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Erecting a Virtual Schoolhouse Gate

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Constitutional Knowledge and Its Impact on Citizenship Exercise in a Networked Society

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Electronic Government, Digital
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IGI Global
DISSEMINATOR OF KNOWLEDGE

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Chapter 4

Erecting a Virtual Schoolhouse Gate

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ABSTRACT

The very first amendment to the United States Constitution protects the freedom of speech. While the Supreme Court held in 1969 that students “do not shed their constitutional rights at the schoolhouse gate,” since then the Court has limited students’ freedom of speech, stopping short of considering the boundaries of off-campus, online speech. Lower court holdings vary, meaning that a student engaging in certain online speech may not be punished at all in one state but would face harsh criminal punishments in another. The lack of a uniform standard leads to dangerously inconsistent punishments and poses the ultimate threat to constitutional knowledge and citizenship exercise: chilling of speech. Recent interest in technology-related cases and the presence of a new justice may reverse the Court’s prior unwillingness to address this issue. In the meantime, this chapter argues that school districts should erect a virtual schoolhouse gate by implementing a uniform standard.

INTRODUCTION

Congress shall make no law ... abridging the freedom of speech. - Amendment I

This chapter address the extent to which the First Amendment to the U.S. Constitution extends protections to public K-12 students’ speech online.

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The Framers of the United States Constitution – the oldest and shortest written constitution in the world – felt so strongly about the importance of free speech that they included it in the very first amendment to the main document. In fact, a number of the Framers wanted to include free speech and other individual rights in the main document and only agreed to sign once it was promised to them that there would be immediate additions (Emerson 1977). In 1791, just four years after ratification of the U.S. Constitution, the Bill of Rights – the first ten amendments – were adopted.

As the final arbiter of the Constitution and its amendments, the U.S. Supreme Court's role in ensuring protection of civil rights cannot be overstated. While the other two branches of government – the legislative and executive – can have an influence on rights, the Supreme Court has an independent and critical role in reviewing the work of the other branches (Rotunda & Nowak 2017). In the past eighty or so years, the U.S. Supreme Court has repeatedly interpreted the provision to include the rights of public school students to freely speak, and decline to speak, in the school context.

In 1969, the Court declared that students – and teachers – do not “shed their constitutional rights at the schoolhouse gate.” In *Tinker v. Des Moines Independent School District* (1969), the Court recognized the important role that public schools play in preparing youth for citizenship. They declared that student speech on campus may not be censored unless the school officials show a reasonable apprehension that the student speech will lead to material disruption or collide with the rights of others. In *Tinker*, Justice Fortas famously wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

In the almost fifty years since *Tinker* was decided, the Supreme Court has decided exactly three cases concerning the extent of students' freedom of speech. Those cases include *Bethel v. Fraser* (1986), *Hazelwood v. Kuhlmeier* (1988), and *Morse v. Frederick* (2007). The reluctance to consider more cases and create more useful guidelines highlights the Court's deference to school officials. Further, the Court's refusal to grant certiorari in *Bell v. Itawamba County* (2015), indicates another concern of the justices – how to handle the impact of technology on rights.

This chapter argues that the schoolhouse gate now extends to off-campus, online speech. The advent and widespread use of the internet by young people has exponentially increased the opportunities for students to speak such that there is now a virtual schoolhouse gate. The Supreme Court simply has not caught up. In fact, according to Connor Mitchell and Carolyn Schurr Levin of the Student Press Law Center (2017), the leading non-profit in this space, the Court has declined a number of opportunities to review the extent to which students' freedom of speech both in K-12 and higher education extends to online speech. Lower courts have explored this question and have reached different conclusions and drawn different lines.

The implications of this question are considerable. Over 90% of American children are enrolled in public schools, and almost all students have an online presence. According to the National Center for Education Statistics, the vast majority of Americans use the internet (2018). According to the Pew Research Center, 92% of teens report going online at least daily, and a quarter of teens report being online almost constantly (Lenhart 2015). If the vast majority of young people rely on online communication, their very ability to organize, express themselves, and shape their and our futures depends on the boundaries we set.

