

## NOTE

# DISCARDING *DARIANO*: THE HECKLER'S VETO AND A NEW SCHOOL SPEECH DOCTRINE

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## INTRODUCTION

Of all of the freedoms enshrined in the Bill of Rights, perhaps none inspire the level of interest and debate among both scholars and laypersons as the freedom of speech. The First Amendment to the Constitution of the United States of America guarantees that "Congress shall make no

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law . . . abridging the freedom of speech, or of the press,”<sup>1</sup> and it has long been held that “speech” encompasses not merely spoken words but any conduct which is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”<sup>2</sup>

One of the First Amendment’s purposes is the protection of unpopular speech.<sup>3</sup> Indeed, if it protected only popular speech then the Amendment’s prohibition of government abridgment would be largely unnecessary. Popular speech is protected not only by the First Amendment but by all manner of societal mores, social norms, and national institutions. Unpopular speech is not so fortunate, and yet the nature of our freedom of speech is such that it functions as “a guarantee that audiences will be confronted with messages they oppose.”<sup>4</sup>

Of course, exposure to unpopular ideas and beliefs is not always pleasant for an audience, and even in the most liberal nations there may occasionally be private actors who, when confronted with such speech, choose to react by threatening to end the speaker’s expression. When the government responds to such potentially disruptive threats by suppressing the speaker’s right to free expression, it has engaged in what is known as a heckler’s veto of that expression.<sup>5</sup> The judiciary responded to such situations by developing the “heckler’s veto doctrine,” a part of First Amendment jurisprudence which clearly rejects the heckler’s veto as a legitimate ground upon which to ban speech.<sup>6</sup> The doctrine emphasizes that private individuals cannot use their own threats or acts of violence or disruption as a basis for essentially enlisting the government to prevent public speech. Indeed, instead of suppressing speech that is potentially disruptive, the government is required to protect those whose controversial speech is under threat from hecklers and disruptors.<sup>7</sup>

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

<sup>3</sup> *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 243 (6th Cir. 2015) (saying that the First Amendment “applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted”).

<sup>4</sup> Recent Case: First Amendment – Student Speech – *Ninth Circuit Denies Motion to Rehear En Banc Decision Permitting School Suppression of Potentially Violence-Provoking Speech*. – *Dariano v. Morgan Hill Unified School District*, 767 F.3d 764 (9th Cir. 2014), cert. denied, 2014 WL 1400871 [hereinafter *Ninth Circuit Denies Motion to Rehear*], 128 HARV. L. REV. 2066, 2066 (2015).

<sup>5</sup> See *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766 (9th Cir. 2014) (O’Scannlain, J., dissenting).

<sup>6</sup> *Id.*; see also *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

<sup>7</sup> See Cheryl A. Leanza, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1308 (2007) (“The relevance of heckler’s veto case law lies in its strong commitment to fulfilling the First Amendment’s ultimate goal of allowing viewpoints to be

By its very nature, the heckler's veto doctrine pits "the protection of this individual freedom [of speech] . . . against society's interest in keeping the peace."<sup>8</sup> This conflict between two fundamental interests is similarly present in another strain of First Amendment jurisprudence: the "school speech" doctrine, which lays out the extent of public school students' right to free expression.<sup>9</sup> Teachers and administrators must deal with "the inherent tension between addressing the problem of bullying and protecting the free speech rights of students," a tension that is manifested in the public school's dual interests of "ensuring safe learning environments for all students and protecting student free speech."<sup>10</sup> Their unenviable task has only become more difficult in the wake of *Morse v. Frederick*, the Supreme Court's most recent foray into student speech rights, which has had the unfortunate effect of further muddling school speech jurisprudence.<sup>11</sup> This lack of clear guidance from the judiciary has left school officials "to make on-the-ground choices that at best recognize only one interest, and at worst result in litigation from the offended side."<sup>12</sup>

It was exactly this kind of litigation that was the subject of *Dariano v. Morgan Hill Unified School District*, the Ninth Circuit's recent attempt to sort out the murky intersection of the heckler's veto doctrine with the school speech doctrine.<sup>13</sup> In the case, a divided court sided with the school officials who had banned peaceful student expression over fears of a reaction from the students' classmates.<sup>14</sup> I will explore how this ruling not only runs counter to the spirit of both the heckler's veto and school speech doctrines, but also creates a split with the Seventh and Eleventh Circuits, which in recent years have found heckler's veto concerns applicable in the case of student speech.<sup>15</sup>

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expressed, even when violence is in the offing . . . . [I]n heckler's veto cases the courts have required the state to ensure dissemination of clashing and unpopular views.").

<sup>8</sup> *Ninth Circuit Denies Motion to Rehear, supra* note 4, at 2066; *see also* Leanza, *supra* note 7, at 1306 (arguing that heckler's veto cases "illustrate the fundamental conflict between two members of the public with competing speech goals and the role of the state in promoting the dissemination of messages").

<sup>9</sup> *Morse v. Frederick*, 551 U.S. 393, 400 (2007).

<sup>10</sup> Francisco M. Negrón, Jr., *Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools*, 11 *FIRST AMEND. L. REV.* 364, 364 (2013).

<sup>11</sup> *See* 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, 1442 (2011).

<sup>12</sup> Negrón, *supra* note 10, at 364.

<sup>13</sup> *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 773–75 (9th Cir. 2014) (McKeown, J., dissenting).

<sup>14</sup> *See id.* at 779. The students in question were wearing American flag t-shirts on the day of a school-sanctioned Cinco de Mayo celebration. Administrators were concerned about the potential for disruptions from upset Mexican-American students. *See id.* at 774–75.

<sup>15</sup> *See* *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) ("Statements that while not fighting words are met by violence or threats or other unprivileged

Part I of this Note explores the nature and development of the heckler's veto doctrine, paying particular attention to the doctrine's roots in the Civil Rights movement. It also discusses the present scope of the doctrine, especially with regards to the doctrine's applicability in the public school context. Part II provides a history of the Supreme Court's school speech jurisprudence beginning with the *Tinker*<sup>16</sup> decision in 1969 and ending with the *Morse*<sup>17</sup> decision in 2007. It will also explore the fallout from the latter and its impact on the school speech doctrine at large. Part III explores *Dariano* in more detail, focusing on the main themes and arguments of both the majority and the dissent. Further, it lays out the nature of the circuit split on the issue of the heckler's veto's applicability in public schools. Finally, Part IV attempts to provide a solution for the Court that attempts to reaffirm the free speech rights of students while respecting the discretion of public school officials and their continued efforts to create and maintain safe, productive learning environments for students.

## I. THE HECKLER'S VETO: PAST AND PRESENT

While the text of the First Amendment indicates a focus on protecting private speech from government interference, the heckler's veto doctrine at its core is a response to concerns over what one scholar termed "one of the pariahs of First Amendment jurisprudence": permitting "one person (the 'heckler') in the audience who objects to the speaker's words to silence a speaker."<sup>18</sup> This is a heckler's veto, and even though it is fundamentally a private check on speech, it still runs counter to the spirit of the First Amendment's free speech protections.<sup>19</sup> This is because courts have interpreted our free speech rights to extend beyond mere pro-

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retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct."); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1275 (11th Cir. 2004) ("Allowing a school to curtail a student's freedom of expression based on [threats of violence] turns reason on its head . . . [T]o do so, however, is to sacrifice freedom upon the altar of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.").

<sup>16</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>17</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>18</sup> John J. McGuire, *The Sword of Damocles Is Not Narrow Tailoring: The First Amendment's Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413, 417 n.16 (1998).

<sup>19</sup> See *Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 792 (2004) (Beam, J., dissenting) ("When the government enforces a heckler's veto, it infringes upon the First Amendment's most vital role."); see also Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 264–65 (2014) ("[T]he evil in heckler's veto situations is that it empowers hecklers to 'silence any speaker of whom they do not approve.'") (quoting another source).

tection from government suppression and penalization of speech.<sup>20</sup> First Amendment speech rights include the right to try to convince others to adopt one's own views and the right to hear views and opinions that help us form our own opinions, even if the majority seeks to squelch certain viewpoints.<sup>21</sup> Understanding the doctrine's importance in the school speech context requires exploring its judicial roots.

