

# ValpoScholar

## Valparaiso University Law Review

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Volume 44  
Number 4 *Symposium on The Civil Rights of  
Public School Students*

pp.1151-1198

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*Symposium on The Civil Rights of Public School Students*

### No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools

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#### Recommended Citation

Adam J. Speraw, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 Val. U. L. Rev. 1151 (2010).

Available at: <https://scholar.valpo.edu/vulr/vol44/iss4/6>

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# NO BULLYING ALLOWED: A CALL FOR A NATIONAL ANTI-BULLYING STATUTE TO PROMOTE A SAFER LEARNING ENVIRONMENT IN AMERICAN PUBLIC SCHOOLS

## I. INTRODUCTION

On April 20, 1999, the most shocking act of school violence in this nation's history occurred at Columbine High School in Littleton, Colorado.<sup>1</sup> On this date, two students entered the school and proceeded to kill twelve fellow students and one teacher before turning their weapons on themselves.<sup>2</sup> This incident alerted many educators and parents around the nation to the violence that can result from bullying in our schools.<sup>3</sup>

In response to the Columbine incident, many states adopted legislation aimed at preventing bullying and its potentially disastrous

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<sup>1</sup> See, e.g., Alan J. Borsuk, *Columbine: One Year Later*, MILWAUKEE J. SENTINEL, Apr. 19, 2000, at A1 ("Although the list of schools that have become sites of lethal violence has other entries, none has been quite as galvanizing as Columbine."); *Counselor Marilyn Towsey*, WASH. POST, June 5, 2001, at T12 (quoting the principal of Liberty Middle School in Ashland, Virginia, as stating that "Columbine changed everything" with regard to school security and the perception of school bullying).

<sup>2</sup> See, e.g., Sam Howe Verhovek, *Terror in Littleton: The Overview; 15 Bodies Are Removed From School in Colorado*, N.Y. TIMES, Apr. 21, 1999, at A1. Eric Harris, eighteen, and Dylan Klebold, seventeen, brought in weapons, including bombs, two shotguns, a semi-automatic rifle, and a semi-automatic pistol. *Id.* The two teens were described by other students as loners and outcasts who called themselves the "Trench coat Mafia," and had an apparent affinity for violent video games. *Id.* The two were arrested in 1998 for breaking into a car, and Eric Harris also maintained a web site and had been accused by a parent of threatening to kill her son. *Id.* Despite these warning signs, school authorities and fellow students stated that they never thought Harris and Klebold were capable of the violence they unleashed. *Id.*

<sup>3</sup> See Susan Atteberry-Smith, *Five Years After Columbine, Bullying Still a Fact of Life in Springfield Schools*, SPRINGFIELD NEWS-LEADER, Apr. 20, 2004, at A1 (stating that according to some school officials, the excessive bullying of Eric Harris and Dylan Klebold caused their deadly shooting spree); Caren Burmeister, *Bullies Not Welcome Program Aims to Stamp Out Intimidation*, FLORIDA TIMES-UNION, Dec. 20, 2003, at L-1 (quoting a school resource center director as stating that "Columbine sums up what happens when bullying isn't dealt with . . . [i]t doesn't go away and can manifest itself with violence," and also citing a study done by the U.S. Department of Education and the Secret Service finding that of the instigators of thirty-seven extreme acts of school violence occurring between 1974 and 2000, nearly three-quarters felt bullied, persecuted, or threatened by their peers); Jennifer Ralston, *Bullies and Bullying*, SCH. LIBR. J., May 1, 2005, at 49 (suggesting that bullying was a precipitating factor in the violence that occurred at Columbine).