BACKGROUND

The Structure of Government

The United States Constitution divides federal government into three branches, and the states mostly mirror this structure in their respective state governments (Rotunda & Nowak 2017). The legislative branch consists of the bicameral Congress, made up of the U.S. House of Representatives (whose members are apportioned according to population) and the U.S. Senate (two members per state). Congress passes laws. The executive branch, comprised of the elected President and his cabinet members who are heads of various agencies, enforces the laws passed by Congress. Finally, the judicial branch – composed of federal district courts, federal courts of appeals or circuit courts, and the Supreme Court – reviews laws to ensure compliance with the Constitution.

The three branches check and balance one another's power by reviewing one another's actions, thereby stabilizing government and virtually eliminating concerns of unchecked power (Rotunda & Nowak 2017). For example, the current President of the United States, Donald Trump, has attempted to undo years of civil rights advances by changing policies of the Department of Justice and issuing executive orders. Upon review of his actions, courts have struck down or limited the reach of his actions, including the so-called Muslim ban, and the efforts to cut funding of cities that call themselves sanctuaries from federal immigration enforcement (Winkler 2017).

Role of the Supreme Court

The nine-member Supreme Court is the highest federal court, and it is the final decision-maker regarding the Constitution. The Constitution usually only applies to state (government) action (Rotunda and Nowak 2017). There are some exceptions, but private action generally does not invoke constitutional rights such as freedom of

speech. When the Supreme Court decides a case, their decision generally precludes further litigation on the same issue because of the doctrine of *stare decisis*. Pursuant to *stare decisis*, once the Court has decided a matter, the matter is already settled and cannot be re-litigated.

Another important point about the Court's reach is the idea that the Court only decides whether a law violates or does not violate the Constitution (Rotunda & Nowak 2017). That is, it provides a floor of rights. Congress and state legislatures, as well as state constitutions, may provide more expansive rights if they choose.

However, the Court does sometimes overturn itself, and it has done so in the First Amendment context. An often-cited example is the Court's change of heart regarding the flag salute. In the 1940 case of *Minersville School District v. Gobitis*, the Court considered whether the expulsion of Lillian and William Gobitis from their Pennsylvania public schools for refusing to salute the flag as part of a daily school exercise violated their First Amendment rights. The Gobitis children were Jehovah's witnesses and believed that the Bible forbade saluting graven images like the flag. The Court upheld their expulsion.

Just three years later, the Court reversed itself in a case called *West Virginia v. Barnette* (1943). During the height of World War II, the West Virginia Board of Education voted to require teachers and students to salute the flag in school. When the children of Jehovah's Witnesses refused to perform the salute, they were sent home, threatened with transfer to reform school for criminally delinquent children, and their parents faced prosecution for causing juvenile delinquency. In *Barnette*, the Court recognized the importance of the state's goal of promoting national unity, but it held that coercing patriotism contradicts the First Amendment. Writing for the majority, Justice Jackson famously said, "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."

Notwithstanding occasional reversals, the Court's adherence to its own precedents has provided stability and predictability in terms of the public's awareness of the protections and limitations of constitutional rights. The nine Justices of the Supreme Court are well-respected jurists who are nominated by the sitting President of the United States when a vacancy arises and confirmed by the members of the U.S. Senate after enduring a hearing process in front of the Senate Judiciary Committee. The justices occupy a vaulted, respected position in the legal profession, and they enjoy life tenure, which frees them from political and other pressures.

Important Values Underlying the First Amendment

Internationally renowned American constitutional law scholar Erwin Chemerinsky outlines the four theories as to why the Supreme Court regards the freedom of speech as a fundamental right (2017). Supreme Court justices refer to these values in their opinions, both as support for their conclusions and to acknowledge and explain deviations from one or more underlying values.

The first theory is self-governance, which articulates the crucial role free speech plays in a democracy. Most scholars agree that political speech is at the core of what is protected by the First Amendment. The second theory is discovering truth. The idea here is that free speech is essential to discover the truth. Of course the internet and social media have tested the limits of this value because any person is able to speak to millions of others in an instant. Justice Oliver Wendell Holmes felt that the marketplace of ideas would promote a clash of ideas and ultimately produce truth (Chemerinsky 2017). Critics worry that not everyone has access to the marketplace of ideas and that it's wrong to assume that truth will triumph over falsehood. Response: government determination of truth and censorship of falsehoods is worse.