#### A. *The Development and Evolution of the Heckler's Veto Doctrine*

The heckler's veto doctrine was not established in a single sweeping decision. Rather, it grew out of the clear and present danger doctrine, an earlier segment of First Amendment jurisprudence.<sup>22</sup> The embryo of the modern heckler's veto doctrine can be traced to the Supreme Court's 1949 decision in *Terminiello v. City of Chicago*,<sup>23</sup> a case whose language can be found in many of the Court's ensuing heckler's veto cases.<sup>24</sup> The plaintiff in *Terminiello* was arrested and charged with breach of the peace while giving a racially inflammatory speech in a private auditorium.<sup>25</sup> The police were concerned about the size and rowdiness of the audience and had been unable to prevent several disturbances from breaking out.<sup>26</sup> Writing for a divided Court, Justice Douglas eloquently laid out the philosophical underpinnings of what was to become the heckler's veto doctrine:

The vitality of civil and political institutions in our society depends on free discussion . . . . Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech,

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<sup>20</sup> See *Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.").

<sup>21</sup> See *Duncan*, *supra* note 19, at 265 (discussing how one of the main reasons for protecting free speech is so that prospective listeners can engage with diverse perspectives). Preventing people from enlisting the government to suppress speech is key to ensuring that First Amendment protections are not subject to private whims. See *Leanza*, *supra* note 7, at 1308 (describing the heckler's veto doctrine's "strong commitment to fulfilling the First Amendment's ultimate goal of allowing viewpoints to be expressed").

<sup>22</sup> See *Leanza*, *supra* note 7, at 1308.

<sup>23</sup> 337 U.S. 1 (1949).

<sup>24</sup> See *Leanza*, *supra* note 7, at 1309.

<sup>25</sup> See *Terminiello*, 337 U.S. at 2–3.

<sup>26</sup> *Id.*

though not absolute, is nevertheless protected against censorship or punishment . . . .<sup>27</sup>

Justice Douglas proceeded to throw out the plaintiff's conviction, noting that a conviction based on one's speech "[stirring] people to anger, [inviting] public dispute, or [bringing] about a condition of unrest" could not stand.<sup>28</sup>

Two years later, the Court took a step away from its *Terminiello* reasoning in *Feiner v. New York*,<sup>29</sup> another case involving a racially charged speech in front of an unruly audience. The plaintiff in this case, Mr. Feiner, was similarly arrested and convicted of breaching the peace after he refused to cease and desist under orders from the police, who were concerned that a fight was about to break out among the crowd.<sup>30</sup> Writing for the majority, Justice Vinson affirmed the conviction on the grounds that Feiner was attempting to incite a riot and that the crowd was close to the violent eruption he was supposedly encouraging.<sup>31</sup> Justice Black dissented, noting that the crowd was not as unruly as the majority said and that the police "did not even pretend to try to protect" Feiner, nor did they attempt to quiet the crowd.<sup>32</sup> Black argued that the Court's ruling "means that, as a practical matter, minority speakers can be silenced in any city" simply by threatening violence and disruption.<sup>33</sup> Scholars have come to see this dissent as "originating the concept of an impermissible 'heckler's veto.'"<sup>34</sup>

### 1. The Heckler's Veto in the Civil Rights Era

The heckler's veto doctrine came of age during the civil rights era of the 1960s, when a series of cases built off of the reasoning and spirit of Justice Douglas's opinion in *Terminiello* and Justice Black's *Feiner* dissent protected the free expression of civil rights protestors.<sup>35</sup> The first of these cases was the Court's 1963 decision in *Edwards v. South Carolina*, in which a group of peaceful black protestors was convicted of breaching the peace after failing to follow police orders to disperse.<sup>36</sup>

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> 340 U.S. 315 (1951).

<sup>30</sup> *See id.* at 316–18.

<sup>31</sup> *See id.* at 319–21.

<sup>32</sup> *Id.* at 326.

<sup>33</sup> *Id.* at 328.

<sup>34</sup> Leanza, *supra* note 7, at 1308. History would prove Justice Black to be prescient in his reasoning. *Feiner* has been limited to its facts by ensuing cases and supplanted by the heckler's veto doctrine. *See id.* at 1309.

<sup>35</sup> *See* Brief for Alliance Defending Freedom as Amicus Curiae Supporting Petitioners [hereinafter Alliance Defending Freedom Brief] at 8, *Dariano v. Morgan Hill Unified Sch. Dist.*, No. 12-720 (Jan. 20, 2015) *cert. denied*.

<sup>36</sup> *Edwards v. South Carolina*, 372 U.S. 229, 230–34 (1963).

The police justified their actions by citing their fears that a group of onlookers they classified as “possible trouble makers” would cause a disturbance.<sup>37</sup> Justice Stewart, writing for the majority, emphasized the peaceful nature of the demonstration and struck down the convictions using Justice Douglas’s exact language from *Terminiello*.<sup>38</sup>

The Court expanded on their ruling in *Edwards* two years later in *Cox v. Louisiana*.<sup>39</sup> In that case, a group of students protesting segregation and discrimination marched to a local courthouse, where they listened to a speech which was deemed to be “inflammatory” by the local sheriff since it led to “muttering” and “grumbling” amongst a group of white onlookers.<sup>40</sup> The demonstrators refused to leave, and the following day, Mr. Cox, the leader of the march, was arrested and charged with breach of the peace.<sup>41</sup> The Court was highly suspicious of the sheriff’s version of events, and deemed his fear of violence to be unfounded given the lack of evidence that the onlookers were becoming violent.<sup>42</sup> However, the Court went one step further and proclaimed that the police could not justify shutting down a peaceful protest based on fears of a violent reaction from onlookers, even if those fears were justified, because “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”<sup>43</sup> The Court struck down the conviction on the grounds that “Louisiana infringed appellant’s rights of free speech and free assembly.”<sup>44</sup>

The first textual appearance of the concept of the heckler’s veto came in 1966 in the Court’s decision in *Brown v. Louisiana*.<sup>45</sup> As in *Edwards* and *Cox*, the defendants in this case had been charged with breaching the peace, this time because of a silent protest in a segregated public library.<sup>46</sup> Once again, the Court said that there had been no breach of the peace, and that even if the peaceful protest had led to a disruptive reaction from onlookers, “we would have to hold that the [breach of the peace] statute cannot constitutionally be applied to punish [defendants’] actions in the circumstances of this case.”<sup>47</sup> One particularly important

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<sup>37</sup> *Id.* at 231.

<sup>38</sup> *See id.* at 238 (“As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech ‘stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.’”).

<sup>39</sup> 379 U.S. 536 (1965).

<sup>40</sup> *Id.* at 543.

<sup>41</sup> *See id.* at 543–44.

<sup>42</sup> *See id.* at 550.

<sup>43</sup> *Id.* at 551.

<sup>44</sup> *Id.* at 545.

<sup>45</sup> 383 U.S. 131 (1966).

<sup>46</sup> *See id.* at 136–37.

<sup>47</sup> *Id.* at 142.

footnote laid out the heckler's veto doctrine as established to that point and referred explicitly to the problem of the heckler's veto: "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."<sup>48</sup>

The footnote was inspired by renowned legal scholar Harry Kalven's 1965 book *The Negro and the First Amendment*, in which Kalven argued that "[i]f the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."<sup>49</sup> The author was referring to attempts by police to use concerns over counter-protestor behavior to shut down civil rights protests. Kalven's recognition of the significance of this public veto and its potential suppressive impact on unpopular viewpoints underscores the heckler's veto doctrine's importance as a guarantor of rights whose expression is not supported by popular sentiment.

