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The NFL Player, the Schoolchild, and the Entertainer: When the Term "Free Speech" is Too Freely Spoken, Exactly "Who's On First?"

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THE NFL PLAYER, THE SCHOOLCHILD, AND THE ENTERTAINER: WHEN THE TERM "FREE SPEECH" IS TOO FREELY SPOKEN, EXACTLY "WHO'S ON *FIRST*?"

First Amendment Speech Protections and State Actors: The Haves and the Have Nots.

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ABSTRACT

As America's media and politicians continue to debate the free speech rights of NFL players, schoolchildren, and entertainers, the dialogue has confused many Americans as to what exactly the First Amendment protects. Chief Justice John G. Roberts ultimately assumes the role of an umpire in many of these issues, guiding the United States Supreme Court to incrementally "call balls and strikes." In recent years, the Court has umpired employment rights and state action cases, and Roberts's calls will likely further distance the Court that decided *Morse v. Frederick* from the one that decided *Tinker v. Des Moines*. Amid a flurry of misleading headlines and confusing free speech doctrines, many Americans simply wonder, when the umpire calls, who's on first?

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PREFACE

In the late 1930s, American comedians Bud Abbott and Lou Costello immortalized a quintessential combination of baseball, comedy, and confusion that came to a recurring question, "Who's on First?" Below is an excerpt:

Costello: I love baseball.

Abbott: We all love baseball.

Costello: When we get to St. Louis, will you tell me the guys' names on the team, so when I go to see them in that St. Louis ballpark, I'll be able to know those fellas? . . .

Abbott: Who is on first!

Costello: Well, what are ya asking me for?

Abbott: I'm not asking you. I'm telling you. Who is on first.

Costello: I'm asking *you* who's on first.

Abbott: That's the man's name.

Costello: That's who's name?

Abbott: Yes.

Costello: Well, go ahead and tell me.

Abbott: Who.

Costello: The guy on first.

Abbott: Who!

Costello: The first baseman.

Abbott: Who is on first!

Abbott and Costello used baseball as a vehicle for a comedy duo of confusion when they honed their iconic routine. Years later, John G. Roberts followed their cue and used baseball as a metaphor for judicial review in his 2005 confirmation hearing for the Supreme Court before the Senate. Roberts stated, "I have no agenda, but I do have a commitment . . . it's my job to call balls and strikes and not to pitch or bat."[1] This Article shows that as America continues to face questions of First Amendment free speech rights, its news outlets have created and perpetuated confusion over exactly "Who's on First?" It shows the differences of free speech rights among NFL players, schoolchildren, and entertainers as well as how the Roberts Court could potentially call the constitutional balls and strikes for schoolchildren, and bring some closure as to "who" actually has First Amendment free speech rights.

First, Part II.A reviews the controversies surrounding recent national anthem protests and discusses the speech rights of NFL players. Then, Part II.B shifts gears and moves the conversation into the schoolhouse to analyze the rights of school

[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 48 (2005).

children by providing a lineage of cases that led to the Roberts Court's 2007 decision in *Morse v. Frederick*. This Part suggests potential changes that the Roberts Court may generate by analyzing the ideologies of the individual Justices on student-speech rights. Part II.C addresses the rights of entertainers, the impact of social media within the entertainment industry, and the use of the Star-Spangled Banner as a source of First Amendment controversy. This Part reviews the constitutionality of legislative attempts to regulate national anthem performances. Finally, Part III briefly concludes.

I. INTRODUCTION

Over the past several years, the American media has heavily covered conduct and utterances that some have defined as First Amendment "free speech," over controversial subjects involving the National Football League (NFL),[2] American schoolchildren,[3] and Roseanne Barr,[4] among others.[5] However, not all of what *could* qualify as speech under the First Amendment *is* in fact protected under that Amendment as "free speech." America saw NFL players silently protest during the national anthem by kneeling.[6] It saw its schoolchildren march out of school in protest of recurrent school shootings.[7] It also saw comedian Roseanne Barr's television comeback in "Roseanne," which was, however, canceled shortly after because of Barr's racially-charged tweets.[8] All the while, media outlets and elected officials

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[2] Stuart P. Rothman, *Letter: Nothing Confusing About Exercising Free Speech*, THE MEADVILLE TRIBUNE (Sept. 22, 2018), https://www.meadvilletribune.com/opinion/letter-nothing-confusing-about-exercising-free-speech/article_ec63e1ae-bcf0-11e8-b49a-cf8d9f4c22e1.html; *see also Kneeling Is a Form of Free Speech Protected by the First Amendment*, KENTUCKY KERNEL (Oct. 11, 2017), www.kykernel.com/opinion/kneeling-is-a-form-of-free-speech-protected-by-the/article_64289330-aec2-11e7-a02f-9b3e53103372.html; *contra* Paul Callan, *There Is No Constitutional Right to Take a Knee While You're at Work*, CNN (Sept. 26, 2017), https://www.cnn.com/2017/09/26/opinions/first-amendment-football-protest-callan-opinion/index.html.

[3] Jacey Fortin, *High School Students Kicked Off Football Team After Protesting During National Anthem*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/high-school-national-anthem.html.

[4] Danielle Miller, *Roseanne Barr's Firing Raises Questions Over Freedom of Speech and Acceptable Use of Social Media*, FOX 10 PHOENIX (May 29, 2018), fox10phoenix.com/news/arizona-news/roseanne-barr-s-firing-raises-questions-over-freedom-of-speech-and-acceptable-use-of-social-media.

[5] Symmonds v. Mahoney, 243 Cal. Rptr. 3d 445, 448 (Ct. App. 2019); *see also* Tal Kopan, *Palin Defends 'Duck Dynasty' Star*, POLITICO (Dec. 19, 2013), https://www.politico.com/story/2013/12/sarah-palin-duck-dynasty-defense-101319.

[6] Fortin, *supra* note 3.

[7] Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "AMFIT," A Legislative Proposal Ensuring the 2nd Amendment into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (AMFIT), A Solution to Maintaining the Right to Bear Arms*, 64 WAYNE L. REV. 431, 437 (2019).

[8] Miller, *supra* note 4.

weighed in on purported "free speech," leaving mixed rhetoric surrounding constitutional protections, and necessitating a succinct analysis of the who, what, where, when, and how for First Amendment free speech rights.[9] In light of the ramifications from such acts, some NFL players contended "that the NFL [would violate] their speech rights by compelling them to stand during the national anthem."[10] Some school administrators rallied fervently against the protests of public schoolchildren, who walked out in light of the Parkland school shooting in Florida, threatening the students with harsh discipline in the event of a walkout.[11] Moreover, some supporters of Roseanne Barr contend that the network violated her First Amendment freedom of speech rights when they canceled her show.[12]

This Article assesses the prevalent misconceptions of First Amendment rights. It covers constitutionally-misinformed elected officials and government administrators, the media outlets that have attempted to correct such errors in the public's understanding of those rights, and news outlets that have erred on these issues. It also analyzes arguments through which protections could be imposed against private entities and the constitutionality of regulating the national anthem, as proposed by elected officials. Most importantly, between the NFL player, the schoolchild, and the entertainer, this Article settles the current landscape for the haves and have nots of free speech rights, and discusses possible changes to come.

Free speech is a relevant and active issue appearing before the United States Supreme Court.[13] In 2018, Justice Alito wrote on behalf of the Court that "most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech."[14] Nevertheless, the local press is often the best available means for nonlawyers to understand the First Amendment outside of written court opinions or legal scholarship, and beyond that of the parchment's plain words.[15] For First Amendment understanding, "the local paper is a better way to reach the public than

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[9] Kopan, *supra* note 5; *see also* LZ Granderson, *'Duck Dynasty' Star's Free Speech Rights Weren't Violated*, CNN (Dec. 20, 2013), https://www.cnn.com/2013/12/19/opinion/granderson-duck-dynasty/index.html.

[10] Phil Cicoria, *Roseanne and NFL Protesters: What Are Their Speech Rights?*, ILLINOIS NEWS BUREAU (May 31, 2018), https://news.illinois.edu/view/6367/656419.

[11] Karma Allen, *Texas Superintendent Vows to Suspend Students Who Walk Out to Protest Guns*, ABC NEWS (Feb. 22, 2018), https://abcnews.go.com/US/texas-superintendent-vows-suspend-students-walkout-protest-guns/story?id=532689552.

[12] Cicoria, *supra* note 10; *see also* John Enger, *The 'Roseanne' Reaction: What Protections Does the First Amendment Actually Afford?*, MINNESOTA PUBLIC RADIO NEWS (May 30, 2018), https://amp.mprnews.org/story/2018/05/30/reaction-roseanne-barr-what-protections-does-the-first-amendment-afford.

[13] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018).

[14] *Id.*

[15] Douglas F. Duchek, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120, 120 (1971); *see generally First Amendment (U.S. Constitution)*, N.Y. TIMES, https://www.nytimes.com/topic/subject/first-amendment-us-constitution (last visited Mar. 5, 2019).

such familiar media as broadcasting facilities or picket lines."[16] However, such guidance in constitutional rhetoric and discourse, has led to a desultory American understanding of the First Amendment and its guaranteed "freedom of speech."[17]

Among such problematic speech analysis, Massachusetts Institute of Technology's *MIT Technology Review* reported that "[f]ree speech means all speech is free unless it butts up against libel law, and that's the end of the story."[18] The *Arizona Daily Star* reported that "[f]ree speech means that we all can say whatever we want free from government interference."[19] As astutely noted by the *Washington Post*, journalistic attempts to synthesize the First Amendment for readership become an Icarian effort to make black-letter and broad what is instead a nuanced and continually-developing progeny of history and court-precedent. Author Megan McArdle reported:

> If you write a column about athletes kneeling during the national anthem, you can expect to find yourself rapidly mired in debates about free speech. Because speech is (we lightheartedly hope) nuanced and complex, there will always be an element of "I know it when I see it" in placing cases into "protected" or "unprotected" categories. Which means we could spend the rest of our lives arguing about just what free speech means — and, frankly, we probably will.[20]

McArdle shows that one difficulty for journalists is the inevitable combination of confusion and finite character space. Journalists must synthesize a full curriculum of constitutional law into a few paragraphs on a single news page. Similarly, the *Chicago Tribune* published a letter, in which author Janice Cody wrote, "[t]he right to free speech is a right to speak without fear of retaliation from the *government*. It guarantees people the right to express their opinions about the government, . . . government policies and actions without fear of being jailed or fined."[21] Cody gave a large caveat

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[16] Duchek, *supra* note 15, at 120.

[17] Lata Nott, *Does it Really Matter That Americans Don't Know Exactly What the First Amendment Says?*, FREEDOM FORUM INSTITUTE (July 12, 2018), https://www.freedomforuminstitute.org/2018/07/12/does-it-really-matter-that-americans-dont-know-exactly-what-the-first-amendment-says/.

[18] Karen Hao, *Why AI is a Threat to Democracy—and What We Can Do to Stop it*, MIT TECHNOLOGY REVIEW (Feb. 26, 2019), https://www.technologyreview.com/s/613010/why-ai-is-a-threat-to-democracyand-what-we-can-do-to-stop-it/.

[19] Jill Jorden Spitz, *Star Editor: Your Questions About Dropping 'Non Sequitur;' My Answers*, ARIZONA DAILY STAR (Feb. 25, 2019), https://tucson.com/opinion/local/star-editor-your-questions-about-dropping-non-sequitur-my-answers/article_b0f711b2-b32b-540d-8564-a276548706dc.html.

[20] Megan McArdle, *'Don't Burn the Flag' and 11 More Rules for Free Speech,* WASH. POST (May 28, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/05/28/12-rules-for-free-speech/?utm_term=.b4473a18e834.

[21] Janice Cody, *Letter: Free Speech Has Consequences*, CHICAGO TRIBUNE (Apr. 5, 2018), https://www.chicagotribune.com/news/opinion/letters/ct-laura-ingraham-david-hogg-free-speech-20180405-story.html (emphasis added).

to her definition, however, by noting to readers that "[n]ot all speech is unfettered."[22] Therefore, given the variety of claims and explanations, for NFL players, schoolchildren, and entertainers, two issues remain. First, remains the status of those rights in their respective contexts of exercise. Second, is what changes, if any, the Roberts Court could generate as its Chief guides the calling of balls and strikes ahead.

II. ANALYSIS

In order for an act to constitute a violation of an individual's right to free speech, the party who censors *must be a government actor* or act with the color thereof.[23] Simply put, the Bill of Rights does not apply to private conduct between private individuals. Moreover, the greater Constitution seldom regulates private action unless such conduct affects the public to a great extent (such as a private establishment—e.g., a restaurant—attempting to racially-discriminate, which can be regulated via Congress' commerce powers).[24] In any case, while the media may react similarly for professional athletes, students, and entertainers, the courts analyze each differently for constitutional purposes.

A. The NFL Player

Colin Kaepernick, the former quarterback and second-round pick for the San Francisco 49ers, took to kneeling in protest during the national anthem.[25] Following a mix of praise and criticism in response to Kaepernick's on-field protest, *The Telegraph* lamented that America offers "a higher premium to four militaristic verses about rockets' red glare and bombs bursting in air than it does to essential freedom of speech."[26] Conversely, some news outlets noted that freedom of speech does not apply in this private context, and consequently, the NFL players were not entitled to the "legal right" of constitutionally-guaranteed freedom of speech.[27] In spite of what may seem to some like straightforward constitutional analysis, headlines have appeared, such as "NFL Owners Just Made a Mockery of All the Talk About Players' Free

[22] *Id.*

[23] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

[24] Katzenbach v. McClung, 379 U.S. 294, 300 (1964).

[25] *Colin Kaepernick's Lawyer Says He Will be Signed in Next 10 Days*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 31, 2017), https://www.ajc.com/sports/colin-kaepernick-lawyer-says-quarterback-will-signed-next-days/A2SeO7tAUGkHl5odDqDY9N/.

[26] Oliver Brown, *Colin Kaepernick Shows That Freedom of Speech Is an Anomaly in America*, THE TELEGRAPH (Sept. 8, 2016), https://www.telegraph.co.uk/american-football/2016/09/08/colin-kaepernick-shows-that-freedom-of-speech-is-an-anomaly-in-a/.

[27] Callan, *supra* note 2; *Kneeling Is a Form of Free Speech Protected by the First Amendment*, *supra* note 2.

Speech Last Season" in *Esquire Magazine*.[28] Other outlets, such as the *Boston Globe*, are more nuanced to suggest that these athletes "live in a free country where you can speak your mind."[29] Like the *Globe*, the *Chicago Tribune* ran a headline that "the NFL tramples on First Amendment values."[30] Even so, the rights and values of a free country are largely fumbled when an NFL player enters the private context of employment.

1. The NFL: An Endzone for the Bill of Rights in a Private Context of Employment

The NFL is a private corporation and not a public entity.[31] Therefore, the NFL's representatives, employees, and fans inside its stadiums do not bear First Amendment protections to shield actions and utterances within that environment. Rather, such conduct is subject to penalty and infraction, termination of employment, or ejection from the stadium. Among what could be banned, for instance, is "Tebowing," a phrase coined after NFL player Tim Tebow would famously take a knee on the football field.[32] Tebow's kneeling, however, was not in protest, nor in celebration, rather, as Tebow put it, "I never did it to celebrate a touchdown . . . . It was never something I did to take away from somebody else. It was just something I did with a personal relationship with my God."[33] Tebow, spoke about players kneeling in protest, "I think when people believe in something and they stand for that, I don't knock them for that."[34] Nonetheless, whether kneeling in protest, or "Tebowing"—as it were—to express religious devotion (another First Amendment-protected act), all is censorable in the private arena of the NFL.

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[28] Jack Holmes, *NFL Owners Just Made a Mockery of All the Talk About Players' Free Speech Last Season*, ESQUIRE (May 23, 2018), https://www.esquire.com/news-politics/a20886232/nfl-players-kneeling-fines-free-speech/.

[29] Jeremy D. Goodwin, *Free Speech for Colin Kaepernick? Shut Up!*, BOSTON GLOBE (Sept. 1, 2016), https://www.bostonglobe.com/opinion/2016/09/01/free-speech-for-colin-kaepernick-shut/wKBLg4YbQOBjwRNTBdQuJI/story.html.

[30] Dahleen Glanton, *In New National Anthem Policy, the NFL Tramples on First Amendment Values*, CHICAGO TRIBUNE (May 28, 2018), https://www.chicagotribune.com/news/columnists/glanton/ct-met-dahleen-glanton-memorial-day-flag-20180525-story.html.

[31] Drew Harwell & Will Hobson, *The NFL Is Dropping its Tax-Exempt Status. Why That Ends Up Helping Them Out.*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/?noredirect=on&utm_term=.f9339105f505.

[32] Josh Peter, *Tim Tebow Not Happy About 'Tebowing' Being Brought into National Anthem Protests Debate*, USA TODAY (June 8, 2018), https://www.usatoday.com/story/sports/2018/06/08/tim-tebow-kneeling-national-anthem/686533002/.

[33] *Id.*

[34] *Id.*

When it comes to private employment, such is the case for NFL players, there generally is no constitutional right to free speech in that environment.[35] However, in the interests of states' rights, states may increase the ceiling of guaranteed rights and prohibit an employer from suppressing speech, as "the Federal Constitution [is said to serve] as a floor, not a ceiling, for civil liberties and civil rights."[36] For instance, Connecticut prohibits employers from suppressing an employee's First Amendment rights, unless the exercise would "substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."[37] However, Connecticut, with all its statutory deference to employees, lacks an NFL team.[38] Nevertheless, California, in which Kaepernick was a quarterback,[39] has a state labor statute that limits the firing of employees who exercise their constitutional rights.[40]

California's limitation requires that "[i]n order to establish a claim of wrongful termination in violation of public policy," one must prove that the termination violated "policy that is '(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental."[41] On a federal level, however, there exists no such showing to be made. Therefore, while there is no federal protection, other states could extend speech protections to athletes, similarly to California. Without state protections, however, NFL players are treated as typical employees.