The third theory supporting free speech as a fundamental right is advancing autonomy. Based in human rights values, advancing autonomy recognizes that speech is an essential aspect of personhood and autonomy. Some critics of this theory note that other aspects of autonomy are not granted fundamental right status and one's free speech may infringe on another's autonomy or self-fulfillment. Lines must be and have been drawn to recognize when there are clashes of rights, but there is no question that hurt feelings at the very least and violence may result from allowing wide latitude for speech under this theory. The white nationalist protesters in Charlottesville, Virginia tested the boundaries (Katz 2017). And more recently the Pittsburgh synagogue shooter who voiced his hatred for Jews repeatedly online before killing eleven adults in their house of worship exemplifies the dangers at the outer limits (Chavez, Grinberg, and McLaughlin 2018).

Finally, recognizing free speech as a fundamental right promotes tolerance. In other words, if everyone feels free to speak, then we all have to recognize one another's point of view, even if we disagree. Critics of this theory question whether tolerance should be regarded as a basic value. While tolerance is not an enumerated constitutional right, there is no question that the Framers, escaping religious and speech intolerance in England, were very much motivated by tolerance as a fundamental value.

Dean Chemerinsky points out that the theories are not mutually exclusive and none is without problems. However, they do exist, the justices do refer to them, and there is no question that they have influenced First Amendment jurisprudence in the absence of detailed constitutional language. With regard to speech, all the First Amendment says is, “Congress shall make no law ... abridging the freedom of speech.” As lofty as the language is, it provides very little actual guidance with regard to critical questions such as whether all speech has the same value, whether some restrictions make sense, and, if so, where to draw the lines.

The Supreme Court and Students’ First Amendment Rights

The Court only hears between 60 and 80 cases each year, representing less than 1% of all appellate petitions filed (“About the Court” 2018). It has granted certiorari – or agreed to hear – dozens of cases regarding the scope of various First Amendment free speech protections. With regard to the relatively narrow area of public school students and their free speech rights, four major cases set the scene for the question of online speech protections. Those cases are *Tinker v. Des Moines Independent School District* (1969), *Bethel School District v. Fraser* (1986), *Hazelwood v. Kuhlmeier* (1988), and *Morse v. Frederick* (2007).

In *Tinker*, as explained earlier, the Court first expressed a broad support for the idea that schoolchildren and teachers enjoy constitutional freedoms inside and outside of public schools (1969). The Court overturned the censorship of the students’ black armbands in protest of the Vietnam War because their speech did not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” The affirmed the idea first offered in *Barnette* that expressive conduct, particularly when it is political in nature, is akin to pure speech that may only be violated under limited circumstances. Justice Fortas wrote:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. 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. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate... Students are entitled to freedom of expression of their views.

Under the facts in that case, since the students’ wearing of the armbands did not disrupt school and did not “collide with the rights of others,” the school could not punish the speech. In *Tinker*, the Court said that unless there was an actual disruption or school authorities could reasonably “forecast substantial disruption

of or material interference with school activities,” censorship violated the students’ First Amendment rights.

The *Tinker* standard of actual or reasonably forecasted material and substantial disruption has not been overturned in fifty years. However, in *Bethel*, *Hazelwood*, and *Morse*, the Court drew more lines around student speech. In *Bethel*, it ruled that schools could prohibit speech they considered “vulgar, lewd, or plainly offensive” because such speech contradicted the fundamental values of public school education. Justice Brennan’s concurring opinion introduced the idea that schools do not have the authority to punish off-campus speech, although in subsequent years some lower courts instead have held that off-campus speech that school officials deem inappropriate may be punished.

In *Hazelwood*, a school prohibited student journalists from publishing a school newspaper issue including controversial topics. When the case was appealed to the Supreme Court, a majority held that the First Amendment allows school officials to censor content in school-sponsored publications that bear the imprimatur of the school as long as the school’s actions are “reasonably related to legitimate pedagogical concerns.” The Court deferred to school officials’ judgment in determining when speech might be considered a product of the school itself by parents and members of the public.