## 2. Further Development and Expansion

It would be a quarter century before the Supreme Court took up another heckler's veto case, but in the interim, the Sixth Circuit helped clarify the doctrine and the specific role of the state and associated actors. *Glasson v. City of Louisville* involved a civil rights lawsuit brought by demonstrators who had been protesting a presidential visit.<sup>50</sup> The appellant was peacefully displaying a sign critical of the president when she began to attract negative attention from a group of onlookers who were "grumbling and muttering threats."<sup>51</sup> An officer monitoring the situation testified that the group was "hollering" and, concerned for Glasson's safety, tore up her sign after she refused to do so herself.<sup>52</sup>

The court noted that the only threat to public safety in this case was the onlookers, and that the police had demonstrated a "shocking disregard" for both Glasson's free speech rights and her right to "have her person and property protected by the state from violence at the hands of persons in disagreement with her ideas."<sup>53</sup> State actors are not only required to refrain from enforcing a heckler's veto, but to protect those exercising their constitutional rights from violent hecklers as long as doing so would not subject those actors to an unreasonably high risk of

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<sup>48</sup> *Id.* at 133 n.1.

<sup>49</sup> HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140–41 (Ohio State University Press 1965).

<sup>50</sup> *Glasson v. City of Louisville*, 518 F.2d 899, 901 (6th Cir. 1975)

<sup>51</sup> *Id.* at 902.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 910–11.



violent injury or retaliation.<sup>54</sup> The court reiterated the classic reasoning behind the heckler's veto doctrine, remarking that allowing the state to prohibit the expression of supposedly "detrimental" or "injurious" ideas would "subvert the First Amendment" and "empower an audience to cut off the expression of a speaker with whom it disagreed."<sup>55</sup> The *Glasson* court also clearly laid out what had only been hinted at in the prior heckler's veto cases: that "state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."<sup>56</sup>

The Supreme Court would take its turn at expanding and refining the heckler's veto doctrine in its 1992 decision in *Forsyth County v. Nationalist Movement*.<sup>57</sup> The Nationalist Movement, a white supremacist organization, challenged the constitutionality of Forsyth County's assembly and parade ordinance, which required groups using public spaces to pay for their own protection if the costs of providing protection exceeded normal bounds.<sup>58</sup> The county had established the fee in the wake of a pair of rallies which attracted significant numbers of demonstrators and counter-demonstrators and resulted in \$670,000 of police protection costs.<sup>59</sup> The Court, led by Justice Blackmun, was concerned that the fee would be administered "based on the content of the speech," as "[t]he fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content."<sup>60</sup> Blackmun ruefully remarked that groups "wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit."<sup>61</sup> The Court dismissed the county's argument that the ordinance was justifiable on the grounds of maintaining order and went on to say that, just as speech could not be punished because it offended a hostile audience, neither could it be financially burdened on those grounds.<sup>62</sup> In essence, the case expanded the protection given to unpopular speech from government actions which had the effect of suppressing said speech.

The Court's 1997 decision in *Reno v. American Civil Liberties Union* would see the heckler's veto doctrine expand beyond cases involving protests to embrace a broader scope of controversial speech.<sup>63</sup>

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<sup>54</sup> See *id.* at 907–09.

<sup>55</sup> *Id.* at 905–06.

<sup>56</sup> *Id.* at 906 (quoting *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973)).

<sup>57</sup> 505 U.S. 123 (1992).

<sup>58</sup> See *id.* at 126–27.

<sup>59</sup> See *id.* at 125–26.

<sup>60</sup> *Id.* at 134.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 134–35.

<sup>63</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

The Communications Decency Act of 1996 featured a provision criminalizing the intentional transmission of “obscene or indecent” material to underage individuals, or any material that “depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”<sup>64</sup> Almost immediately after the bill was signed, it was challenged by a number of plaintiffs, including the American Civil Liberties Union, who claimed that the provisions were unconstitutional.<sup>65</sup> The Court was highly concerned about the possibilities that the provision would chill speech on the internet.<sup>66</sup> In his majority opinion, Justice Stevens argued that the provisions in question “confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child . . . would be present.”<sup>67</sup> Although it might appear odd to apply the heckler’s veto in the context of an impersonal communication where no violence is threatened, Stevens was simply reapplying the reasoning which the Court had used in its earlier heckler’s veto cases; “a critical element of the heckler’s veto [doctrine] is the obligation of the state not to allow public opposition to shut down a speaker,” regardless of the exact form which such public opposition might take.<sup>68</sup> Above all, this is the core of what the modern heckler’s veto doctrine seeks to achieve.

### B. *The Heckler’s Veto in Public Schools*

The past two decades have seen the circuit courts extend the heckler’s veto doctrine to the public school context, although as *Dariano* demonstrates there is no general agreement as to the doctrine’s scope in relation to student speech.<sup>69</sup> Interestingly enough, the Ninth Circuit has actually endorsed the idea that the heckler’s veto can apply in situations where special school-specific considerations are in play. Six years before its *Dariano* opinion, the court considered *Center for Bio-Ethical Reform v. Los Angeles County Sheriff Department*, a case which bears a strong resemblance to the classic heckler’s veto cases of the civil rights era.<sup>70</sup> Here, a pro-life group which was demonstrating in the vicinity of a pub-

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<sup>64</sup> *Id.* at 859–60.

<sup>65</sup> *See id.* at 861–62.

<sup>66</sup> *See id.* at 880.

<sup>67</sup> *Id.*

<sup>68</sup> Leanza, *supra* note 7, at 1313; *see also* Nelson v. Streeter, 16 F.3d 145, 151–52 (7th Cir. 1994) (ruling that city aldermen were wrong in removing a controversial painting from an art exhibition after fears arose that the painting might spark riots in the community. The court noted that the heckler’s veto doctrine applies both in cases where violence is latent and when it is presently occurring).

<sup>69</sup> *See infra* Section III.C.

<sup>70</sup> *Ctr. for Bio-Ethical Reform v. L.A. Cty. Sheriff Dep’t*, 533 F.3d 780 (9th Cir. 2008).

lic middle school held up signs with graphic pictures of aborted fetuses.<sup>71</sup> Upon hearing that some students were planning on throwing rocks at the display and that others were crying and distraught as a result of seeing the images, concerned school officials contacted the police.<sup>72</sup> The two demonstrators holding the signs in question were ordered to leave, and testified that their fears over being arrested had prevented them from protesting at other schools.<sup>73</sup>

The court engaged in a heckler's veto analysis of the California statute at issue in the case, deeming it to be "just the kind of accession to the heckler's veto outlawed by the case law" since the demonstrators' speech was permissible under the statute "until the students and drivers around the school reacted to it, at which point the speech was deemed disruptive and ordered stopped."<sup>74</sup> It then considered what kind of impact the middle school setting should have on the traditional heckler's veto analysis, conceding that the presence of children was a "special circumstance" given that middle school students "may well be particularly susceptible to distraction or emotion in the face of controversial speech, and may not always be expected to act responsibly."<sup>75</sup> However, the court declined to limit the scope of the heckler's veto in this case on the grounds that there was "no precedent for a 'minors' exception" to the heckler's veto doctrine and that creating one "would therefore be an unprecedented departure from bedrock First Amendment principles."<sup>76</sup> The Ninth Circuit's message in *Center for Bio-Ethical Reform* seemed clear: a heckler's veto that is demanded by public school students is no less unconstitutional than one demanded by adults.<sup>77</sup> However, as *Dariano* would show, the court apparently was not prepared to extend such reasoning into the classroom.<sup>78</sup>

The same cannot be said for other circuit courts, most notably the Seventh and Eleventh Circuits, both of which have implicitly or explicitly embraced heckler's veto principles in public school settings. In *Holloman ex rel. Holloman v. Harland*, the Eleventh Circuit faced a case in which the plaintiff, a high school student, sued school officials who punished him after he refused to say the Pledge of Allegiance with the rest of his class.<sup>79</sup> During the pledge the appellant chose to silently raise his fist,

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<sup>71</sup> See *id.* at 784.

<sup>72</sup> See *id.* at 785.

<sup>73</sup> See *id.* at 785–86.

<sup>74</sup> *Id.* at 789.

<sup>75</sup> *Id.* at 790.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 777–78 (9th Cir. 2014); see generally *infra* Section III.A (discussing the *Dariano* ruling).