In the general employment sense, *Forbes* accurately headlined to readers that "Your Free Speech Rights (Mostly) Don't Apply At Work."[42] It provided three major potential exceptions in the context of employment: government employers, associations of "concerted activity," and private employer actions affecting only a certain class of people.[43] Turning back to the NFL, curiously, Stewart Harris, Professor of Constitutional Law at the Appalachian School of Law and radio-host of

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[35] Gregory J. Ossi, Kishka-Kamari McClain, & Jacqueline Warner, *Proceedings of the 33rd Annual Institute: §6.04. State Laws*, 33 ENERGY & MIN. L. INST. 6.04 (2012).

[36] Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 11 (1993).

[37] CONN. GEN. STAT. § 31-51q (1983).

[38] *Teams*, NATIONAL FOOTBALL LEAGUE, https://www.nfl.com/teams (last visited Apr. 3, 2019) (the official digital links to all 32 NFL teams).

[39] *Colin Kaepernick's Lawyer Says He Will be Signed in Next 10 Days*, *supra* note 25.

[40] CAL. LAB. CODE § 96 (West 2000).

[41] Barbee v. Household Auto. Fin. Corp., 6 Cal. Rptr. 3d 406, 412 (Ct. App. 2003).

[42] Tom Spiggle, *Your Free Speech Rights (Mostly) Don't Apply at Work*, FORBES (Sept. 28, 2018), https://www.forbes.com/sites/tomspiggle/2018/09/28/free-speech-work-rights/amp/.

[43] *Id.*

"Your Weekly Constitutional,"[44] stated that "the NFL – right now – could fire every single person who kneels at these protests. The NFL is a private entity. These are private relationships they have with the players. The only legal problem they might have is whatever the contract says [that] they have with that particular player."[45] Professor Harris stated that the individual NFL contracts likely contain "morals clauses," which provide "that if the player does something either on the field or off the field that puts the NFL in a bad light, [or] could harm the NFL . . . they can be terminated."[46] He clarified that NFL protests are not a constitutional issue, "it does involve free speech, but in a private context where the Constitution doesn't protect anybody."[47]

2. A Blitz: the NFL as a State Actor?

For private environments, state action exists only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."[48] There exists an argument that NFL players are not truly a private context of employment because NFL employers accept subsidies.[49] For instance, the NFL's tax-derived subsidies have helped to fund football stadiums in Minneapolis, Minnesota and Atlanta, Georgia at an amount of $700 million.[50] However, many American industries receive subsidies; such as the industries of oil, gas, airline, and farming, to name a few.[51] Additionally, the federal government has notably bailed out the industries of auto and finance.[52] The issue

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[44] *Stewart Harris*, WVTF, https://www.wvtf.org/people/stewart-harris (last visited Mar. 20, 2019).

[45] Stewart Harris, *Say What?, Your Weekly Constitutional*, WVTF (Jan. 2, 2019), https://www.podomatic.com/podcasts/ywc/episodes/2019-01-02T08_19_34-08_00.

[46] *Id.*

[47] *Id.*

[48] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

[49] Chris Isidore, *NFL gets billions in subsidies from U.S. taxpayers*, CNN BUSINESS (Jan. 30, 2015), https://money.cnn.com/2015/01/30/news/companies/nfl-taxpayers/

[50] *Id.*

[51] Len Tesoro, *Debunking Myths About Federal Oil & Gas Subsidies*, FORBES (Feb. 22, 2016), https://www.forbes.com/sites/drillinginfo/2016/02/22/debunking-myths-about-federal-oil-gas-subsidies/#3fa26fd06e1c; *see also* Ashley Nunes, *Government Airline Subsidies... So What?*, FORBES (Nov. 16, 2016), https://www.forbes.com/sites/realspin/2016/11/17/government-airline-subsidies-so-what/#1b74a0841f5f; Dan Charles, *Farmers Got Billions From Taxpayers In 2019, And Hardly Anyone Objecte*d, NPR (Dec. 31, 2019), https://www.npr.org/sections/thesalt/2019/12/31/790261705/farmers-got-billions-from-taxpayers-in-2019-and-hardly-anyone-objected.

[52] Ron Blitzer, *Sanders criticizes Biden for 'taking a little bit of credit' for Obama accomplishments*, FOX NEWS (Mar. 8, 2020), https://www.foxnews.com/politics/sanders-

becomes the threshold at which a private entity becomes a state entity. Nevertheless, the Court has recently addressed the bounds of private parties, state action, and constitutional rights.

In 2019, Justice Brett Kavanaugh wrote a majority opinion in *Manhattan Community Access Corp. v. Halleck*, which addressed employment and free speech in the context of state action.[53] Among the majority was Chief Justice Roberts, joined by Justices Alito, Gorsuch, and Thomas.[54] In that case, Time Warner Cable system afforded public access channels for private citizens to utilize.[55] The Court faced the question of whether a private entity becomes a state actor by operating public access channels on its cable system.[56] It also considered whether a private citizen's First Amendment rights are infringed if such a private entity exercises editorial discretion.[57] Kavanaugh summarized that

> [t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine . . . a private entity may be considered a state actor when it exercises a function "traditionally exclusively reserved to the State."[58]

The majority found a lack of state action insofar as "operation of public access channels on a cable system," was a "function [that] has not traditionally and exclusively been performed by government."[59] The Court elaborated that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[60] Justice Sonia Sotomayor dissented with Justices Breyer, Ginsburg, and Kagan from the majority, on the rationale that the administrator "[b]y accepting [an] agency relationship . . . stepped into the City's shoes and thus qualifie[d] as a state actor, subject to the First Amendment like any other."[61] In contrast, the majority offered a floodgates argument, "[i]f the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to

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criticizes-biden-for-taking-a-little-bit-of-credit-for-obama-accomplishments; *see also*, LAURENCE M. BALL, THE FED AND LEHMAN BROTHERS 211(2018).

[53] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U. S. 345, 352 (1974)).

[59] *Id.* at 1929.

[60] *Id.* at 1930–31.

[61] *Id.* at 1934.

be appropriate editorial discretion within that open forum."[62] The majority affirmed its reasoning that merely "being regulated by the State does not make one a state actor" and "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."[63]

Alternatively, Professor Harris proposed a novel theory that it is "possible to argue" state action potentially exists on the part of President Trump, that is,

> by actively encouraging the NFL owners to fire . . . "these sons of bitches," as [Trump] calls them, our President has entwined the government (in the person of himself), so closely with these private interests that, if in fact, [the NFL owners] follow his advice and fired them, that might actually be considered a constitutional violation because it was done at the behest of a government actor.[64]

Nevertheless, as to this novel argument, Trump's words did not give effect to any NFL changes and did not achieve ripeness. Harris settled that, generally, for "right now – no constitutional protection" exists for NFL players in their arena of private employment.[65]

The Court has indeed not specifically addressed issues of employee speech rights for NFL players. However, on a general employment level, in *Garcetti v. Ceballos*, the Roberts Court ruled that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[66] That majority opinion, written by Justice Anthony Kennedy, consisted of Chief Justice Roberts and Justices Clarence Thomas, Samuel Alito, and Antonin Scalia.[67] Justice Ruth Bader Ginsburg dissented with Justice David Souter, who wrote, "I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work."[68] Though the dissenters clarified, they would hold that the employer's "interests in addressing official wrongdoing and threats to

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[62] *Id.* at 1930–31.

[63] *Id.* at 1932–34.

[64] *Harris*, *supra* note 45; *see also* Warner Todd Huston, *'Get Those SOBs Off the Field!': Trump Slams NFL Anthem Protesters, Hopes Owners Fire Them*, BREITBART (Sept. 22, 2017), https://www.breitbart.com/sports/2017/09/22/get-sobs-off-field-trump-slams-nfl-anthem-protesters-hopes-owners-fire (President Trump stated: "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, say: 'Get that son of a bitch off the field right now. Out. He's fired!' They don't know it…They're friends of mine, many of them. They don't know it. They'll be the most popular person in the country.").

[65] Harris, *supra* note 45.

[66] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citing Connick v. Myers, 461 U.S. 138, 143) (Kennedy, J.).

[67] *Id.* at 413.

[68] *Id.* at 428.

health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."[69] Justice Breyer, who dissented separately, wrote also "I agree that the Constitution does not seek to displace . . . managerial discretion by judicial supervision."[70] Breyer noted that certain fields have professional responsibilities beyond their immediate employer, which necessitates greater freedom in speech rights, such as those in healthcare and law.[71]Breyer wrote that he dissented separately from Justices Souter, Stevens, and Ginsburg insofar as he "agree[d] with much of Justice Souter's analysis, . . . [but] the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes."[72]

Therefore, even if state-action could be found to exist among the NFL, the control that the Roberts Court has recognized for employers is significant, even among the dissenters conceding as much in *Ceballos*. Moreover, at a federal level, the Roberts Court's majority ruling to restrict the state action doctrine suggests that ultimately the NFL would not be found to constitute a state actor, though Justices Sotomayor, Breyer, Ginsburg, and Kagan might say otherwise. Ultimately, however, in a free speech case, NFL players would likely be viewed as general employees and subject to the controls of that private context.

B. The Schoolchild

Kaepernick, as a leader both on and off the field, inspired American youth to follow accordingly in protest.[73] For instance, at Louisiana's Parkway High School, two football players were expelled from the school's team for protesting during the anthem.[74] The Louisiana High School Athletic Association (HSSA) supported the coach's decision.[75] Like that of Tommie Smith and John Carlos at the 1968 Olympics, Parkway student Cedric Ingram-Lewis raised his fist in the air during the national anthem, while fellow student Larry McCullough took a knee (like Kaepernick).[76] Similarly, in Needville, Texas, public school Superintendent Curtis Rhodes threatened students with a three-day suspension via Facebook and wrote that the school district "will not allow a student demonstration during school hours for any type of protest or awareness."[77] Superintendent Rhodes stated that "[l]ife is all about choices and every

[69] *Id.*

[70] *Id.* at 446 (internal brackets and quotations omitted).

[71] *Id.* at 447.

[72] *Id.* at 447–48.

[73] Fortin, *supra* note 3.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Allen, *supra* note 11.

choice has a consequence whether it be positive or negative. We will discipline no matter if it is one, fifty, or five hundred students involved."[78] In 2018, a Scottsdale, Arizona middle-school suspended forty students for leaving school property while protesting.[79] Consequently, a question looms as to what the constitutional repercussions may be for acts similar to those taken by the Louisiana HSAA, the Needville, Texas Superintendent, and other public schools.

The constitutional rights of schoolchildren are subject to the context of the arena in which a student exercises those rights.[80] That is, whether they perform the conduct in a public or private setting.[81] For a public school student, administrative attempts to censor may violate First Amendment rights.[82] However, for a private school student there are no constitutional free speech rights simply because the school is not a state actor.[83] Thus, while the Warren Court pronounced in 1969 that public school students indeed do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[84] the private school student sheds accordingly.[85] Therefore, First Amendment free speech analysis and state-actor analysis must be conducted together with regard to cases involving students.

1. A Constitutional Lineage of Student Speech

In *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court required that

> [i]n order for the State [acting] in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness . . . [of] an unpopular viewpoint.[86]

In the case of *Tinker*, in 1965, three children wore black armbands in protest of the Vietnam war.[87] The school suspended the children until they would return without

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[78] *Id.*

[79] Samie Gebers, *40 Scottsdale Middle-School Students Suspended After Walkout*, AZCENTRAL (Feb. 28, 2018), https://www.azcentral.com/story/news/local/scottsdale-education/2018/02/28/40-scottsdale-middle-school-students-suspended-after-walkout/381459002/.

[80] 150 AM. JUR. TRIALS 115, § 4 (2017).

[81] *Id.*

[82] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[83] Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 222 (2013).

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

[85] Bowman, *supra* note 83.

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

[87] *Id.* at 504.

armbands.[88] The children waited, however, until the originally planned protest period had expired in order to return at their own prerogative without the armbands.[89] Accordingly, the children sued for injunctive relief and nominal damages in order to advance the argument of rights centered in free speech.[90]

On behalf of the Court in *Tinker*, Justice Abe Fortas wrote a majority opinion sympathizing with the plight of the three students, an opinion from which Justices Hugo Black[91] and John Marshall Harlan II dissented.[92] Justice Potter Stewart concurred with the majority opinion but cautioned that he "[could not] share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[93] Justice Byron White concurred also, limiting his support, however, by disclaiming that he did "not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside v. Byars*, . . . a case relied upon by the Court in the matter now before us."[94] White did not specify the parts with which he refused to subscribe; however, in *Burnside*, the Fifth Circuit had held that "school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guarantee[d] to them under the First Amendment to the Constitution," so long as such exercise "[does] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[95]

Justice Black dissented from *Tinker*, however, that "public school students [are not] sent to the schools at public expense to broadcast political or any other views to educate and inform the public," as "children [have] not yet reached the point of experience and wisdom which enabled them to teach all of their elders."[96] Black wrote, perhaps "the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach."[97] Justice Harlan, in his brief dissent, advocated for a petitioner's burden to show illegitimate school concerns.[98] Nevertheless, the Warren Court majority forever changed the rights of public schoolchildren.

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 515–27.

[92] *Id.* at 526.

[93] *Id.* at 515.

[94] *Id.*

[95] Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

[96] *Tinker*, 393 U.S. at 522.

[97] *Id.*

[98] *Id.* at 526.

While *Tinker* seemed revolutionary, the path to it had a logical trajectory. Curiously, before Justice Black dissented in *Tinker*, he served on the Stone Court that laid genesis in part to the progeny of student free speech precedent. In the 1943 case of *West Virginia State Board of Education v. Barnette*, amid the backdrop of World War II and only two years after America had entered the war,[99] the Supreme Court decided that compelling public schoolchildren to salute the flag and "pledge [allegiance] transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[100] In *Barnette*, a West Virginia state statute required that all schools, public and private, foster faith in both the United States and the State itself.[101] Consequentially, the West Virginia State Board of Education adopted a resolution requiring students honor the Nation by saluting the Flag of the United States.[102] The Court struck down the "compulsion of students to declare a belief," on the rationale that "[t]hey are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means."[103] In seeming contrast from the subsequent case of *Tinker*, Justice Black concurred with the *Barnette* majority, writing that "[n]either our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation."[104] In *Tinker*, however, Black (a Stone Court holdover to the Warren Court) distinguished his *Barnette* concurrence from his *Tinker* dissent by noting that, in *Barnette*, the schoolchildren had "religious scruples" against compelled classroom speech.[105]

Nevertheless, the *Tinker* majority,[106] cited *Barnette*[107] and required that in order for a public school to penalize speech, it must demonstrate that a student's "forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" [108] Otherwise, "the prohibition

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[99] *Take A Closer Look: America Goes to War*, THE NATIONAL WWII MUSEUM, https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/america-goes-war-take-closer-look (last visited Mar. 21, 2019).

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

[101] *Id.* at 625–26.

[102] *Id.*

[103] *Id.* at 631.

[104] *Id.* at 644.

[105] *Id.*

[106] A 7-2 majority opinion of the Warren Court, written by Justice Abe Fortas, with which Chief Justice Earl Warren joined, along with Justices William O. Douglas, William Brennan, and Thurgood Marshall. Justices Byron White and Potter Stewart concurred. *Tinker v. Des Moines Independent Community School District*, OYEZ, https://www.oyez.org/cases/1968/21 (last visited Mar. 13, 2019).

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

[108] *Id.* at 509.

cannot be sustained" and the state actor cannot meet its burden.[109] Once again, however, paramount with regard to analysis of school censorship is the public or private context in which students are enrolled.

As a preliminary matter to the progeny of student speech cases that followed *Tinker* is the most famous quote to come from Justice Abe Fortas on behalf of the Court in that case. Fortas wrote:

> 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.[110]

Nevertheless, in the fifty years that have followed Fortas's words, subsequent Courts scaled back what the Warren Court offered schoolchildren in 1969.

In *Bethel School District No. 403 v. Fraser*, the Burger Court examined the constitutionality of a high school student's suspension for giving an assembly speech in which he spoke in support of a student self-government candidate using an "elaborate, graphic, and explicit sexual metaphor."[111] Prior to the student's speech, two of his teachers warned him that the speech was inappropriate and risked "severe consequences."[112] Nevertheless, the student gave the speech, which resulted in significant school disruption.[113] Writing for the majority, Chief Justice Warren E. Burger wrote that the "First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[114] Burger distinguished *Fraser* from *Tinker* by noting a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case."[115]

The Court stated that indeed "[t]hese fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular."[116] However, the Court qualified, "these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."[117] Therefore, in the interests of other

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[109] *Id.*

[110] *See Id.* at 506.

[111] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986).

[112] *Id.*

[113] *Id.* at 678.

[114] *Id.* at 685.

[115] *Id.* at 680.

[116] *Id.* at 681.

[117] *Id.*

students, *Fraser* removed lewdness from *Tinker*'s protective ambit for the speech of schoolchildren.

Two years after *Fraser*, the Court, under Chief Justice Rehnquist, reviewed another student speech case, *Hazelwood School District v. Kuhlmeier*.[118] In *Kuhlmeier*, student members of the high school newspaper alleged a First Amendment rights violation because the school deleted sections of the newspaper that dealt with teen pregnancy and the impact of parental divorce on students.[119] Justice White wrote on behalf of the Court that "First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment."[120] White elaborated that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."[121] His words echoed that of Justice Potter Stewart's concurrence in *Tinker* (with whom White concurred previously in *Tinker*).[122] However, White distinguished *Kuhlmeier* from *Tinker*.[123] He explained that in *Tinker*, the Court reviewed the censorship of students' personal expression, whereas *Kuhlmeier* ventured into broader school "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."[124] White elaborated that activities such as a school newspaper "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[125] In a broadcast for *Your Weekly Constitutional*, Professor Stewart Harris stated that *Kuhlmeier* may be treated "effectively [as] an overruling of the *Tinker* case."[126] Harris characterized the legal effect bluntly as "a loophole you can drive a truck through."[127]

Nevertheless, attempts to stifle speech may instead create more speech, such was the case for *Kuhlmeier*. In spite of the principal's attempt to censor the school news pages in *Kuhlmeier*, those pages ultimately ran in the *St. Louis Globe-Democrat* with

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[118] 484 U.S. 260 (1988).

[119] *Id.* at 262–63.

[120] *Id.* at 266 (citations omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) and *Bethel*, 478 U.S. at 682).

[121] *Id.* (citations omitted) (quoting *Bethel*, 478 U.S. at 685).

[122] *See Tinker*, 393 U.S. at 515.