For almost twenty years, the Court did not consider another student speech case. However, in 2007 it agreed to hear a case about whether schools could punish students for speech perceived by school officials as promoting illegal drug use at an off-campus, school-sponsored activity (*Morse v. Frederick*). The case arose when a principal allowed students to participate in the Olympic torch relay coming through Juneau, Alaska. The event occurred during school hours but across the street from the school. Joseph Frederick was a sassy student who later admitted that he purposely used non-sensical language when he unfurled a banner that read “Bong Hits 4 Jesus” during the televised torch rally. Principal Deborah Morse tore up the banner and suspended the student for promoting illegal drug use, which was against school policy.

The Court upheld the punishment, pointing out that the speech in *Morse* was distinct from the speech in *Tinker*, *Fraser*, and *Kuhlmeier*. The main effect of the *Morse* decision was to expand schools’ authority to regulate speech that occurs off-campus but at a school-sponsored event. If the First Amendment is a big piece of cheese, these cases – and the Court’s silence – have created big holes such that students’ First Amendment rights now look like a block of Swiss cheese.

But what of speech that occurs off-campus and *not* at a school-sponsored event? Online speech has grown exponentially in frequency, and yet, the Court has yet to determine the boundaries of regulating it. In early 2016, the Supreme Court declined to grant certiorari to the case of *Bell v. Itawamba County School Board* (2015). In

that case, the Fifth Circuit upheld disciplinary action imposed on Taylor Bell, a high school senior who recorded a rap song containing threatening language off-campus and posted it to his own Facebook page and later to YouTube. Bell posted the song off-campus on his personal computer. The Fifth Circuit considered whether off-campus speech directed at school officials and reasonably understood by them to be threatening, harassing and intimidating speech that could create a substantial disruption violated the Tinker standard.

The court reasoned that school officials acted within their authority since the recording described violent acts to be carried out against two named sports coaches employed by the school, the student intended the recording to reach the school community and the school reasonably forecasted a substantial disruption at school. Bell appealed the decision to the U.S. Supreme Court, and just a few days after Justice Antonin Scalia passed away unexpectedly, the Court denied cert.

The Supreme Court's refusal to grant certiorari means the various standards imposed by lower circuit courts will continue to cause confusion at best and trample on students' rights and their futures at worst. Observers note a number of potential reasons that the Supreme Court has elected to stay out of this question. In general, the Court generally recognizes that school officials are in the best position to make decisions regarding school functioning. Second, the consequences of a ruling both in favor of and limiting free speech are high. Bullying and cyberbullying are very real threats to student safety, and speech that might be tolerated when spoken seems more harmful when written and posted online. On the other hand, a ruling limiting free speech would be difficult to implement, and lower courts have struggled to draw meaningful lines. Finally, the Court generally is not known for being technology-savvy, and it generally lags behind the other branches of government in terms of understanding and interpreting regulations of technology.

ARGUMENT

The lack of a national standard for off-campus, online speech fails to give notice, offers school officials unfettered discretion which leads to inconsistent discipline, and may chill students' speech. In considering a solution, a balance must be struck between the schools' important and legitimate safety and pedagogical concerns and the societal values associated with free exercise of speech in an era where most speech occurs online and through social media.

In *Goss v. Lopez* (1975), the U.S. Supreme Court held that school suspensions for less than ten days only require "rudimentary precautions" whereas shorter suspensions require minimal procedural (notice and hearing) protections. Aware of the additional measures that must be taken once a student is expelled for ten or

more days, school officials often suspend students for less than ten days, but many students receive multiple suspensions throughout a school year that add up to more than ten days missed, but receive no corresponding procedural due process protections or educational services that often attach only to longer suspensions (Ross, 2016).

Different Approaches Across the Country

Federal appellate courts are split on when and how schools may regulate online, off-campus speech. In an exhaustive analysis of holdings related to online, off-campus speech, Ferry identified several different approaches (Ferry, 2018). She found that while the majority of federal appellate courts apply *Tinker*'s material and substantial disruption standard, their approach to applying the exceptions from *Fraser*, *Kuhlmeier*, and *Morse* vary. She found that the Second, Seventh, and Eighth Circuits apply the foreseeability threshold to the *Tinker* test. The Third Circuit also applies foreseeability but focuses on the student's intent, thereby narrowing the possibility for censorship. The Fourth Circuit also applies *Tinker* but focuses on a "sufficient nexus" between the speech and harm. Rather than focusing on the speaker's intent, the Eleventh Circuit adopted a pro-school test that applies both *Tinker* and the "true threat" test. The Fifth Circuit employs a flexible, fact-specific inquiry that seems to favor school officials.

