a-platform-for-social-activism/ [https://perma.cc/3WL3-8UN9].

equality.[31] Stewart's act was met with little to no opposition.[32] Other acts of social activism, however, such as Colin Kaepernick's kneeling during the national anthem, have created a world of controversy by igniting passionate conversations on the relationship between free speech rights and social activism in sports.[33] This section discusses the growing influence of social activism in sports, with a particular emphasis on professional and high school football.

A. The Rebirth of Social Activism in Sports: The Evolution of the Kaepernick Effect

On August 26, 2016, Colin Kaepernick, a quarterback for the San Francisco 49ers, added his name to a growing list of NFL players and athletes using their names and platforms to bring publicity to an issue they want to bring to the forefront of public discourse.[34] Colin Kaepernick's social protest is not a new phenomenon; in fact, some of this nation's most iconic moments of social activism have occurred during sporting events by professional athletes. Some of the most well-known instances of professional athletes engaging in social activism include the following events: Muhammad Ali's

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31. Lindsay Kramer, *Breanna Stewart finding an activist voice as loud as her game: 'Why are you not speaking up?'*, SYRACUSE, http://www.syracuse.com/sports/index.ssf/2017/07/breanna_stewart_finding_an_activist_voice_thats_as_loud_as_her_game.html (last updated July 18, 2017, 2:27 PM) [https://perma.cc/6EH5-FVY6].

32. *Id.*

33. Lucy Rock, *As Women's Sports Grows, Athletes Find They Can't Stay Silent In the Era of Trump*, GUARDIAN (July 29, 2017, 7:00 AM), https://www.theguardian.com/sport/2017/jul/29/womens-sport-activism-and-political-protest-planned-parenthood [https://perma.cc/A7V5-J7Q5]; *see also* discussion *infra* Part I.A.; Timothy L. Epstein, *The Relationship Between Sports and Social Activism*, CHI. DAILY LAW BULL., Jan. 6, 2015, at 1.

34. The number of professional athletes kneeling during the national anthem continues to grow since Colin Kaepernick's historic protest. For example, the following professional athletes have engaged in national anthem protests: San Francisco 49ers linebacker Eli Harold, WNBA player Kelsey Bone, soccer player Megan Rapinoe, Denver Broncos linebacker Brandon Marshall, and Miami Dolphins players Arian Foster, Michael Thomas, Kenny Stills, and Jelani Jenkins. Lindsay Gibbs & Aysha Khan, *Tracking the Kaepernick Effect: The Anthem Protests are Spreading*, THINK PROGRESS (Sept. 20, 2016, 4:15 PM), https://thinkprogress.org/national-anthem-sports-protest-tracker-kaepernick-284ff1d1ab3e/ [https://perma.cc/TN4R-LD4F].

refusal to be drafted during the Vietnam War;[35] the "Black Power salute" during the 1968 Olympics by medalists Tommie Smith and John Carlos;[36] and, more recently, Colin Kaepernick's refusal to stand during the national anthem.[37]

The Kaepernick phenomenon has permeated other NFL teams as well as other professional sports. For example, Kenny Stills of the Miami Dolphins and Marcus Peters of the Kansas City Chiefs also participated in national anthem protests during NFL games.[38] Likewise, United States soccer player Megan Rapinoe kneeled during the national anthem to protest racial injustice

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35. In 1967, boxing champion Muhammad Ali refused to be drafted to fight in the Vietnam War, citing religious reasons for his decision. As a result, he was stripped of his heavyweight boxing title, convicted of draft evasion, and sentenced to five years in prison. Ali appealed the decision to the Supreme Court, arguing that he qualified for conscientious objector status because his refusal to enter the draft was based on his Muslim faith. Muhammad Ali's conviction eventually was overturned by the Supreme Court on a technicality. *See* Clay v. United States, 403 U.S. 698 (1971); *see also* Krishnadev Calamur, *Muhammad Ali and Vietnam*, ATLANTIC (June 4, 2016), https://www.theatlantic.com/news/archive/2016/06 /muhammad-ali-vietnam/485717/ [https://perma.cc/4K67-6MZP].

36. Tommie Smith and John Carlos sparked world controversy when they gave the Black Power salute as they stood on the awards podium at the 1968 Olympics in Mexico City. Their symbolic act was in protest of the inequality in the United States for black Americans. The backlash for their social activism was swift and severe. Both men were suspended from the United States Olympic team, vilified by their communities, and received countless death threats. *See* Joshua Haddow, *We Interviewed Tommie Smith About the 1968 'Black Power' Salute*, VICE (Aug. 10, 2012), https://www.vice.com/en_us/article/ex5mz7/the-story-behind-the-1968-salute.team [https://perma.cc/KLU9-8BCX].

37. *See* Mahita Gajanan, *Colin Kaepernick and a Brief History of Protest in Sports*, TIME: SPORTS (Aug. 29, 2016), http://time.com/4470998/athletes-protest-colin-kaepernick/ [https://perma.cc/D2VG-VJXH]. Significantly, a professional athlete's decision not to stand during the national anthem is not entirely new. In 1996, the NBA almost suspended Mahmoud Abdul-Rauf for his decision not to stand during the national anthem because it conflicted with his Islamic belief system. Abdul-Rauf's stance ultimately led to his early departure from the NBA. *See* Eddie Maisonet, *Mahmoud Abdul-Rauf: Here, gone and quickly forgotten*, SBNATION (Mar. 25, 2014, 9:50 AM), http://www.sbnation.com/2014/3/25/5544 920/mahmoud-abdul-rauf-nuggets-national-anthem [https://perma.cc/T65D-2ESM].

38. *NFL players who protested during the national anthem in Week 11 2016*, ESPN (Nov. 20, 2016), http://www.espn.com/blog/nflnation/post/_/id/221815 /nfl-players-who-protested-during-the-national-anthem-in-week-11 [https://perma.cc/3 ZYY-6THB]. Both NFL players, Kenny Stills of the Miami Dolphins and Marcus Peters of the Kansas City Chiefs, kneeled during the national anthem to protest police brutality. *Id.*

in the United States in support of Kaepernick's stance.[39] In a post-game interview following the protest, Rapinoe stated, "I am disgusted with the way he has been treated . . . and [the] hatred he has received in all of this . . . . We need a more substantive conversation around race relations and the way people of color are treated."[40] Notably, the WNBA, after intense criticism, reversed its decision to fine athletes for wearing shirts with "#BlackLivesMatter" and "#Dallas5" hashtags[41] printed on the front.[42] Additionally, Barbara Barker of *Newsday* wrote,

> Although much of the recent activism has centered around Black Lives Matter, there has been a growing political awareness for several years with athletes using their platform to try to effect social change. Jason Collins became the first active athlete in one of the four major U.S. professional sports leagues to come out as gay, a number of athletes have spoken out about LGBT rights, Aaron Rodgers took on

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39. *U.S. soccer star Megan Rapinoe kneels during national anthem*, CBS NEWS (Sept. 4, 2016, 10:48 PM), https://www.cbsnews.com/news/us-soccer-star-megan-rapinoe-kneels-during-national-anthem-colin-kaepernick/ ("'It was a little nod to Kaepernick and everything that he's standing for right now. I think it's actually pretty disgusting the way he was treated and the way that a lot of the media has covered it and made it about something that it absolutely isn't. We need to have a more thoughtful, two-sided conversation about racial issues in this country.'") [https://perma.cc/SPL3-KMRC].

40. *Soccer player Megan Rapinoe kneels as 'nod to Kaepernick'*, ESPN (Sept. 7, 2016), http://www.espn.com/espnw/sports/article/17467341/nwsl-seattle-reign-us-women-national-team-player-megan-rapinoe-national-anthem-kneel-nod-san-francisco-49ers-quarterback-colin-kaepernick [https://perma.cc/KK44-WN2T].

41. Black Lives Matter is a social activist movement whose mission is to build local coalitions to address violence against black communities by addressing things such as police brutality. *See About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Oct. 22, 2017) [https://perma.cc/23GP-9EPH]. The Dallas 5 is a reference used to acknowledge and honor the five fallen Dallas police officers that were ambushed during a peaceful demonstration regarding recent police shootings involving black civilians in the city of Dallas. *See Powerful Mural Honors Slain Dallas Police Officers*, FOX NEWS INSIDER (Aug. 1, 2016, 10:37 AM), http://insider.foxnews.com/2016/08/01/mural-honors-slain-dallas-police-officers-see-powerful-photos [https://perma.cc/BT2V-W7UN]. Notably, hashtags are labels used on social media sites like Twitter or Facebook to represent content on a particular topic. Individuals often use hashtags on social media sites to signal that they are sharing relevant information on a particular topic, such as poverty or unemployment.

42. Alicia Adamczyk, *The WNBA Reverses Fine for Black Lives Matter Warm Up Shirts*, MONEY: SPORTS (July 25, 2016, 1:54 PM), http://time.com/money/4417237/wnba-black-lives-matter-fine/ [https://perma.cc/B532-SXKU].

> a fan who shouted an anti-Muslim remark and Ed O'Bannon sued the NCAA on behalf of college athletes.[43]

Notably, following Kaepernick's act of kneeling during the national anthem, other players have engaged in other acts of symbolic protests, such as sitting, holding up raised fists, and locking arms.[44] Although Kaepernick's protest during a NFL game is one example in a long history of social activism in sports, the nature of his protest—kneeling during the national anthem—is arguably one of the most controversial acts in the history of professional sports.[45] Kaepernick's act provoked a national debate about the appropriateness of social protests in professional sports.[46] Professional athletes engaging in social protests have been categorized as "disrespectful" or "unpatriotic" by some fans while others applaud them for using their names and platforms to bring publicity to important social issues.[47] The heart of the debate, however, has centered around patriotic symbolism and the sentiment that all Americans should stand during the national anthem to honor the men and women of the armed forces.[48] Therefore, many viewed Kaepernick's symbolic act of kneeling during the national anthem as unpatriotic and disrespectful to the men and women of

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43. Barbara Barker, *Athletes no longer afraid to speak out on social issues*, NEWSDAY: SPORTS (July 15, 2016, 8:35 PM), http://www.newsday.com/sports/columnists/barbara-barker/athletes-no-longer-afraid-to-speak-out-on-social-issues-1.12050846 [https://perma.cc/8HEY-BYS4].

44. Sophie Tatum, *Athletes, activists spar on kneeling National Anthem protests*, CNN (Sept. 28, 2017, 4:20 AM), http://www.cnn.com/2017/09/27/politics /cnn-nfl-kneeling-protests-town-hall-ac360/index.html [https://perma.cc/E65N-JVDG].

45. Colin Kaepernick's symbolic act of kneeling during the national anthem in protest of police brutality is distinct from other historical incidences of social activism in sports because Kaepernick's act sparked a movement within American sports. Specifically, Kaepernick's protest inspired athletes from all types of sports and levels—high school and collegiate sports, for example—to join his efforts to bring attention to police brutality. Significantly, one of Colin Kaepernick's San Francisco 49ers teammates, safety Eric Reid, expressed support for Kaepernick by joining him in taking a knee during the first kneeling protest. *See* Mark Sandritter, *A timeline of Colin Kaepernick's national anthem protest and the athletes who joined him*, SBNATION (Nov. 6, 2016), http://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl [https://perma.cc/XA5B-J2HR].

46. Tatum, *supra* note 44.

47. Jennifer Angiesta, *CNN Poll: Americans Split on Anthem Protests*, CNN POLITICS (Sept. 30, 2017, 2:49 AM), http://www.cnn.com/2017/09/29/politics/national-anthem-nfl-cnn-poll/index.html [https://perma.cc/9J4J-X264].

48. Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL OF RTS. J. 367, 368–69 (2004).

the armed forces who risk their lives to keep the United States safe.[49] Members of the military and ordinary citizens vehemently expressed their disapproval of Kaepernick's act.[50] Opponents of Kaepernick's actions also contended that social protests should not be a part of the sporting milieu and argue that spectators should be able to watch their favorite team play without being subjected to political and social controversy.[51] Conversely, those who championed Kaepernick's protest argued that he simply was exercising his constitutional right to freedom of expression by using his public persona to bring attention to police brutality against black Americans—an important social issue.[52]

Despite the criticism, these athletes are lawfully exercising their First Amendment freedom of expression rights. While people across the nation debated the appropriateness of Kaepernick's protest, a silent movement was slowly building in high school football. High school students across the nation began to mimic Kaepernick's example by kneeling at football games during the national anthem in protest of police brutality.[53]

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49. Katie Couric, *Ruth Bader Ginsburg on Trump, Kaepernick and her lifelong love of the law*, YAHOO (Oct. 10, 2016), https://www.yahoo.com/katiecouric/ruth-bader-ginsburg-on-trump-kaepernick-and-her-lifelong-love-of-the-law-132236633.html [https://perma.cc/4HZJ-YCRD]; s*ee also* Ryan Wilson, *Esiason on Kaepernick sitting: 'It's about as disrespectful as any athlete has ever been,'* CBSSPORTS (Aug. 31, 2016), http://www.cbssports.com/nfl/news/esiason-on-kaepernick-sitting-its-about-as-disrespectful-as-any-athlete-has-ever-been/ [https://perma.cc/NS2W-C3DR].

50. Paul Szoldra & Christopher Woody, *What Some US Troops Really Think About Colin Kaepernick And Kneeling During the National Anthem*, BUSINESS INSIDER (Sept. 25, 2017), http://taskandpurpose.com/troops-kaepernick-national-anthem-trump/ [https://perma.cc/8KKW-2BC8].

51. John O. McGinnis, *Social Norms, Not the Constitution, Should Regulate Protests at Sport Ceremonies*, LIBRARY OF LAW AND LIBERTY (Sept. 18, 2016), http://www.libertylawsite.org/2016/09/18/social-norms-not-the-constitution-should-regulate-protests-at-sport-ceremonies/ [https://perma.cc/BGJ3-5TD5].

52. Athena Jones & Tom LoBianco, *Obama: Colin Kaepernick 'exercising constitutional right'*, CNN (Sept. 5, 2016), http://www.cnn.com/2016/09/05/politics/barack-obama-colin-kaepernick/ [https://perma.cc/8K2P-QBWY]; *see also* Chris Biderman, *Colin Kaepernick is exercising his rights, whether you agree or not*, NINERS WIRE (Aug. 27, 2016), http://ninerswire.usatoday.com/2016/08/27/colin-kaepernick-is-exercising-his-rights-whether-your-agree-or-not/ [https://perma.cc/M7UL-2YW3].

53. *Student Protests During National Anthem & Pledge: A Resource & Timeline*, NAT'L COAL. AGAINST CENSORSHIP, http://ncac.org/students-protesting-during-anthem-pledge-a-resource-timeline (last visited October 22, 2017) [https://perma.cc/CE3T-SLA7].

B. The Emergence of Social Protests in High School Sports and Disciplinary Consequences

As news of Colin Kaepernick's protest began to move across the country, it was only a matter of time before student-athletes attending K-12 schools followed suit. Many school administrators found themselves thrust into a world of controversy as their respective communities reacted to the student-athletes' social protests during school sporting events.[54] Specifically, school authorities struggled to determine the correct response to students' symbolic expression during the national anthem.[55] School authorities either could discipline students for engaging in a national anthem protest or support students' conduct as an exercise of their constitutional freedom of expression rights. Either course of action placed school administrators at risk of public backlash and criticism from the communities in which they serve.

School authorities expressed various reactions to student national anthem protests. Some school administrators expressed public support for students while others issued sanctions or swiftly implemented policies prohibiting national anthem protests during school sporting events. For example, the Oakland School District in California retweeted news stories and supportive messages on the district's official Twitter page in acknowledgement of students' rights to engage in social activism during school-sponsored sporting events.[56] Additionally, coaches, parents, and teachers throughout the country joined student protests during the national

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54. Eric Russell, *High school athletes, officials confront national anthem protests*, PORTLAND PRESS HERALD (Sept. 26, 2017), http://www.pressherald.com/2017/09/26/high-school-athletes-and-officials-confront-national-anthem-protests/ ("High school athletes, coaches and administrators across Maine are grappling with the increasingly bitter debate over whether kneeling during the national anthem is an acceptable form of protest.") [https://perma.cc/7BKX-96CG]; *see also* Kyle Neddenriep, *Some Indiana High Schools Weigh Pregame Protest Phenomenon*, INDY STAR, https://www.indystar.com/story/sports/high-school/2017/09/28/some-indiana-high-schools-weigh-pregame-protest-phenomenon/712907001/ (last updated Sept. 28, 2017, 5:01 PM) ("[T]his is as polarizing of an issue as he has seen in his time as an administrator. 'I'm afraid of what could happen, ... What happens if adults in the bleachers get mad? You've got a bad situation on your hands. It's an emotional topic.'") [https://perma.cc/KAF6-GV2M].

55. *See* Blad, *supra* note 19. School administrators had different interpretations regarding whether students kneeling during the national anthem was protected speech or unprotected speech that warranted disciplinary action. As a result, some students were disciplined for kneeling during the national anthem while others were permitted to engage in the symbolic conduct. *See id.*

56. *Id.*

anthem.[57] For example, in Seattle, the entire high school football team at Garfield High School, including the coaches, kneeled during the national anthem in protest of social injustice.[58] The Seattle Public School System responded to the players' protest in a public statement that declared that "[s]tudents kneeling during the national anthem are expressing their rights protected by the First Amendment. Seattle Public Schools supports all students' right to free speech."[59] Similarly, the entire football team from Woodrow Wilson High School in New Jersey, including their coaches, protested during the national anthem to display their solidarity with Colin Kaepernick and his efforts to increase awareness about police brutality.[60]

As the trend of national anthem protests continues to permeate the high school sports milieu, some school administrators are supporting students' symbolic expression while others are resistant and respond with swift, harsh punishments, characterizing the student protests as defiant and disrespectful.[61] As a result, the punitive responses to student national anthem protests range in severity and scope. For example, Mike Oppong, a football player at Doherty High School in Massachusetts, received a one-game suspension for kneeling during the national anthem in solidarity with Colin Kaepernick to protest police brutality against people of color.[62] Similarly, another student, Bishop Gorman, was suspended from his Nevada high school and placed on a disciplinary contract for kneeling during the national anthem.[63] Although these two instances of disciplinary action occurred on opposite sides of the country, they both represent the disturbing trend of impermissible content regulation of student speech by state officials.[64] Unfortunately, the harsh responses to individuals

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57. *Id.*

58. Q13 Fox News Staff, *Entire Seattle high school football team kneels during national anthem before game*, Q13 FOX (Sept. 16, 2016, 10:37 PM), http://q13fox.com/2016/09/16/entire-seattle-high-school-team-kneels-during-national-anthem-before-game/ [https://perma.cc/79KK-PSH6].

59. *Id.*

60. Rachaell Davis, *This High School Football Coach Planned To Kneel Alone During National Anthem – Then This Happened*, ESSENCE (Sept. 12, 2016), http://www.essence.com/2016/09/12/high-school-football-team-knee-support-kaepernick [https://perma.cc/EWF7-HPD9].

61. Blad, *supra* note 19.

62. Emmett Knowlton, *High school player suspended for kneeling during anthem has suspension lifted after public outcry*, BUS. INSIDER: SPORTS (Sept. 12, 2016), http://www.businessinsider.com/high-school-football-player-suspended-kneeling-during-national-anthem-2016-9 [https://perma.cc/MS67-CJRN].

63. *Id.*

64. *See Student Protests During National Anthem & Pledge: A Resource & Timeline*, *supra* note 53.

exercising their right to freedom of expression are all too familiar. Kaepernick was subjected to severe economic sanctions in the aftermath of his national anthem protest. For example, many sports commentators assert that NFL teams are imposing economic sanctions on Colin Kaepernick by not offering him a contract to play professional football.[65] Additionally, despite Kaepernick's impressive NFL record,[66] players with less skills and experience have been signed to NFL teams while Kaepernick remains unsigned, as none of the 32 NFL teams are willing to offer him a contract despite his free agent status.[67] Although Kaepernick was subjected to much harsher consequences than student protestors, he,

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65. *See Ravens owner admits that Colin Kaepernick's protest is a factor in whether to sign him*, CETUSNEWS, http://www.cetusnews.com/news/Ravens-owner-admits-that-Colin-Kaepernick's-protest-is-a-factor-in-whether-to-sign-him.SJ_lefp3IZ.html (last visited Oct. 22, 2017) (providing that Baltimore Ravens owner admits that Colin Kaepernick's national anthem protest is a factor in whether to offer him a contract) [https://perma.cc/GP7J-H887].

66. Raphael Garcia, *Colin Kaepernick Is Actually Better Than Many of the NFL's First and Second-String Quarterbacks*, COMPLEX SPORTS (Aug. 22, 2017), http://www.complex.com/sports/2017/08/kaepernick-is-better-than-most-quarterbacks/ ("When compared to both starters and backups the trend is very clear: Kaepernick's stats are stronger than many men who are scheduled to suit up this season. His completion percentage of 59.2 percent is higher than Jay Cutler, Blake Bortles, Ryan Fitzpatrick, and Cam Newton. His completion percentage also compares favorably against backups, as only Case Keenum, Matt Barkley, and Trevor Siemian recorded better percentages while appearing in at least six games.") [https://perma.cc/D9ND-QZ59]. NFL teams have signed more than 30 quarterbacks since Colin Kaepernick became a free agent, 19 of which have never completed a pass during an NFL regular season game. Considering Kaepernick has completed 1,011 passes, many fans posit that he has been blacklisted in response to his national anthem protest. For example, the Miami Dolphins choose to sign a white quarterback out of retirement with inferior statistics than Kaepernick. *See* Sean Gregory, '*For Me, Its Personal.' NFL Fans Boycott Football As Colin Kaepernick Goes Unemployed*, TIME (Sept. 1, 2017), http://time.com/4924420/colin-kaepernick-nfl-football-boycott/ [https://perma.cc/J6JX-TV3M]. Thomas Lott, *Atlanta NAACP calls for boycott of NFL, Falcons game over treatment of Colin Kaepernick*, SPORTING NEWS (Aug. 19, 2017), http://www.sportingnews.com/nfl/news/atlanta-naacp-boycott-nfl-falcons-colin-kaepernick/hkrlbvv9x0ff10maxkyzzrlu1 ("Some believe Kaepernick is being blackballed by owners after he opted out of his contract and became a free agent this offseason.") [https://perma.cc/N7XT-6YMF].

67. Christine Brennan, *An unsigned Colin Kaepernick is a bad sign for NFL*, USA TODAY (May 4, 2017, 2:15 AM), https://www.usatoday.com/story/sports/columnist/brennan/2017/05/03/colin-kaepernick-free-agent-nfl-quarterback-national-anthem/101259582/ [https://perma.cc/9YKE-33LT].

unlike the students, was afforded First Amendment protections and permitted to continue his national anthem protests.[68]

As previously mentioned, a great deal of opposition by school administrators to student protests during the national anthem stems from a concern that allowing this symbolic speech teaches students to be disrespectful, especially in relation to honoring the men and women who have served in the military.[69] It is a well-established American tradition and patriotic ritual to play the national anthem at sporting events and for spectators to stand to show respect for the flag and the soldiers who sacrificed their lives to uphold the freedom the American flag represents.[70] Therefore, kneeling—as opposed to standing—during the national anthem is considered disrespectful and offensive by many individuals in the military and the public at large, which encompasses some school administrators.[71] For example, the principal of Lely High School in Naples, Florida informed students that any student-athlete who refuses to

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68. Chris Yuscavage, *HS and College Football Players Are Being Unfairly Penalized for National Anthem Protests*, COMPLEX SPORTS (Oct. 11, 2017), http://www.complex.com/sports/2017/10/hs-college-football-players-penalized-for-kneeling-during-national-anthem (highlighting how high school and college football players are being punished unfairly for engaging in national anthem protests, unlike their NFL counterparts) [https://perma.cc/N4JG-N5DU].