[123] *See Kuhlmeier*, 484 U.S. at 270–71.

[124] *Id.* at 271.

[125] *Id.*

[126] Stewart Harris, *The Schoolhouse Gate*, YOUR WEEKLY CONSTITUTIONAL (Mar. 3, 2019), https://www.podomatic.com/podcasts/ywc/episodes/2019-03-02T16_32_50-08_00.

[127] *Id.*

a headline "Too Hot for Hazelwood."[128] The irony of *Kuhlmeier* was the inevitable more rampant exposure that flowed from efforts to censor student expression from infecting other students.[129] This evokes a flaw of censorship that James Madison addressed in Federalist Paper No. 10, in which Madison wrote that "[i]t could never be more truly said" that the prevention of factions is "worse than the disease" of factions itself.[130] "Liberty is to faction what air is to fire, an aliment without which it instantly expires."[131] Furthermore, he noted the fallacy of stifling at the hands of a state actor, as "it could not be less folly to abolish liberty, which is essential to political life," for the only way in which government can exterminate such thoughts is to terminate liberty.[132] Such an attempt "nourishes faction" and would be as futile as for one "to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."[133] Said otherwise, the solution to contentious speech is more speech, not less.[134] Censorship fuels exposure.

In 2007, the Roberts Court addressed student free speech rights in *Morse v. Frederick*, and so, announced that it had "create[d] another exception" to *Tinker*.[135] Chief Justice Roberts elaborated that "[i]n doing so, we continue to distance ourselves from *Tinker,* but we neither overrule it nor offer an explanation of when it operates and when it does not."[136] So to say, the Roberts Court moved the posts of *Tinker*'s "schoolhouse gate" without explaining where it moved them and leaving the "gate" open for more tinkering to come.[137]

In *Morse*, high school students had gathered at a school-sanctioned viewing of the Olympic Torch Relay, as it traveled through Juneau, Alaska to the 2002 Salt Lake City Winter Games.[138] As news cameras passed the crowd, a high school senior showcased a 14-foot banner that stated, "BONG HiTS 4 JESUS."[139] The school principal ordered

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[128] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 140 (2018).

[129] *Id.*

[130] THE FEDERALIST NO. 10 (James Madison).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*; *see also* David L. Hudson, Jr., *Counterspeech Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA, http://www.mtsu.edu/first-amendment/article/940/counterspeech-doctrine (last updated Dec. 2017).

[135] *See* Morse v. Frederick, 551 U.S. 393, 418 (2007).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 397.

[139] *Id.*

the banner to be taken down.[140] However, one student refused to comply.[141] The principal confiscated the banner and ordered the student to her office.[142] She explained after the fact that her order was pursuant to a school board policy prohibiting the student advocacy of "substances that are illegal to minors."[143] The principal suspended the student from school for ten days, leading to the most recent Supreme Court case centered on student speech rights.[144]

Chief Justice Roberts wrote the opinion on behalf of the court and framed the case consistently with the existing precedent for First Amendment rights in the school environment.[145] The Chief Justice rejected the argument that this was anything but a "school speech case."[146] Rather, Roberts noted that "[t]he best [the student] can come up with is that the banner is 'meaningless and funny.'"[147] However, curiously, Justin Driver, University of Chicago Law School professor and author of *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* opined that the student would have been much wiser to argue for his free exercise of religion insofar as the message contained Jesus.[148] Nevertheless, the student did not do so, and Roberts ruled out hypotheticals of anything other than meaninglessness.[149] Roberts established that this was "plainly not a case about political debate over the criminalization of drug use or possession."[150] Likewise, Roberts ruled out the school's argument, rejecting the advancement of a "broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*." [151] The Court carefully rejected using *Fraser* for precedential support because "this stretches *Fraser* too far."[152] *Fraser* "should not be read to encompass *any* speech that could fit under *some* definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some."[153] Rather, the Court's concern was "not that Frederick's speech was offensive, but that it was reasonably viewed as promoting

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[140] *Id.* at 398.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 401.

[146] *Id.* at 400.

[147] *Id.* at 402.

[148] Harris, *supra* note 126.

[149] *Morse*, 551 U.S at 403.

[150] *Id.*

[151] *Id.* at 409.

[152] *Id.*

[153] *Id.*

illegal drug use."[154] Therefore, the Court ultimately held that "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."[155]

Justice Clarence Thomas concurred with *Morse*'s majority, but wrote fondly upon the days of old, stating that "in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order."[156] Moreover, Thomas did not hide his hostility for *Tinker*. [157] Rather, he stated, "I join the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech . . . I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."[158] Given such an opportunity in the future, it is therefore foreseeable that Thomas would vote to overrule *Tinker*.[159] Nevertheless, among the greater Court, it may be less than likely to see *Tinker*'s overturn under Chief Justice Roberts, "who has continually evinced a desire to render unanimous narrow decisions that further the public faith in the Court, rather than undermine it."[160]

In addition to Justice Thomas, Justices Samuel Alito and Anthony Kennedy concurred in *Morse*, but Alito clarified that he "d[id] not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court."[161] Alito elaborated, qualifying that "[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents."[162] Moreover, he continued, "[i]t is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities."[163] Turning once again to the relevant subject of state actors and public students' free speech rights, Alito wrote, "[i]t is even more dangerous to assume that

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[154] *Id.*

[155] *Id.* at 403.

[156] *Id.* at 412.

[157] *Id.* at 422.

[158] *Id.*

[159] David L. Hudson Jr., *Justice Thomas Making Waves in First Amendment Jurisprudence*, FREEDOM FORUM INSTITUTE (May 10, 2011), https://www.freedomforuminstitute.org/2011/05/10/justice-thomas-making-waves-in-first-amendment-jurisprudence/.

[160] Christian Ketter, *"Making Administrative Law Strict Again" in the Era of Trump: The Future of the Chevron Doctrine, According to the Judicial Conference for the United States Court of Appeals for the Federal Circuit*, 19 FLA. COASTAL L. REV. 201 (2019).

[161] *Morse*, 551 U.S. at 422.

[162] *Id.* at 424.

[163] *Id.*

such a delegation of authority somehow strips public school authorities of their status as agents of the State."[164]

Justice Breyer concurred in part, under a minimalist approach, concurring insofar as he believed that qualified immunity should simply bar the student's claim for monetary damages.[165] According to Cass R. Sunstein, Professor of Law and former Administrator of the White House Office of Information and Regulatory Affairs,[166] "judicial minimalism" is an approach to law by which jurists take "small steps . . . avoiding depth and width," in otherwise sweeping decisions, as "minimalists hope to eliminate large decision-making burdens."[167] Moreover, Chief Justice Roberts (characterized by some as a judicial minimalist) has advocated that "the broader the agreement among the justices, the more likely it is a decision . . . on the narrowest possible grounds."[168] Breyer advocated for such minimalism and narrowness, as he urged that the Court should bar the claim and "say no more."[169] Breyer dissented on the basis that the case's First Amendment issue was difficult and unwarranted given the grounds on which it could have been decided without necessitating the turn to a constitutional basis.[170]

The U.S. Supreme Court's "'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."[171] To the Roberts Court majority, however, this issue of student speech must have been an important constitutional question that had not been adequately settled by the likes of *Tinker*, *Kuhlmeier*, and *Fraser*, for the "avoidance of unnecessary constitutional decisions . . . has been explained by concerns regarding federal courts' credibility, the final and delicate nature of judicial review, and the paramount importance of constitutional adjudication."[172] Moreover, the fact that Chief Justice Roberts used his unique power to select the decision's authorship, assigning the majority opinion to himself, may best indicate *Morse*'s significance.[173]

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[164] *Id.*

[165] *Id.* at 425.

[166] *Cass R. Sunstein*, HARVARD LAW SCHOOL, https://hls.harvard.edu/faculty/directory/10871/Sunstein (last visited Apr. 3, 2019).

[167] Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 826–27 (2008).

[168] *Id.*

[169] *Morse*, 551 U.S. at 425.

[170] *Id.*

[171] Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994).

[172] *Id.*

[173] Linda Greenhouse, *Chief Justice Roberts in His Own Voice the Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 90–91 (2013).

Of course, *Morse* was not without its dissenters.[174] Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg dissented from the majority.[175] Stevens' dissent found a threshold between condemning the school's justification but not condemning the acts of the principal, as "[t]he First Amendment demands more, indeed, much more."[176] Justice Stevens wrote that the Court "cannot justify disciplining [a student] for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs."[177] Stevens likened the controversy surrounding marijuana to the Viet-Nam rhetoric in *Tinker*.[178] He wanted to establish a state's burden to show that the student "willfully infringed on anyone's rights or interfered with any of the school's educational programs."[179] Stevens charged that, by not requiring this demonstration in *Morse*, "the Court punt[ed]" in its last case on student speech.[180]

2. *Tinker-Morse* Going Forth and the Schoolhouse Gates for Cyberbullying and Hate Speech

Nevertheless, Justice Stevens (and his fellow dissenters) certainly did not argue for unbridled student speech. However, there are those who do so. For instance, John O. Hayward, Senior Lecturer in Law at Bentley University, has advocated that anti-cyber bullying laws are the greatest threat to student free speech.[181] Similarly, Assistant Professor Mary-Rose Papandrea of Boston College Law School wrote that "[g]ranting schools broad authority to censor the digital speech of their students would unnecessarily exacerbate this risk and prove a grave threat to the speech rights of

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[174] *Morse*, 551 U.S. at 433.

[175] *Id.*

[176] Stevens wrote:

> I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

Id. at 434 (citations omitted).

[177] *Id.*

[178] *Id.* at 447–48.

[179] *Id.* at 440 (citations omitted).

[180] *Id.* at 441.

[181] John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 124 (2011).

adolescents generally."[182] Papandrea qualifies, however, that "schools should not have to tolerate lewd speech in the classroom or harassing and demeaning speech that interferes with another student's ability to learn."[183] Ultimately, the inevitable challenge of establishing what is "lewd," "harassing," or "demeaning" may very well beg the question and prove as quixotic as Justice Stewart's famous attempt to define pornography, in which he wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."[184] Thus, the Court would inevitably grapple with whether the likes of "BONG HiTS 4 JESUS" is student speech to warrant permissible censorship.[185] Perhaps, as the Roberts Court "continue[s] to distance [itself] from *Tinker*,"[186] if the right case shall come, the Court will simply know it when it sees it.[187]

Nevertheless, the most fervent supporters of boundless public-school students' free speech may be at odds with student hate speech, a complicated subject with many layers indeed.[188] For instance, at California's Newport Harbor High School, police were called after students had posted flyers with swastikas.[189] The flyers appeared days after Eva Schloss, stepsister of Anne Frank, spoke to children who had posted anti-Semitic imagery at an off-campus party.[190] The Court has notably grappled with the difficulties of regulating hate speech in *R.A.V. v. City of St. Paul*.[191] In the unanimous decision of *R.A.V.*, written on behalf of the Court by Justice Antonin Scalia, the Court held a "Bias–Motivated Crime Ordinance" facially invalid because it prohibited displays of symbols that "arouse . . . anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[192] The Court ruled, however, that certain limited categories of speech, such as obscenity and defamation "may be

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[182] Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1089 (2008).

[183] *Id.* at 1088. Note also that Papanrea qualifies her article with a footnote acknowledging that "private school students cannot claim that their schools have infringed upon their free speech rights under the U.S. Constitution." *Id.* at 1102.

[184] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[185] Morse v. Frederick, 551 U.S. 393, 397.

[186] *Id.* at 418.

[187] *Jacobellis*, 378 U.S. at 180.

[188] Stephanie Becker, *High School Plastered With Swastikas After Holocaust Survivor Visit*, CNN (Mar. 13, 2019), https://www.cnn.com/2019/03/12/us/california-swastikas-at-school/index.html.

[189] *Id.*

[190] *Id.*

[191] 505 U.S. 377 (1992).

[192] *Id.*

regulated because of their constitutionally proscribable content."[193] It qualified that group, however, as "these categories are not entirely invisible to the Constitution, and the government may not regulate them based on hostility, or favoritism towards a nonproscribable message they contain."[194] Scalia elaborated that "fighting words," despite their verbal qualities, are not within the First Amendment's scope because of their unprotected nonspeech characteristics.[195] Nonetheless, in *R.A.V.*, the Court clarified its "belief that burning a cross in someone's front yard is reprehensible," but there existed "sufficient means at [St. Paul's] disposal to prevent such behavior without adding the First Amendment to the fire."[196]

In spite of the fact that *R.A.V.* was unanimously decided, Justice Scalia's majority opinion was not without criticism from the concurring Justices. Justice Byron White criticized the opinion in his concurrence, writing that "the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection."[197] White chided that "[s]hould the government want to criminalize certain fighting words, the Court now requires it to criminalize *all* fighting words."[198] Justice Harry Blackmun concurred notwithstanding similar criticism expressed.[199] Blackmun wrote that the majority opinion "weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant."[200] Nevertheless, he provided the ultimate reason for his concurrence was that he (like Justice White) agreed that the Minnesota ordinance exceeded the bounds of mere "fighting words" into protected speech.[201]

Justice John Paul Stevens, concurring in *R.A.V.*, wrote that "[t]here are legitimate, reasonable, and neutral justifications" for prohibitions on hate speech.[202] Stevens found issue, however, and stated that "the Court holds, a government must either proscribe *all* speech or no speech at all."[203] Stevens wrote, nevertheless, that he found the Minnesota ordinance overbroad, but had it not been so, he would have voted to uphold it.[204] *R.A.V.* demonstrated the difficulty of regulating hate speech. In fact,

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[193] *Id.* at 383.

[194] *Id.*

[195] *Id.* at 386.

[196] *Id.* at 396.

[197] *Id.* at 401.

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

[199] *Id.* at 415.

[200] *Id.*

[201] *Id.* at 416.

[202] *Id.*

[203] *Id.* at 419.

[204] *Id.* at 436.

Justice Stevens' rhetorical question that follows showed the fine line that ultimately can prove fatal for prohibitions on hate speech.[205] Stevens asked, is an "ordinance 'overbroad' because it prohibits too much speech? If not, is it 'underbroad' because it does not prohibit enough speech?"[206] And so, while hate speech *can* be regulated, the means and extent thereof may be difficult to execute constitutionally.[207] That difficulty, however, is eased in the school environment, as *Fraser* allows for speech regulation when school administrators consider "the sensibilities of fellow students."[208]

Ultimately, however, some scholars (even before *Morse*) have asserted that *"Tinker, Fraser,* and *Kuhlmeier* provide no obstacle to the implementation of hate speech regulations."[209] Rather, much "[t]o the contrary. Their rationales *support* public school efforts to provide environments for learning and to safeguard the sensibilities of elementary and secondary students."[210] Moreover, scholars argue that, hate speech is indeed capable of regulation that is "designed to protect students and to encourage learning," while allowing the American public school system to "remain true to our liberal principles of freedom of expression."[211]

Some scholars and jurists look to the progeny of cases up to *Morse* sounded in student free speech "as fundamental alterations of student-school relationships, or even of the basic role of minors in society."[212] Others, like Andrew R. Lewis, Associate Professor of Political Science at the University of Cincinnati,[213] have claimed that political forces are at play and Conservatives support free speech cases, not only "when it serves them."[214] Lewis asserts that conservative groups who once lambasted the free speech of *Cohen v. California*[215] now supported the student in

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[205] *Id.* at 416–17.

[206] *Id.*

[207] *Id.*

[208] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[209] Alison G. Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71, 129 (1992).

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

[211] *Id.*

[212] Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions-for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1407 (2011).

[213] *Andrew R. Lewis*, ANDREW R. LEWIS, www.andrewrlewis.com/about-2 (last visited Mar. 14, 2019).

[214] Andrew R. Lewis, *How the Pro-Life Movement Has Promoted Liberal Values*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/opinion/abortion-roe-wade-liberals.html.

[215] 403 U.S. 15 (1971).

Morse v. Frederick in order to "carve out space for pro-life speech."[216] *Cohen* involved a 1968 arrest for disorderly conduct after the defendant wore a controversial jacket that was decorated with the clearly visible words "Fuck the Draft" into a Los Angeles County Courthouse.[217] The Court noted albeit archaically that indeed "[t]here were women and children present in the [courthouse] corridor," but held nevertheless that "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display . . . of this single four-letter expletive[,] a criminal offense."[218] Putting aside Cohen's anti-war sentiment for the war in Vietnam amid the backdrop of President Richard M. Nixon's administration,[219] and referring strictly to Professor Lewis's assertions regarding *Morse*, Professor Lewis's proposition is supported by two important events. First, by the structure of the *Morse v. Frederick* majority.[220] That Court majority did not support the student[221] when restricting his speech, a majority moreover that solely consisted of conservative-appointees: Chief Justice Roberts (appointed by George W. Bush),[222] Justices Alito (George W. Bush),[223] Kennedy (Ronald Reagan),[224] Scalia (Ronald Reagan),[225] and Thomas (George H.W. Bush).[226] In dissent were Justices Stephen Breyer (William

[216] *Andrew R. Lewis*, *supra* note 213.

[217] *See Cohen*, 403 U.S. at 16.

[218] *Id.* at 16, 26.

[219] *Ending the Vietnam War, 1969–1973*, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1969-1976/ending-vietnam (last visited Apr. 3, 2019).

[220] *See* Morse v. Frederick, 551 U.S. 393 (2007).

[221] Lewis, *supra* note 213.

[222] Adam Cohen, *The 'Enigma' Who Is the Chief Justice of the United States*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/books/review/joan-biskupic-chief-life-turbulent-times-chief-justice-john-roberts.html.

[223] Laura Sullivan, *Bush Taps Alito for Supreme Court Vacancy*, NPR (Oct. 31, 2005), https://www.npr.org/templates/story/story.php?storyId=4982338.

[224] Scott Bomboy, *How Justice Kennedy Replaced Powell (and Bork) at the Court*, NATIONAL CONSTITUTION CENTER (June 27, 2018), https://constitutioncenter.org/blog/how-justice-kennedy-replaced-powell-and-bork-at-the-court.

[225] Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html?utm_term=.4cd96be31435.