Of all the federal appellate courts, the Ninth Circuit has adopted the most student-friendly approach by refusing to apply *Tinker* unless there is an identifiable threat of school violence. Ferry concludes that the First, Sixth, Tenth, and D.C. Circuits have not yet addressed off-campus online speech.

Since the "true threat" doctrine supports school officials' concerns and is part of the author's recommended approach, it is worth explaining further. The Supreme Court first articulated the true threat doctrine in a per curiam (or slam dunk) opinion in case called *Watts v. United States* in 1969. In *Watts*, a speaker made threatening speech about the president, but the Court held that the speech was protected as political speech. While the Court made it clear that speech that is considered a true threat is unprotected, it has never clearly defined what constitutes a true threat. However, where speech purposely or knowingly communicates an intention to inflict unlawful harm on another person or persons, it is likely to be considered a true threat not worthy of protection. One challenge with the true threat test is whether the threat is assessed from the perspective of the speaker or the target of the speech and courts have used both perspectives.

Balancing School Officials' Concerns With Students' First Amendment Rights

Arguments for School Officials

The Supreme Court has repeatedly recognized two important arguments in favor of school officials: 1) they need flexibility as they are the ones on the ground making decisions based on the needs of their particular students and schools, and 2) they have a duty to maintain safety and order.

The Supreme Court has extended special deference to government actors in “special needs” environments such as public schools. In the public school context, the Court has repeatedly held in *New Jersey v. T.L.O.* (1985), *Bethel v. Fraser* (1986), *Vernonia School District v. Acton* (1995), *Board of Pottawatomie County v. Earls* (2002) and other cases that since school officials are acting in loco parentis (“in the place of parents”), they have a special duty to maintain safety and order. In too many public schools, teachers and staff feel overworked and underpaid, and the burnout rate is high. Courts give deference to school officials out of respect for the unique challenges they face and a realization that local decision-making necessarily happens swiftly. As a nod to these needs, judges feel that they are not in the best position to second-guess school teachers and staff.

Arguments in Favor of Students' Individual Rights

On the other hand, some justices – including Justices Abe Fortas, Thurgood Marshall (the first African American Supreme Court Justice) and William Brennan – have recognized the vital importance of schools as training grounds for citizenship, and in order to be engaged citizens, students must learn and exercise their rights and responsibilities. Since schools are the one public institution that touches most students, it is the one institution that is uniquely situated to promote all the values underlying speech as a fundamental right. In recent years, civic education programs and courses have been cut in favor of “core” courses that prepare students for standardized testing. Without these designated opportunities to learn about active citizen engagement, most public school students will only learn about their free speech rights if they are allowed to exercise them.

Building on the constitutional values, advocates and scholars point out very serious challenges with the harshness of current censorship practices. Noted constitutional and education law scholar Professor Catherine J. Ross makes a powerful argument that many minor infractions resulting in school exclusion involve violations of school speech codes (2016). Professor Ross points out that students are often disciplined for out-of-school speech in disproportionately harsh ways, and disciplinary referrals

are an important predictor of involvement in the juvenile justice system. The school-to-prison pipeline has been well-documented in the literature and includes not just the disturbing overall problem of school discipline leading to criminal convictions and recidivism, but also disparities in discipline across race, gender, disability, and class lines. Low-income black and brown boys are far more likely to be disciplined for the same behavior as higher-income white boys and girls. The New York Civil Liberties Union reports that the use of “profane language” is one of the top ten reasons students are suspended (Ross, 2016). In America today, students are arrested rather than sent home when they protest in ways that evoke disapproval from schools.

According to Professor Ross, schools respond disproportionately to speech for which adults could never be punished, and for which young people could not be punished outside of school, with potentially life-changing consequences. Ross points out that even if a student has the resources to pursue a civil suit and is lucky enough to prevail, unless the student obtains an injunction, the penalty will be applied before resolution of the lawsuit (Ross, 2016).