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consequences from occurring in their schools.<sup>4</sup> In addition, national anti-bullying legislation has been proposed in the U.S. House of Representatives to amend the Safe and Drug-Free Schools and Communities Act to include measures to prevent bullying and harassment.<sup>5</sup> However, the efficacy of state measures has not been fully analyzed and no consensus has been reached as to the effect of state anti-bullying statutes on curbing school bullying and violence.<sup>6</sup>

Most current anti-bullying legislation focuses on physical and verbal bullying, yet other types of bullying, such as relational bullying, can also cause violence and other problems.<sup>7</sup> While physical violence is the most recognizable damage that can result from bullying, psychological injury is a type of damage that is hard to recognize and can be very harmful to a child's well-being and school performance.<sup>8</sup> Because physical violence and injury are relatively easy to recognize and sanction, the main difficulty in crafting an anti-bullying statute is being able to constitutionally prohibit and sanction verbal bullying and harassment.

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<sup>4</sup> According to Bullypolice.org, forty-one states have adopted some form of anti-bullying legislation. Bully Police USA, <http://www.bullypolice.org/> (last visited Apr. 9, 2010). These states include, in chronological order of year adopted starting in 1999: Georgia, New Hampshire, Colorado, Louisiana, Mississippi, Oregon, West Virginia, Connecticut, New Jersey, Washington, Arizona, California, Rhode Island, Vermont, Arizona, Indiana, Maryland, Virginia, Texas, Tennessee, Maine, Nevada, Idaho, South Carolina, Arkansas, New Mexico, Delaware, Iowa, Illinois, Kansas, Minnesota, Ohio, Pennsylvania, Nebraska, Kentucky, Utah, Florida, North Carolina, Wyoming, and Alabama. *Id.* Bullypolice.org also grades each of these states' anti-bullying laws based on how effective they are. *Id.*

<sup>5</sup> H.R. 4776(g)(12)(B), (13)(B), 108th Cong. (2004) (this legislation was proposed in the House and referred to the Subcommittee on Education Reform of the House Committee on Education and the Workforce, however, no further action was taken).

<sup>6</sup> See Kathleen Hart, Note, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1122-24 (2005) (analyzing the effectiveness of state anti-bullying legislation in preventing harassment and bullying in schools); Stuart W. Twemlow, et. al., *Creating a Peaceful School Learning Environment: A Controlled Study of an Elementary School Intervention to Reduce Violence*, 158 AM. J. PSYCH. 808 (2001) (stating that few programs to prevent school violence have been evaluated).

<sup>7</sup> See Joan Arehart-Treichel, *Bullying Need Not Be Physical to Have Dire Consequences*, 42 PSYCHIATRIC NEWS 30 (2007) (discussing relational bullying, which is socially manipulative nonphysical behavior intended to harm another person, and the psychological pain it can cause children in school).

<sup>8</sup> See Denise Lavoie, *Suicide Raises Questions About School's Vigilance*, South Bend trib., Mar. 31, 2010, at A6 (discussing the suicide of a teen girl who was mercilessly harassed, threatened, and taunted, as well as several other cases illustrating the adverse effects of bullying); Twemlow, *supra* note 6, at 808. This report in the *American Journal of Psychiatry* found that increased psychiatric consultation and zero tolerance for bullying in an elementary school raised the standardized scores of the school's students and resulted in a decreased number of discipline problems compared to a control elementary school with only regular psychiatric consultation.

Therefore, an effective anti-bullying policy must address the myriad types of bullying and the different effects such bullying can have on students.

A comprehensive national anti-bullying statute would allow school officials to better deal with the different harms associated with bullying and would bring all the states into line with a single standard for addressing bullying in the special context of the school environment. The most important element of anti-bullying statutes needing standardization is the definition of bullying and what behavior or speech constitutes bullying. This will help schools diagnose all types of bullying and the harms that can arise from them. The focus of this Note will be to define bullying behavior that can be sanctioned without violating the First Amendment.