[226] R.W. Apple Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle; 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

Clinton),[227] Ruth Bader Ginsburg (William Clinton),[228] David Souter (George H.W. Bush),[229] John Paul Stevens (Gerald Ford).[230] Second, Lewis's assertion is also countered by the statements of the school principal's appellate counsel in *Morse*, retired Court of Appeals Judge Kenneth Starr, who said that the case "should not be read more broadly."[231]

Morse has, however, helped to resolve the cloudy line in lineage from *Tinker* for political speech rights of students. For instance, Clovis North High School in Fresno, California told student Maddie Mueller that she could not wear her "Make America Great Again" hat in support of President Donald J. Trump.[232] Mueller asked publicly, "being a patriot and trying to show pride in your country, how is that inappropriate?"[233] A Clovis school district spokesperson explained the school's prohibition of the Trump-supporting baseball cap, stating that the "[b]ottom line for us [is that] our dress code is really about allowing our kids to come to school, to feel safe at school, to feel supported at school and to be free of distractions so they can focus on learning."[234] An Opinion article in the *Los Angeles Times* asked, "Can kids wear black armbands to school but not MAGA hats?"[235] The *Times* also charged that

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[227] Joan Biskupic, *A Moderate Pragmatist*, WASH. POST (May 14, 1994), https://www.washingtonpost.com/archive/politics/1994/05/14/a-moderate-pragmatist/25631eed-ed9e-48ee-ba12-dcdf9c16fe61/.

[228] Jill Lepore, *Ruth Bader Ginsburg's Unlikely Path to the Supreme Court*, THE NEW YORKER (Oct. 8, 2018), https://www.newyorker.com/magazine/2018/10/08/ruth-bader-ginsburgs-unlikely-path-to-the-supreme-court.

[229] 101 CONG. REC. 19, 136 (daily ed. Oct. 2, 1990) (hearing for David H. Souter).

[230] Adam Liptak, *Retired Justice John Paul Stevens Says Kavanaugh Is Not Fit for Supreme Court*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/us/politics/john-paul-stevens-brett-kavanaugh.html; *see also* Morse v. Frederick, 551 U.S. 393 (2007).

[231] Associated Press, *Supreme Court Rules Against Student in 'Bong Hits 4 Jesus' Case*, FOX NEWS (June 25, 2007), https://www.foxnews.com/story/supreme-court-rules-against-student-in-bong-hits-4-jesus-case. (Kenneth Starr served on the United States Court of Appeals for the District of Columbia Circuit (Reagan), prior to serving as Solicitor General under President George H. W. Bush and independent counsel during the Clinton administration; *see Starr, Kenneth Winston*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/starr-kenneth-winston (last visited Jan. 27, 2020)).

[232] Alex Sundby, *Student Criticizes Dress Code After Being Told She Can't Wear "Make America Great Again" Hat to School*, CBS NEWS (Feb 22. 2019), https://www.cbsnews.com/news/maga-hat-student-criticizes-dress-code-make-america-great-again-hat-california-high-school/?fbclid=IwAR3OnikwfwuFSUYbrlxmfW1a9A7FX5XNvmT048iykzDFwTYzfFHuqVz2nEU.

[233] *Id.*

[234] *Id.*

[235] Michael McGough, *Can Kids Wear Black Armbands to School but Not MAGA Hats?*, L.A. TIMES (Feb. 26, 2019), https://www.latimes.com/opinion/enterthefray/la-ol-student-speech-20190226-story.html.

"[i]t's ironic that Tinker may be teetering at a time when, in other settings, children are being praised for speaking out on political issues," such as the walkouts for changes in gun control following the Parkland shooting.[236]

Indeed, *Tinker* could potentially support a contemporary parallel between black anti-war arm bands and "Make America Great Again" hats. However, with *Morse*, the Roberts Court successfully "distance[d] [itself] from *Tinker,* but . . . neither overrule[d] it nor offer[ed] an explanation of when it operates and when it does not."[237] Therefore, it is not clear in what circumstances a public student can wear a political hat and when a student cannot. Mueller has since sued the school for violation of her First Amendment rights.[238] Clovis School District's spokesperson stated that the high school does not prohibit all hats, and "[t]here has never been a subjective evaluation of what language or logo is or is not on a hat, because the policy is straightforward in allowing only school hats or hats in solid school colors."[239] While Mueller may argue that the school's prohibition of some hats but not all is not content-neutral, the Court has made it clear that "regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'"[240]

The Court has noted that "[t]he principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[241] Government "[r]egulation that serves purposes unrelated to the content of expression is [nevertheless] deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[242] Judge Breyer has explained content neutrality's purpose, insofar as it "[g]enerally, . . . prohibits the government from choosing the subjects that are appropriate for public discussion."[243] He noted that "content-neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship."[244] However, "unlike the viewpoint-discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the

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[236] *Id.*

[237] Morse v. Frederick, 551 U.S. 393, 418 (2007).

[238] Sam Wolfston, *Student Sues School District After Being Told She Can't Wear a Maga Hat*, THE GUARDIAN (Feb. 26, 2019), https://www.theguardian.com/us-news/2019/feb/26/maga-hat-ban-student-sues-school-district-california.

[239] Elise Solé, *Teen Is Fighting to Wear Her MAGA Hat to School: 'Since When Is Patriotism Inappropriate?'*, YAHOO (Feb. 21, 2019), https://www.yahoo.com/lifestyle/teen-fighting-wear-maga-hat-school-since-patriotism-inappropriate-015831730.html.

[240] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[241] *Id.*

[242] *Id.* at 791–92.

[243] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983) (Breyer, J. dissenting).

[244] *Id.*

content-neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area."[245] It serves to fortify the core of First Amendment protections from viewpoint discrimination.[246]

Thus, Clovis High School's explanation may be both content-neutral and consistent with *Fraser* that when schools censor student speech, they may do so for "the sensibilities of fellow students."[247] Still, black arm-bands could be said to affect student sensibilities, and without an explanation of when *Tinker* operates,[248] the fact remains that public schoolchildren—like Mueller—do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[249]

Nevertheless, while Mueller did not receive express permission to wear the hat, she (like others who allegedly wore hats in violation of policy) has not been disciplined.[250] The student stated, "I've been repeatedly pulled aside by teachers and sent to the disciplinary office, but nothing made it onto my official record because there is no rule about Trump clothing."[251] Until, however, Mueller refuses to shed her hat at the schoolhouse gate, she may not have a viable case, for a party must not show not only that a government act is unconstitutional, but that she "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement."[252] Standing may not be established by mere "fear of enforcement."[253] Therefore, it may be in the school's best interest to argue that Mueller is without standing unless and until she suffers a cognizable injury, as until then, she also suffers from a lack of ripeness.[254] Furthermore, somewhat fatally to Mueller's argument, she has stated that the school does not enforce its policy.[255] Nevertheless, for both Maddie Mueller and *Tinker*, time will tell what happens. A court, acting on judicial minimalist grounds, could bar Mueller's action for a lack of injury, avoid the last resort of constitutionality, and simply "say no more."[256] Such an approach would prevent courts from being forced to re-examine the clouded line between *Tinker* and *Morse*.[257]

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[245] *Id.*

[246] *Id.*

[247] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[248] *Morse*, 551 U.S. at 418.

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

[250] Solé, *supra* note 239.

[251] *Id.*

[252] Poe v. Ullman, 367 U.S. 497, 504–05 (1961).

[253] *Id.* at 508.

[254] *See, e.g.*, *id.* at 504–05.

[255] Solé, *supra* note 239.

[256] Morse v. Frederick, 551 U.S. 393, 425 (2007) (Breyer, J., concurring in part, and dissenting in part).

[257] *Id.* at 418.

3. The Roberts Court, Student Sports, and State Action

There is much focus among scholars and journalists upon the Roberts Court's handling of *Morse* and the external forces of purported political pressure.[258] However, the *Brentwood* cases may be a better focus for where changes could come to student free speech rights, as those cases "shaped sports" and the function of state actors in that environment. Due to the well-covered controversies arising in school sports environments, these cases (and their underlying doctrine) are contemporarily relevant to student speech rights within school athletic associations.[259]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Rehnquist Court addressed the state action doctrine with regard to not-for-profit athletic associations.[260] In *Brentwood*, Tennessee had delegated the authority to oversee the State's high school athletics to a not-for-profit athletic association.[261] The Association regulated Tennessee's interscholastic athletic competitions among all schools in the State, both public and private.[262] As such, it sanctioned a private school member of its athletic association, Brentwood Academy, for violating a rule that prohibited a high school from unduly influencing student recruits.[263] All parties who voted on the sanctions were members of the not-for-profit association as well as public school administrators outside of the Association.[264] The private school sued the Association in federal court under a theory that the Association's acts to enforce constitute sufficient state action and a violation of its First and Fourteenth Amendment rights.[265] In an opinion written by Justice David Souter, the Court held that the "Association's regulatory activity is state action owing to the pervasive entwinement of state school officials in the Association's structure, there being no offsetting reason to see the Association's acts in any other way."[266] This case is often referred to as *Brentwood I*, as its remedial enforcement also reappeared before the Court in

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[258] *Andrew R. Lewis*, *supra* note 214; *see also* Tony Mauro, *Roberts Declares Himself First Amendment's 'Most Aggressive Defender' at SCOTUS*, LAW.COM (Feb. 13, 2019), https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus/?slreturn=20190303163203; McGough, *supra* note 233.

[259] Jacey Fortin, *High School Students Kicked Off Football Team After Protesting During National Anthem*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/high-school-national-anthem.html.

[260] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 293 (2001).

[261] *Id.* at 292.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* at 295–04.

Tennessee Secondary School Athletic Association v. Brentwood Academy (*Brentwood II*).[267]

Once again, for private environments, such as school athletic associations, state action exists only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."[268] However, in *Brentwood I*, Justice Thomas dissented arguing that he saw "no 'symbiotic relationship' between the State and the TSSAA."[269] When *Brentwood II* reached the Roberts Court six years later, in 2007, Thomas concurred in the judgment that there was no First Amendment violation after all, and nevertheless affirmed that he "would simply overrule *Brentwood I*."[270]

Since the time of *Brentwood I*, the composition of the Court has changed dramatically; as in *Brentwood I*, the "Justices' votes were perfectly ordered ideologically."[271] That case consisted of a majority opinion written by "the five least conservative:" Justice David Souter, joined by Justices John Paul Stevens, Sandra Day O'Connor, Ruth Bader Ginsburg, and Stephen Breyer, of which only Justices Ginsburg and Breyer remain.[272] *Brentwood I* was countered by a dissent by "the four most conservative," Chief Justice William Rehnquist, Justices Antonin Scalia, Anthony Kennedy, and Justice Thomas as the writer.[273] Of those four, only Thomas, the dissent's author who affirmed his hostility to the opinion six years later in *Brentwood II*, remains.[274] Therefore, Thomas's hostility pervades student related cases from *Tinker* to *Brentwood*.[275]

According to Terri Peretti, Professor of Political Science at Santa Clara University, the focus—with regard to changes to *Brentwood I*—is properly between "the Court's ideologically-median Justice and . . . the ideological location of new appointees."[276] Since *Brentwood I* was decided, America saw the appointments of Chief Justice John Roberts (George W. Bush 2005),[277] Justices Samuel Alito (George

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[267] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007).

[268] *Brentwood Acad.*, 531 U.S. at 295.

[269] *Id.* at 311.

[270] *Tenn. Secondary Sch.*, 551 U.S. at 306.

[271] Terri Peretti, *What if the NCAA Was a State Actor? Here, There, and Beyond*, 20 ROGER WILLIAMS U. L. REV. 292, 317 (2015).

[272] *Id.*

[273] *Id.*

[274] *Tenn. Secondary Sch.*, 551 U.S. at 306.

[275] Morse v. Frederick, 551 U.S. 393, 422 (2007) (Thomas, J., concurring).

[276] Peretti, *supra* note 271, at 317.

[277] John Cassidy, *Why Did Chief Justice John Roberts Decide to Speak Out Against Trump?*, THE NEW YORKER (Nov. 21, 2018), https://www.newyorker.com/news/our-columnists/why-did-chief-justice-john-roberts-decide-to-speak-out-against-trump.

W. Bush 2006),[278] Sonia Sotomayor (Barack Obama 2009),[279] Elena Kagan (Barack Obama 2010),[280] Neil Gorsuch (Donald Trump 2017),[281] and Brett Kavanaugh (Donald Trump 2018).[282] Thus, vigilant Roberts Court observers should monitor the trajectory of both state action and student speech developments.

4. The Roberts Court's Potential Balls and Strikes for Schoolchildren Post-*Morse*

If a case shall appear to settle lingering issues of free speech rights for schoolchildren, the Justice's past decisions may provide an indication of their potential constitutional resolution. As an initial matter, *Morse* is as a strong indication of the general manner in which the members of current Court remaining therefrom would rule. Among those who concurred in Chief Justice Roberts opinion were Justices Thomas and Alito.[283] Breyer dissented in part.[284] Ginsburg dissented.[285] Among the Justices who heard both *Brentwood* cases and *Morse* are members of its majority Ginsburg and Breyer as well as dissenter Thomas. Among the justices from *Brentwood II* and *Morse* are the aforementioned (that time with Thomas concurring), Alito, and Chief Justice Roberts in a largely unanimous decision.[286] Thus, Sotomayor, Kagan, Gorsuch, and Kavanaugh are Judges who have yet to participate in addressing the issue of student rights at the Supreme Court.

a. Chief Justice Roberts: the self-declared umpire

At his 2005 Senate Confirmation Hearing, Chief Justice John Roberts employed a sports analogy for law, in which he opined that "Judges and Justices are servants of

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[278] Joan Biskupic, *This Justice Began the Supreme Court's Conservative Transformation*, CNN (Dec. 8, 2018), https://www.cnn.com/2018/12/08/politics/samuel-alito-supreme-court-conservative-tilt/index.html.

[279] Charlie Savage, *Senate Approves Sotomayor to Supreme Court*, N.Y. TIMES (Aug. 6, 2009), https://www.nytimes.com/2009/08/07/us/politics/07confirm.html.

[280] Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html.

[281] Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN (Apr. 7, 2017), https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html.

[282] Sabrina Siddiqui & Lauren Gambino, *Brett Kavanaugh's Confirmation to US Supreme Court Gives Trump a Major Victory*, THE GUARDIAN (Oct. 7, 2018), https://www.theguardian.com/us-news/2018/oct/06/brett-kavanaugh-confirmed-us-supreme-court.

[283] Morse v. Frederick, 551 U.S. 393, 396 (2007).

[284] *Id.* at 425–33.

[285] *Id.* at 433.

[286] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 294 (2007).

the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them . . . [in] a limited role. Nobody ever went to a ball game to see the umpire."[287] Nevertheless, in baseball, the umpire has a discretionary role to rule upon what constitutes a ball or a strike, and in so doing, effectively calls the runs and the outs.[288] Accordingly, in *Morse*'s oral argument, Chief Justice Roberts telegraphed his thinking as to the purpose that *Morse* should serve going forth. Roberts laid out a brief lineage of student-speech precedent, stating to Joseph Frederick's attorney Douglas K. Mertz:

> Can we get back to what the case is about[?] You think the law was so clearly established when this happened that the principal, [in] the instant that the banner was unfurled, snowballs are flying around, the torch is coming, [that principal] should have said oh, I remember under *Tinker* I can only take the sign down if it's disruptive. But then under *Frazier* I can do something if it interferes with the basic mission, and under *Kuhlmeier* I've got this other thing. So she should have known at that point that she could not take the banner down, and it was so clear that she should have to pay out of her own pocket because of it.[289]

In presenting the question as Roberts framed it, he suggested there exists a scattered confusion in the precedent. It was one that he would course-correct in *Morse*.

Early on in oral argument, Roberts established that "I guess my question goes to how broadly we should read *Tinker*. I mean, why is it that the classroom ought to be a forum for political debate simply because the students want to put that on their agenda?"[290] Roberts's use of "forum" is interesting because *Tinker* does not include the conspicuous use of the term "forum;" rather, it is *Kuhlmeier*. The Court in *Kuhlmeier* declined to extend free speech rights to public school students with regard to a school newspaper, or a school play. Instead, according to *Kuhlmeier*, the student is subject to how the school "reserved the forum for its intended purpose."[291] It appears that Roberts may have sensed a dissonance between *Kuhlmeier* and *Tinker*. The issue is insofar as the political speech rights that *Tinker* so broadly established were limited with *Kuhlmeier*, but the extent is not clear as to whether a school may limit political discourse, if the school did not intend that the classroom be a forum for that purpose.[292]

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[287] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).

[288] WILLIAM M. SIMONS, THE COOPERSTOWN SYMPOSIUM ON BASEBALL AND AMERICAN CULTURE, 2013–2014 251 (2015).

[289] Oral Argument No. 06-278, Alderson Reporting Company, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf 48 (2007) (case italicization added).

[290] Oral Argument No. 06-278, Alderson Reporting Company, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf 9 (2007) (case italicization added).

[291] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (brackets omitted).

[292] *Id.*

A Roberts Court's narrowing of *Tinker*, guided by the Chief Justice himself, may be foreseeable given his reservations towards *Tinker* and his reputation for preference towards narrowly structured, incremental decisions, which "have the effect of making his approach to judicial decision making transparent."[293] Roberts said at his 2005 Senate Confirmation Hearing, "I have no agenda, but I do have a commitment . . . it's my job to call balls and strikes and not to pitch or bat."[294] However, the Roberts Court's calling balls and strikes of the previous Courts from *Tinker* to *Kuhlmeier* has positioned the Court and its umpire to steal a base towards limiting *Tinker* further.

b. Justice Thomas's fierce consistency

Justice Clarence Thomas concurred separately in *Morse*, specifically to state that *Tinker* "is without basis in the Constitution.[295] Justice Thomas stated that he joined *Morse* only "because it erodes *Tinker*'s hold in the realm of student speech."[296] He wanted to "dispense with *Tinker* altogether," and stated if "given the opportunity, I would do so."[297] In his tenure on the Court, some have accused Justice Thomas of surprisingly liberal opinions.[298] For instance, in 2005, Justice Thomas dissented from the Court's decision to uphold the federal government's ability to regulate medicinal marijuana as a congressional commerce power in *Gonzales v. Raich*.[299] This dissent shocked some as liberal in nature, but as *Slate* reported, "[t]o careful observers, Thomas' ruling[s] should not come as a shock."[300] There, Thomas affirmed his longstanding concept of Federalism to its logical conclusion of California's right as a state.[301] He follows those principles in student speech cases as well.