<sup>79</sup> See *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1260–61 (11th Cir. 2004).

a measure which his teacher saw as “unorthodox and deliberately provocative.”<sup>80</sup> The court assessed the school’s action through the prism of the material and substantial interference standard from *Tinker*,<sup>81</sup> as it could not simply defer to any claims by school officials of “the specter of disruption or the mere theoretical possibility of discord.”<sup>82</sup> The court remarked that “the fact that other students may have disagreed with either Holloman’s act or the message it conveyed is irrelevant to our analysis”<sup>83</sup> and proceeded to implicitly embrace the heckler’s veto doctrine’s applicability to the situation:

If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob. . . . The fact that other students might take such a hairstyle as an incitement to violence is an indictment of those other students, not long hair.<sup>84</sup>

In essence, the court argued that schools cannot hide behind the expected or even actual reactions of their students to suppress student speech.

The court acknowledged, as the Ninth Circuit would in *Center for Bio-Ethical Reform*, that students did not always receive the same constitutional protections in school as they would outside, but still emphasized that such protections for students could not be stripped on account of their classmates’ violent actions.<sup>85</sup> The principal’s task of maintaining order in school could not come at the cost of “turning a blind eye to basic notions of right and wrong.”<sup>86</sup> At its core, *Holloman* stands as a repudiation of the idea that school officials can count on blind deference by the courts to their contentions that maintaining a safe learning environment requires reducing students’ free speech rights.<sup>87</sup>

The Seventh Circuit was even more explicit in its application of heckler’s veto principles in the public school context. In *Zamecnik v.*

<sup>80</sup> *Id.* at 1270.

<sup>81</sup> Under this standard, the school must demonstrate that its limitations on student speech were designed to prevent a material and substantial interference in the school’s educational mission. *See infra* Section II.A.

<sup>82</sup> *Holloman*, 370 F.3d at 1271.

<sup>83</sup> *Id.* at 1274–75.

<sup>84</sup> *Id.* at 1275.

<sup>85</sup> *See id.* at 1275–6.

<sup>86</sup> *Id.*

<sup>87</sup> *See generally* Negrón, *supra* note 10, at 364 (describing how schools “are faced with balancing two strongly competing interests: ensuring safe learning environments for all students and protecting free speech.”).

*Indian Prairie School District*, the court faced a case in which the plaintiffs, students at a public high school, were prevented from wearing “Be Happy, Not Gay” t-shirts one day after a private student group promoted a pro-LGBT “Day of Silence.”<sup>88</sup> Writing for the majority, Judge Posner noted that “high school students should not be raised in an intellectual bubble,” which would be the case if schools forbade discussion of political and social issues during the day.<sup>89</sup> He asserted that by banning the t-shirts the school was attempting to protect the rights of LGBT students, but said that this was an invalid justification given that “people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life.”<sup>90</sup> Posner remarked that the substantial disruption cases in the *Tinker* line “do not establish a generalized ‘hurt feelings’ defense to a high school’s violation of the First Amendment rights of its students,” but added that school officials are entitled to a modicum of discretion in discerning when speech goes from hurting feelings to substantially disrupting a school’s educational mission.<sup>91</sup>

Posner proceeded to analyze the school’s forecast of a substantial disruption, and particularly its contention that student harassment of the plaintiffs for wearing the shirts counted as such a disruption. He announced that such evidence could not be considered as part of a substantial disruption analysis because doing so would go against the heckler’s veto doctrine:

Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker’s opponents’ mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response.<sup>92</sup>

Posner was, in fact, more inclined to believe that high schools should be in the business of promoting debate and discourse rather than trying to squelch it.<sup>93</sup> As the Eleventh Circuit had done in *Holloman*, the Seventh Circuit recognized the responsibilities of public schools towards their

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<sup>88</sup> *Zamecnik v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 875 (7th Cir. 2011).

<sup>89</sup> *Id.* at 876.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 877–78.

<sup>92</sup> *Id.* at 879. This means that the harassment of *Zamecnik* could not be used by the school to justify banning the former’s speech. *See id.*

<sup>93</sup> *See id.* at 878 (arguing that the fact that schools “are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source False The First Amendment . . . is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing

students without using this as an excuse to provide school officials with *carte blanche* to censor student speech.<sup>94</sup> For our purposes, the important difference between *Holloman* and *Zamecnik* on one hand and *Center for Bio-Ethical Reform* on the other is that the former cases recognized the heckler's veto in the context of student speech in the classroom, whereas the latter merely declined to create an exception to the heckler's veto doctrine for speech in the vicinity of a public school. This distinction will become important when analyzing the Ninth Circuit's subsequent ruling in *Dariano*.

## II. THE SCHOOL SPEECH DOCTRINE

We have already seen the evolution of the heckler's veto doctrine and how it has been applied to public schools at the circuit level, but in every student speech case, the heckler's veto issue comes up as part of the more general school speech analysis. Understanding the prongs of the school speech doctrine and the confusion surrounding its current state is essential to knowing the context and importance of *Dariano*.

### A. *Tinker and the Substantial Disruption Test*

The Supreme Court's modern school speech jurisprudence began to take shape in 1969's *Tinker v. Des Moines Independent Community School District*.<sup>95</sup> The plaintiffs in this case planned to wear black arm bands to school to protest the Vietnam War.<sup>96</sup> In response, the principal established a policy banning all arm bands, and the plaintiffs had to remove their bands to enter the school.<sup>97</sup> The Court began by noting the special constitutional characteristics of the school setting and the tension between "affirming the comprehensive authority of the States and of school officials" and protecting the First Amendment rights of students.<sup>98</sup> Writing for the majority, Justice Fortas established what would become known as the substantial disruption standard:

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or

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the school to limit the debate when it becomes substantially disruptive.") (quoting *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 679–80 (7th Cir. 2008)).

<sup>94</sup> See *id.* at 879–80 (noting that schools have "legitimate responsibilities . . . toward the immature captive audience that consists of [their] students").

<sup>95</sup> See *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>96</sup> See *id.* at 504.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 507.

cause a disturbance. But our Constitution says we must take this risk . . . . Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ [restrictions on student speech] cannot be sustained.<sup>99</sup>

Fortas continued by arguing that public schools, despite their unique characteristics vis-à-vis other public spaces, could not be “enclaves of totalitarianism” or a “closed-circuit” that fed students state-approved messages without respecting their students’ fundamental right of expression.<sup>100</sup> A desire to avoid the controversy or discord that might arise in response to the expression of unpopular views is not a justification for regulating student speech unless there is a material and substantial interference with the operations of the school.<sup>101</sup>

The substantial disruption standard for regulating student speech has been further developed in the half century since *Tinker* was decided.<sup>102</sup> Unfortunately, as a result of the individualized nature of the substantial disruption analysis, courts have generally struggled to define exactly what a substantial disruption is in marginal cases.<sup>103</sup> Additionally, there remains some confusion as to whether the substantial disruption standard is concerned only with the speaker or whether third-party disruptions also must be considered.<sup>104</sup> These unresolved issues have created an unfavorable situation for school administrators trying to toe the line between respecting speech rights and preserving productive learning environments.<sup>105</sup>

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<sup>99</sup> *Id.* at 508–09.

<sup>100</sup> *Id.* at 511.

<sup>101</sup> *See id.* at 513–14.

<sup>102</sup> For instance, it is now commonly accepted that schools do not have to wait for a substantial disruption to actually occur to regulate student speech, nor must they wait for an absolute certainty of a disruption; when a school has forecasted a disruption it is up to courts to decide whether this forecast is reasonable given the circumstances of the case. *See Lowery v. Euverard*, 497 F.3d 584, 591–93 (6th Cir. 2007).

<sup>103</sup> *See* Shannon M. Raley, Note, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 795–96 (2011).

<sup>104</sup> *See* Alliance Defending Freedom Brief, *supra* note 35, at 23.

<sup>105</sup> *See* Charles R. Waggoner, *The Impact of Symbolic Speech in Public Schools: A Selective Case Analysis From Tinker to Zamecnik*, 3 ADMIN. ISSUES J. 64, 70 (2013) (arguing that the lack of a consistent principle which can explain judicial rulings in school speech cases leaves administrators “between the proverbial rock and hard place”). The *Tinkers* themselves have lamented how the Supreme Court has declined to elaborate on the kinds of protections *Tinker* offers to political speech. *See* Brief of *Amici Curiae* Mary Beth Tinker and John Tinker in Support of Petitioner [hereinafter *Tinker Brief*] at 11, *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354 (9th Cir. 2014) (No. 14-720), *cert. denied*, 135 S. Ct. 1700 (2015).