69. David B. Larter, *Legendary SEAL Leader: National Anthem Protests Disrespect the Military*, NAVY TIMES (Aug. 26, 2017), http://www.navytimes.com/news/your-navy/2016/09/09/legendary-seal-leader-national-anthem-protests-disrespect-the-military/ [https://perma.cc/P9GM-PNQZ].

70. *See* Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 534 (2007) ("'[A]rising to a standing position upon hearing the national anthem being played,' but merely 'an act showing one's respect for the government.'").

71. Melissa Jacobs, *Week Under Review: Don't take Kaepernick's protest as disrespect for military*, SPORTS ILLUSTRATED (Aug. 29, 2016), https://www.si.com/nfl/2016/08/29/colin-kaepernick-national-anthem-protest-49ers [https://perma.cc/58VE-RG7K]; *see also* Kevin L. Burke, *Sports and Patriotism: Why We Stand for the National Anthem*, SPORTING NEWS (Oct. 12, 2016), http://www.sportingnews.com/nfl/news/sports-patriotism-national-anthem-protests-athletes-colin-kaepernick/1u5n4asb5tujz138i101evbdju ("From MLB, the tradition spread to other sports throughout the United States. According to Ferris, sports fans adopted the military's reverence for the anthem by standing to show respect for the flag.") [https://perma.cc/SFT6-THSH]; 36 U.S.C. § 301 (2012) ("[A]ll other persons present should face the flag and stand at attention with their right hand over the heart, and men not in uniform, if applicable, should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart; and (2) when the flag is not displayed, all present should face toward the music and act in the same manner they would if the flag were displayed.").

stand during the national anthem would be removed from the game.[72] The principal stated, "'[W]hen that anthem is being played, you are to stand and you are to be quiet."'[73]

Likewise, a principal at a high school in Honolulu, Hawaii responded to students kneeling during the national anthem by issuing the following statement in a letter to the faculty and staff:

> The behavior of that small group of students was disrespectful to our school and our country. It was particularly unfortunate that this occurred over Memorial Day weekend, knowing that thousands of KS Kapalama family members, faculty, staff and alumni have served our country's military to defend and uphold the freedoms we enjoy today.[74]

These examples of school administrators' reactions to student national anthem protests demonstrate the immense disparity in how schools respond to students' social protests. Currently, students' First Amendment rights in K-12 schools reside in a sea of ambiguity. The Supreme Court has acknowledged that students are considered "persons" under the Constitution and thus are entitled to fundamental rights, such as freedom of expression.[75] The Court, however, marginalizes those same rights in subsequent decisions by permitting school authorities to limit freedom of speech under certain circumstances.[76] Instead of safeguarding students' constitutional freedoms, the Court has left the preservation of students' rights to the discretion of overzealous school administrators who utilize the Court's deference to usurp student rights under the guise of school

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72. Carli Teproff, *Principal to Students about the anthem: 'You are to stand and you are to be quiet'*, MIAMI HERALD (Sept. 15, 2016, 10:17 PM), http://www.miamiherald.com/news/state/florida/article102151582.html [https://perma.cc/WNK8-6LV8].

73. Annika Hammerschlag, *SWFL students react to Collier principal's anthem order*, NAPLES DAILY NEWS (Sept. 16, 2016, 9:58 PM), http://www.naplesnews.com/story/news/education/2016/09/16/swfl-students-react-collier-principals-anthem-order/90507656/ [https://perma.cc/5LKR-6TQL].

74. Mileka Lincoln, *Graduating Kamehameha students refuse to stand for national anthem*, HAWAII NEWS NOW (June 16, 2016, 1:36 PM), http://www.hawaiinewsnow.com/story/32234076/kamehameha-schools-seniors-spark-debate-by-protesting-national-anthem-at-graduation-ceremony [https://perma.cc/BW2A-VP3K].

75. Frank D. LoMonte, *Shrinking* Tinker*: Students Are 'Persons' Under Our Constitution-Except When They Aren't*, 58 AM. U.L. REV. 1323, 1339 (2009) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

76. *Id.* at 1324.

order.[77] Furthermore, there is no Supreme Court precedent that directly addresses what freedom of expression rights, if any, high school athletes have during school-sponsored sporting events. In light of the gross disparities in relation to whether students are disciplined for kneeling during the national anthem, it is of paramount importance to address the quandary surrounding the scope of students' freedom of expression rights outside the traditional school learning environment.

II. FREEDOM OF EXPRESSION JURISPRUDENCE: K-12 PERSPECTIVE

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[78] In assessing whether students attending K-12 public schools have the constitutional right to engage in social protests during school-sponsored events, such as sports, one must examine freedom of expression jurisprudence.

The First Amendment right to freedom of speech and expression is arguably one of the most cherished rights guaranteed by the Constitution.[79] As a nation built on democracy, citizens must be afforded the opportunity to express themselves freely without fear of repercussions in order to participate fully in the democratic process.[80] Therefore, many legal scholars view First Amendment protections as one of the pillars of democracy.[81] Although the express language of the Constitution only

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77. Anna Boksenbaum, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 135 (2005) ("The Court's decision that sexually suggestive speech was unprotected by the First Amendment dealt a serious blow to *Tinker*'s liberal approach, as it gave deference to school administrators to decide what kind of speech is permissible in school and gave schools responsibility for inculcating students into community morals and standards of behavior.").

78. U.S. CONST. amend. I.

79. Nina Petraro, *Harmful Speech and True Threats:* Virginia v. Black *and the First Amendment in an Age of Terrorism*, 20 ST. JOHN'S J. LEGAL COMMENT. 531, 563 (2006) ("There is no doubt that Americans' First Amendment right to free speech is fundamental and cherished within our United States Constitution . . .").

80. Nicole McLaughlin, *Spectrum of Defamation of Religion Laws and the Possibility of A Universal International Standard*, 32 LOY. L.A. INT'L & COMP. L. REV. 395, 419 (2010) ("When a country stifles freedom of expression, it threatens democracy because democracy thrives under transparency and freedom of speech.").

81. Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U.L. REV. 1097, 1102 (2016); Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 66 (2014).

protects freedom of speech, several different categories of protected speech fall within its periphery.[82] The Supreme Court has interpreted the broad language of the First Amendment to include protection of symbolic gestures and conduct because people often communicate ideas through both verbal and non-verbal means.[83] Over the years, some justices have recognized two distinct types of speech in evaluating First Amendment protections: (1) pure speech, which is afforded the full protections of the Constitution; and (2) symbolic speech, which may receive only partial protections because it includes speech plus conduct.[84] An example of pure speech is a protest or demonstration, whereas symbolic speech includes conduct such as burning a flag or kneeling during the national anthem to convey a particular message.[85] The Court has established that when pure speech and symbolic speech are part of the same conduct, the government may limit First Amendment protections if there is an important governmental interest in regulating the non-speech element.[86] For

82. Christopher Cavaliere, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 879 (2011).

83. In *West Virginia State Board of Education v. Barnette*, the Court said, "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

84. McGoldrick, Jr., *supra* note 25, at 3–4 ("An example of symbolic speech in action is when David O'Brien burned his draft card to protest the Vietnam War. The Court assumed that the illegal act of destroying his draft card was symbolic speech, but unprotected because of the government's overriding interest in protecting the Selective Service System . . . . And then there is mere conduct that, though expressive, receives no protection as speech at all and can be regulated for any rational reason."); s*ee also* Amalgamated Food Emp.'s Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). The majority only referred to pure speech. *Id.* at 313 ("To be sure, this Court has noted that picketing involves elements of both speech and conduct, i.e., patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech."). The concurring opinion, however, referenced speech plus. *Id*. at 326 (Douglas, J., concurring) ("Picketing is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated.").

85. McGoldrick, *supra* note 25, at 5.

86. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). The *O'Brien* Court emphasized the importance of distinguishing expressive conduct protected

example, in *United States v. O'Brien*, the Court held that the First Amendment did not afford protection to the plaintiff's act of burning his draft registration card in protest of the Vietnam War.[87] The Court reasoned that although O'Brien's symbolic speech was protected speech, the government's important interest in prohibiting the destruction of registration cards justified narrowly construed limitations on O'Brien's First Amendment freedoms.[88] The guiding principles set forth in *O'Brien* for ascertaining whether symbolic speech is protected under the First Amendment apply exclusively to adults.[89] Although children do not relinquish their constitutional rights while attending public schools,[90] the Court employs a different constitutional framework for evaluating freedom of expression rights in K-12 schools.

It is well established that students in K-12 schools possess First Amendment rights.[91] The Supreme Court has noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the

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by the First Amendment from conduct that is expressive, but is not afforded First Amendment protections. *Id.* The Court provided the following criteria to determine when a restriction on conduct that involved speech and nonspeech elements—that is, nonverbal expression—is constitutionally permissible: (1) the restriction is within the government's constitutional powers; (2) the intent of the governmental actions is to pursue a legitimate governmental action; (3) the governmental interest is not related to restricting expression; and (4) the restriction that results is tailored narrowly to meet the government interest. *See id.* It is important to note that many legal scholars criticize the *O'Brien* Court for delineating between symbolic speech and conduct, arguing that it is impossible to make such a distinction. *See* Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1844–45 (1997); *see also* McGoldrick, Jr., *supra* note 25.

87. *O'Brien*, 391 U.S. at 376–77.

88. *Id.* at 376 ("The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents.").

89. The Court did not even reference the *O'Brien* Test in its *Tinker* decision. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

90. *Id.* at 506 ("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.").

91. *Id.*

community of American schools."[92] To this end, the Supreme Court has issued a series of decisions upholding students' constitutional rights in K-12 schools. The 1943 Supreme Court decision in *West Virginia State Board of Education v. Barnette* provided the legal framework for assessing students' First Amendment rights in K-12 schools for more than 25 years.[93] *Barnette* solidified not only students' First Amendment right to free speech but also the right not to be compelled by school authorities to express adherence to a particular viewpoint.[94] Although *Barnette* made a significant contribution to freedom of expression jurisprudence, the landmark *Tinker v. Des Moines* case and the subsequent trilogy of First Amendment cases provide a modern legal framework for free speech rights in today's K-12 schools.[95] Many scholars view *Tinker* as the pinnacle of student free speech protections because the Court granted unbridled First Amendment protections to students as long as their expression did not materially disrupt the school learning environment.[96]

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92. Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."); *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

93. W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

94. *Id.* at 642, 644 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

95. Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 626 (2002).

96. Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008) ("Scholars view *Tinker v. Des Moines Independent Community School District* as the high-water mark of student speech protection and the Supreme Court's subsequent decisions, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* (the Bong Hits case) as a considerable retreat from this mark."); Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1502, 1506 (2008) ("The high water point for students' First Amendment rights came in the first case directly on the question that the Supreme Court decided, *Tinker v. Des Moines Independent Community School District*."); Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 618 (2010) ("*Tinker* is generally hailed by scholars as the high-water mark

The subsequent Supreme Court decisions incrementally diminished the *Tinker* Court's stance regarding students' free speech rights by carving out a series of exceptions that severely limited students' free speech rights in K-12 schools.[97] The following discussion highlights the complex landscape of free speech jurisprudence in the context of K-12 schools.