Two years after *Gonzalez*, in *Morse*, Thomas joined the majority but concurred separately to specifically articulate an originalist theory as to why student free-speech

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[293] Michael J. Gerhardt, "*Tradeoffs Of Candor: Does Judicial Transparency Erode Legitimacy?": Symposium: Silence Is Golden*, 64 N.Y.U. ANN. SURV. AM. L. 475, 491.

[294] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 48 (2005).

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

[296] *Id.*

[297] *Id.*

[298] Mark Joseph Stern, *Clarence Thomas, Liberal*, SLATE (Jun. 18, 2013), https://slate.com/news-and-politics/2013/06/clarence-thomass-liberal-rulings-how-the-supreme-court-justices-originalism-leads-him-to-side-with-liberals.html.

[299] Gonzales v. Raich, 545 U.S. 1, 42–57 (2005).

[300] Stern, *supra* note 298.

[301] *Gonzales*, 545 U.S. at 63–66 (Thomas dissented: "We normally presume that States enforce their own laws . . . unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana . . . Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.").

rights are constitutionally non-existent.[302] Thomas wrote that "[i]f students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not."[303]

It may be chiefly stated that one can never truly predict decisional outcomes in the Supreme Court.[304] However, Justice Thomas's consistency, which is rooted in principles of Federalism and the constitutional theory of originalism,[305] and taken with his vehement rallying against *Tinker*, indicate safety in such predictions.

c. FACTUAL CoNTEXTS 4 JUSTICE BREYER, the goals of education, and his pragmatism in framing cases with blunt practicality

In *Morse*, Justice Breyer did not find it necessary for the Court to address the constitutional issue. Nevertheless, Judge Breyer ironically did not avoid the question in his concurrence. There, Breyer suggested that his threshold for student speech rights could turn on whether speech appropriate for censorship "would risk significant interference with reasonable school efforts to maintain discipline."[306] In oral argument, Breyer communicated that he felt it would have been "a very different case if in fact it [BONG HiTS 4 JESUS] had been a whisper or if it had been a serious effort to contest the drug laws."[307] However, Breyer stated, "[i]t wasn't either. It was a joke. It was a 15-foot banner. We have the message plus the means plus the school event."[308]

Breyer values the educational goals for children and order thereof.[309] In 2011, the Court touched upon the subject of children and the First Amendment in *Brown v. Entertainment Merchants Association* when it struck down a California law that "prohibit[ed] the sale or rental of 'violent video games' to minors, and requir[ed] . . .

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[302] Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 89 (2014).

[303] Morse v. Frederick, 551 U.S. 393, 411 (2007).

[304] Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 122 (2005).

[305] Ralph A. Rossum, *Symposium: Celebrating an Anniversary: A Look Back at Justice Clarence Thomas's Twenty Years on The United States Supreme Court: Symposium Article: Clarence Thomas's Originalist Understanding of the Interstate, Negative, and Indian Commerce Clauses*, 88 U. DET. MERCY L. REV. 769, 794 (2011).

[306] *Morse*, 551 U.S. at 427.

[307] Oral Argument No. 06-278, Alderson Reporting Company, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf 37 (2007).

[308] *Id.*

[309] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 857 (2011).

packaging to be labeled" for adults.[310] Dissenting from a 7-2 majority, Justice Breyer and Justice Thomas wrote respective dissents.[311] While Thomas's dissent centered on originalism,[312] Breyer framed his dissent in a practical way, stating:

> This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children--by their parents, by their teachers, and by the people acting democratically through their governments.[313]

Breyer concluded that "[t]he statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help."[314]

Therefore, for Breyer, in a subsequent student speech case, his ruling would likely be influenced by: the factual context of the message itself; the medium of communication; the level of disruption; and the educational mission taken in a totality of circumstances for the merits of the speaker's case.

d. Justice Alito's specific potential for a switch hit on certain grounds

It is a mistake to presume that Alito would support limiting student speech simply because he concurred in the *Morse* majority. Alito limited his concurrence to go no further than upholding a public school's restriction of speech that reasonably seems to advocate for illegal drug use.[315] Moreover, Alito disclaimed that the majority opinion *should not* be read to support restriction of student speech that may "plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[316] Second, outside of his concurrence, on two occasions, Justice Alito has however expressed concern against broad restrictions on student speech. First, in oral arguments for *Morse*, Deputy Solicitor General Edwin Kneedler argued on behalf of the United States that censorship may be constitutionally permissible over students

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[310] *Id.* at 789.

[311] *Id.* at 821 (J. Thomas dissented separately and writing that "[t]he practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.").

[312] *Id.*

[313] *Id.* at 857.

[314] *Id.* at 848.

[315] Morse v. Frederick, 551 U.S. 393, 422 (2007) (quoting Justice Steven's *Morse* dissent).

[316] *Id.*

simply because a "school does not have to tolerate a message that is inconsistent with its basic educational [mission]."[317] Justice Alito cut Kneedler off, stating

> [w]ell, that's a very -- I find that a very, a very disturbing argument, because schools [can] and they [have] defined their educational mission so broadly that they can suppress all sorts of political speech and speech expressing fundamental values of the students, under the banner of, of -- of getting rid of speech that's inconsistent with educational missions.[318]

Subsequent to *Morse*, Justice Alito dissented alone from a denial of certiorari on a question of student's rights to free speech, for a Ninth Circuit case in which the Court of Appeals affirmed summary judgment in favor of the school after it prevented a high school senior and her fellow wind-ensemble members from performing Franz Biebl's "Ave Maria" at graduation, due to its religious connotations.[319]

In his dissent from a denial for writ of certiorari, Alito stated that "when a public school purports to allow students to express themselves, it must respect the students' free speech rights. School administrators may not behave like puppeteers who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings." [320] Alito cautioned that the lower court's decision, as left to stand, "will have important implications" because "[e]ven if the decision is read narrowly, it will restrict what is purportedly personal student expression at public school graduation ceremonies."[321] When concurring in *Morse*, Alito stated pointedly that "the Court correctly reaffirm[ed] the recognition in *Tinker* . . . of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[322]

Thus, of the *Morse* holdovers, Alito's participation in a decision on student speech may turn on whether the speech is political or religious, as he may uphold student's rights in that context. In contrast, Alito may sympathize with educators if the student speaker is advocating for illegal conduct or acts to such an extent that demonstrates "school officials must have greater authority to intervene before speech leads to violence."[323] However, if Chief Justice Roberts's goal is to bring clarity to the lineage, adding religion into the mix would likely do anything but. Nevertheless, Alito's analysis dictated that when "a public school purports to allow students to express

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[317] Oral Argument No. 06-278, Alderson Reporting Company, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf 20 (2001).

[318] *Morse*, 551 U.S. at 422 (quoting Justice Steven's *Morse* dissent).

[319] Nurre v. Whitehead, 559 U.S. 1025, 1026–28 (2010) (That majority consisted of Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor).

[320] *Id.* at 1028.

[321] Nurre v. Whitehead, 559 U.S. 1025, 1030 (2010).

[322] *Morse*, 551 U.S. at 422.

[323] *Id.* at 425.

themselves it must respect the students' free speech rights."[324] Therefore, if schools did not purport to allow expression, but moved to ban all disruptive speech, Alito could potentially support a majority on those grounds.

e. Justice Ginsburg, stare decisis, and Tinker.

Justice Ginsburg joined the late-Justice Stevens's dissent, along with Justice David Souter.[325] Among them, she is the only Justice remaining. Stevens's dissent stated, it was "perfectly clear that 'promoting illegal drug use,' comes nowhere close to proscribable 'incitement to imminent lawless action.'"[326] Therefore, for the *Morse* dissenters, it mattered not that the banner involved illegal drugs. Nor did it matter that it was a school event. Rather, the dissenters looked beyond the school environment to broader grounds of *Brandenburg v. Ohio*, a case which affirmed "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe [speech] . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[327] Curiously, in crafting his dissent, Stevens did not acknowledge *Kuhlmeier*, a majority in which he joined Chief Justice Rehnquist, Justices Byron White, O'Connor, and Scalia to "conclude that the standard articulated in *Tinke*r for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[328] Rather, the dissenters shifted their precedential focus elsewhere.

The *Morse* dissenters noted that "[h]owever necessary it may be to modify [*Brandenburg*'s] principles in the school setting, *Tinker* affirmed their continuing vitality."[329] The dissenters conceded that "it is possible that our rigid imminence requirement [under *Brandenburg*] ought to be relaxed at schools," as under *Fraser*, "[t]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[330] Nevertheless, Ginsburg joined a hardline stance of *stare decisis* regarding *Tinker*. This is not to suggest, however, that Justice Ginsburg has withheld any and all hostility to student rights, as she concurred in a 1995 judgment that upheld random drug testing for student athletes

[324] *Nurre* 559 U.S. at 1028.

[325] *Morse*, 551 U.S. at 433.

[326] *Id.* at 438 (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam)) (internal citations omitted).

[327] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[328] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

[329] *Morse*, 551 U.S. at 436.

[330] *Id.* at 439.

due in part to their "decreased expectation of privacy."[331] That decision was, however, early in Ginsburg's tenure on the Court, as she had taken the seat in the year before.[332] Ginsburg concurred in that case, noting that she believed the constitutional question was still reserved as to whether the student body at large may be subjected to suspicionless drug testing.[333] Still, on student speech rights, Ginsburg's support is wisely to be expected.

In a 2007 study of ideological shift among judges Northwestern Law Professor Lee Epstein, Washington University Law Professor Andrew D. Martin, Harvard Law Professor Kevin M. Quinn, and Professor of Political Science Jeffery A. Segal found that "Justice Ginsburg reaches liberal decisions in about 60% of the Court's cases - almost exactly the [expected] percentage . . . from a Justice with her moderately left-of-center political outlook."[334] It therefore seems unlikely that Ginsburg would support limiting *Tinker* any further than *Morse* has already, due to Ginsburg's *Brandenburg-Tinker* rationale to prohibit censorship of student speech with a non-imminent danger, and *stare decisis* for *Tinker*.

f. From John Paul Stevens to Justice Kagan, a potential swing vote and ideological shift

The precedent by which Justice Elena Kagan's potential opinion may be analyzed is limited. Constitutional scholar Dean Erwin Chemerinsky noted that this is in part because "Justice Kagan ha[d] never been on the bench" prior to her appointment, and consequently, "there exists no body of prior judicial opinions to scrutinize, unlike when Justice Sotomayor was confirmed."[335] Chemerinsky further noted that "[a]s a law professor, Elena Kagan wrote only five major articles, and none of them were particularly controversial."[336]

Prior to her tenure on the Court, Justice Elena Kagan, wrote about free speech while she was a University of Chicago Professor on leave serving as Associate Counsel to President William J. Clinton.[337] Then Professor Kagan wrote that

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[331] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995) (Nevertheless, the majority that consisted of "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 665).

[332] RUTH BADER GINSBURG, ET AL., MY OWN WORDS 84 (2016).

[333] *Acton*, 515 U.S. at 666.

[334] Lee Epstein, Andrew D. Martin, Kevin M. Quinn, & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, And How Important?*, 101 NW. U.L. REV. 1483, 1492 (2007).

[335] Erwin Chemerinsky, Joan Biskupic, Martin A. Schwartz, & Leon Friedman, *Twenty-Second Annual Supreme Court Overview: October 2019 Term: The Supreme Court 2009 Term Overview and 2010 Term Preview*, 27 TOURO L. REV. 33, 37 (2011).

[336] *Id.* at 37–38.

[337] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413 (1996).

> [i]n recent decades, the Court almost never has upheld a regulation of political speech. Perhaps more tellingly, almost all of the landmarks of First Amendment law--the classic cases that set the tone and provide the focus for analysis of free speech questions--arise out of governmental attempts to restrict speech of an obviously political nature.[338]

Kagan furthered that "[i]f the goal of a free speech system is to provide individuals . . . with the range of opinion and information that will enable them to arrive at truth and make wise decisions, then a tiered system of speech, of the kind the Court has created, seems appropriate."[339] She acknowledged a value system of speech, stating that "[s]ome speech does not enrich (may even impoverish) the sphere of public discourse. Other speech contributes to reasoned deliberation on matters of public import. Under the audience-based approach, it would be perverse to treat these disparate forms of speech identically. Thus emerges a multitiered system."[340] Kagan envisioned analysis as to "whether the harm the government is seeking to prevent arises from the expressive aspect of the communication--or, stated in another way, whether the harm results from a listener's hearing the content of speech and reacting to it."[341] Kagan wrote that the purpose of her Article was to shift "focus from consequences to sources" of consequences, as has been the Court's unspoken goal to uncover "improper governmental motives."[342]

Upon her nomination, Dean Chemerinsky cautioned that with Justice Kagan, "[t]he disadvantage that she poses for President Obama is that neither he nor anyone else knows exactly where she falls on the ideological spectrum. Everyone expects that she will be somewhat left of center."[343] Chemerinsky acknowledged that "[m]any think Justice Kagan will be considerably more moderate than Justice [John Paul] Stevens," whom she succeeded on the Court.[344]

Roughly a decade has passed since Chemerinsky's disclaimer on President Obama's appointment. Without a student free speech case having come before the Court since *Morse* or similar precedent by which to gauge Kagan's ideologies, the possibility remains for a central shift from Stevens's dissent. Still, constitutional theory provides that there exists a general element of ideological shift towards center among Supreme Court justices.[345] Such was the case with Justices Stevens and O'Connor,[346] who shifted left, after having been appointed by Republican

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[338] *Id.* at 474.

[339] *Id.* at 476.

[340] *Id.*

[341] *Id.* at 486.

[342] *Id.* at 414.

[343] Chemerinsky et al., *supra* note 335, at 37–38.

[344] *Id.* at 37–38.

[345] *Epstein et al.*, *supra* note 334, at 1508.

[346] *Id.* at 1501, 1508.

administrations.[347] Similarly, Justice Byron White shifted right after his appointment by President John F. Kennedy.[348]

In 2016, Sociology Professor Michael A. McCall and San Diego State University Professor of Political Science Madhavi M. McCall noted that "Justices Sotomayor and Kagan seem at home in the left wing of the Court, though their more limited service to date cautions that this is a tentative assessment."[349] Nevertheless, in First Amendment jurisprudence, Justice Kagan dissented with Justices Breyer, Ginsburg, and Sotomayor, asserting that "[t]he First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate."[350] Participation in that dissent is indeed consistent with the McCalls' research on the Court's left wing.[351] However, the case from which Kagan dissented centered on campaign finance laws and political action committees.[352] Whether Kagan's sentiments extend similarly to student speech has yet to be seen. Thus, given Dean Chemerinsky's concerns and the general shift that exists across a Justice's career, the possibility exists for Kagan to be a swing-vote towards center in a narrow Roberts Court decision to come. *Morse* is the last landmark on student free speech rights. The late Justice Stevens dissented from that case, chiding that the majority "fashion[ed] a test that trivializes the two cardinal principles upon which *Tinker* rests" in a "ham-handed" decision.[353] Kagan's role in such a decision depends upon if she bears the same ideologies of Stevens, which on this issue has yet to be seen.

g. Justice Sotomayor's unique student speech experiences on the U.S. Court of Appeals for the Second Circuit

Contrary to what Chemerinsky noted about Justice Kagan,[354] Justice Sonia Sotomayor had a body of precedent that could indicate where her ideology may fall on certain subjects. With regard to student speech, then-Judge Sotomayor demonstrated her thoughts on this subject.

In a 2008 Second Circuit Court of Appeals case, *Doninger v. Niehoff*, Judge Sotomayor and the majority reviewed a case in which a student had been barred from running as High School Senior Class Secretary "after she posted a vulgar and

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[347] Ketter, *supra* note 7; *see also*, Epstein et al., *supra* note 334 (President Nixon appointed Justice Stevens as a Judge to the United States Court of Appeals for the Seventh Circuit, prior to President Gerald Ford appointing him to the U.S. Supreme Court, similarly O'Connor was appointed to the Supreme Court by President Ronald Reagan).

[348] Epstein et al., *supra* note 334, at 1514, 1520.

[349] Michael A. McCall & Madhave M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115, 126 (2016).

[350] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755, 757 (2011).

[351] McCall & McCall, *supra* note 349, at 126.

[352] *Bennett*, 564 U.S. at 729.

[353] *Morse v. Frederick*, 551 U.S. 393, 437, 445 (2007) (Stevens, J. dissenting).

[354] Chemerinsky et al., *supra* note 335, at 37.

misleading message about the supposed cancellation of an upcoming school event on an independently operated, publicly accessible [blog]."[355] In that controversial blog post, the student wrote that a school event was "cancelled due to douchebags in central office," which "is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, [they] got pissed off and decided to just cancel the whole thing all together. anddd [sic] so basically we aren't going to have it at all."[356] the Second Circuit held that the student failed to sufficiently demonstrate a successful First Amendment claim, nevertheless deciding that the student's social media post generated "a foreseeable risk of substantial disruption to the work and discipline of the school."[357]

Post-*Morse*, the Second Circuit noted that "[t]he Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, *does not occur on school grounds or at a school-sponsored event.*"[358] However, it ruled that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[359] The Circuit stated that it was "acutely attentive in this context to the need to draw a clear line between student activity that 'affects matter of legitimate concern to the school community,' and activity that does not.[360] Though Sotomayor's experience at the appellate level both predates and postdates *Morse*.

Prior to *Morse*, Sotomayor sat on another Second Circuit panel addressing student speech rights in *Guiles v. Marineau*.[361] In *Guiles*, the Circuit reviewed an issue of student speech in which a seventh-grader in 2004 wore an anti-war t-shirt that criticized President George W. Bush.[362] The shirt, featured a photo of the President and stated that Bush was the "Chicken-Hawk-in-Chief," as well as a "crook . . . AWOL draft dodger, lying drunk driver," on a "World Domination Tour" and accused him of cocaine and marijuana abuse.[363] In that case, the Court noted that "[a]lthough some students expressed disapproval of [the] shirt, this did not lead to any major disruption or fights. Some students complained to teachers about the shirt but the teachers responded that the shirt was permitted."[364] The Circuit noted the lineage of student

[355] Doninger v. Niehoff, 527 F.3d 41, 43 (2d Cir. 2008).