Part II of this Note discusses the Supreme Court decisions and legislation dealing with student speech and the First Amendment, provides an overview of harassment and discrimination law under two federal statutes, introduces the contents of state anti-bullying legislation, and briefly states the limits of congressional power under the Spending Clause.<sup>9</sup> Next, Part III discusses the impact of these areas of law on potential anti-bullying legislation.<sup>10</sup> Part IV discusses the advantages of a national anti-bullying standard and proposes a model anti-bullying statute that could effectively accomplish the aims of prior state anti-bullying legislation.<sup>11</sup> Finally, Part V offers a model anti-bullying statute that attempts to balance the competing interests of protecting students and respecting the First Amendment.<sup>12</sup>

## II. BACKGROUND

This Note centers on crafting a national anti-bullying statute that would effectively deal with bullying in schools. Guidelines established by the Supreme Court's student speech precedents are important considerations in crafting verbal bullying and harassment legislation.

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<sup>9</sup> See *infra* Parts II.A-D (discussing Supreme Court student speech decisions, Title IX law, Title VII law, and the power of Congress under the Spending Clause).

<sup>10</sup> See *infra* Part III (finding that Supreme Court decisions and Title IX law are not sufficient to prevent bullying and harassment in school and that Title VII can offer guidance).

<sup>11</sup> See *infra* Part IV (discussing advantages a national anti-bullying policy would offer and proposing an anti-bullying statute that would accomplish the goals of reducing bullying and the harm it produces).

<sup>12</sup> See *infra* Part V (concluding that national anti-bullying legislation based on the model code proposed in this Note would help to reduce bullying and its consequences in schools and set the extent to which a school can regulate student speech to protect students from bullying).

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Major Supreme Court cases about student speech help set the general limits within which schools may prohibit student speech to combat verbal bullying and harassment.

Below, Part II.A begins with a discussion of the “three pillars” of the Supreme Court’s student speech jurisprudence.<sup>13</sup> Part II.B examines the permissible regulations on harassing and discriminatory speech under Title VII and Title IX.<sup>14</sup> Part II.C describes state anti-bullying statutes and their respective definitions of bullying.<sup>15</sup> Finally, Part II.D discusses the power of Congress under the Spending Clause to place conditions on the receipt of federal funds.<sup>16</sup>

A. *The Three Pillars of Supreme Court Student Speech Jurisprudence*

The Supreme Court has established three standards, commonly known as the “Three Pillars,” by which it measures the constitutionality of school sanctions on student speech.<sup>17</sup> First, in *Tinker v. Des Moines Independent School District* the Court established what has been called the material disruption standard.<sup>18</sup> Next, *Bethel School District No. 403 v. Fraser* held that *Tinker* is not the only standard by which to measure the constitutionality of sanctions on student speech and that students’ First Amendment rights in school are not as extensive as those of adults in other settings.<sup>19</sup> Finally, in *Hazelwood School District v. Kuhlmeier*, the Court recognized that schools have greater authority to prohibit speech in school-sponsored activities if the speech can reasonably be attributed to the school itself.<sup>20</sup> In crafting a national anti-bullying statute, each of these standards must be analyzed as to their effectiveness and use as applied to bullying.<sup>21</sup>

<sup>13</sup> See *infra* Part II.A (discussing the standards the Supreme Court has established for evaluating student free speech rights).

<sup>14</sup> See *infra* Part II.B (focusing on Title IX, 20 U.S.C. § 1681 (2006) claims for student-on-student sexual harassment, and Title VII, 42 U.S.C. § 2000e-2 (2006) claims for “hostile workplace environment” harassment and discrimination).

<sup>15</sup> See *infra* Part II.C (examining recent state anti-bullying statutes categorized by their definition of bullying and looking at their effectiveness of curbing bullying and its effects in schools).

<sup>16</sup> See *infra* Part II.D (describing the Supreme Court’s interpretation of congressional power under the Spending Clause and the limits the Court has placed on it).

<sup>17</sup> See *infra* Parts II.A.1-3 (setting out the standards established by the Supreme Court in *Tinker*, *Fraser*, and *Kuhlmeier*).

<sup>18</sup> 393 U.S. 503 (1969).