B. Bethel and Kuhlmeier: *Adding More Prongs to Tinker*

The Supreme Court's next two school speech cases created additional bases for restricting student speech which are not as important for our purposes but still necessary for understanding how the doctrine has evolved. In *Bethel School District No. 403 v. Fraser*, the plaintiff was a high school student who gave a crude speech during a school assembly and was suspended by school administrators.<sup>106</sup> Writing for the Court, Justice Burger upheld the suspension on the grounds that one of the functions of public schools is educating students to "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."<sup>107</sup> Burger emphasized the "special characteristics of the school environment" which permit schools a degree of leeway in banning "lewd, indecent or offensive speech and conduct" that threatens their task of turning students into civil and mature adults.<sup>108</sup> He was careful to distinguish the speech in *Fraser* from that in *Tinker*, noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech."<sup>109</sup> In sum, *Fraser* granted schools significant deference in banning lewd and indecent nonpolitical speech.<sup>110</sup>

Two years later, the Court created another path to restrict student speech in *Hazelwood School District v. Kuhlmeier*, which involved a controversial student piece in a school newspaper.<sup>111</sup> The teacher who advised the newspaper prevented an article about teen pregnancy from being published due to his concerns about the propriety of the material for a young audience.<sup>112</sup> Justice White, writing for the Court, began by discussing how the "special characteristics of the school environment" permit schools to regulate speech "even though the government could not censor similar speech outside the school."<sup>113</sup> White argued that student speech rights are not impermissibly abridged when educators regulate the style and content of speech in student-sponsored activities, provided "their actions are reasonably related to legitimate pedagogical concerns."<sup>114</sup> Like *Fraser*, *Kuhlmeier* affirms that there are multiple ways in which restrictions of student speech can be justified.<sup>115</sup> However, it is

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<sup>106</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986).

<sup>107</sup> *Id.* at 683.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 680.

<sup>110</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988).

<sup>111</sup> *Id.* at 262

<sup>112</sup> *See id.* at 263–64.

<sup>113</sup> *Id.* at 266.

<sup>114</sup> *Id.* at 273.

<sup>115</sup> *See id.* at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from



important to note that neither case has substantially limited *Tinker* in practice.<sup>116</sup>

### C. *Morse and the Uncertainty of the Present Doctrine*

The Court's most recent foray into school speech jurisprudence was in the 2007 decision *Morse v. Frederick*, in which a student unfurled a banner saying "BONG HiTS 4 JESUS" outside his school while his classmates were outside to watch the Olympic torch relay.<sup>117</sup> The banner was confiscated and the student, Frederick, was suspended.<sup>118</sup> Chief Justice Roberts's majority opinion quickly honed in on the ostensibly pro-drug content of Morse's banner, noting that the government's interest in minimizing drug abuse among students "allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use."<sup>119</sup> Roberts opined that the speech in *Morse* was more dangerous to the school's mission than the armbands in *Tinker* given the school's specific concern in limiting drug abuse, and that this justified the school's decision to ban the speech.<sup>120</sup> The Court, however, was careful to note that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive'" given that "much political and religious speech might be perceived as offensive to some."<sup>121</sup>

Justice Alito's concurrence emphasized Roberts's point, as he joined the opinion in the understanding that it only applied to speech advocating illegal drug use rather than any speech commenting on political and social issues, as school officials do not have "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed."<sup>122</sup> Alito worried that Roberts's opinion could be interpreted to allow the banning of any speech that goes against a vague educational mission, which was especially concerning for him given that a school's educational mission is defined in part by elected and appointed officials who see the school's mission as inculcating their own political and social views in students.<sup>123</sup> He asserted that *Morse* does not support restricting speech on political or social issues and that any restrictions must "be based on some special characteristic of the school setting."<sup>124</sup>

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the question whether the First Amendment requires a school affirmatively to promote particular student speech.").

<sup>116</sup> See Moss, *supra* note 11, at 1435–36.

<sup>117</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>118</sup> *Id.* at 398.

<sup>119</sup> *Id.* at 408–09.

<sup>120</sup> See *id.* at 408–09.

<sup>121</sup> *Id.* at 409.

<sup>122</sup> *Id.* at 422–23 (Alito, J., concurring).

<sup>123</sup> *Id.* at 423.

<sup>124</sup> *Id.* at 424.

Thanks in large part to Alito's decisive concurrence, *Morse* initially seemed like a narrow ruling. However, some lower courts have since used *Morse* to restrict a wide variety of non-drug-related speech that was seen as "having the possibility of leading to physical harm."<sup>125</sup> *Harper v. Poway Unified School District*, in which a high school student was prevented from wearing an anti-homosexuality t-shirt, is typical of such cases.<sup>126</sup> The court noted the *Morse* Court's attempts to limit the scope of its ruling, but decided that "*Morse* lends support for a finding that the speech at issue in the instant case may be properly restricted by school officials if it is considered harmful."<sup>127</sup> It further asserted that *Morse* "affirms that school officials have a duty to protect students . . . from degrading acts or expressions that promote injury to the student's physical, emotional or psychological well-being" if they hurt the school's educational mission.<sup>128</sup> Other courts have paid more heed to Justice Alito's concurrence and restricted *Morse* to speech promoting drug use and other similarly weighty illegality.<sup>129</sup> In cases like this, courts read *Morse* as "ensuring that political speech will remain protected within the school setting."<sup>130</sup> Scholars have also come down on both sides of this emerging split, with some arguing that *Morse* allows explicit viewpoint discrimination by public schools and others countering that the decision should be narrowly construed given its strong focus on student safety rather than offensive or unpopular viewpoints.<sup>131</sup> Perhaps the best way to understand these competing interpretations of *Morse* is as a disagreement over the decision's impact on student speech that doesn't involve illegal activities or significant danger to students. Regardless, the unfortunate reality of the situation is that the Supreme Court has not yet clarified its ruling in *Morse*, even as calls have grown "to help schools navigate the tension between the student speech issues and the increasing national demands for safe learning environments."<sup>132</sup>

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<sup>125</sup> Ronald C. Schoedel III, *Morse v. Frederick: Tinkering with School Speech: Can Five Years of Inconsistent Interpretation Yield a Hybrid Content-Effects-Based Approach to School Speech as a Tool for the Prevention of School Violence?*, 2012 B.Y.U. L. REV. 1633, 1635 (2012).

<sup>126</sup> *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072, 1075 (S.D. Cal. 2008).

<sup>127</sup> *Id.* at 1100.

<sup>128</sup> *Id.* at 1101.

<sup>129</sup> *See, e.g., Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 769–70 (5th Cir. 2007) (arguing that *Morse* is "focused on the particular harm to students of speech advocating drug use" and that "speech advocating a harm that is demonstrably grave . . . to the physical safety of students . . . is unprotected").

<sup>130</sup> *Id.* at 768.

<sup>131</sup> *See generally Moss, supra* note 11, at 1438–40 (providing an overview of the different scholarly views of the *Morse* decision and its breadth).

<sup>132</sup> Negrón, *supra* note 10, at 380.

III. *DARIANO V. MORGAN HILL*

It was into the clouded and uncertain intersection between the school speech and heckler's veto doctrines that the Ninth Circuit stepped with its ruling in *Dariano v. Morgan Hill Unified School District*.<sup>133</sup> In deciding that school officials can limit speech that might cause a disruptive reaction, the court created a circuit split on the issue of the heckler's veto's applicability in the context of student speech in public schools.<sup>134</sup>

The events at the root of *Dariano* began on May 5, 2010, at Live Oak High School, a public school that had set the date aside as a celebration of Cinco de Mayo and "the pride and community strength" of its Mexican-American students.<sup>135</sup> Live Oak is a diverse school that has a history of racially based fights and tension among its students, including at prior Cinco de Mayo celebrations.<sup>136</sup> On the date of the 2010 celebration, a group of white students, including the eventual appellant, wore American flag shirts to school, prompting concerns among administrators that there might be a repeat of earlier altercations.<sup>137</sup> The students were sent home after refusing to remove their shirts and brought suit against the district on the grounds that their rights to freedom of expression had been violated.<sup>138</sup>

A. *The Majority Opinion*

The court began its analysis by reviewing school speech jurisprudence, especially *Tinker*'s substantial disruption prong and the discretion that courts generally afford school officials in determining whether the threat of such a disruption exists.<sup>139</sup> Writing for the majority, Judge McKeown noted the "evidence of nascent and escalating violence at Live Oak" in the context of the 2009 altercation and deigned the school officials to have reasonably and "presciently avoided an altercation," thus satisfying the *Tinker* substantial disruption test.<sup>140</sup> The majority was careful to distinguish the facts in *Dariano* from those of *Tinker*, arguing that in the present case the measures taken by the vice principal were minimal restrictions that arose out of a desire to avoid a major disruption

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<sup>133</sup> *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014).