She provides the example of Adam Porter’s case. Before the Fifth Circuit Court of Appeals found his drawing of a violent attack on his school was protected speech, Adam had already been arrested, kept in jail for four days, threatened with expulsion, sent to an alternative school with at-risk youth, and dropped out of school. Even though the court ruled that his First Amendment rights were violated, “no one could turn back the clock and restore his route to a high school diploma” (Ross, 2016).

Building on robust scholarship documenting the existence and dangers of the school-to-prison pipeline, in a 2017 law review article the author coined the term “prisonization” to describe the practice of students being treated like little prisoners by being subjected to zero tolerance policies, metal detectors, armed police officers in schools, cameras, drug-sniffing dogs, and other law enforcement techniques (Ahranjani, 2017). Today, with millions of students attending prisonized schools, the dangers of censorship extend far beyond mere censorship of articles as in *Hazelwood* or suspension from school as in *Tinker* and *Bethel*.

The Supreme Court and Technology

While all these factors and perhaps others explain why the Court would want to stay out of the question of students’ free speech online, the Court’s recent foray into technology in a different constitutional context provide hope that it may move past its fear of technology. In the past decade, the Court has considered three cases regarding whether the Fourth Amendment’s warrant requirement extends to GPS tracking and cell phones. These cases indicate a sea change in terms of at least a majority of the Court’s willingness to extend constitutional protections to current technologies.

In 2012, in *United States v. Jones*, the Court ruled that police need a search warrant to use a GPS tracking device to monitor a person's life, particularly if there was no urgent public safety rationale. In *Riley v. California* (2014), the Court unanimously ruled that if officers seize a smartphone at the time of an arrest, they need a warrant before viewing its contents. Finally, in deciding the 2018 case of *Carpenter v. United States*, the Court considered whether police need a search warrant to obtain cellphone location information that is routinely collected and stored by wireless providers. It concluded that the government did indeed violate the Fourth Amendment when it did not obtain a search warrant to access historical records containing the physical locations of cell phones.

Since the appointment of conservative Brett Kavanaugh to the Supreme Court in October, 2018 to replace the more moderate Anthony Kennedy, it remains to be seen how the Supreme Court will rule on cases considering cases at the intersection of civil rights and technology. The Heritage Foundation, a conservative think tank, points out that while he served on the D.C. Circuit, Justice Kavanaugh did not hear many technology cases, but he certainly proved himself to be an originalist and a textualist who firmly believed in the limited role of judges to decide the law rather than what it should be (Snead, 2018). As an originalist and a textualist, he likely will resist the urge to *create* law.

Carpenter v. United States (2018) was a 5-4 decision in which Chief Justice Roberts, a conservative appointed by then-President George W. Bush, sided with the liberal Justices Kagan, Sotomayor, Ginsburg and Breyer in the relatively narrow holding in terms of scope. Justice Kavanaugh replaced his mentor Justice Kennedy, who voted with the dissent. However, even if Kavanaugh adopts his predecessor's stance, the outcome in the case would have been the same.

If, in fact, the Court could overcome its reluctance to get involved in public school affairs and its fear of technology, the implications are tremendous. By way of example, consider students' recent exercise of their first amendment right to speak to protest the second amendment's right to bear arms. In the wake of the shooting resulting in 17 deaths in a Parkland, Florida public high school, students at Marjory Stoneman Douglas High and across the country mobilized to ask for adults to make schools safer (Gray 2018). Students mobilized online and organized thousands of walk-outs all over the country and the world at 10 a.m. on March 14, 2018. They also organized a national march in Washington, DC on March 24, 2018, just five weeks after the shooting rampage, and smaller marches were held in countless other cities.

Without online communications, these tremendous efforts never would have occurred. While some schools affirmatively support walkout efforts as political expression and civic activism, others warned students they would be punished for walking out. Without national standards protecting student speech, students learn different lessons about the importance of civic engagement. Without the Supreme

Court or Congressional action to extend free speech rights to online communications, the very future of democracy is at stake when some voices are discouraged and punished.

SOLUTIONS AND RECOMMENDATIONS

The American system of democracy is at once fragile and strong. Our Constitution has withstood the test of time, yet civil rights that took decades to establish have been eroding at an alarming pace at the direction of the Trump administration.