<sup>19</sup> 478 U.S. 675 (1986).

<sup>20</sup> 484 U.S. 258 (1988).

<sup>21</sup> See *infra* Parts III.A.1-2 (analyzing the effectiveness of the Supreme Court’s standards in the anti-bullying context); *infra* Parts IV.B-C (setting out and discussing a Model Anti-bullying Statute and contributions from certain Supreme Court cases).

## 1. The Material Disruption Standard

*Tinker* considered students' First Amendment rights in school during school hours.<sup>22</sup> *Tinker* involved students who wore armbands to school in protest of the Vietnam War in violation of a school policy adopted subsequently and intended to punish these specific students.<sup>23</sup> The Court held that the school's condemnation of the students' peaceful expression of their views was unconstitutional because the silent protest did not disrupt the school environment.<sup>24</sup> The opinion laid the foundation for future school expression challenges.<sup>25</sup> *Tinker* is considered a landmark case because it definitively established that "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>26</sup>

<sup>22</sup> *Tinker*, 393 U.S. at 504.

<sup>23</sup> *Id.* This policy was adopted in response to school principals becoming aware of a plan by a group of adults and students to publicize their support for a truce in the Vietnam War by wearing black armbands during the holiday season. *Id.* The school policy stated that if a student wore an armband to school, he or she would be asked to remove it and if he or she refused, the student would be sent home and suspended. *Id.* On December 16, 1965, Mary Beth and Christopher Tinker wore black armbands to school. *Id.* They both were sent home, suspended from school, and not allowed to come back unless they did not wear the armbands. *Id.* Neither student returned to school until after New Year's Day when the period during which they had planned to wear the armbands was over. *Id.*

<sup>24</sup> *Id.* at 514. The Court found no evidence that the school officials could reasonably have determined that there would be a substantial disruption of or material interference with school activities caused by the students wearing black armbands. *Id.* Therefore, the Court found that "the silent, passive 'witness of the armbands'" was not a form of expression that the school officials could restrict or punish. *Id.*

<sup>25</sup> *Id.* at 508-13. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

In order for the State 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 that always accompany an unpopular viewpoint.

*Id.* at 509. "The classroom is particularly the marketplace of ideas. The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth . . ." *Id.* at 512 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>26</sup> *Id.* at 506. See Nadine Strossen, Essay, *Students' Rights and How They are Wronged*, 32 U. RICH. L. REV. 457, 458 (1998) (Strossen was president of the ACLU and explained that *Tinker* was the high water mark for student speech rights and that subsequent Supreme Court decisions have eroded *Tinker's* affirmation of student speech rights); Hart, *supra* note 6, at 1122-24 (stating that the Court in *Tinker* shifted the focus for the basis of school power from one where the schools had the power to indoctrinate students in the values and traditions of our society, to one in which a school's purpose is to engender views that attempt to reconstruct the social order, and that the Court's conception of the proper role of schools has guided its analysis of student rights ever since); Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student*

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Most importantly, the Court held that a restriction on student speech violated the First Amendment unless it was shown that the expression created a substantial and material disruption of the school environment.<sup>27</sup> Despite subsequent cases, this material disruption standard remains viable and is still the starting point for analysis of student free speech rights.<sup>28</sup>

The opinion did not have unanimous support, however; Justice Black's dissent immediately called into question *Tinker's* effect on a school's ability to discipline its students and to regulate student speech.<sup>29</sup> Justice Black averred that the Court did not allow enough deference for school officials to maintain discipline and order.<sup>30</sup> In the long term,

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*Threats*, 30 SETON HALL L. REV. 635, 649 (2000) (stating that *Tinker* is considered by many scholars to be "the apex of student speech rights").