<sup>134</sup> See *id.* at 767 (O'Scannlain, J., dissenting) ("In [overlooking the heckler's veto], the panel creates a split with the Seventh and Eleventh CircuitsFalse"); see generally *supra* Section I.B. (discussing the *Zamecnik* and *Holloman* decisions by the Seventh and Eleventh Circuits).

<sup>135</sup> *Dariano*, 767 F.3d at 774.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.* at 775.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* at 776.

<sup>140</sup> *Id.* at 776–77.

rather than an “urgent wish to avoid controversy,” as had been the case in *Tinker*.<sup>141</sup>

The court did address the heckler’s veto issue, but only to explain why it did not apply in *Dariano*. Judge McKeown explained that “the language of *Tinker* and the school setting guides us here,” with the questionable implication that, in the school context, *Tinker* acts as an override to any heckler’s veto concerns.<sup>142</sup> The majority dismissed the fact that it was not the speakers who were being disruptive by asserting that there is no consequential difference between a disruption caused by the speaker and one caused by the audience.<sup>143</sup> However, the case that the court cited to support this proposition did not involve a heckler’s veto issue, and the ruling in that case implies that the existence of such a concern would change the analysis.<sup>144</sup> Tellingly, the majority did not substantially engage with the facts of *Holloman* and *Zamecnik*, the two circuit court cases which found the heckler’s veto to apply in the public school context.<sup>145</sup> In the end, the court leaned heavily on the language of deference, emphasizing the difficulties faced by school authorities and signaling that the court’s job “is not to second-guess” the reasonable actions of school officials.<sup>146</sup>

The majority exclusively used a *Tinker* substantial disruption analysis to arrive at its conclusion,<sup>147</sup> but *Dariano* arguably implicates the Supreme Court’s *Morse* ruling as well. The majority in *Dariano* emphasized how the school officials were not trying to avoid controversy in making students remove their shirts, but the vice principal’s actions could easily be seen as motivated primarily by a desire to limit political speech that ran counter to the school’s desire to avoid political controversy and celebrate Cinco de Mayo.<sup>148</sup> Both the majority and concurrence in *Morse* demonstrate a strong aversion to the regulation of political student speech simply because the school disapproves of the message.<sup>149</sup> Indeed, the speech in *Dariano* can be construed as the kind of social commentary which the *Morse* concurrence explicitly discusses. The majority in *Dariano* would surely counter that *Tinker* exclusively

<sup>141</sup> *Id.* at 777.

<sup>142</sup> *Id.* at 778.

<sup>143</sup> *Id.*

<sup>144</sup> See *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 38 n.11 (10th Cir. 2013) (“Moreover, there is no indication in this case that the problematic student disruptions were aimed at stopping plaintiffs’ expression, and plaintiffs did not otherwise develop such an argument.”).

<sup>145</sup> See discussion *supra* Section I.B.

<sup>146</sup> *Dariano*, 767 F.3d at 779.

<sup>147</sup> See *id.* at 776 (“We analyze the students’ claims under the well-recognized framework of *Tinker* . . .”).

<sup>148</sup> *Id.* at 777.

<sup>149</sup> See discussion *supra* Section II.C.

governs cases where school officials claim to be acting to avoid substantial disruptions to the educational process, to the exclusion of both the heckler's veto doctrine and other school speech jurisprudence.<sup>150</sup>

### B. *The Dissent*

Three judges dissented from the Ninth Circuit's ruling in *Dariano*, primarily on the grounds that the heckler's veto was implicated in the case and that the source of the threatened disruption was relevant to the analysis.<sup>151</sup> Writing for the dissent, Judge O'Scannlain argued that "far from abandoning the heckler's veto doctrine in public schools, *Tinker* stands as a dramatic reaffirmation of it."<sup>152</sup> The dissent emphasized that the government cannot consider an audience's negative reaction to be a basis for the suppression of speech, and claimed that the majority was incorrect in saying that the other circuit courts have not distinguished between disruptions caused by speakers and audiences in their heckler's veto cases.<sup>153</sup>

Judge O'Scannlain posited that the actions of school officials and the majority's decision gave students the message that "by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them."<sup>154</sup> He contrasts this "perverse incentive" with the goal of the heckler's veto doctrine, which is to protect unpopular speech from suppression.<sup>155</sup> O'Scannlain channels *Tinker* by offering a broader defense of student speech rights as necessary to preserve the "hazardous freedom" and "openness" which characterize a healthy discussion.<sup>156</sup> These arguments seem to implicate *Morse's* considerations of when it is proper to regulate the political speech of students, and implicitly reject the majority's singular use of the *Tinker* substantial disruption standard in deciding the case.

### C. *The Circuit Split*

The dissent in *Dariano* was correct to note that the court's ruling created a split with the Seventh and Tenth Circuits on the issue of whether the heckler's veto doctrine has any relevance in a *Tinker* sub-

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<sup>150</sup> However, there is ample evidence in the *Tinker* ruling to suggest that the Court did not consider the substantial disruption test to be a one-size-fits-all solution to potentially disruptive student speech. See *infra* Part IV.

<sup>151</sup> See *Dariano*, 767 F.3d at 766.

<sup>152</sup> *Id.* at 769.

<sup>153</sup> See *id.* at 771. This difference of opinion over whether there is a difference between audience-caused and speaker-caused disruptions appears to drive the split between the majority and the dissent in *Dariano*, and merits further examination. See *infra* Part IV.

<sup>154</sup> *Dariano*, 767 F.3d at 770.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 769 (quoting *Tinker*, 393 U.S. at 508–09).

stantial disruption analysis. To begin with, the Ninth Circuit has already applied the heckler's veto doctrine in a case with a public school setting. In *Center for Bio-Ethical Reform*, the court ruled that the disruptive reactions of middle school students to a pro-life protest could not be used as a basis for suppressing the protest, which had taken place on public property adjacent to the school.<sup>157</sup> The Ninth Circuit refused to create a minors exception to the heckler's veto in school settings, despite the government's argument that the court was threatening to "substantially limit the power of government to protect the school environment."<sup>158</sup> The Supreme Court denied certiorari in that case, and in doing so seemed to reject the appellants' request that the Court fashion an exception to the heckler's veto doctrine.<sup>159</sup>

None of this is to say that the Ninth Circuit's ruling in *Dariano* was necessarily inconsistent with *Center for Bio-Ethical Reform*; indeed, there are important factual dissimilarities between the two cases, including the exact location of the expression in question and the age and status of the speakers. However, *Center for Bio-Ethical Reform* shows that the Ninth Circuit is well aware of the heckler's veto and does not dismiss out of hand the idea that it could apply in a school setting.<sup>160</sup> The question becomes why the Court chose not to take the next logical step in *Dariano* and grant public school students heckler's veto protections. From the opinion, it seems as though the court's fixation on *Tinker* as the sole standard by which cases involving disruptive student speech could be resolved precluded a deeper heckler's veto analysis.

Regardless of the rationale behind the majority's decision not to extend their *Center for Bio-Ethical Reform* ruling in *Dariano*, their decision creates a clear split with the Seventh and Eleventh Circuits. The *Dariano* majority attempted to justify their refusal to apply the heckler's veto doctrine by pointing to *Tinker* and the unique characteristics of the school environment, an approach that is rejected by the other circuits.<sup>161</sup> While the courts in *Holloman* and *Zamecnik* both utilized a *Tinker* analysis, they rejected the idea that student reactions to the peaceful expressions of their classmates were an appropriate basis upon which to strip the latter of their rights.<sup>162</sup> The *Zamecnik* court in particular argued that

<sup>157</sup> See *supra* Section I.A.2.