A. Mind to Mind Framework: West Virginia v. Barnette

In *West Virginia State Board of Education v. Barnette*, the West Virginia Legislature amended a statute to require schools to offer courses in both history and civics for the purpose of "teaching, fostering, and perpetuating the ideals, principles and spirits of Americanism . . . ."[98] The local Board of Education responded to the statutory amendments by adopting a resolution making the flag salute part of the regular school program and activities.[99] The flag salute mandate required students to give a stiff-arm salute while reciting the Pledge of Allegiance out of honor and respect for the nation or be subjected to disciplinary action.[100] Although the compulsory flag salute policy appeared neutral on its face, in practice it had a significant impact on certain groups of students because it conflicted with their religious beliefs.[101] Two students at Slip Grade School in West Virginia, Marie and Gathie Barnette, refused to salute the flag because it conflicted with their religious beliefs as Jehovah's Witness.[102] As a result, the Barnettes and several other children who practiced the Jehovah's Witness faith were expelled from school for their

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of student free speech"); Matthew Sheffield, *Stop with the Exceptions: A Narrow Interpretation of* Tinker *for All Student Speech Claims*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 175, 176 (2011).

97. Aaron J. Hersh, Note, *Rehabilitating* Tinker*: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1321 (2013) ("While *Tinker* remains the foundational precedent of student free expression doctrine, it has not gone unchanged. The Supreme Court has invoked its underlying principles as guides in three subsequent decisions –*Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* . . . . These opinions reflect a degradation of *Tinker*'s First Amendment principles . . . ."); Alison Hofheimer, *Saved by the Bell? Is Online, Off-Campus Student Speech Protected by the First Amendment?*, 40 FLA. ST. U. L. REV. 971, 976 (2013).

98. *Barnette*, 319 U.S. at 625.

99. *Id.* at 626.

100. *Id.*

101. *Id.* at 629.

102. *Id.*

refusal to participate in the flag salute.[103] Furthermore, the expelled children's parents also experienced adverse consequences for their children's religious stance.[104] Many of the parents either were prosecuted or threatened with prosecution for violating state truancy laws, which categorize a child that is expelled as unlawfully absent, thus subjecting their parents or guardians to criminal penalties, including fines and imprisonment for up to 30 days.[105] School authorities also threatened to send the children practicing the Jehovah's Witness faith to reformatories for juvenile delinquents.[106] The Barnettes, on behalf of their children and other citizens, responded to the harsh disciplinary actions by filing suit in district court, seeking an injunction to restrain the enforcement of the Board of Education's flag salute mandate and regulations against Jehovah's Witnesses attending West Virginia public schools.[107]

Barnette exemplifies the ongoing struggle many courts experience as they attempt to strike a balance between constitutionalism and patriotism. The *Barnette* Court explicitly acknowledged that "the case is made difficult not because the principles of its decision are obscure but because the flag involved is our own."[108] Thus, although a member of the judiciary may feel a civic duty to uphold the principles of the Constitution, he also may feel a moral obligation to preserve socially-constructed notions of patriotism.[109] Because the American flag is at the heart of the *Barnette* decision, dichotomizing personal and political allegiance from constitutional analysis is an arduous task. This moral quandary continues to persist more than 70 years after *Barnette* as school administrators attempt to reconcile the societal pressure of requiring student-athletes to stand during the national anthem while still preserving the athletes' constitutional freedom of expression rights.[110]

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103. *Id.*

104. *Id.* at 630.

105. *Id.* at 629; W. VA. CODE § 4904(4) (Supp. 1941).

106. *Barnette*, 319 U.S. at 630.

107. *Id.* at 629.

108. *Id.* at 641.

109. *See generally* Ronald C. Den Otter, *The Place of Moral Judgment in Constitutional Interpretation*, 37 IND. L. REV. 375 (discussing the required constitutional analysis by judges in morally and factually complicated cases).

110. Russell, *supra* note 54 ("High school athletes, coaches and administrators across Maine are grappling with the increasingly bitter debate over whether kneeling during the national anthem is an acceptable form of protest."); *see also* Scott Berson, *These schools will punish athletes who protest the anthem. Is that against the law?*, MIAMI HERALD (Sept. 29, 2017, 10:02 AM), http://www.miamiherald.com/news/nation-world/national/article176084591.html (highlighting the challenges school administrators, like Superintendent Scott Smith, face as they find themselves forced to choose between preserving students' First Amendment rights

The *Barnette* decision served as the catalyst for a significant paradigm shift in First Amendment constitutional jurisprudence. In *Barnette*, the Supreme Court overruled earlier per curiam Pledge of Allegiance decisions, including the landmark *Minersville School District v. Gobitis*[111] decision, and held that a state no longer could infringe upon students' First Amendment freedom of speech and religious rights under the guise of nationalism.[112] The Court described symbolic speech as a "short cut from mind to mind" because it encompasses the use of a symbol to communicate a particular message.[113] Although *Barnette* may be categorized as a free exercise of religion case, the Court emphasized that the students' right not to speak was part of their First Amendment freedoms under the Freedom of Speech Clause; therefore, the state did not have the constitutional right to compel students to profess any particular matter of opinion.[114] As Justice Jackson eloquently stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[115]

Although *Barnette* involved a religious rejection to a patriotic ritual school mandate, striking similarities exist between the flag salute mandate in *Barnette* and the modern-day school mandate for students to stand during the national anthem. First, in both scenarios students refused to follow a school mandate to participate in a patriotic ritual. In *Barnette*, the Jehovah's Witness students refused to salute the flag and recite the Pledge of Allegiance; in the current education milieu, students are refusing to stand during the national anthem.[116] Second, in both scenarios students asserted that their decision to engage or not engage in symbolic speech

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and requiring them to stand for the national anthem as a sign of respect for the United States) [https://perma.cc/V96Y-2QXL].

111. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that a state statute requiring K-12 students to salute the national flag during their daily school exercises is constitutional). Justice Frankfurter, relying on substantive due process principles, reasoned that a state has a rational basis to require students to recite the Pledge of Allegiance and the allowance of any exemptions, including on religious grounds, would undermine school discipline and send a negative message to students about the importance of respecting the American flag. The Court further reasoned that a statute requiring a Pledge of Allegiance mandate in public schools is a rational means of teaching patriotism in schools. *See id.*

112. *Barnette*, 319 U.S. at 642; John J. Concannon III, *The Pledge of Allegiance and the First Amendment*, 23 SUFFOLK U. L. REV. 1019, 1030 (1989).

113. *Barnette*, 319 U.S. at 632.

114. *Id.* at 633–34.

115. *Id.* at 642.

116. *Id.* at 628–29; *see also* discussion *supra* Part. I.B.

was protected under the First Amendment. Finally, both situations involve authoritative figures trying to reconcile the challenge of balancing students' freedom of expression rights with fostering a spirit of patriotism among students. Based on these similarities, one can argue that students' symbolic conduct of kneeling during the national anthem to protest police brutality is protected speech because *Barnette* clearly established that it is unconstitutional for the state to compel students to participate in symbolic speech or profess any particular matter of opinion.[117] Therefore, one can infer that if it is impermissible for students to be compelled by the state to profess any particular matter of opinion, then students also may not be restricted from expressing their opinions through symbolic speech.

B. The Gold Standard: Tinker v. Des Moines

Tinker v. Des Moines is considered the cornerstone of freedom of expression jurisprudence in the context of K-12 schools.[118] *Tinker* solidified the idea that children do not "shed their constitutional rights to freedom of expression or speech at the schoolhouse" door.[119] This profound statement conveys the importance of recognizing and preserving the constitutional freedoms of students to the greatest extent possible while attending K-12 public schools. The central issue in *Tinker* was whether the prohibition of students wearing armbands in protest of the Vietnam War violated students' First Amendment freedom of expression rights.[120] The facts in this case involved a group of students who attended Des Moines public schools and who planned on wearing black armbands to school as a symbolic protest against the Vietnam War.[121] The principals in the school district became aware of the planned student protests and adopted a policy banning students from wearing armbands to school.[122] Under the new policy, a student found wearing an armband to school would be asked to remove it or be suspended from school until the student returned without the armband in compliance with the school policy.[123] Despite knowledge

117. *Barnette*, 319 U.S. at 642.

118. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 527 (2000) ("*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students.").

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

120. *Id.* at 507–08.

121. *Id.* at 504.

122. *Id.*

123. *Id.*

of the school's policy, students Mary Beth Tinker and Christopher Eckhardt wore the armbands to school.[124] As a result, they were suspended from school and not permitted to return until either they complied with the policy or the period for the armband protest expired.[125] A complaint was filed in the United States District Court for the Southern District of West Virginia on behalf of the students under Section 1983 of Title 42 of the United States Code, seeking an injunction to prevent the school district from disciplining the students for their symbolic expression.[126] The district court dismissed the complaint, reasoning that the students' First Amendment freedom of expression rights were not infringed when school leaders forbade the students' expression to prevent disturbing the school environment.[127] The Eighth Circuit Court of Appeals affirmed the district court's decision.[128]

In reviewing the appellate court decision, the Supreme Court relied heavily on the guiding principle that states and school officials should be afforded great deference to prescribe and control student conduct in schools as long as their actions are consistent with fundamental constitutional safeguards.[129] The Court emphasized that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," but rather the expressive conduct must materially and substantially interfere with the school learning environment.[130] In applying these guiding principles to the facts in *Tinker*, the Court opined that there was no indication that school authorities reasonably could forecast a material disruption of the school learning environment or a substantial disruption.[131] To the contrary, no disruptions to the school environment occurred as a result of the student armband protests nor were there any efforts by the student protestors to infringe on the rights of others.[132] Justice Fortas, writing for the majority, reasoned that although the students' symbolic armband protest caused discussions to occur outside of the classroom, there were no instances of disorderly conduct or interference with classwork.[133] Furthermore, the Court reasoned that unless school authorities can provide an evidentiary

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 505.
128. *Id.*
129. *Id.* at 507.
130. *Id.* at 508.
131. *Id.* at 514.
132. *Id.*
133. *Id.*

basis for constitutionally valid reasons to regulate their speech, students must be afforded their constitutional right to freedom of speech.[134]

This landmark Supreme Court case established the Material Disruption Standard, which prohibits school authorities from infringing upon students' freedom of expression rights unless such conduct causes a material and substantial disruption to the school environment.[135] For many years the *Tinker* Material Disruption Standard has been the gatekeeper for students' First Amendment rights in schools. The educational landscape, however, has changed immensely since the Court's decision 48 years ago. For instance, some parents now are sending their children to charter schools or homeschooling them, bullying is more prevalent, and technology and the Internet are embedded heavily within school environments. Significant changes in education such as these have created formidable challenges as school leaders and lower courts express differing views regarding the appropriate application of the *Tinker* Material Disruption Standard in today's schooling context.[136] Although this Article focuses on revamping *Tinker*'s standard to provide better protections for students' symbolic speech rights, it is important to note other areas of concern regarding *Tinker*'s effectiveness in safeguarding students' First Amendment rights. For example, school leaders are unsure of their authority over student speech that occurs off-campus on social media sites, such as Facebook and

134. *Id.* at 511.