[356] *Id.* at 45.

[357] *Id.* at 53.

[358] *Id.* at 48.

[359] *Id.* at 48 (citing Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007), cert. denied, 128 S. Ct. 1741 (2008)).

[360] *Id.*

[361] *See generally*, Guiles v. Marineau, 349 F. Supp. 2d 871 (D. Vt. 2004).

[362] *Guiles*, 349 F. Supp. at 873–74.

[363] *Id.*

[364] *Id.* at 874.

speech cases and the exceptions thereto, providing that "[u]nder *Fraser*, administrators may ensure that the form or manner of speech is appropriate for the school setting even though they may not regulate the political content of the speech unless they satisfy *Tinker*'s disruption test."[365]

Prior to the Second Circuit's *Doninger* decision, and more importantly, the Supreme Court's *Morse* decision, the Circuit noted that "the most recent Supreme Court decision addressing school speech is *Hazelwood*.[366] It interpreted *Hazelwood* as establishing the proposition that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[367] In a larger sense, however, the Circuit noted what Roberts acknowledged later in *Morse*, that is, the scattered function that flowed from *Tinker* onward.[368] It stated, "[o]verall, these cases show that *different standards apply in the school setting depending on the content and the context of the speech*."[369] Thus, prior to *Morse*, Sotomayor and the Second Circuit acknowledged that *Guiles* was affected greatly by the message itself or the circumstances in which it is communicated.[370] It explained the complicated constitutional terrain that lower courts must navigate, stating, "[i]n general, if educators censor student speech based on its political content then, under *Tinker*, they must have specific grounds for suspecting that the speech will disrupt the educational environment," but consequently, "[i]f the speech occurs in a school-sponsored forum . . . then *Hazelwood* applies and the censorship only needs to be reasonably related to educational goals."[371] However, the Circuit noted that ultimately, "under *Fraser*, educators may censor speech" unless "the censorship is unrelated to the political message of the speech and is intended only to ensure that the speech is not lewd or otherwise offensive."[372] The premise in *Guiles* mirrors the logic that Roberts applied in his question at oral argument in *Morse*.[373]

Thus, uniquely among her fellow members, Sotomayor, at the appellate level, navigated, acknowledged, and felt the lack of resolution that Roberts sensed in *Morse*. While her reputation on the Court is liberal leaning, Sotomayor's judicial reasoning on student speech may be influenced on her experience. Therefore, Sotomayor may

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[365] *Id.* at 879.

[366] *Id.*

[367] *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] Oral Argument No. 06-278, Alderson Reporting Company, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf 48 (2007) (case italicization added).

vote to restrict *Tinker* in favor of establishing precedent that does not require appellate courts to conduct factual undertakings reviewing content and context.

h. Justice Gorsuch, small swinging decisions and context driven.

According to University of Washington School of Law Professor Ronald Collins, "it is readily apparent that" Neil Gorsuch's law career bears a "long and informed commitment to the First Amendment"[374] For instance, Justice Gorsuch's prior experience on the Tenth Circuit brought the issues of free speech and students together, in *Mink v. Knox* albeit in a University context. In that case, a University of Northern Colorado student, shared a fictional character of his creation on a website that he maintained. The student based that character on the likeness of a professor at the school, using altered photos of the professor with a "Hitler-like mustache," and the character espoused views "diametrically opposed" to the actual professor.[375] The professor pursued police action under Colorado's criminal libel statute, and the defendant's appeal was reviewed by the Tenth Circuit panel upon which Gorsuch sat.

Judge Gorsuch concurred with the majority that the act was not libelous.[376] He wrote, "I agree with my colleagues that the answer to that question must be 'no.' I reach this conclusion for a simple and straightforward reason: this court has already said so."[377] Gorsuch, affirmed protections for parody, but noted a caveat that "[t]he First Amendment does not 'absolutely protect all verbal means of intentionally inflicting emotional distress, all forms of racial, sexual, and religious insults, so long as the offending communications do not contain false factual statements."[378] He closed with an instruction of judicial minimalism by stating, "[r]espectfully, I would avoid [the] thickets" of what speech contexts garner protection, "[w]hoever has the better path through them, it's better yet that we sidestep them altogether" and "decide the case currently before us . . . . Beyond that, I would not venture."[379] Finally, Gorsuch excerpted part of Chief Justice Roberts's written opinion from when Roberts sat on the U.S Court of Appeals for the District of Columbia Circuit, in which he wrote that "the cardinal principle of judicial restraint -- if it is not necessary to decide more, it is necessary not to decide more -- counsels us to go no further."[380] It is therefore

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[374] Mark Grabowski, *Give Gorsuch a 21st Century Litmus Test*, 35 YALE J. ON REG. BULLETIN 1, 6 (citing Ronald Collins, *Judge Neil Gorsuch–the Scholarly First Amendment Jurist*, FIRST AMENDMENT NEWS (Feb. 7, 2017), http://mtpress.mtsu.edu/firstamendment/judge-neil-gorsuch-the-scholarly-first-amendment-jurist/).

[375] Mink v. Knox, 613 F.3d 995, 998–99 (10th Cir. 2010).

[376] *Id.* at 1012 (Gorsuch, J., concurring).

[377] *Id.*

[378] *Id.* at 1012–13 (Gorsuch, J., concurring, citing Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 602 (1990)) (internal brackets omitted).

[379] Mink v. Knox, 613 F.3d 995, 1013 (10th Cir. 2010) (Gorsuch, J., concurring).

[380] PDK Labs. Inc. v. United States DEA, 362 F.3d 786, 799 (D.C. Cir. 2004); *see also*, *Mink*, 613 F.3d at 1013 (Gorsuch J. concurring).

conceivable that Justice Gorsuch could support a majority opinion in which Chief Justice Roberts elects to craft an opinion to build on *Morse* that is limited in scope, proceeding minimally to restrict the precedent and bring clarity to the doctrine.

However, Gorsuch's potential sympathy to students' desires may be subjected to his concepts of classroom order and weariness of technology. For instance, as an adjunct law professor, Gorsuch prohibited his legal ethics students from the use of computers in his classroom.[381] Ultimately, some believe that Gorsuch's role on the Court could impact the manner in which it addresses cases that involve technology.[382] Therefore, student speech cases will depend on the context that comes before the Court, Gorsuch's reputation for championing First Amendment rights, could be swayed by factual circumstances of classroom disruption and cyberbullying, leading him to favor incremental restriction on student speech.

i. Justice Kavanaugh, a swing-voter in other fields, mentored by Justice Kennedy and Kenneth Starr suggests likely not for student speech.

Justice Kavanaugh replaced Justice Anthony Kennedy, the very Justice for whom he had previously clerked for with Justice Gorsuch.[383] Justice Kennedy was known as the Court's "pivotal swing vote."[384] Nevertheless, after Kennedy stepped down in June of 2018, President Donald Trump filled Kennedy's vacancy with Justice Brett Kavanaugh.[385] Many believe that the Chief Justice will take Kennedy's mantle as swing justice.[386] While serving together, both "Chief Justice Roberts and Justice Kennedy . . . vied for the distinction of casting the fewest dissenting votes."[387] Reportedly, Chief Justice Roberts "actually won that race in the 2005, 2007, 2009, and

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[381] Grabowski, *supra* note 374, at 5.

[382] *Id.* at 7–8 (citing *Ars Technica* tech policy reporter Joe Silver).

[383] Jessica Gresko, *Decades of 'Fancy meeting you here!' for Gorsuch, Kavanaugh*, AMERICAN PRESS (Aug. 24, 2018), https://apnews.com/4c9280d2fa594a578c98f78222b68900/Decades-of-'Fancy-meeting-you-here!'-for-Gorsuch,-Kavanaugh.

[384] Katie Reilly, *How Anthony Kennedy's Swing Vote Made Him 'The Decider'*, TIME (June 27, 2018), time.com/5323863/justice-anthony-kennedy-retirement-time-cover.

[385] Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html.

[386] David A. Kaplan, *John Roberts's Chance for Greatness*, THE ATLANTIC (Oct. 10, 2018), https://www.theatlantic.com/ideas/archive/2018/10/roberts-court/572482; Tom McCarthy, *Is John Roberts Poised to Become the Supreme Court's Key Swing Vote?*, THE GUARDIAN (July 15, 2018), https://www.theguardian.com/law/2018/jul/15/john-roberts-supreme-court-swing-vote-anthony-kennedy; Jonathan Nash, *Chief Justice Roberts Will Be the New 'Swing' Vote*, THE HILL (June 30, 2018), https://thehill.com/opinion/judiciary/394940-chief-justice-roberts-will-be-the-new-swing-vote.

[387] Linda Greenhouse, *Chief Justice Roberts in His Own Voice the Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 94 (2013).

2011 Terms."[388] Nevertheless, some outlets have suggested that Gorsuch and Kavanaugh have the potential to function as swing justices.[389] Parenthetically, in late 2018, Roberts and Kavanaugh voted in the majority to deny the Court's review of abortion rights, a denial of certiorari from which the other conservative-minded, Alito, Gorsuch, and Thomas, dissented.[390] Therefore, Kavanaugh, having served for Kennedy, seems to have the greatest promise of generally fulfilling the role that his mentor served on the Court in both function and form.[391] In terms of student speech, however, it may be best to look at what to date may have shaped Kavanaugh's thinking on the subject.

In analyzing Justice Kavanaugh's potential opinion on student speech from the lens of Justice Kennedy, who concurred in the majority of *Morse*,[392] this suggests Kavanaugh could follow similar form and maintain comfort within an incremental move that follows *Morse*'s lead away from *Tinker*. It should be noted, however, that Kennedy joined Alito's concurrence.[393] Thus, in reference to Alito's aforementioned potential for a swing vote, Kavanaugh could be anticipated to join.

Justice Kavanaugh's potential for decision may be influenced by another one of his former mentors, Kenneth Starr.[394] After clerking for Justice Kennedy, Kavanaugh worked under Starr in the Office of Independent Counsel.[395] Starr reportedly looked to Kavanaugh as part of the Office's "brain trust, the lawyers who puzzled over the many legal and constitutional questions that came up."[396] Kavanaugh, spoke very highly of Starr in 1999 and said "maybe I'm an optimist. But one day, I, for myself, hope to be able to call him Mr. Justice Starr."[397] Starr had been considered previously

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[388] *Id.*

[389] Victor Reklaitis, *Gorsuch, Kavanaugh emerging as Supreme Court swing votes | 2020 election to spark record ad spending*, MARKETWATCH (July 2, 2019), https://www.marketwatch.com/story/gorsuch-kavanaugh-emerging-as-supreme-court-swing-votes-2020-election-to-spark-record-ad-spending-2019-07-02.

[390] Alica Miranda Ollstein, *Kavanaugh, Roberts Side With Liberal Judges on Planned Parenthood Case*, POLITICO (Dec. 10, 2018), https://www.politico.com/story/2018/12/10/supreme-court-planned-parenthood-defunding-case-845056.

[391] Ketter, *supra* note 160.

[392] *See generally*, Morse v. Frederick, 551 U.S. 393 (2007).

[393] Morse v. Frederick, 551 U.S. 393, 422–25 (2007) (Alito, J., concurring).

[394] Tamara Keith, *Brett Kavanaugh's Role In the Starr Investigation And How It Shaped Him*, NPR (Aug. 17, 2018), https://www.npr.org/2018/08/17/639670928/brett-kavanaughs-role-in-the-starr-investigation-and-how-it-shaped-him.

[395] David Hudson Jr., *Brett Kavanaugh, The First Amendment Encyclopedia* (Nov. 2018), https://www.mtsu.edu/first-amendment/article/1603/brett-kavanaugh.

[396] Tamara Keith, *Brett Kavanaugh's Role In the Starr Investigation And How It Shaped Him*, NPR (Aug. 17, 2018), https://www.npr.org/2018/08/17/639670928/brett-kavanaughs-role-in-the-starr-investigation-and-how-it-shaped-him.

[397] *Id.*

for a position on the Supreme Court seat under President George H. W. Bush.[398] Nevertheless, while Kavanaugh sat on the D.C. Circuit, Starr represented the school principal in *Morse*.[399]

In a D.C. Circuit Court of Appeals case, *Mahoney v. Doe*, Kavanaugh concurred with frank discourse as to where the First Amendment ends when it comes to protests.[400] Appellants, the Christian Defense Coalition, along with Rev. Patrick Mahoney, Cradles of Love, Inc. and others claimed that a D.C. statute prohibiting public and private property defacement "violate[d] their First Amendment right to chalk the 1600 block of Pennsylvania Avenue (literally, the street in front of the White House)."[401] In 2008, the Appellants notified police and the Department of Interior of their intent to protest via a sidewalk chalk demonstration outside the White House, in protest of President Obama's position towards abortion and in light of the anniversary for *Roe v. Wade*.[402] The police attempted to help facilitate the appellants' protest but informed them of the statute and ultimately prevented the sidewalk chalking demonstration.[403] The Circuit acknowledged that the street outside the White House constitutes a public forum.[404] However, it found the D.C. statute was content-neutral, prohibiting "certain conduct (i.e. disfiguring, cutting, chipping, defacing or defiling), including certain expressive conduct (i.e. writing, marking, drawing, or painting)," but "without reference to the message the speaker wishes to convey" and the content itself.[405] It found also that the government's interest in maintaining physical esthetics was substantial.[406] Thus, no matter how temporary chalking seemed, the Circuit ruled

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[398] Andrew Rosenthal, *MARSHALL RETIRES FROM HIGH COURT; BLOW TO LIBERALS*, N.Y. TIMES (June 28, 1991), https://www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html; *see also*, Nicholas Wu, Jeanine Santucci, & Savannah Behrman, *Who is Ken Starr? Trump once called his impeachment lawyer a 'lunatic' and 'disaster*, USA TODAY (Jan. 18, 2020), https://www.usatoday.com/story/news/politics/2020/01/18/impeachment-who-ken-starr-trump-called-clinton-prosecutor-disaster/4501073002/.

[399] Associated Press, *Supreme Court Rules Against Student in 'Bong Hits 4 Jesus' Case*, FOX NEWS (June 25, 2007), https://www.foxnews.com/story/supreme-court-rules-against-student-in-bong-hits-4-jesus-case. (Kenneth Starr served on the United States Court of Appeals for the District of Columbia Circuit (Reagan), prior to serving as Solicitor General under President George H. Bush and independent counsel during the Clinton administration. (*Starr, Kenneth Winston*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/starr-kenneth-winston (last visited Jan. 27, 2020)).

[400] Mahoney v. Doe, 642 F.3d 1112, 1114 (D.C. Cir. 2011).

[401] *Id.*

[402] *Id.* at 294–95.

[403] *Id.*

[404] *Id.* at 296.

[405] *Id.* at 297.

[406] *Id.* at 297–98.

that this conduct was "defacement of public property" and its prohibition in *Mahoney* was constitutional.[407]

Then-Judge Kavanaugh concurred in the *Mahoney* majority and echoed the judicial sentiment of simplifying speech doctrine.[408] He wrote,

> I add these few words simply because *I do not want the fog of First Amendment doctrine to make this case seem harder than it is.* No one has a First Amendment right to deface government property. No one has a First Amendment right, for example, to spray-paint the Washington Monument or smash the windows of a police car.[409]

Kavanaugh quoted Justice William H. Rehnquist:

> One who burns down the factory of a company whose products he dislikes can expect his First Amendment defense to a consequent arson prosecution to be given short shrift by the courts. . . . The same fate would doubtless await the First Amendment claim of one prosecuted for destruction of government property after he defaced a speed limit sign in order to protest the stated speed limit.[410]

Judge Kavanaugh concluded his concurrence, "[w]hen, as here, the Government applies a restriction on defacement in a content-neutral and viewpoint-neutral fashion, there can be no serious First Amendment objection."[411] Therefore, Justice Kavanaugh would conceivably join in a Roberts Court majority opinion to uphold censorship of student speech that is both content-neutral and viewpoint-neutral. If the next case after *Morse* is structured to allow a school to censor *any* speech disrupting the class, regardless of its content or viewpoint, Kavanaugh could conceivably join accordingly.

Ultimately, looking to Justice Kavanaugh's molding influences and his straightforward jurisprudence, Kavanaugh may be presumed to vote with the Roberts Court in continuing the mantle of *Morse*.

5. Possibility for Bench Clearing and Roberts's Potential Strategy Post-*Morse*

There is a large caveat to the preceding analysis, as the 2020 Presidential election results will affect who is appointed to the Court in the event of judicial retirement.[412] The oldest aged Justices are Ginsburg at eighty-six, Breyer at eighty, and Thomas at

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[407] *Id.* at 298 (Mahoney argued additionally that his First Amendment rights were infringed pursuant to the Religious Freedom Restoration Act, an argument with which the Circuit also disagreed).

[408] *Id.* at 301 (Kavanaugh, J., concurring) (emphasis added in italics).

[409] *Id.* (Kavanaugh, J., concurring) (emphasis added in italics).

[410] *Id.* at 301 (Kavanaugh, J., concurring and quoting *Smith v. Goguen*, 415 U.S. 566, 594 (1974) (Rehnquist, J., dissenting on separate point)).

[411] *Id.* at 301.

[412] Ketter, *supra* note 160.

seventy.[413] Among those three, Ginsburg and Thomas have exclaimed a strong desire to remain on the Court, but Washington insiders have suggested Executive plans are in order should this occur.[414]

In any case, on its whole, Roberts could craft a decision that limits all disruptive speech in favor of classroom order, regardless of speaker or message. Joining Chief Justice Roberts might be Justices Thomas, Alito, Kavanaugh, and Gorsuch. That would be a sufficient majority, though any Justice other than Thomas cannot be truly expected to rule for further limitation away from *Tinker*. Justice Ginsburg would be expected to support the speaker similarly to *Morse*. Breyer's desire for factual context and minimalist judicial decision-making suggests that he might wish to leave *Tinker-More* as is. Justice Sotomayor seems most situated among the Democrat-appointees to join a majority opinion that would bring clarity to the lower courts, provided that it does not subject her principles. Ultimately, Justice Kagan is the least predictable. If a case for the speech rights of schoolchildren shall come before the Court, these are factors that Chief Justice Roberts will weigh if he wishes to bring clarity to the doctrine and ease of application to the lower courts.