<sup>27</sup> *Tinker*, 393 U.S. at 509. A prohibition of speech cannot be sustained where no finding is made "that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . .'" *Id.* (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). "Clearly, the prohibition of expression . . . without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511; see Edward T. Ramey, *Student Expression: The Legacy of Tinker In the Wake of Columbine*, 77 DENV. U. L. REV. 699, 702 (2000). Ramey explained:

[T]he Court set the standard that a student may express his or her opinion, even on controversial subjects, essentially anywhere "on the campus during the authorized hours," "if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."

*Id.* (quoting *Tinker*, 393 U.S. at 512-13). See also Hart, *supra* note 6, at 1125 (stating that the *Tinker* test focuses on "the actual effect or results of the regulated speech or expression"); Carmen N. Snook, Comment, *Oregon's "Bully Bill": Are We Needlessly Repressing Student Speech In the Name of School Safety?*, 38 WILLAMETTE L. REV. 657, 669 (2002) (stating that the important element of the *Tinker* standard is the effect of the student's speech, not the content of the student's speech). But see Hart, *supra* note 6, at 1125 n.109 (noting that the Court considered both the disruptive effect of the speech, as well as whether the act of speech was disruptive itself, in making its determination).

<sup>28</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (the Court began its examination of student speech rights with *Tinker*). See also, e.g., Ronna Greff Schneider, *Freedom of Expression and Violence at School*, 1 EDUC. L. § 2:27 (2008) (discussing recent student speech rights cases, many of which began with or included in their analysis, the *Tinker* standard).

<sup>29</sup> *Tinker*, 393 U.S. at 515 (Black, J., dissenting). "[I]f the time has come when pupils of state-supported schools . . . can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." *Id.* at 518. Justice Black's vigorous dissent concluded, "I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 526.

<sup>30</sup> Justice Black believed that the majority had taken the "power to control pupils by the elected 'officials of state supported public schools . . . [and] in ultimate effect transferred [it] to the Supreme Court." *Id.* at 515 (internal citations omitted).

Justice Black's concerns seem well-founded, and his dissent has been endorsed and cited by a majority of the Court in subsequent student speech decisions.<sup>31</sup>

## 2. An Unclear Second Pillar

In the Court's second pillar of student speech jurisprudence, *Bethel School District No. 403 v. Fraser*, the Court considered the constitutionality of student Matthew Fraser's suspension for giving a speech containing graphic and explicit sexual metaphors at a school assembly.<sup>32</sup> The Court upheld Fraser's punishment because the school had authority to prohibit such speech.<sup>33</sup> The opinion distinguished the sexual content of the speech in *Fraser* from the political content of the speech in *Tinker*.<sup>34</sup> Next, the Court retreated from *Tinker's* material disruption standard by stressing that the constitutional rights of students in public schools were not as extensive as those held by adults in other settings.<sup>35</sup> This is because of the age and maturity of students, as well as their propensity for being impressionable.<sup>36</sup>

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<sup>31</sup> See, e.g., *Morse*, 551 U.S. at 417 (discussing Justice Black's dissent in its analysis of student speech jurisprudence). The Court noted that it had signaled a break from *Tinker* by quoting Justice Black's dissent in *Fraser*. *Id.* at 418 n.7 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)).

<sup>32</sup> 478 U.S. at 677-78. The speech at the center of *Fraser* was given at a high school assembly where Fraser was nominating a fellow student for an elective office. *Id.* at 677. Two teachers with whom Fraser had discussed the contents of his speech advised him that it was inappropriate, that he probably should not deliver it, and that if he did, he could face severe consequences. *Id.* at 678. A school counselor observed the other students' reaction to the speech, during which some hooted and yelled, others made sexually graphic gestures, and still others seemed embarrassed and bewildered. *Id.* One teacher even noted that she was forced to discuss the speech instead of conducting a part of the class lesson the next day. *Id.* Fraser was suspended under a school disciplinary rule that stated, "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* At a disciplinary review of Fraser's suspension, the hearing officer determined that Fraser's speech was "indecent, lewd, and offensive," and fell within the meaning of obscene contained in the school disciplinary rule. *Id.* at 678-79.