135. *Id.*

136. Rory Allen Weeks, Note, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials' Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157, 1192–93 (2012) ("[C]ourts should not interpret *Tinker* so that it applies to all off-campus student speech that could offend other students or even devastate their well-being. By interpreting *Tinker* this way, school officials' authority to regulate off-campus speech will be analogous to that which parents have over a visiting child."); Shannon M. Raley, Note, *Tweaking* Tinker*: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 775 (2011) ("[T]he *Tinker* standard cannot adequately encompass situations that arise in today's Internet-centered world because a great deal of Internet-originated speech does not occur 'on-campus' and courts are unsure of what exactly constitutes a 'substantial disruption' as required by *Tinker*."); Matthew I. Schiffhauer, Note, *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. LEGAL COMMENT. 731, 733 (2010) (advocating for the adoption of a new free speech standard for K-12 schools to evaluate the constitutionality of student Internet speech. The proposed new standard integrates both prongs of *Tinker* to evaluate students' constitutional rights in Internet speech cases).

Snapchat, yet causes a material disruption on campus.[137] Additionally, school authorities are trying to reconcile the tension between peer sexual harassment law and students' freedom of expression rights.[138] Specifically, many school leaders are finding themselves in a doctrinal quandary when speech that is protected under the *Tinker* standard also triggers Title IX sexual harassment liability.[139] All of the aforementioned issues regarding the application of *Tinker*'s Material Disruption Standard in today's educational milieu illuminate the standard's limited utility in today's educational environment as well as the need to consider revising the standard to improve its effectiveness in safeguarding students' First Amendment rights.

C. Birth of Censorship: Bethel School District No. 43 v. Fraser

Bethel School District No. 43 v. Fraser addresses an important area in freedom of expression jurisprudence in K-12 schools—administrative censorship of lewd or offensive speech.[140] Although the Court in *Tinker* established that school authorities may not infringe upon the freedom of expression rights of students unless their conduct causes a material disruption to the school's operation and discipline, the Court failed to address the appropriate action when a student's conduct does not cause a material disruption but violates a school rule. The question remains whether students in K-12 public schools are granted unbridled freedom of expression rights as long as they do not cause a material disruption to the school learning environment. The Supreme Court granted certiorari to review *Fraser* to address this legal conundrum.

In *Fraser*, a high school student, Matthew Fraser, was suspended from school for lewd remarks he made during a speech in which he nominated a classmate for student elective office.[141] Fraser discussed the contents of

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137. *See supra* note 96.

138. Lynn Mostoller, *Freedom of Speech and Freedom from Student-on-Student Sexual Harassment in Public Schools: The Nexus Between* Tinker v. Des Moines Independent Community School District *and* Davis v. Monroe County Board of Education, 33 N.M. L. REV. 533, 534 (2003).

139. *Id.* at 556–57.

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

141. *Id.* at 677. Fraser's explicit speech stated:

> 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

the speech beforehand with two of his teachers, both of whom forewarned him that the content was inappropriate and that he would be in violation of the school's offensive speech policy if he delivered the speech without making their suggested changes.[142] Bethel High School's disciplinary policy for inappropriate language stated that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[143] Fraser delivered the speech without making any changes and was suspended for three days.[144] Fraser challenged his suspension through the school district's grievance process.[145] The hearing officer, however, upheld the school's disciplinary action, concluding that Fraser's speech violated the school policy because it was lewd, indecent, and offensive.[146]

Fraser's father filed suit on his behalf in district court, alleging that the school's disciplinary action violated Fraser's First Amendment freedom of speech rights.[147] The district court found that the school's offensive speech policy was unconstitutionally vague and overbroad and that the school's disciplinary actions violated Fraser's First Amendment freedom of speech rights.[148] The Ninth Circuit Court of Appeals affirmed the district court's decision, rejecting the school district's stance that disciplinary action is necessary to protect a captive audience of minors from being exposed to lewd and indecent speech.[149] The Supreme Court, however, took a different stance and overruled the lower court decisions by holding that it is permissible constitutionally for school authorities to impose disciplinary sanctions upon students for lewd and indecent speech.[150] The Court addressed Fraser's argument that his speech was protected under the *Tinker* Material Disruption Standard[151] by distinguishing between the protected political speech from *Tinker v. Des Moines* and Fraser's unprotected

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> finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

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

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 679 (majority opinion).
148. *Id.*
149. *Id.* at 680.
150. *Id.* at 685.
151. *Id.* at 680–85; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969); *supra* notes 8–9 and accompanying text.

sexually explicit speech.[152] Specifically, the Court asserted that the First Amendment does not protect the type of indecent and lewd language present in Fraser's graduation speech because such discourse undermines the fundamental values that public schools are trying to instill among students, such as understanding socially appropriate behavior.[153] The Court reasoned that Fraser's use of sexually explicit language to an audience that included younger students demonstrated his lack of discretion in determining not only the boundaries of socially appropriate behavior but the potential harmful consequences of his actions.[154]

Although the *Fraser* Court did not overturn *Tinker*, it did narrow substantially its reach by carving out an exception for lewd and offensive speech. For these reasons, one of the most profound proclamations made by the *Fraser* Court is that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[155] This statement diminishes the power behind the *Tinker* Court's robust promulgation that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[156] On the one hand, the Court is establishing the importance of not treating students as second-class citizens and preserving their constitutional protections to the greatest extent possible in K-12 school settings. On the other hand, the Court is undermining that very position by emphasizing that, although students maintain some constitutional protections in K-12 schools, they are not the full rights afforded to adults in other settings.

A great deal of the *Fraser* decision's scholarly critiques focus on the Court's dramatic departure from *Tinker*'s speech-protective jurisprudence and the challenges associated with defining the scope of Fraser's reach.[157] *Fraser* is viewed as part of a growing trend of courts diminishing students' free speech rights by affording school administrators greater deference in determining protected speech.[158] As Justice Burger enunciated in *Fraser*, "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[159] It is this

152. *Fraser*, 478 U.S. at 686.
153. *Id.* at 681.
154. *Id*. at 683.
155. *Id*. at 682.
156. *Tinker*, 393 U.S. at 506.
157. *See* Nina Zollo, Comment, *Constitutional Law: School Has Broad Discretion to Prohibit Offensive Student Speech*, 39 U. FLA. L. REV. 193, 203 (1987).
158. David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 182 (2002).
159. *Fraser*, 478 U.S. at 683.

expansive discretionary authority granted to school administrators by the *Fraser* Court that has received the greatest criticism among free speech advocates who predict that the Court's departure from *Tinker*'s speech-protective jurisprudence will have a "chilling effect" on student free speech rights.[160] In response to this prediction, Jonathan Pyle argues that *Fraser* should be overturned and the *Tinker* Material Disruption Standard should govern school censorship of student speech.[161] If the Court had applied the *Tinker* standard in *Fraser*, as Pyle suggests, the outcome would have been considerably different because the facts in *Fraser* do not support *Tinker*'s requisite material disruption of the educational process to warrant infringing on students' free speech rights.[162] The likelihood of *Fraser* being overturned, however, is improbable in light of the current conservative make-up of the Court and the cases that preceded *Fraser* that support curtailing student free speech rights.[163] Another area of scholarly critique of *Fraser* focuses on the intended scope of the standard. How broad is *Fraser*'s reach in terms of what lewd or offensive speech may be censored? Specifically, some scholars question whether lower courts should apply a broad application of *Fraser* that permits school authorities to censor any speech they deem lewd or offensive

160. *See* Zollo, *supra* note 157 ("By giving schools broad discretion, the instant Court ignores its own warnings of the chilling effects inherent in prohibiting speech offensive to some members of society."); s*ee also* Therese Thibodeaux, Note, Bethel School District No. 403 v. Fraser*: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516, 525 (1987) (noting that the *Fraser* decision represents a retreat from the Court's "progressive stance" to the pre-*Tinker* ideology of allowing school authorities unbridled deference supporting the in loco parentis role of schools); Phoebe Graubard, Note, *The Expanded Role of School Administrators and Governing Boards in First Amendment Student Speech Disputes:* Bethel School District v. Fraser, 17 GOLDEN GATE U.L. REV. 257, 271 (1987) (highlighting *Fraser*'s departure from *Tinker*'s expansive student free speech rights).

161. Pyle, *supra* note 23, at 633 ("[T]he *Tinker* disruption standard, and nothing more, should govern the school's regulation of independent student speech.").

162. Sara Slaff, *Silencing Student Speech:* Bethel School District No. 403 v. Fraser, 37 AM. U.L. REV. 203, 217–18 (1987).

163. *See* Morse v. Frederick, 551 U.S. 393, 403 (2007) ("[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."); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (establishing that public school officials can censor school-sponsored expression for legitimate educational purposes).

or a narrower reading that only permits censorship of speech that is sponsored by the school.[164]

The uncertainty surrounding the scope of *Fraser* is evident by the varied lower court interpretations of the standard articulated by the Court for censoring inappropriate speech. For example, in a Sixth Circuit case, *Boroff v. Van Wert City Board of Education*, the court broadly interpreted *Fraser* to permit censorship of student expression that does not align with the school's educational mission or conflicts with the fundamental values of public schools.[165] This broad interpretation of *Fraser* enhances the school's role as *in loco parentis* while simultaneously minimizing students' free speech protections.[166] In a similar case, however, the Second Circuit took a very different doctrinal stance and narrowly interpreted *Fraser* to permit school censorship for expression involving profanity or sexual innuendos only if it occurs during a school-sponsored activity.[167] Thus, under the Second Circuit's narrow interpretation of *Fraser* the focus is on the context in which the language occurred as opposed to whether the speech is lewd or offensive.[168] The lack of consensus among the judiciary regarding the scope of *Fraser* illustrates the ongoing tension between affording school administrators enough discretionary power to maintain school discipline and order and preserving students' free speech rights. This conundrum continues in the next

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164. Hudson & Ferguson, *supra* note 158, at 191 ("The problem originates in the way *Fraser* is interpreted by some lower courts. The issue that has caused a split in the First Amendment's application is whether *Fraser* allows schools to censor any speech deemed vulgar or offensive (broad reading), or whether *Fraser* only allows the regulation of speech that is sponsored by the school (narrow reading)."); *see also* Sarah Tope Reise, *"Just Say No" to Pro-Drug and Alcohol Student Speech: The Constitutionality of School Prohibitions of Student Speech Promoting Drug and Alcohol Use*, 57 EMORY L.J. 1259, 1287–88 (2008) (explaining that some courts reject a broad reading of *Fraser* because it essentially would overrule the principles set forth in *Tinker*. Specifically, *Tinker*'s disruption requirement is intended to prevent school authorities from prohibiting any expression simply because they find it disagreeable. Thus, a broad interpretation of *Fraser* would undermine this principle by allowing school authorities to circumvent *Tinker*'s Material Disruption Standard to censor protected speech unlawfully.).

165. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469–70 (6th Cir. 2000).

166. Reise, *supra* note 164, at 1279.

167. Guiles v. Marineau, 461 F.3d 320, 326 (2nd Cir. 2006) ("To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech . . . . Speech falling outside of these categories is subject to *Tinker*'s general rule . . . ." (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001))).