<sup>158</sup> *Application in School Setting of "Heckler's Veto" Ban on Content-Restrictive Regulations*, U.S. SUP. CT. ACTIONS 16, Jan. 15, 2009.

<sup>159</sup> See *id.*

<sup>160</sup> See *Ctr. for Bio-Ethical Reform v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) (noting that there is no minors' exception to the heckler's veto).

<sup>161</sup> See *Dariano*, 767 F.3d at 778.

<sup>162</sup> See *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) ("Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct."); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1275 (11th Cir. 2004) ("If

the disruption created by such harassment should not even be considered in the *Tinker* analysis.<sup>163</sup> The Seventh and Eleventh Circuits also rejected the idea that the public school context strips students of all heckler's veto protections; on the contrary, the courts emphasized the value of debate in the school context and the need to avoid "turning a blind eye to basic notions of right and wrong."<sup>164</sup> While both courts agree with the Ninth Circuit that a degree of deference must be granted to school officials' determinations of what constitutes a disruption, they stringently reject the notion that this deference requires that basic First Amendment protections such as the heckler's veto be cast aside.<sup>165</sup>

The circuits also disagree on the question of whether *Tinker*'s substantial disruption test covers any real or potential disruption caused by student expression or only those that do not arise directly from the speakers but from the audience, as was the case in *Dariano*. The Ninth Circuit clearly favors the former approach, as in *Dariano* they explicitly noted their belief that "[i]n the school context, the crucial distinction is the nature of the speech, not the source of it."<sup>166</sup> The court claimed that there is no basis for a distinction between a disruption caused by the speaker and one caused by onlookers.<sup>167</sup> The Eleventh Circuit implicitly disagreed with this interpretation in *Holloman*, as it found student expression to be constitutionally protected when the speaker does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."<sup>168</sup> This disagreement was a key factor in how the circuits resolved the issue of the heckler's veto in their respective decisions.

Unfortunately, the Supreme Court passed up its first chance to resolve this circuit split when it denied certiorari in *Dariano*.<sup>169</sup> The Court's decision to deny certiorari in both *Center for Bio-Ethical Reform* and *Dariano* is impossible to interpret with certainty, but it seems to fit into the larger pattern of the Court hesitating to clarify the school speech doctrine in the wake of *Morse* and its fallout.<sup>170</sup> Until it does so, the

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the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.").

<sup>163</sup> See *Zamecnik*, 636 F.3d at 879.

<sup>164</sup> *Holloman*, 370 F.3d at 1276.

<sup>165</sup> See *supra* Section I.A.2.

<sup>166</sup> *Dariano*, 767 F.3d at 778.

<sup>167</sup> See *id.*

<sup>168</sup> *Holloman*, 370 F.3d at 1276.

<sup>169</sup> See Lawrence Hurley, *Supreme Court Rejects Free Speech Appeal over Cinco de Mayo School Dispute*, REUTERS (Mar. 30, 2015, 10:20 AM), <http://www.reuters.com/article/us-usa-court-censorship-idUSKBN0MQ1JD20150330>.

<sup>170</sup> See *supra* Part II.C.

question of the heckler's veto's applicability in public school settings will remain one of the many murky areas of the Court's school speech jurisprudence.

#### IV. TOWARDS A MORE WORKABLE SCHOOL SPEECH DOCTRINE

If the Supreme Court's goal in *Morse* was to clarify its school speech jurisprudence, then it has failed utterly, if not in the initial fractured decision, then in its refusal to hear another school speech case since then. Since the decision was handed down, courts have struggled to determine the breadth of its protections for the political speech of students.<sup>171</sup> The importance of *Morse* for the circuit split over the heckler's veto is not immediately apparent, given that the *Tinker* substantial disruption test was central to each circuit's analysis.<sup>172</sup> However, the Court cannot effectively resolve the heckler's veto issue in public schools without dealing with the issues raised in *Morse*. Does political student speech need to be analyzed differently under *Tinker*? Does it merit heckler's veto protections? How much latitude should be given to school authorities in their regulation of political speech? These are all questions which float around both the Court's school speech jurisprudence and the circuit split over the heckler's veto, and they must all be answered for either area of the law to be clarified.

##### A. *The Supreme Court Should Overturn the Ninth Circuit's Decision in Dariano*

To begin with, the Court should overturn the Ninth Circuit's flawed ruling in *Dariano*. The *Dariano* majority couched its decision in the language of deference to school officials and to the seemingly all-encompassing precedent of *Tinker*, arguing that their "role was not to second-guess . . . the precautions put in place to avoid violence where the school reasonably forecast substantial disruption or violence."<sup>173</sup> The court's admonition that "deference does not mean abdication" rings somewhat hollow given its curt dismissal of the dissent's arguments that restrictions on peaceful student expression should be considered more carefully.<sup>174</sup> However, a close reading of *Tinker* reveals that the *Dariano* court's use of it to dismiss the applicability of the heckler's veto was incorrect. In fact, the case can easily be read as an early affirmation of the heckler's

<sup>171</sup> See *id.*

<sup>172</sup> See *Dariano*, 636 F.3d at 776 ("We analyze the students' claims under the well-recognized framework of *Tinker* . . ."); *Zamecnik*, 636 F.3d at 876 (noting that the school must satisfy the *Tinker* substantial disruption standard to justify its restrictions on student speech); *Holloman*, 370 F.3d at 1273 ("Consequently, we apply the *Tinker* . . . doctrine in this case.")

<sup>173</sup> *Dariano*, 767 F.3d at 779.

<sup>174</sup> *Id.*



veto doctrine. The school officials in *Tinker* were primarily concerned with the reactions to the Tinkers' armbands from students who disagreed with their message.<sup>175</sup> In response, the *Tinker* Court defended the students' rights to speech from suppression based on school officials' "urgent wish to avoid the controversy which might result from the expression."<sup>176</sup> The Ninth Circuit's use of *Tinker* turns it from a case which implicitly endorses the heckler's veto doctrine to one which completely locks out any sort of heckler's veto analysis as inapplicable.

The Ninth Circuit's belief that *Tinker*'s substantial disruption test applies equally to disruptions caused by both speakers and their audiences is mistaken. When it lays out the limits of the expressive rights of students, the *Tinker* court argues that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."<sup>177</sup> In this passage, the Court is clearly focusing on actions by the speaker that would remove his speech from the sphere of constitutional protection, not audience reactions that might do so. Indeed, the *Tinker* Court's "focus on the protesting students' behavior—not the reaction of third parties, which is largely outside of the protestors' control—is clear" throughout its analysis.<sup>178</sup> In *Blackwell v. Issaquena County Board of Education*, a school speech case cited by the *Tinker* Court, the Fifth Circuit similarly focused on the behavior and actions of the speakers in a school speech case, in this case declining to enjoin school officials' restriction of student expression on the grounds that the speakers harassed other students and created a significant disturbance.<sup>179</sup> Clearly, the *Tinker* court distinguished disruptions arising directly from student speech from disruptions that arise from reactions to that speech. *Dariano* is mistaken in its interpretation of *Tinker*,<sup>180</sup> while *Holloman* and *Zamecnik*, as we have seen, are more faithful to the *Tinker* Court's intent in establishing the substantial disruption standard.<sup>181</sup>

In the end, *Tinker* cannot be separated entirely from the heckler's veto doctrine, deference to school officials notwithstanding. If students do not "shed their constitutional rights to freedom of speech or expres-

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<sup>175</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 513 (emphasis added).

<sup>178</sup> Alliance Defending Freedom Brief, *supra* note 35, at \*12.

<sup>179</sup> See *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966).

<sup>180</sup> The Tinkers believe that the Ninth Circuit's decision was based on a flawed understanding of their case. See *Tinker* Brief, *supra* note 105, at 13 ("The [*Dariano* decision] undermines constitutional values by teaching law-abiding students that the peaceful must surrender their rights in the face of hostility from the violent. Nothing could be more antithetical to First Amendment principles, especially in view of recent events.").