Scholars have proposed that in the absence of Supreme Court precedent, school districts should simply adopt policies that reflect best practices (Ferry, 2018; Shaver, 2017). In carefully considering the various circuit court approaches, Ferry thoughtfully proposes a model standard for school districts to adopt, which the author has changed slightly. Ferry's proposed standard would first consider whether the speech in question occurred off- or on-campus. If it occurred on-campus, the *Tinker* standard would apply. If it occurred off-campus, there must be an initial assessment of whether the online speech caused a material and substantial disruption, a true threat, or neither. The author adds that the true threat could be assessed either from the perspective of the speaker or the recipient.

Pursuant to longstanding doctrine, true threats could be punished immediately. Where the online speech creates a material and substantial disruption to school functioning, it could be punished if the speaker intentionally caused the disruption, and courts should look at content and form of the speech in determining intent. If the online speech creates no disruption and does not constitute a true threat, it should not be punished.

This test incorporates all the elements considered by lower courts, recognizes schools' important interests, and ultimately heavily weights students' First Amendment rights in a way that is consistent with the theories underlying free speech as a fundamental right. Children have been at the forefront of many social movements, from the civil rights movement to the anti-Vietnam War movement to gun violence to climate change. Cultivating their voices has been and will be critical to the continuing growth of our democracy. Allowing them the space to exercise free speech in the medium that currently presents itself gives them the opportunity to pressure-test democratic values.

FUTURE RESEARCH DIRECTIONS

A valid critique of this case by international readers is that an expansive vision of free speech is a uniquely American concept. In fact, when the Pew Research Center polled 38 countries in 2015, it found that Americans are more tolerant of not only free speech than citizens in the other countries polled, but also more supportive of free press and the right to internet usage without government censorship (Gray, 2016). Interestingly, Latin America was the region second most likely to support these three freedoms, with Europe in third place, Asia in fourth, Africa in fifth, and the Middle East in last place. In terms of a country-by-country analysis, after the U.S., the countries whose populations are most supportive of free expression are Poland, Spain and Mexico. It follows that generally countries with strong support of free expression also support student speech, including online speech.

One critique of Americans' support for free expression is, of course, that speech can be incredibly harmful. For example, comparative constitutional law scholar Mila Versteeg now based at the University of Virginia in Charlottesville has pointed out that the 2017 rally in Charlottesville in which heavily armed white nationalists invaded a progressive university town to protest, and the protests led to violence and death, would not have happened in Europe (2017).

Professor Versteeg points out that while the European Court of Human Rights protects free speech, it also recognizes that it must be balanced against other societal interests and is not absolute. She argues that the European approach is more neutral and refuses to rely on the values articulated in the earlier section on values underlying the First Amendment because the burden to discern when the speech is harmful and to respond to harmful speech then falls on fallible and busy individual human beings rather than the government to police.

However, the increased and increasing access to the internet as a forum for speech makes it even more difficult for government to draw and enforce lines. It seems likely that other countries may move closer to the American approach to free speech given the internet's omnipresence in the lives of all people across borders. In fact, to some extent, the internet erases borders and limitations for its users. Young people in the internet era can and do share information instantaneously.

A recent Knight Foundation survey of over 10,000 American high school students and over 550 high school teachers indicated that American high school students value First Amendment freedoms even more than adults (Policinski, 2017). For example, 91 percent of youth respondents said that it was important to be able to "express unpopular opinions" (Polcinski, 2017). For better or worse, American youths' expansive views likely will influence youth in other countries.

Therefore, the author argues that what the U.S. Supreme Court does and does not decide with regard to students' online free speech rights is relevant to Latin American and European observers in the near term and less relevant in Asia, Africa, and the Middle East, where citizens and governments are not as supportive of strong speech rights. Further study is necessary. Very little has been written comparing different countries' treatment of rights to free speech for children. The author hopes to engage in such study to explore the extent to which Americans' expansive view of free speech applies to and influences other countries.

CONCLUSION

In terms of today's youth and online speech, adults have a responsibility to nurture this speech but also think about whether and what lines may be drawn to protect them from hate, bullying, and other negative speech while recognizing the importance of cultivating students' voices. While the United States is peerless with regard to its expansive speech protection by law, it is worth watching our jurisprudential development since at least two regions – Latin America and Europe – are not far behind. Monitoring U.S. court decisions may provide an insightful perspective of what issues arise in a country with expansive protections and may inform other countries' development of laws relating to student online speech.

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