168. *Id*. at 326.

student free speech case before the Supreme Court, *Hazelwood School District et al. v. Kuhlmeier*.[169]

D. Curriculum Matters: Hazelwood School District et al. v. Kuhlmeier

The Court's ruling in *Hazelwood School District v. Kuhlmeier* represents yet another exception to *Tinker*'s Material Disruption Standard and permits school administrators to limit students' freedom of expression rights, even in the absence of a material disruption.[170] The Court in *Hazelwood* established that educators did not offend the First Amendment by exercising editorial control over the content of student speech so long as their actions were "reasonably related to legitimate pedagogical concerns."[171] The facts in *Hazelwood* involve a group of students that challenged the constitutionality of a principal's censorship of a student newspaper that was part of a student journalism class at Hazelwood East High School.[172] Each semester, before the student newspaper went to print, page proofs had to be submitted to the principal for final approval.[173] The students submitted the page proofs to the principal, who rejected two of the articles for publication.[174] In regards to the first article, the principal had privacy concerns regarding concealing the identity of the pregnant students featured in the article.[175] Additionally, the principal was concerned that some of the sexual references in the article were too advanced for some of the younger members of the student body.[176] The second article rejected by the principal discussed the impact of divorce on students, in which a student criticized his father for not being around enough and made other negative comments regarding his parents.[177] The principal reasoned that the parents should be allowed to respond to their son's assertions prior to the article being published.[178] As a result of a tight publication deadline, the principal decided not to publish the two articles of concern.[179] The high school journalism students filed

169. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
170. *Id.* at 289.
171. *Id.* at 273.
172. *Id.* at 263.
173. *Id.*
174. *Id.*
175. *Id.* at 265.
176. *Id.* at 263.
177. *Id.*
178. *Id.*
179. *Id.* at 263–64.

suit, alleging that the principal's actions violated their constitutional free speech rights.[180]

Hazelwood was the first student free speech case before the Supreme Court by which the Court critically evaluated students' free speech rights in the context of school-sponsored activities.[181] The Court, by a 5-3 vote, held that the principal's censorship of the school-sponsored newspaper did not violate students' free speech rights.[182] The Court based its decision on a public forum analysis that evaluated whether the school newspaper may be categorized as a forum for public expression.[183] The Court reasoned that the school newspaper could not be categorized as a public forum because the school never deviated from its policy that designated the student newspaper as part of the educational curriculum and not a vehicle for public expression.[184] Significantly, the Court distinguished the speech at issue in *Hazelwood* from the speech in *Tinker* to illustrate the need to adopt a new standard governing students' free speech rights in the context of school-sponsored curriculum activities.[185] In *Hazelwood*, the Court considered the educator's control over school-sponsored expressive activities, such as student newspapers, that might be perceived as bearing the "imprimatur of the school."[186] In *Tinker*, however, the Court's inquiry examined whether it is constitutionally permissible for school authorities to limit a student's individual freedom of expression that happens to occur

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180. *Id.* at 264. Respondents filed suit in the United States District Court for the Eastern District of Missouri. "The District Court concluded that school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has 'a substantial and reasonable basis.'" *Id.* (internal citations omitted).

181. *Id.* at 266–76.

182. *Id.* at 276.

183. William M. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum – Manner of Restriction*, 71 A.L.R.6th 471 (2012). It is well established in constitutional jurisprudence that content-based restrictions that occur in traditional public forums are subject to strict scrutiny. The government normally can impose only content-neutral time, place, and manner restrictions on speech in a public forum. Examples of public forums are city parks and sidewalks. *See also* Alan Brownstein, *The Nonforum As A First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 722 (2009) ("The traditional public forum doctrine content-based speech restrictions in a designated public forum are subject to strict scrutiny.").

184. *Hazelwood*, 484 U.S. at 269.

185. *Id.* at 272.

186. *Id.* at 271.

in school.[187] In evaluating the record, the Court concluded that educators should have the authority to censor free speech that is part of the educational curriculum to ensure that the speech is age-appropriate and accomplishes the desired learning objectives.[188]

The *Hazelwood* decision, like many of the free speech cases following the *Tinker* decision, has been met with stark criticism from free speech advocates for carving out yet another exception that limits student speech.[189] Constitutional law expert Erwin Chemerinsky asserts that the *Hazelwood* decision is historic because it ushers in a paradigm shift from *Tinker*'s speech-protective rhetoric to an authoritative approach that affords great deference to school authorities to punish student speech.[190] Chemerinsky's assertion is supported by several other scholars who criticize the *Hazelwood* decision for diminishing students' First Amendment rights by increasing the deference given to school authorities

187. *Id.* at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 509 (1969).

188. *Hazelwood*, 484 U.S. at 272.

189. *See, e.g.*, Frank D. LoMonte, "*The Key Word Is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 306 (2013) ("In *Hazelwood*, the Supreme Court carved out a category of 'curricular' speech that, in the majority's view, was entitled to minimal First Amendment protection."); Cavaliere, *supra* note 82, at 885 ("Whatever general rule the Court may have attempted to create in *Tinker* has been chiseled away by the Court's subsequent student speech decisions. Now, whether a school may silence student speech depends on whether the speech falls within any one of four categories of unprotected expression: a school may limit student speech if it is disruptive under *Tinker*, ugly under *Fraser*, school sponsored under *Hazelwood*, or drug-promoting under *Morse*."); Shari Golub, Note, Tinker *to* Fraser *to* Hazelwood–*Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights:* Hazelwood School Dist. v. Kuhlmeier, 38 DEPAUL L. REV. 487, 504–05 (1989) (explaining that the *Hazelwood* Court "conveniently evaded" the "appropriate balance" struck by the *Tinker* Court.).

190. Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 292 (2013).

to limit free speech.[191] For example, one scholar contends that *Hazelwood* undermines students' First Amendment rights by allowing school authorities to use their discretionary power to categorize student speech freely and suppress it without any fear of judicial oversight.[192] Some states have responded to the *Hazelwood* decision by passing legislation to extend students' constitutional protections for school newspapers in hopes of avoiding a chilling effect on free speech.[193]

E. Guiding the Moral Compass: Morse v. Frederick

In *Morse v. Frederick*, the Supreme Court examined whether prohibiting students from displaying messages that support the use of illegal drugs during a school-supervised event violates the First Amendment.[194] In *Morse*, students at Juneau-Douglas High School were permitted to observe the Olympic Torch Relay scheduled to proceed along the street in front of the high school as part of a school-sponsored event.[195] This was a monumental event because it was the first time in American history that the Olympic Torch Relay passed through Alaska.[196] Therefore, the principal reasoned that permitting students to leave class and observe the Olympic torchbearers from the street had educational value and allowed students to

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191. Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1929 (2002) ("As a result of the *Hazelwood* decision, secondary schools have censored student speech far more rampantly in the past decade than in previous years."); *see also* Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 451 (2000) ("Perhaps the most obvious criticism of *Hazelwood* is that the standard 'translates into essentially no judicial review of the school authorities' conduct.'").

192. S. Elizabeth Wilborn, *Teaching the New Three Rs-Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 137 (1995).

193. *See* MASS. GEN. LAWS ch. 71, § 82 (2017) ("The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school."); COLO. REV. STAT. § 22-1-120(2) (2017) ("If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school."); IOWA CODE § 280.22 (2017) ("[S]tudents of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications.").

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

195. *Id.* at 397.

196. *Id.* at 434 (Stevens, J., dissenting).

be a part of a historic event.[197] The controversy that ensued revolved around the plaintiff, Joseph Frederick, a senior at Juneau-Douglas High School.[198] He and his friends decided to watch the Olympic Torch Relay across the street from the school.[199] As the torchbearers and media crew passed by, Frederick and his friends unveiled a 14-foot banner that read "BONG HITS 4 JESUS."[200] Principal Morse demanded that the students take down the banner immediately because it promoted illegal drug use.[201] Every student complied except for Frederick.[202] The principal confiscated the banner and instructed Frederick to come to his office.[203] Frederick defiantly relinquished the banner and walked in the other direction.[204] Principal Morse suspended Frederick for ten days for violating the schools anti-drug policy by promoting illegal drug use during a school-sponsored activity.[205] The school's anti-drug policy stated: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors."[206] Additionally, the school's policy explicitly stated that "pupils who participate in approved social events and class trips" are subject to the disciplinary consequences for violating any such policies.[207]

Frederick filed a suit in the United States District Court of Alaska against the school district under 42 U.S.C. § 1983, alleging that both the school board and principal violated his First Amendment rights.[208] The district court ruled in favor of the principal and school board, finding that their actions did not violate Frederick's First Amendment freedom of expression rights.[209] The court reasoned that the principal was reasonable in interpreting the "BONG HITS 4 JESUS" banner as promoting illegal drug use, and, thus, disciplinary action was appropriate for Frederick's violation of the school board's anti-drug policy.[210] The district court

197. *Id.* at 397 (majority opinion).
198. *Id.*
199. *Id.*
200. *Id.* It is common knowledge that the phrase "bong hits" refers to smoking marijuana.
201. *Id.* at 397–98.
202. *Id.* at 398.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 399.
209. *Id.*
210. *Id.* at 402.

emphasized that Principal Morse had the authority to stop such messages during a school-sponsored activity.[211] The plaintiff appealed the district court's finding that the principal's actions did not violate his First Amendment rights.[212] On appeal, the Ninth Circuit ruled that despite the banner advocating for illegal drug use, Principal Morse violated Frederick's First Amendment rights because he preemptively disciplined Frederick without demonstrating that his symbolic speech was likely to cause a material disruption to the school activity.[213]

The Supreme Court overturned the Ninth Circuit's decision by a 6-3 vote and held that the principal's confiscation of Frederick's banner, which promoted illegal drug use, was not a violation of his First Amendment free speech rights.[214] The Court reasoned that schools must be permitted to regulate speech that encourages illegal drug use to students entrusted in their care.[215] The Court found the principal's response reasonable in light of Frederick's actions of brandishing a pro-drug banner in front of his peers and the school staff at a school-sponsored event.[216] The Court referenced the Safe and Drug-Free Schools and Communities Act, which requires schools receiving federal funds to make a concerted effort to promote a drug-free environment.[217] Therefore, the principal's actions not only were reasonable but part of his responsibility in the management of the school.[218] The Court also cited previous Supreme Court decisions that illuminated the important role schools play in deterring illegal drug use.[219] Ultimately, the Court concluded that schools should not be required to turn a blind eye to the promotion of illegal drug use under the auspices of First Amendment freedom of expression rights.[220]

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211. *Id.* at 410.
212. *Id.* at 399–400.
213. *Id.* at 396.
214. *Id.* at 397.
215. *Id.*
216. *Id.*
217. *Id.* at 395; *see also* Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7114(d)(6) (2017).
218. *Morse*, 551 U.S. at 408.
219. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–62 ("School years are the time when the physical, psychological, and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.' And of course, the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.") (internal citations omitted).
220. *Morse*, 551 U.S. at 409.

The criticism of *Morse* has been especially harsh because the Court created more uncertainty in the already muddled waters of freedom of expression jurisprudence in schools. One scholar encapsulates what is described as the intellectual puzzle created by *Morse* for lower courts, citing four different possible interpretations of how to assess whether speech advocating drug use may be censored in schools.[221] First, one may interpret that Justice Roberts created a narrow drug exception that permits limiting student speech that promotes illegal drug use.[222] A second view is that the *Morse* Court simply applied the *Tinker* standard by finding that drugs constitute a material disruption to schools.[223] A third interpretation of the legal standard put forth in *Morse* is that the Court expanded the authority of school administrators by permitting them to decide what qualifies as constitutionally protected speech in schools.[224] Lastly, the fourth doctrinal interpretation of *Morse* is that although the decision did not overrule *Tinker*, it substantially restricted *Tinker*'s ability to protect student rights by carving out yet another exception to *Tinker*'s Material Disruption Standard.[225] Although the aforementioned list of *Morse* interpretations are not exhaustive, the scholar's critique illuminates the need for clarity regarding the proper application of the *Tinker* standard in regulating speech in K-12 schools. Some scholars have responded to the ambiguity in *Morse* by suggesting the adoption of a new four-part test for assessing the constitutionality of any censored student speech.[226]

The *Morse* case illuminates the ongoing trend of courts struggling to protect students' free speech rights without impeding school administrators' ability to maintain a school environment conducive to learning. In light of the continuously changing contexts of today's schools, courts likely will continue to face the endemic challenges associated with students' free speech rights in K-12 schools.