C. The Entertainer

In 2018, comedian Roseanne Barr returned to primetime television with her title series "Roseanne," which first premiered in 1988.[415] A well-received comeback, Roseanne's revival reportedly was "the highest-rated comedy show on any network in four years," having 18.2 million viewers.[416] However, after two months back on the air, ABC canceled the hit show despite its quick success after Barr wrote an offensive tweet that reportedly referred to Valerie Jarrett (President Obama's former Senior Advisor) and identified her as "vj."[417] Barr tweeted, "Muslim brotherhood & planet of the apes had a baby=vj."[418] Barr then referred to Chelsea Clinton as "Chelsea Soros Clinton."[419] Barr's use of "Soros" referred to billionaire George Soros, whom the *New*

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[413] Dvin Dwyer, *Justice Clarence Thomas: 'I'm not retiring'*, ABC NEWS (Apr. 5, 2019), https://abcnews.go.com/Politics/justice-clarence-thomas-im-retiring/story?id=62204804.

[414] *Id.*; *see also*, Tessa Berenson & Alana Abramson, *Ruth Bader Ginsburg Has No Plans to Retire. But Washington Is Preparing for the Battle Over Her Seat*, TIME (Aug. 28, 2019), https://time.com/5663752/ruth-bader-ginsburg-supreme-court-white-house-nomination/.

[415] Jennifer Harper, *'Roseanne' Premiere Garners 18 Million Viewers for ABC, Highest-Rated Comedy in Four Years*, WASH. POST (Mar. 28, 2018), https://www.washingtontimes.com/news/2018/mar/28/roseanne-premiere-garners-18-million-viewers-for-a/.

[416] *Id.*

[417] Frank Pallotta & Brian Stelter, *ABC Cancels 'Roseanne' After Star's Racist Twitter Rant*, CNN (May 29, 2018), money.cnn.com/2018/05/29/media/roseanne-twitter-chelsea-clinton/index.html.

[418] *Id.*

[419] *Id.*

York Times billed "a major Democratic Party Patron."[420]After Clinton clarified that she was not married or related to a member of the Soros family, Barr apologized to Clinton and nevertheless tweeted: "By the way, George Soros is a nazi who turned in his fellow Jews 2 be murdered in German concentration camps & stole their wealth-were you aware of that? But, we all make mistakes, right Chelsea?"[421]

A local *Fox News* affiliate in Arizona reported that "[s]ome have questioned Barr's firing, saying she is protected by the First Amendment to say whatever she wants."[422] Nevertheless, the *Fox* affiliate clarified to its readership that "Roseanne's relationship with ABC is really dictated by the contract between the two of them."[423] The *National Review* astutely ran an article clarifying that Barr's termination "is in no way a free-speech or First Amendment issue," as "ABC simply exercised its own rights as a private company to decide [with] whom it does and does not want to associate."[424] Therefore, the content of an employment contract will ultimately govern both the employee's rights to speech and the ramifications of violations by either party.[425]

Barr faced immediate consequences from both the media and the public for her online statements.[426] Following the backlash, Barr tweeted, "let me apologize & make amends. I begged [Disney-ABC] not to cancel the show."[427] Fellow comedian, and co-host of "The View," Whoopi Goldberg, who reviewed Barr's behavior following the incident, reportedly expressed suspicion that Barr's comments were a thinly-veiled publicity stunt.[428] Nonetheless, stunt or not, this is not the first time a comedian received criticism, "for as long as there has been comedy, there has been offensive

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[420] Nicholas Confessore & Matthew Rosenberg, *Facebook Fallout Ruptures Democrats' Longtime Alliance With Silicon Valley*, N.Y. TIMES (Nov. 17, 2018), https://www.nytimes.com/2018/11/17/technology/facebook-democrats-congress.html.

[421] Pallotta & Stelter, *supra* note 417.

[422] Miller, *supra* note 4.

[423] *Id.*

[424] Katherine Timpf, *Roseanne's Firing Is Not a Free-Speech Issue*, NATIONAL REVIEW (May 29, 2018), https://www.nationalreview.com/2018/05/roseanne-barr-firing-justified-not-free-speech-issue/amp/.

[425] Rosalind Bentley, *Were Roseanne Barr's Free Speech Rights Violated When Disney Fired Her?*, ATLANTA JOURNAL-CONSTITUTION (May 31, 2018), https://www.ajc.com/entertainment/celebrity-news/were-roseanne-barr-free-speech-rights-violated-when-disney-fired-her/SoLNjBLoantzMvhU6QQoFJ/.

[426] Chris Morris, *ABC's 'Roseanne' Spinoff —Without Roseanne—Is Already Facing Backlash*, FORTUNE (June 22, 2018), https://fortune.com/2018/06/22/roseanne-spinoff-abc-the-conners-backlash/.

[427] Aric Jenkins, *Roseanne Barr Says She 'Begged' an ABC Exec Not to Cancel Her Show*, FORTUNE (June 1, 2018), https://fortune.com/2018/06/01/roseanne-barr-twitter/.

[428] Tanasia Kenney, *Whoopi Goldberg Questions if Roseanne's Latest Outburst Is Just a Publicity Stunt, Sunny Hostin Calls for Sympathy*, ATLANTA BLACK STAR (July 22, 2018), https://atlantablackstar.com/2018/07/22/whoopi-goldberg-questions-if-roseannes-latest-outburst-is-just-a-publicity-stunt-sunny-hostin-calls-for-sympathy/.

comedy."[429] MSN reported that comedian Ricky Gervais "is determined to defend free speech."[430] Gervais said, "I know that I have an immense amount of privilege which is why I should defend freedom of speech . . . Censorship is a slippery slope. It's very odd now . . . It's being perpetrated and supported by people who think they're doing the right thing." [431] However, Ricky Gervais is not defending free speech, per se. Not in a constitutional sense. Rather, he is on a crusade for lesser prudence among those who will backlash against controversial statements.[432]

1. Comedians and the Courts

In a general sense of Barr's First Amendment rights, a comedian's "[ability] to speak authentically without fear of arrest" is asserted to be the product of comedian Lenny Bruce.[433] Bruce's live stand-up comedy changed the legal ramifications for American comedians, but not before at least eight arrests for obscenity and six trials across four cities.[434] Similarly, George Carlin's standup comedy routine, the "Seven Words You Cannot Say," not only landed him in jail for violating obscenity laws, it made its way to the U.S. Supreme Court docket, in the case of *Federal Communications Commission v. Pacifica Foundation*.[435] Justice John Paul Stevens wrote the opinion for *Pacifica*, in which the Court reviewed the F.C.C.'s determination of indecency, and held that the F.C.C.'s action was not "forbidden 'censorship,'" under the 1934 Communications Act. [436] Furthermore, the Court upheld the finding regarding Carlin's routine that there was "no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast."[437] Consequently, the Court found that the F.C.C.'s order did not violate the broadcaster's First Amendment rights.[438] Therefore, in the public arena outside of private contracts, an entertainer is subject to the restrictive nature of broadcasting, but in the private arena, rights are indeed established by contract.

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[429] Brian Logan, *The New Offenders of Standup Comedy*, THE GUARDIAN (July 26, 2009), https://www.theguardian.com/stage/2009/jul/27/comedy-standup-new-offenders.

[430] Bang Showbiz, *Ricky Gervais Is Determined to Defend Free Speech*, MSN (Mar. 8, 2019), https://www.msn.com/en-us/entertainment/celebrity/ricky-gervais-is-determined-to-defend-free-speech/ar-BBUwJS1.

[431] *Id.*

[432] *Id.*

[433] Ronald K.L. Collins, *Lenny Bruce & the First Amendment: Remarks at Ohio Northern University Law School*, 30 OHIO N.U. L. REV. 15, 28 (2004).

[434] *Id.*

[435] 438 U.S. 726 (1978).

[436] *Id.* at 738.

[437] *Id.* at 741.

[438] *Id.* at 750–51.

Distinguishably from Bruce and Carlin, who were arrested by government actors for their respective speech, Barr merely suffered a private entity's snubbing and public backlash like that of other entertainers whose "speech" has provoked resentment. For instance, in 1993, actor, Ted Danson, faced backlash after he sported blackface and accompanied his then-girlfriend Whoopi Goldberg to a Friars Club roast at which he served as host and repeatedly used a racial epithet.[439]

More recently, comedian, Kathy Griffin appeared in a photoshoot in which she held a prop of a beheaded President Trump.[440] *CNN* parted ways with Griffin in response.[441] Anderson Cooper, Griffin's *CNN* co-host, tweeted that he was "appalled by the photoshoot" and found it "clearly disgusting and completely inappropriate."[442] *Time* declared that Griffin's conduct was "free speech" and reported that there are public "contentions are that this is hate speech, it's criminal, or it's treasonous."[443] *Time* reported, however, "[t]he common factor that the armchair warriors fail to realize is that all three of those categories demand that the *government* step in and act to curtail her vile expression."[444] *Time* declared that Griffin "unquestionably has the right to make a fool of herself in this manner. And she should have that right."[445] Yet, while there is a freedom from government intervention, public backlash is not the equivalent to a constitutional abridgment of free speech.[446] Rather, it is merely the private consequence of such public speech.

Similarly, the consequences of Barr's conduct were effected by private actors *not* government actors. A constitutional violation of one's right to free speech under the First Amendment requires that the violator (or the enforcing party of that violation) is

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[439] Lena Williams, *After the Roast, Fire and Smoke*, N.Y. TIMES (Oct. 14, 1993), https://www.nytimes.com/1993/10/14/garden/after-the-roast-fire-and-smoke.html.

[440] Jenna Ellis, *Why Kathy Griffin Has the Right to Grotesquely Mock Donald Trump*, TIME (May 31, 2017), time.com/4800018/kathy-griffin-free-speech/.

[441] Herman Wong, *CNN Cuts Ties With Kathy Griffin Amid Controversy Over Comedian's Gruesome Anti-Trump Photo*, WASH. POST (May 31, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/05/30/kathy-griffin-apologizes-for-severed-donald-trump-head-photo-after-backlash/.

[442] Anderson Cooper (@andersoncooper), TWITTER (May 30, 2017, 6:26 PM), https://twitter.com/andersoncooper/status/869726823306887169.

[443] Ellis, *supra* note 440.

[444] *Id.*

[445] *Id.*

[446] *Id.*

a government actor.[447] Neither ABC, nor its parent-company Disney, is a government actor.[448] Rather, they were Barr's private employer.[449]

2. Constitutionally Misinformed Defense of Entertainers

The backlash that Barr faced is similar to that of Phil Robertson, star of "Duck Dynasty," who A&E Network suspended from the filming of that show.[450] Robertson had made controversial statements to *GQ* about the LGBT community.[451] He said, "start with homosexual behavior and just morph out from there. Bestiality, sleeping around with this woman and that woman and that woman and those men," and "don't be deceived. Neither the adulterers, the idolaters, the male prostitutes, the homosexual offenders, the greedy, the drunkards, the slanderers, the swindlers — they won't inherit the kingdom of God. Don't deceive yourself. It's not right."[452] He added,

> [i]t seems like, to me, a vagina — as a man — would be more desirable than a man's anus. That's just me. I'm just thinking: There's more there! She's got more to offer. I mean, come on, dudes! You know what I'm saying? But hey, sin: It's not logical, my man. It's just not logical.[453]

Similar to Disney with Barr, A&E reacted swiftly, releasing a statement through *Variety*, in which the network wrote, "[w]e are extremely disappointed to have read Phil Robertson's comments in *GQ*, which are based on his own personal beliefs and are not reflected in the series Duck Dynasty."[454] It continued that Robertson's "personal views in no way reflect those of [A&E] Networks, who have always been strong supporters and champions of the LGBT community."[455]

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[447] Bowman, *supra* note 83, at 222.

[448] Geraldine Fabrikant, *The Media Business: The Merger; Walt Disney to Acquire ABC in $19 Billion Deal to Build a Giant for Entertainment*, N.Y. TIMES (Aug. 1, 1995), https://www.nytimes.com/1995/08/01/business/media-business-merger-walt-disney-acquire-abc-19-billion-deal-build-giant-for.html.

[449] John F. Trent, *After Disney Rehires James Gunn – Actor James Woods Questions Why Roseanne Hasn't Been Rehired*, BOUNDING INTO COMICS (Mar. 15, 2019), https://boundingintocomics.com/2019/03/15/after-disney-rehires-james-gunn-actor-james-woods-questions-why-roseanne-hasnt-been-rehired/.

[450] AJ Marechal, *'Duck Dynasty': Phil Robertson Suspended Indefinitely Following Anti-Gay Remarks*, VARIETY (Dec. 18, 2013), https://variety.com/2013/tv/news/duck-dynasty-ae-suspends-phil-robertson-following-gay-remarks-1200974473/.

[451] *Id.*

[452] *Id.*

[453] *Id.*

[454] *Id.*

[455] *Id.*

Just as the networks reacted similarly in the cases of Barr and Robertson, the term "free speech" emerged in both.[456] With Robertson, for instance, it was former Vice-Presidential candidate, Governor Sarah Palin (R-AK), who came to Robertson's defense.[457] Palin stated, "[f]ree speech is an endangered species. Those 'intolerants' hatin' and taking on the Duck Dynasty patriarch for voicing his personal opinion are taking on all of us."[458] Similarly, Governor Bobby Jindal (R-LA) also invoked the Constitution in defense of Robertson, when Jindal stated, "I remember when TV networks believed in the First Amendment, . . . it is a messed up situation when Miley Cyrus gets a laugh, and Phil Robertson gets suspended."[459]A *CNN* contributor chastised Jindal for his flawed constitutional argument, stating that, "a governor rumored to have his sights on the presidency doesn't understand the breadth of the First Amendment."[460] Robertson's words (like Barr's) are not, however, protected from private ramifications. Rather, like the NFL players, the speech rights of entertainers are subject to the private contractual agreement between the employee and the employer.[461] Nevertheless, principally among those who create and perpetuate errors in American misunderstanding of free speech are its own elected officials, the very people who take an oath to uphold that right, among others.[462]

More than just Barr and Robertson, both the entertainment industry and the media covering it freely use the phrase "free speech." Such invocation of "free speech" claims with regard to private ramifications from conduct seem to cloud the public/private line at which constitutional rights end. The confusion over speech runs deeper in the entertainment industry, however. For instance *Deadline*, headlined that "Free Speech Chill Sets Into Hollywood," in response to Disney firing James Gunn (director of "Guardians of the Galaxy") in 2018, for controversial tweets unearthed years after he published them to Twitter.[463] Among Gunn's tweets were, "I like when little boys touch me in my silly place," and "[t]he best thing about being raped is when you're done being raped and it's like 'whew this feels great, not being raped!'"[464]

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[456] Kopan, *supra* note 5.

[457] *Id.*

[458] *Id.*

[459] Granderson, *supra* note 9.

[460] *Id.*

[461] *Say What?, Your Weekly Constitutional*, WVTF (Jan. 2, 2019), https://www.listennotes.com/podcasts/your-weekly/say-what-5r6Ea91Gmy7/.

[462] 5 U.S.C § 3331 (2019).

[463] Mike Fleming Jr., *Dave Bautista Stands for Felled 'Guardians of the Galaxy's James Gunn as Free Speech Chill Sets into Hollywood*, DEADLINE (July 21, 2018), https://deadline.com/2018/07/dave-bautista-guardians-of-the-galaxy-james-gunn-amy-powell-1202430859/.

[464] Mike Fleming Jr., *James Gunn Fired from 'Guardians of fhe Galaxy' Franchise Over Offensive Tweets*, DEADLINE (July 20, 2018), https://deadline.com/2018/07/james-gunn-fired-guardians-of-the-galaxy-disney-offensive-tweets-1202430392/.

Disney has since relented and rehired Gunn to direct the third installment to "Guardians of the Galaxy."[465]

In response to Disney's seemingly disparate treatment, Academy-Award nominated actor James Woods tweeted, "Oh, and is Roseanne back on Roseanne, too?"[466] Woods himself helped to add to the confusion over entertainers and free speech rights via Twitter by invoking free speech rights after his agent dropped the actor from representation due to Woods's outspoken conservative politics. [467] Woods thanked his agent for past work, and tweeted, "I was thinking if you're feeling patriotic, you would appreciate free speech and one's right to think as an individual."[468]

Later, in May 2019, Woods announced that he was leaving Twitter after the private social media company censored another one of his tweets.[469] "It now seems they have chosen to delete that tweet from my account without my permission. Until free speech is allowed on Twitter, I will not be permitted to participate in our democracy with my voice . . . my Twitter days are in the past."[470] In response to Woods's battle with Twitter, President Trump tweeted, "How can it be possible that James Woods (and many others), a strong but responsible Conservative Voice, is banned from Twitter? Social Media & Fake News Media, together with their partner, the Democrat Party, have no idea the problems they are causing for themselves. VERY UNFAIR!"[471] Professor Bradley A. Smith of Capital University, who served as chairman of the Institute for Free Speech, and former chairman of the Federal Election Commission wrote in *City Journal* that Twitter, a social media platform like Facebook, is a private company that has its own free speech rights and may accordingly ban or censor its

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[465] Jessica Napoli, *Disney Rehires James Gunn to Direct 'Guardians of the Galaxy 3'*, FOX NEWS (Mar. 15, 2019), https://www.foxnews.com/entertainment/disney-rehires-james-gunn-to-direct-guardians-of-the-galaxy-3.

[466] Trent, *supra* note 449.

[467] Rebecca Rubin, *James Woods Says He Was Dropped by 'Liberal' Talent Agent*, VARIETY (July 5, 2018), https://variety.com/2018/biz/news/james-wood-dropped-by-agent-ken-kaplan-1202865614/ (explaining that Woods's agent, Ken Kaplan, wrote "It's the 4th of July and I'm feeling patriotic. I don't want to represent you anymore. I mean I could go on a rant but you know what I'd say.").

[468] *Id.*

[469] Tyler McCarthy, *James Woods Says He's Leaving Twitter 'Until Free Speech is Allowed' on the Platform Following Suspension*, FOX NEWS (May 10, 2019), https://www.foxnews.com/entertainment/james-woods-leaving-twitter; *see also* Ryan Saavedra, *James Woods Releases New Statement About Twitter Suspending Him*, THE DAILY WIRE (May 10, 2019), https://www.dailywire.com/news/james-woods-releases-new-statement-about-twitter-ryan-saavedra.