<sup>181</sup> See *supra* Part III.C.

sion at the schoolhouse gate,” then it is only logical to provide students with the protection of First Amendment doctrines such as the heckler’s veto, at least to a reasonable extent.<sup>182</sup> The judiciary has long highlighted the importance of preserving rights for students, who at their age are only just beginning to engage with the rights and responsibilities bestowed on them by the Constitution.<sup>183</sup> The *Tinker* Court understood this, and it is up to the present Court to reaffirm the case’s strong protections for student expression. In defining exactly what these protections should be, the Court will have to move beyond precedent and synthesize its existing doctrine.

### B. *The Court Should Reaffirm Student Speech Rights and Reform Their School Speech Jurisprudence*

If the Ninth Circuit’s approach in *Dariano* is indeed incorrect, the Supreme Court must then elucidate a clear reformulation of its school speech doctrine. Merely affirming the *Zamecnik* and *Holloman* decisions will not be sufficient, as the implications of extending the heckler’s veto doctrine to student speech would go beyond the treatment which the Seventh and Eleventh Circuits give the issue in their decisions. The Court’s overall goal should be to avoid what happened after *Morse*, when a fractured decision led to uncertainty about the state of the doctrine and divergent rulings in lower courts.<sup>184</sup> The status quo does nothing to help school teachers and administrators understand how to permissibly regulate student speech. Some scholars have begun to propose ways for the Court to resolve this jurisprudential mess, but the rise of the heckler’s veto circuit split adds a new dimension to the issue and provides the Court with an opportunity to rationalize its relevant jurisprudence.<sup>185</sup> This Note proposes something of a harmonization of the *Tinker* and *Morse* areas of the school speech doctrine, although not a merger, as that would be impracticable given the substantive differences between the situations to which the cases respond.

First, the Court should make it clear that its overall goal in clarifying its school speech jurisprudence does not dramatically interfere with the deference traditionally given to school officials. It is indisputable that

<sup>182</sup> *Tinker*, 393 U.S. at 506.

<sup>183</sup> See *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

<sup>184</sup> See *supra* Part II.C.

<sup>185</sup> See, e.g., Raley, *supra* note 103, at 797–98 (laying out a multifactor balancing test for what kinds of student speech should be restricted); Schoedel, *supra* note 125, at 1658–59 (advocating an interpretation of *Morse* which embraces Alito’s concurrence but allows schools to ban speech which meets the definition of fighting words).

the school environment is not identical to the average public space, and that “[t]he very nature of public education requires limitations on one’s personal liberty in order for the learning process to succeed.”<sup>186</sup> Additionally, the Court must propose a workable standard which does not impose a heavy burden on the school officials who will have to interpret and enforce it. In *Dariano*, Judge O’Scannlain effectively critiqued the majority’s opinion but failed to offer a realistic replacement standard.<sup>187</sup> These are the challenges which I will try to deal with in proposing a potential roadmap for the Court to consider in revising its school speech jurisprudence.

Any revisions to the school speech doctrine should focus exclusively on speech with some sort of political or social message or commentary, as this is the type of speech that traditionally has merited the greatest level of protection in the courts and other types of speech are thus best left to school administrators to regulate. The *Tinker* substantial disruption doctrine should be maintained, but updated to explicitly incorporate heckler’s veto doctrine principles, as the Seventh and Eleventh Circuits have already done. The new substantial disruption standard would, in the case of political speech, only govern disruptions by the speakers unless the speech also constituted fighting words or a clear, express attempt to bully or hurt fellow students. The American flag t-shirts in *Dariano* would thus be permissible, but not shirts emblazoned with messages like “Mexicans go home” or “America is for Americans.” Additionally, symbols which have blatantly offensive connotations, such as swastikas, would be impermissible regardless of context. This standard would allow schools to use their own guidelines on bullying and misbehavior to decide when a student’s political speech becomes inappropriate. Of course, it would then be up to the courts to prevent schools from using this discretion to create overbroad guidelines that have the effect of chilling all political speech. Overall, then, *Morse*’s heightened concerns about protecting political speech and Justice Alito’s specific desire to avoid having schools pick and choose which messages students could disseminate would be incorporated into the substantial disruption standard via a de facto heckler’s veto doctrine.

The Court should simultaneously reassert that *Morse* was a narrow ruling regarding speech that encourages drug use and other illegal activity. Justice Alito’s admonition that schools should not be allowed to use some vague “educational mission” to ban certain types of political speech should be adopted by the Court at large.<sup>188</sup> Discretion cannot be

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<sup>186</sup> Todd A. DeMitchell, Frudden v. Pilling: *The School Uniform and Compelled Speech*, 312 ED. LAW REP. 1, 7 (2015).

<sup>187</sup> See *Ninth Circuit Denies Motion to Rehear*, *supra* note 4, at 2070.

<sup>188</sup> *Morse v. Frederick*, 551 U.S. 393, 423 (2007).

allowed to become a broad license to limit political speech, subject only to the most cursory judicial overview. At any rate, all political speech that doesn't explicitly encourage violent or illegal activity would be analyzed under the revised *Tinker* substantial disruption standard, subject as well to the specific limitations imposed by *Bethel* and *Kuhlmeier*. All speech, political or not, encouraging drug use, violence, or other illegal activities would remain within *Morse's* sphere. This new system would have numerous advantages over the current doctrine, as it would more forcefully guarantee student political speech rights, protect students from bullying without unduly limiting their exposure to diverse opinions, resolve the issue of the heckler's veto's applicability in the classroom, clarify the Court's school speech jurisprudence, and create certainty for teachers and administrators who would no longer have to wonder what a court would say about their actions.

#### CONCLUSION

The plaintiffs in *Dariano* are perhaps not the most sympathetic fighters for free speech rights, given the ulterior motives one could read into their actions and their status as high school students. However, the role of the First Amendment is to protect unpopular speech, as this is the kind of speech which provokes the debate and discussion which are so essential to the healthy functioning of a liberal democracy. The free speech rights of public schools are not and cannot be coterminous with those of adults, nor can they be cavalierly tossed aside under the guise of deference towards and respect for strained school officials. However, the muddled state of the Supreme Court's school speech jurisprudence and its failure to resolve the outstanding circuit split on the issue of the heckler's veto in public schools have created a situation where lower courts are free to do exactly that.

The intentions of courts such as the Ninth Circuit in limiting student speech rights are doubtlessly noble: they wish to help school administrators and teachers create safe and productive learning environments in which students can maximize their potential. However, in limiting student speech rights they fail to understand that the freedoms enshrined in the Bill of Rights are not always clean and proper. Schools should not become places where students are sheltered from every reality of the outside world, or from views with which they might disagree. Peaceful student speech that comments on social or political issues in a manner that does not bully classmates should not be subject to blanket restrictions, even if such speech prompts an angry, disruptive reaction. Schools are places of learning, and our public schools have a special duty to educate the nation's youth not just in math, science, and reading, but in the values and norms which guide public discourse in the United States. Stu-

dents who believe that disruption and suppression is the best way to respond to views with which they disagree should not be humored by school officials, but rather prevented from acting in such a manner and reprimanded for doing so. The role of the government is to protect speakers and their rights, not to aid and abet those who would see such speech silenced. To submit to the heckler's veto of young students would create a dangerous precedent in each of their minds, one which could have a chilling effect on everyone's speech in a potentially illiberal future.

*Tinker*, just like the heckler's veto doctrine itself, is rooted in the spirit and thinking of the civil rights era, when the judiciary acted decisively to protect and enforce previously neglected rights. In recent years, the Supreme Court failed to clearly articulate this animating rationale behind its school speech jurisprudence, with the result being that the rights of students to free expression have been eroded in lower courts. It now falls once more to the Court to defend the rights of those who cannot effectively represent themselves and to use the heckler's veto circuit split to clearly establish meaningful protections for students whose peaceful, respectful political speech faces suppression at the hands of disruptive classmates and nervous school officials. Freedom of speech is a right to be celebrated for the revolutionary idea that it is, not merely tolerated as a necessary nuisance.