In sum, *Barnette*, *Tinker*, *Hazelwood*, *Fraser*, and *Morse* collectively create the framework for evaluating students' free speech rights in K-12 schools.[227] Although *Tinker*'s speech-protective rhetoric was intended to

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221. Joyce Dindo, *The Various Interpretations of* Morse v. Frederick*: Just A Drug Exception or A Retraction of Student Free Speech Rights?*, 37 CAP. U. L. REV. 201, 221 (2008).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 362 (2007).

227. *See* West Va. State Bd. of Educ. v. Barnette, 319 US. 624 (1943) (asserting that the First Amendment gives students not only the right to speak, but

solidify students' First Amendment rights in schools, it is evident by the Court's dismantling of *Tinker*'s protections through a series of exceptions[228] that students shed a substantial portion of their First Amendment rights at the schoolhouse door.[229] The impact of the current paradigm shift from speech-protective rhetoric to speech-limiting rhetoric is especially apparent in the treatment of students' symbolic speech in the context of national anthem protests. Instead of protecting students' symbolic speech during national anthem protests, school authorities are using the discretionary power bestowed upon them by the Court to silence student voices.[230] The aforementioned legal framework for protecting students' free speech rights in K-12 schools does not adequately shield students participating in national anthem protests from impermissible encroachments on their constitutional rights. The existing legal framework for symbolic speech in schools must be evaluated and restructured to safeguard students' rights.

III. UNCHARTED WATERS: SAFEGUARDING STUDENTS' FREE SPEECH RIGHTS

The insurgence of student national anthem protests at school-sponsored athletic events has raised concerns regarding the effectiveness of existing free speech doctrine in safeguarding students' First Amendment rights. The legal doctrine established in *Tinker*, *Fraser*, *Morse*, and *Hazelwood* concomitantly creates today's modern legal framework for evaluating students' free speech rights. The current free speech jurisprudence established in these cases, however, fails to provide students with adequate protection of their First Amendment rights, especially in the context of student national anthem protests. As a result, students across the country attempting to exercise their freedom of expression rights are being disciplined for kneeling

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the right not to speak; school authorities may not compel students to salute the flag); Morse v. Frederick, 551 U.S. 393 (2007) (asserting that student symbolic speech promoting illegal drug use my be limited); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (asserting that lewd and offensive student speech during school-sponsored activities may be censored); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (asserting that school authorities may limit school-sponsored activities that are part of the educational curriculum).

228. Sheffield, *supra* note 96, at 176 ("The *Tinker* decision has been treated by many as the high-water mark for the First Amendment rights of students in public schools. Accordingly, the subsequent Supreme Court decisions on the issue of students' free speech rights in public schools, each of which found for the respective school district, are treated as substantial retreats from the First Amendment protections that students received under the *Tinker* decision.").

229. *See id.*

230. Blad, *supra* note 19; *see also* discussion *supra* Part I.B.

during the national anthem.[231] This section highlights the shortfalls of existing First Amendment jurisprudence and charts a path forward to safeguarding students' free speech rights in K-12 schools.

A. Free Speech Shortfalls: A Call for Change

The judicial decisions in *Hazelwood*, *Fraser*, and *Morse* do not provide any constitutional protections to students participating in national anthem protests. In all three cases, the Supreme Court carved out narrow exceptions that permit school authorities to censor student speech, none of which are applicable to the type of symbolic speech at issue in national anthem protests.[232] For instance, the school-sponsored expressive activity addressed in *Hazelwood* is distinct from the extra-curricular sporting events at issue in national anthem protests. First, the school-sponsored activity in *Hazelwood*, a student newspaper, was part of the educational curriculum[233] whereas school athletic teams are not a part of the curriculum. Second, the free speech at the center of the controversy in *Hazelwood* occurred during the regular school day[234] whereas high school sporting events typically are held outside of the regular school hours, thereby removing any threat of a material disruption to the school learning environment.

Although some individuals may argue that extra-curricular school athletic events are implicitly part of the educational curriculum—and thus should be analyzed under the aforementioned free speech jurisprudence—because they are designed to teach values like teamwork, conflict management skills, and responsibility, those sentiments should be rejected adamantly. Student participation in extra-curricular activities, such as football, are voluntary activities in which students do not receive academic credit for participation and thus are outside the scope of *Hazelwood*. Furthermore, the performance of students who play on school-sponsored athletic teams are not part of the educational curriculum because their athletic performance is not used to evaluate academic achievement. Similarly, the *Fraser* standard is not applicable to national anthem protests because its narrow rule only permits school authorities to censor lewd and indecent speech.[235] The symbolic speech students are conveying by kneeling during the national anthem is not lewd or indecent but rather political speech intended to communicate the need to address police

231. *See* Blad, *supra* note 19; *see also* discussion *supra* Part I.B.
232. *See* discussion *supra* Part I.B.; Blad, *supra* note 19.
233. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
234. *Id.* at 262–65.
235. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

brutality against black Americans. Likewise, the *Morse* standard, which established that school authorities may regulate student speech that promotes illegal drug use during school-sponsored events, is distinct from the symbolic speech expressed in national anthem protests because the message is intended to speak out against police brutality, not promote illegal drug use.

The speech-protective standard espoused in *Tinker* serves as a catch-all for regulating students' free speech rights in schools because the scope of First Amendment protections in *Morse*, *Frazer*, and *Hazelwood* are so limited.[236] Despite *Tinker*'s speech-protective rhetoric, however, it too falls short of adequately safeguarding students' First Amendment rights in schools. First, the Material Disruption Standard, as interpreted by the lower courts, gives too much deference to school authorities.[237] Scholars like Professor Andrew Miller argue that school authorities have almost unbridled discretion in regulating student speech.[238] The expansive deference given to school authorities is problematic, especially in the context of national anthem protests, because it fails to shield students from school authorities using their discretionary power to limit student speech simply because they disagree with the content of the message. For example, the principal of Lely High School in Naples, Florida mandated that students stand during the national anthem or be removed from athletic games.[239] Similarly, students choosing to participate in national anthem protests were suspended at Doherty High School in Worcester, Massachusetts.[240] Both instances demonstrate how affording school authorities too much deference allows them to engage in viewpoint discrimination, which is prohibited by the First Amendment.[241] Thus, in the context of national anthem protests, the *Tinker* standard serves as a breeding ground for viewpoint discrimination because of the expansive deference given to school authorities. Viewpoint discrimination undermines

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236. Bernard James, Tinker *in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 613 (2013).

237. *Id.* at 615.

238. Miller, *supra* note 95, at 626.

239. Blad, *supra* note 19.

240. Cindy Boren, *High school rethinks decision to suspend player for national anthem protest*, WASH. POST (Sept. 12, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/09/12/high-school-rethinks-decision-to-suspend-player-for-national-anthem-protest/?utmterm=.f3829cb7a19e [https://perma.cc/M864-9ZYA].

241. Viewpoint discrimination refers to the idea that state actors may not censor speech based on its content or the viewpoint of the speaker. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

one of the key purposes of the First Amendment, which is to promote a marketplace of ideas.[242]

The school environment should be a quintessential marketplace of ideas where students are trained on how to participate actively in democracy through vast exposure to robust exchanges of ideas that challenge and critique existing ideologies.[243] This sentiment is captured in a prominent educational theory—"The Open Classroom Model"—in which students are introduced to objective conceptions of diverse perspectives and theories that allow them to critique the validity of the various positions.[244] According to this theory, the purpose of education is to equip students with the skills, knowledge, and critical thinking skills to make informed decisions and actively participate in democracy.[245] This notion is illustrated in the following quote from *Tinker*: "Students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[246] Therefore, student national anthem protests to express opposition to the treatment of black Americans in the United States, particularly by police officers, contribute to the marketplace of ideas regarding minority relations and critique existing practices. The students like Kaepernick are exercising their constitutional right to participate actively in public discourse and the free exchange of ideas. It is illogical to acknowledge Kaepernick's right to freedom of expression yet allow the State to deny citizens-in-training—students—the same opportunity. Because school sporting events are open to the general public, it is more difficult for school officials to filter what types of political and social messages students receive from spectators. Therefore, notions of equity demand that students, like sporting event attendees, are permitted the same constitutional freedoms to express themselves freely as long as they are not infringing on the rights of others. Moreover, it is well established in First Amendment jurisprudence that students are considered "persons"

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242. Stephen C. Jacques, Reno v. ACLU*: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U.L. REV. 1945, 1949–50 (1997).

243. Keyishian v. Bd. Of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (citing United States v. Associated Press, 52 F. Supp. 362, 372 (1943))).

244. Deborah A. Churton-Hale, Tinker *Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in* Seyfried v. Walton, 11 HASTINGS CONST. L.Q. 247, 273 (1984).

245. *Id.*

246. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 511 (1969).

under the Constitution both in an outside of school.[247] Therefore, students should be afforded the same level of constitutional protections as adults to the greatest extent possible. As the Court stated in *Tinker*, "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[248]

Because democracy and free speech are inextricably linked, laws must be developed that safeguard free speech rights in our nation's public schools. One scholar has supported this notion by stating that "[i]nstead of offering them the government of 'The Brave New World,' young people need help to empower themselves. It's not enough for the coming generation to know old ideas, they must be able to develop their own."[249] This goal can be accomplished only by prioritizing the preservation of students' free speech rights in K-12 schools and dismantling efforts to stifle the free exchange of ideas. The vigilant protection of First Amendment freedoms is nowhere more vital than our nation's public schools.[250] For these reasons, the current *Tinker* standard needs to be revamped to better protect students' free speech rights.

B. Tinker-Spence *Standard: A New Constitutional Standard for Free Speech in K-12 Schools*

The proposed new K-12 standard applies the full protections of the *Spence* Test[251] for student-initiated symbolic speech during non-academic, school-sponsored events. The *Spence* case is part of numerous symbolic speech cases that provide a framework for First Amendment freedom of expression jurisprudence.[252] Currently, the criterion established to

247. LoMonte, *Shrinking* Tinker*: Students Are 'Persons' Under Our Constitution-Except When They Aren't*, *supra* note 75, at 1339.

248. *Tinker*, 393 U.S. at 511.

249. *The Brave New World of Fear: Public Education*, *supra* note 16.

250. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

251. Spence v. Washington, 418 U.S. 405, 415 (1974).

252. *See* Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (holding that the defendant's act of burning the American flag during a protest is expressive conduct that is afforded First Amendment protections); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."); United States v. Eichman, 496 U.S. 310, 318 (1990) (holding that the Flag Burning Act was subject to strict scrutiny and could not be upheld under the First Amendment).

determine protected speech in *Spence v. Washington* is used exclusively in the context of adult freedom of expression cases and is thus not applicable to K-12 settings.[253] The *Spence* Test, however, is a great starting point for developing a new constitutional standard to ensure that students' freedom of expression rights are protected in K-12 schools because it is considered the seminal case in symbolic speech. In *Spence*, the defendant displayed an upside-down flag with a peace symbol affixed on both sides outside his apartment window in protest of the killings at Kent State University and the invasion of Cambodia during the Vietnam War.[254] Three police officers observed the flag and arrested the defendant for violating the Washington Flag-Desecration Statute, which made it a misdemeanor to place "any word, figure, mark, picture, design, drawing or advertisement" upon the flag of the United States and to display such flag in its superimposed state.[255] At trial, the defendant argued that he used black tape intentionally to affix the peace symbol to the flag so it could be removed without damaging the flag.[256] He asserted that because he did not damage the flag, he was not in violation of the statute.[257] Furthermore, the defendant contended that the flag desecration statute was an impermissible violation of his First Amendment rights because it was overbroad on its face and, thus, invalid.[258] The lower court rejected the defendant's

253. Students in K-12 public schools do not receive the same constitutional protections as adults, as evidenced by the Supreme Court decisions in *Tinker*, *Morse*, *Hazelwood* and *Fraser*, which, collectively, govern students' free speech rights. Unlike the broad free speech rights established in *Spence v. Washington* for adults, student free speech jurisprudence allows school administrators to limit students' First Amendment rights if the speech causes a material disruption or meets one of the exceptions established by the court; *see supra* note 227. *See generally* Colleen Creamer Fielkow, *Bullies, Words, and Wounds: One State's Approach in Controlling Aggressive Expression Between Children*, 46 DEPAUL L. REV. 1057, 1074, 1077 (1997) ("In general, the U.S. Supreme Court has determined that children receive less constitutional protection than adults . . . . the Court has carved out other categories of expression from First Amendment protection for student speech—modeled after the First Amendment doctrine as applied to adults . . . . These categories are more easily invoked in the public school setting than for adults since the school authorities have a lower constitutional threshold to satisfy than a state attempting to curb adult expression.").