[470] *Id.*; *see also* Saavedra, *supra* note 469.

[471] Donald J. Trump (@realDonaldTrump), TWITTER (May 4, 2019, 2:31 PM), https://twitter.com/realDonaldTrump/status/1124743267873116160?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1124743267873116160&ref_url=ht; Saavedra, *supra* note 336.

users.[472] Smith elaborated that social media platforms "ha[ve] a right to make this decision; it is not violating the First Amendment."[473] Moreover, he wrote "[a] primary reason why the Founders adopted the First Amendment was their recognition that" the government itself could not be the arbiters of what is fair.[474] Rather, "the First Amendment keeps the government at bay—even when [a notable user] tweets out poorly formulated views on free speech."[475]

3. Statutes, Salutes, and the Star-Spangled Banner

Returning once again to Roseanne Barr, however, her tweeting in 2018 was not the first time she said or did something unprotected by the First Amendment that sparked major controversy and constitutional rhetoric.[476] For instance, on July 25, 1990, Barr notoriously took the field of a San Diego Padres baseball game to sing the national anthem.[477] Barr's approach to the anthem was met with boos from the audience until finally she concluded "the land of the free and the home of the brave" by grabbing her groin.[478] In light of Barr's performance, President Bush was asked if there should be a constitutional amendment added to prevent "desecration of the national anthem," a question that President George H.W. Bush avoided.[479] Her "interpretation" nevertheless garnered a sharp reaction from Bush.[480] When asked his thoughts on Barr's performance, President Bush replied, "[m]y reaction is: It was disgraceful. That's the way I feel about it, and I think a lot of the San Diego fans said the same thing."[481] More colorfully than the reaction Bush gave, however, was President Trump's reaction to the more recent NFL kneeling, of which he said,

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[472] Bradley A. Smith, *Free Speech Means Free Speech*, CITY JOURNAL (Nov. 1, 2019), https://www.city-journal.org/twitter-jack-dorsey-banning-political-ads.

[473] *Id.*

[474] *Id.*

[475] *Id.*

[476] Geoff Edgers, *Roseanne on the Day She Shrieked 'The Star-Spangled Banner,' Grabbed Her Crotch and Earned a Rebuke From President Bush*, WASH. POST (July 23, 2015), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/07/23/roseanne-on-the-day-she-shrieked-the-star-spangled-banner-grabbed-her-crotch-and-earned-a-rebuke-from-president-bush/?noredirect=on&utm_term=.dbbb645cf62c.

[477] *Id.*

[478] *Id.*

[479] Exchange with Reporters Aboard Air Force One, 2 PUB. PAPERS 1072, 1073 (July 27, 1990) [hereinafter Exchange with Reporters].

[480] Helena Andrews-Dyer, *Did Barbara Bush Actually Call Roseanne Barr 'Brave'?*, WASH. POST (Apr. 18, 2018), https://www.washingtonpost.com/news/reliable-source/wp/2018/04/18/did-barbara-bush-actually-call-roseanne-barr-brave/?utm_term=.f8074c7732bb.

[481] Exchange with Reporters, *supra* note 479, at 1073.

"Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say: 'Get that son of a bitch off the field right now. Out! He's fired!'" [482]

Neither Kaepernick nor Barr, however, were the first to stir controversy within the vehicle of the national anthem.[483] Famously, at another ball game, on October 7, 1968, the musician Jose Feliciano sang the anthem at the fifth game of the World Series between the Detroit Tigers and the St. Louis Cardinals.[484] The *New York Times* described it then as "controversial."[485] Feliciano's national anthem was an original rendition with the well-known words of Francis Scott Key but a melody and chord progression original to Feliciano.[486] Feliciano's interpretation came late in 1968, a frantic year in which America's war in Vietnam reached the Tet Offensive,[487] the National Guard and the Chicago Police battled protestors outside the Democratic National Convention at which Hubert Humphrey won the nomination for President,[488] and America suffered the assassinations of both Martin Luther King, Jr. in Memphis, Tennessee[489] and Robert Kennedy in Los Angeles.[490] Feliciano's "Star-Spangled Banner" was a poignant commentary on a year that would continue with even more protests involving the national anthem. Nine days after Feliciano's controversial protest, U.S. Olympic Sprinters Tommie Smith and John Carlos took the podium for the Olympic medaling ceremony, raising their fists in protest during the playing of the Star-Spangled Banner.[491] That moment "[became] an iconic image of the Black Power

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[482] Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: 'Get that Son of a Bitch Off the Field'*, THE GUARDIAN (Sept. 23, 2017), https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests.

[483] Victor Mather, *A Polarizing Anthem Performance — by Jose Feliciano in 1968*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/sports/baseball/national-anthem.html.

[484] *Id.*

[485] Matt Monagan, *It's Been 50 Years Since Jose Feliciano's Memorable National Anthem Performance*, CUT4 BY MLB.COM (Oct. 7, 2018), https://www.mlb.com/cut4/jose-feliciano-national-anthem-was-50-years-ago/c-296904880.

[486] Mather, *supra* note 483.

[487] *Tet Offensive*, HISTORY.COM, https://www.history.com/topics/vietnam-war/tet-offensive (last visited Jan. 25, 2020).

[488] Maggie Astor, *'The Whole World Is Watching': The 1968 Democratic Convention, 50 Years Later*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/politics/chicago-1968-democratic-convention-.html.

[489] Alex Scimecca, *PHOTOS: A Look at Martin Luther King's Assassination 50 Years Ago Today*, FORTUNE (Apr. 4, 2018), https://www.fortune.com/2018/04/04/martin-luther-king-assassination-50-years-photos/.

[490] Colleen Shalby, *The Assassination of Robert Kennedy, As Told 50 Years Later*, N.Y. TIMES (June 4, 2018), https://www.latimes.com/projects/la-na-robert-f-kennedy/.

[491] DeNeen L. Brown, *'A Cry for Freedom': The Black Power Salute That Rocked the World 50 Years Ago*, WASH. POST (Oct. 16, 2018),

movement."[492] More importantly, Feliciano's anthem was not the first "interpretation" of the anthem that offended Americans.

Among the earliest controversies involving the anthem was in January 1944, when the legendary composer Igor Stravinsky offered up his original modern classical arrangement of the Star-Spangled Banner.[493] Stravinsky conducted the Boston Symphony Orchestra in an orchestral program of his compositions.[494] He sought to offer a different take—a religious quality—to the national anthem.[495] Stravinsky said, "I gave it the character of a church hymn . . . not that of a soldier's marching song or a club song, as it was originally."[496] And so, the anthem's typical fanfare was rather understated in this arrangement, with complex Stravinsky-esque modern harmonies.[497] After several days of the Boston Symphony performing this concert program and his original anthem, the Boston Police Commissioner had officers waiting in the venue on the night of an NBC radio broadcast.[498] Boston Police Commissioner, Thomas Sullivan, used a World War I-era Massachusetts state statute that prohibited use of the Star-Spangled Banner for the purposes of dance, used amid a medley of other songs, or performed with "embellishment."[499] Stravinsky swapped the music that evening, however, for a traditional arrangement and suffered no penalty.[500] Reportedly, however, his penalty would have merely been a fine in the amount of one hundred dollars.[501] Nevertheless, the story has grown into a famous myth that the composer was arrested for his performance.[502]

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https://www.washingtonpost.com/history/2018/10/16/a-cry-freedom-black-power-salute-that-rocked-world-years-ago/?utm_term=.b75f39bf0ff5; *see also* DeNeen L. Brown, *They Didn't #TakeTheKnee: The Black Power Protest Salute That Shook the World in 1968*, WASH. POST (Sept. 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/.

[492] *See* Brown, *supra* note 491.

[493] Carly Carioli, *Did the Star-Spangled Banner Land Stravinsky in Jail?*, BOSTON GLOBE (Jul. 1, 2016), https://www.bostonglobe.com/ideas/2016/06/30/stravinsky/rfnaZtqjCQXZAobdv7kVkI/amp.html.

[494] *Id.*

[495] *Id.*

[496] *Id.*

[497] *Id.*

[498] *Id.*

[499] *Id.*

[500] *Id.*

[501] *Id.*

[502] *Id.*

The call for statutes to regulate performances of the national anthem is still alive, however.[503] In 2012, Indiana State Senator, Vaneta Becker (R-Evansville), proposed a bill to fine national anthem performers (paid or unpaid) for interpretive deviations.[504] Senator Becker defended her bill to the *Los Angeles Times* and stated, "[i]t's not like we're going after anyone's ability to sing," rather, "[w]e just want them to respect the words and the tune as it was originally intended and we normally sing it."[505] However, as a matter of constitutional law, Senator Becker's bill did involve legally "going after" someone's "ability to sing."[506] As Justice Kennedy wrote in *Ward v. Rock Against Racism*,"[m]usic is one of the oldest forms of human expression."[507] In order for national anthem regulation to meet a constitutional muster, the "content-neutral time, place, or manner regulation [must] be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[508]

Senator Becker's goal envisioned a statutorily-mandated patriotic interpretation.[509] Such a pursuit mirrors the governmental failed efforts to regulate the "expressive conduct" of respect for the American flag, a pursuit of which the Court has held that "the State's interest in preserving the flag as a symbol of nationhood and national unity [does not] justify [a] criminal conviction for engaging in political expression."[510] The state interest in mandating respect for the Star-Spangled Banner is no different than preventing flag desecration. Furthermore, the interpretive whims of an anthem performer are individually unique, as both contemporary and classical musicians "interpret . . . and improvise in doing so."[511] Dr. Mark Clague, associate professor of musicology at the University of Michigan and "[o]ne of the nation's foremost experts on 'The Star-Spangled Banner,'" has helped to rectify the misconception that there is somehow "a sanctioned traditional or otherwise official version of 'The Star-Spangled Banner.'"[512] Rather, the 1931 Act that made Key's

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[503] Nick Carbone, *Watch Out, Weird Al: 'Modifying' National-Anthem Lyrics Could Get You Fined*, TIME (Jan. 9, 2012), https://newsfeed.time.com/2012/01/09/watch-out-weird-al-modifying-national-anthem-lyrics-could-get-you-fined/.

[504] *Id.*

[505] *Id.*

[506] *Id.*

[507] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[508] McCullen v. Coakley, 573 U.S. 464, 486 (2014).

[509] Carbone, *supra* note 503.

[510] Texas v. Johnson, 491 U.S. 397, 420 (1989).

[511] Carol S. Gould & Kenneth Keaton, *The Essential Role of Improvisation in Musical Performance*, 58 J. AESTHET. ART CRIT. 143, 143–48 (2000).

[512] Sydney Hawkins, *National Anthem Expert Debunks Famous Myths About 'The Star-Spangled Banner'*, UNIVERSITY OF MICHIGAN NEWS (June 30, 2016), https://news.umich.edu/national-anthem-expert-debunks-famous-myths-about-the-star-spangled-banner/.

song the national anthem "does not identify an official arrangement, in part because the song as sung in the 20th century had already departed from what Key had known."[513] Failed attempts occurred nevertheless, according to Dr. Clague: during World War I, "attempts were made to codify the arrangement," which "result[ed] in both a military 'Service Version' and a 'Standardized Version' endorsed by the Department of Education."[514] Therefore, Becker's mandate for "the tune," envisions the way "we normally sing it."[515] It is a fool's errand both musically and constitutionally, as this conceived traditional interpretation is not even what the composer wrote.[516] Therefore, the unattainable utopia of which Senator Becker seeks, a "respect [for] the words and the tune as it was originally intended and we normally sing it"[517] is in itself an interpretation. When restricted via statute, such a restriction on the bounds of expression is a censorship of content.[518] Furthermore, it is an infringement on the rights under the First Amendment, and it is executed by a state actor (not a private entity).

Two years before Justice Robert Jackson would serve as a chief prosecutor at the Nuremberg Trials over Nazi party members in the wake of World War II,[519] he captured the American dedication to free speech when he wrote with regard to compulsory participation in the pledge of allegiance on behalf of the Court:

> 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.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[520]

Simply put, the government cannot cross the thresholds of compelled speech for any reason without violating the principles of the Constitution, regardless of general concern compellingly centered in politics, nationalism, religion or otherwise.[521]

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[513] *Id.*

[514] *Id.*

[515] Carbone, *supra* note 503.

[516] Hawkins, *supra* note 512.

[517] Carbone, *supra* note 503.

[518] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[519] John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUD. L. REV. 511, 513 (2007).

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

[521] *Id.*

Nevertheless, the First Amendment protects the individual from "official control."[522] To be clear, however, while private environments such as the NFL, the Major League Baseball Association, or the Boston Symphony Orchestra are not constitutionally-prevented from dictating the manner in which the Star-Spangled Banner shall be performed or received in that environment, it is the government that is expressly prohibited from exerting such "official control."[523] Thus, private requirements from a venue restricting a performer may stand muster for the nature of the private actor.[524]

4. Entertainers, Employment Law, and Free Speech

Compelled speech, however, can be required by employers both public and private. For instance, attorneys are not constitutionally free from compelled speech, as a state may bar admission of any applicant who refuses to take the oath to uphold a state or federal Constitution due to a rational connection between the required oath and the practice of law itself.[525] The Court stated that it was "not persuaded that careful administration of such a system" requiring as New York's need result in chilling effects upon the exercise of constitutional freedoms."[526] Rather, oath requirements had a rational relationship to serve a "principal means of policing the Bar" and affirming the significance of law itself with "deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions."[527]

This is not to say, however, that First Amendment rights of entertainers do not exist. Recently, California's Second District Court of Appeal ruled in favor of musician, Eddie Money (Mahoney) in *Symmonds v. Mahoney*.[528] Money had terminated his drummer, Glenn Symmonds, after Symonds suffered a back injury that made lifting difficult.[529] Symmonds also suffered from incontinence caused by cancer, requiring the drummer to wear diapers.[530] The appellate court opinion stated that "[d]uring concerts [Money] would joke about Symmonds' [sic] condition to the audience, referring to Symmonds as 'Chemo the Drummer' (a reference to chemotherapy), and stating that the concert tour was sponsored by 'Depends,' . . . a brand of 'diaper used by people with urinary incontinence."[531] Eventually, in 2015,

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[522] *Id.*

[523] *Id.*

[524] *See generally* Bowman, *supra* note 83.

[525] Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 167 (1971).

[526] *Id.*

[527] *Id.*

[528] 243 Cal. Rptr. 3d 445, 448 (Ct. App. 2019).

[529] *Id.* at 449.

[530] *Id.*

[531] *Id.* at 449–50.

Money terminated the whole band but rehired all, except for Symmonds.[532] Symmonds sued Money for employment discrimination based on the drummer's age, disability, and medical condition.[533] Nevertheless, in February 2019, the appellate court ruled in favor of Money, holding that "[a] singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right of free speech."[534] The case was covered by the *Hollywood Reporter*, which accurately reflected the Court's declaration of Money's free speech rights.[535]

Entertainers and athletes are simply among the greater regulatable class of the employed. In *Waters v. Churchill*, a plurality opinion written by Justice Sandra Day O'Connor, the Court upheld the dismissal of a government employee, holding in part "that the government as employer indeed has far broader powers than does the government as sovereign."[536] It stated furthermore that an "at-will government employee . . . generally has no claim based on the Constitution at all."[537] Justice Stevens, dissented from the majority, while noting nonetheless that "[a]bsent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds."[538] Indeed, some corporate employers may tread the line as to whether they qualify as government actors in the constitutional sense.[539] For instance, if "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[540] Those types of employers are, however, part of a rare dividing line of trees in a forest of employers public and private. For the reasons aforementioned regarding state action analysis, the sports and entertainment industry constitute general employment over which the employers have control, pursuant to *Garcetti v. Ceballos*. However, even in the context of state action, the Court has granted much deference to government employers.[541] Therefore, as Justice Stevens

[532] *Id.* at 450.

[533] *Id.* at 449.

[534] *Id.* at 454.

[535] Ashley Cullins, *Eddie Money's Decision to Fire Drummer Was Expression of Free Speech, Court Rules*, HOLLYWOOD REPORTER (Feb. 4, 2019), https://www.hollywoodreporter.com/thr-esq/eddie-moneys-firing-drummer-was-expression-free-speech-court-rules-1182348.

[536] Waters v. Churchill, 511 U.S. 661, 671 (1994).

[537] *Id.* at 679.

[538] *Id.* at 694–95.

[539] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 399 (1995).

[540] *Id.*

[541] *Id.* at 679.

noted in *Waters*, the remedy for employees is in contract and statute, but not the Constitution.[542]

III. CONCLUSION

Ultimately, when it comes to the rights of entertainers and NFL players, the terms of the contract will largely govern the relationship with the employing entity, regardless of state action. The Court's precedent on employee censorship, preceding the Roberts Court's decisions benefited employers, even before its enunciations on state-action. Thus, at a federal level, the NFL and entertainers will not benefit from the Roberts Court, their remedy is at the state level.

For schoolchildren, however, it depends on whether the school in which the child is enrolled is public or private. For now, at least, private schoolchildren do benefit from *Tinker*. Therefore, while the NFL and ABC may censor employee conduct, the Court has made clear that public schoolchildren do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[543] Thus, with regard to the NFL player, the schoolchild, the entertainer, and exactly "Who's on First" for the Roberts Court, it is the public schoolchild who may see changes to Court precedent.[544]

Going forth, it is the duty of the press, expressly protected by the Constitution, to make these distinctions and fully inform the public as to the protections of free speech. It is also the duty of America's elected officials, who take an oath to uphold the Constitution, that they adequately understand such rights guaranteed under the First Amendment. Finally, it is the duty of the people to whom the First Amendment guarantees its protections to strive for continual understanding of just what is free speech and when it comes to America's NFL players, its schoolchildren, and its entertainers, "who's on first."[545] Nevertheless, for schoolchildren, Chief Justice John Roberts may guide the Court to reduce confusion.

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[542] Waters v. Churchill, 511 U.S. 661, 694–95 (1994).

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

[544] Bowman, *supra* note 83.

[545] Bud Abbott & Lou Costello, *Bud Abbott and Lou Costello's "Who's On First?" Routine in "The Naughty Nineties" (1945)*, https://www.filmsite.org/whosonfirst.html (last visited Feb. 4, 2019).