254. *Spence*, 418 U.S. at 406.

255. *Id.*

256. *Id.*

257. *Id.* at 408.

258. State v. Spence, 490 P.2d 1321, 1322 (1971), *rev'd*, 506 P.2d 293 (1973), *rev'd sub nom.* Spence v. Washington., 418 U.S. 405 (1974) ("The instant case

argument and sentenced him to jail and a fine for violating the statute.[259] The defendant unsuccessfully appealed the trial court decision to the Washington Supreme Court, which upheld the defendant's conviction and rejected any claims to free speech rights.[260] The Washington Supreme Court reasoned, "The statute does not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance."[261] This victory for the State of Washington, however, was short lived.[262] The Supreme Court reversed the Washington Supreme Court decision, ruling in favor of the defendant.[263]

In reaching its decision, the Supreme Court focused on ascertaining whether the conduct "was sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]."[264] To this end, the Court for the first time attempted to define which symbolic acts are protected under the First Amendment.[265] Prior to the *Spence* case, there was pervasive uncertainty among the lower courts regarding how to delineate which symbolic acts are protected under the First Amendment.[266] In response to the split in the circuit courts, the *Spence* Court established that the following criteria must be met for a determination that symbolic speech is protected under the First Amendment: (1) the actor/speaker intends to convey a particular message; and (2) it must be likely that those who witness the activity will understand what the speaker intends to convey by his or her behavior.[267] These criteria, combined with the *Tinker* Material Disruption Standard, serve as the guiding principles for the proposed new constitutional standard for evaluating whether a student's symbolic speech is protected under the First Amendment.

Under the proposed *Tinker-Spence* Standard, student symbolic speech qualifies for First Amendment protections if all of the following occur:

(1) The actor/speaker intends to convey a particular message;

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illustrates overbreadth on the face of RCW 9.86.020(1) and (2), not only with respect to the American flag itself, but also with respect to the items included in the statutory definition of the flag.").

259. *Spence*, 418 U.S. at 407 (1974).
260. *Id.* at 408.
261. *Spence*, 506 P.2d at 299.
262. *See Spence*, 418 U.S. at 408.
263. *Id.* at 412.
264. *Spence*, 506 P.2d at 797.
265. *Spence*, 418 U.S. at 409–10.
266. *See* McGoldrick, Jr., *supra* note 25, at 33.
267. *Spence*, 418 U.S. at 415.

> (2) Those who witness the activity likely understand what the speaker intends to convey by his or her behavior;
> (3) Symbolic speech does not interfere with the rights of others; and
> (4) Symbolic speech does not involve peer coercion of other students to participate.

Applying the *Tinker-Spence* Standard to the student protests during the national anthem, the symbolic speech communicated through kneeling would be protected constitutionally because the student intends to convey a message—stop police brutality against black American males—and those who witness the symbolic conduct—individuals attending/watching the sporting event—understand what the student intends to communicate through his actions. The symbolic speech does not interfere with the legal rights of other students or spectators attending the event. To the contrary, national anthem protests are a form of symbolic speech that the First Amendment encourages and was designed to protect.[268] Whether school authorities agree or disagree with the symbolic message being conveyed through the national anthem protests is irrelevant. Adopting the *Tinker-Spence* standard promotes a long-held tradition of promoting free speech by encouraging the exchange of diverse ideas and perspectives. Lastly, as long as the student conveying the symbolic message does not try to coerce other students to participate, the conduct should be afforded the full constitutional protections of the First Amendment. The last factor—the symbolic speech does not involve peer coercion to participate—is important because it protects students from being subjected to peer pressure to convey a particular message, which, in the context of national anthem protests, is a message in opposition to the mistreatment of black Americans. It is crucial not only that we protect students' constitutional rights to convey a message through conduct but also safeguard non-participating students from being coerced into communicating a particular message.

Additionally, the *Tinker-Spence* Standard should be adopted because it accounts for the special characteristics of schools by requiring that students' symbolic speech not involve coercing peers into participation nor interfere with the rights of others. One of the special characteristics of K-12 schools is that they contain youths that are vulnerable to peer pressure because of their developmental stage. The proposed new constitutional standard safeguards students' symbolic speech rights, such as participating in national anthem protests, while protecting their peers from being compelled to speak by participating in the protest. Just as

268. Wasserman, *supra* note 48, at 394.

students should not be compelled by school authorities to stand for the national anthem, which is a form of symbolic speech, their peers should not be coerced into kneeling in protest for the national anthem.

The proposed *Tinker-Spence* standard also should be adopted because it bridges the doctrinal gap between *Tinker* and *Spence*, thereby providing stronger First Amendment protections for students' symbolic speech. The new standard protects students from school authorities using the court's deference to legitimize viewpoint discrimination, such as prohibiting national anthem protests, by eliminating the application of *Tinker*'s Material Disruption Standard to extra-curricular activities. One scholar suggests addressing concerns about *Tinker* serving as a conduit for viewpoint discrimination by modifying *Tinker*'s existing framework to deter viewpoint discrimination.[269] Specifically, the scholar contends that speech restrictions under *Tinker* should be tailored narrowly to achieve a legitimate governmental purpose to reduce the risk of viewpoint discrimination.[270] The *Tinker-Spence* test is a better solution, however, because it addresses the need to minimize the deference given to school authorities to regulate student speech. Under the proposed *Tinker-Spence* standard, whether the government has a legitimate interest in censoring student symbolic speech is irrelevant. Furthermore, *Tinker*'s Material Disruption Standard never should have applied to non-curricular school activities because it minimizes students' free speech protections.[271] Any standard governing free speech rights in schools should balance students' rights and the ability of school authorities to maintain an environment conducive to learning. This proposed standard accomplishes that goal.

In addition to addressing all of the aforementioned shortfalls in *Tinker*'s Material Disruption Standard, the proposed new standard provides students with the full protections of the *Spence* Standard that is applied in adult contexts. Under this new standard, students are afforded the same constitutional protections as Kaepernick, as long as the students' symbolic expression does not interfere with the rights of others or involve peer coercion. Because students are considered "persons" under the Constitution,[272] courts should strive to afford them with the same free

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269. *See* John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. Rev. 569, 569 (2009).

270. *Id.* at 623.

271. Brownstein, *supra* note 183, at 742–43; *see also* Walter E. Forehand, *Constitutional Law-Tinkering with* Tinker*: Academic Freedom in the Public Schools*-Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988), 16 FLA. ST. U.L. REV. 159, 170 (1988).

272. *See* Lomonte, *Shrinking* Tinker*: Students Are 'Persons' Under Our Constitution-Except When They Aren't*, *supra* note 75, at 1339.

speech protections to the greatest extent possible. The proposed *Tinker-Spence* standard accomplishes this goal.

C. Limitations of Proposed Tinker-Spence *Standard*

Despite the laudable intentions behind the endorsement of this new constitutional standard, it is important to acknowledge the potential limitations and negative outcomes that may result from the adoption of this standard. First, there is a potential negative economic effect on K-12 schools. Many sports spectators may take the stance that they are purchasing a ticket to view the game and not a political protest.[273] Because kneeling during the national anthem is considered disrespectful to the military, allowing students to engage in this type of symbolic conduct may result in boycotts and loss of sponsorships.[274] Second, affording student-athletes the full constitutional protection to engage in social protests during the national anthem also may increase the likelihood of violence at school sporting events because of hostile responses from those in opposition to symbolic acts. For example, members of the Beaumont Bears little league team were subjected to racial slurs and death threats for kneeling during the national anthem at a football game.[275] Therefore, safeguarding student rights to engage in social protests during the national anthem, even if it causes a material disruption, may result in increased costs to schools for additional security.

Despite the possibility of material disruptions, the preservation of First Amendment rights is so integral to the fabric of our nation that democracy demands that these rights are not limited simply to appease the sentiments of those in opposition. Embracing diverse viewpoints and perspectives is one of the foundational elements of democracy. Therefore, we must protect those rights fervently. Lastly, although the proposed standard prohibits any form of peer coercion to communicate a particular message, peer pressure and K-12 schooling are inextricably linked.[276] It is well established in social science literature that peer groups have a tremendous

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273. McGinnis, *supra* note 51.

274. *Id.*

275. Shaun King, *KING: After taking a knee, young boys saw their football coach suspended then their whole season canceled*, N.Y. DAILY NEWS (Oct. 17, 2016, 1:19 PM), http://www.nydailynews.com/news/national/king-young-football-team-season-canceled-knee-article-1.2833792 [https://perma.cc/USH8-ZJ56].

276. Marcie Samartino, *Schools and Youth TALK BACK do Schools Say Yes to Peer Pressure*, NEWSDAY, Dec. 18, 1994, at 1, 2 ("[S]chools do enough to help people deal with peer pressure because the schools cannot change the way people are, and no matter what, there will always be peer pressure.").

influence on students' attitudes and behaviors.[277] Despite these limitations, the benefits of the *Spence-Tinker* standard supersede any disadvantages.

CONCLUSION

Public schools play the most critical role in preparing youth for democratic participation and citizenship.[278] One of the goals of public education is to encourage civic participation by imparting students with the skills, knowledge, and fundamental values necessary for the preservation of our democratic system.[279] At the heart of these goals is providing students with the opportunity to engage in political involvement by participating in simulations of democratic structures and processes, such as social protests.[280] Therefore, it is crucial to implement constitutional safeguards through the adoption of the *Tinker-Spence* standard to shield students from violations of their constitutional freedom of expression rights and to help preserve civic education in K-12 schools. Ideally, schools should mirror the society in which students live to adequately prepare the youth for adulthood. How can students be expected to engage actively as citizens without the opportunity to practice their civic and political skills? The *Tinker-Spence* standard ensures that the creed set forth by the Court in *Tinker v. Des Moines*[281] is honored—that students do not shed their constitutional rights at the schoolhouse door. One of the primary purposes of the First Amendment is to protect individuals from having their rights infringed upon by private and public citizens.[282] To deny children the same constitutional rights afforded

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277. Kimberly A. Maxwell, *Friends: The Role of Peer Influence Across Adolescent Risk Behaviors*, J. OF YOUTH & ADOLESCENCE 267, 268 ("To explain how peer influence and friendship selection affect adolescent behavior, theory posits that peer pressure exists as the mutual effect of close friends and that the type of friendship determines the degree of influence.").

278. MCCORMICK FOUND., CIVIC BLUEPRINT FOR ILLINOIS HIGH SCHOOLS 21 (2003), http://documents.mccormickfoundation.org/PDF/IL-Civic-Blueprint.pdf [https://perma.cc/5296-B89W].

279. *Id.* at 22.

280. Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1278 (2000).

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

282. Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties. C. R. McCorkle, *Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties*, 163 A.L.R. 1358 (1946).

to adults goes against the spirit and purpose of the Constitution. As one scholar correctly noted,

> 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 and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[283]

Society must be relentless in its fight to protect the freedom of expression rights of future citizens. Democracy depends upon it.

283. *Id.* at 508–09.