<sup>33</sup> *Id.* at 685.

<sup>34</sup> *Id.* at 680. The Court reasoned that there was a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech." *Id.* The Court also found that the sanctions imposed on Fraser were not related to any political viewpoint. *Id.* at 685.

<sup>35</sup> *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

<sup>36</sup> The Court referred to the right of an adult to express an anti-draft viewpoint in offensive terms and distinguished that right because the same latitude need not be granted to students in a public school. *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1971) (involving an anti-draft protester who wore a jacket into a courthouse that had profane language on the back)). In addition, the Court quoted a Second Circuit concurring opinion for the proposition that "the First Amendment gives a high school student the classroom right to



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*Fraser* established that a school may restrict lewd, vulgar speech that it deems inconsistent with its basic educational mission.<sup>37</sup> However, *Fraser* is imprecise, confusing lower courts as to its application.<sup>38</sup> This lack of clarity results in inconsistent decisions among the lower federal courts when applying *Fraser* to student speech challenges.<sup>39</sup> Commentators differ on whether *Fraser* represents a new category of permissible speech regulation for lewd and indecent speech or a broader power that allows schools to regulate speech they deem inconsistent with their basic educational missions.<sup>40</sup> The Court has specifically stated

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wear Tinker's armband, but not Cohen's jacket." *Id.* at 682-83 (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1047 (2d Cir. 1979) (Newman, J., concurring in result)).

<sup>37</sup> *Fraser*, 478 U.S. at 685. In making its determination, the Court recognized limitations in its prior jurisprudence on a speaker's right to reach an unlimited audience. *Id.* at 684. These limitations include "where the speech is sexually explicit and the audience may include children." *Id.* (citing Ginsberg v. New York, 390 U.S. 629 (1968)). Also included is "an interest in protecting minors from exposure to vulgar and offensive spoken language." *Id.* at 684-85 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978)). In addition, the Court noted that the freedom to advocate unpopular and controversial views in the school setting must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681. The Court also cited to Thomas Jefferson's Manual of Parliamentary Practice, which was adopted by the House of Representatives, as well as the comparable rules for the Senate, which prohibit representatives and senators from using indecent or abusive language in Congressional proceedings. *Id.* at 681-82 (citing JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE §§ 359, 360, reprinted in MANUAL AND RULES OF HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 97-271, at 158-59 (1982); SENATE PROCEDURE, S. DOC. NO. 97-2, Rule XIX, at 568-69, 588-91 (1981)).

<sup>38</sup> See Morse v. Frederick, 551 U.S. 393, 404-05 (2007) (stating that the mode of analysis employed in *Fraser* is unclear and that at best, two principles can be distilled from the opinion: (1) students' constitutional rights "in public school are not automatically coextensive with the rights of adults in other settings"; and (2) *Tinker's* mode of analysis is not absolute).

<sup>39</sup> See Hart, *supra* note 6, at 126 n.119, 120 (stating that some commentators and lower federal courts see *Fraser* as creating a specific exception to the First Amendment for lewd and indecent student speech, while others see it as establishing a school's right to regulate speech that can be seen as school endorsed); see also Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52, 53 (2002) (stating that *Fraser* allows a school to suppress lewd and indecent speech as a second category of allowable student speech restriction); Lynn Mostoller, Note & Comment, *Freedom of Speech and Freedom from Student-on-Student Sexual Harassment in Public Schools: The Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N.M. L. REV. 533, 539 (2003) (noting that the Third and Ninth Circuits each view "lewd and indecent" speech as separate categories of allowable speech regulation in public schools). *But see, e.g.,* McCarthy at 541-42 (stating that the Sixth, Seventh, Eighth, and Eleventh Circuits all follow a more expansive view of *Fraser* which simply allows schools to regulate in an effort "to teach 'habits and manners of civility'" (quoting *Fraser*, 478 U.S. at 681)).

<sup>40</sup> See *supra* note 39 (explaining commentators' divergent views about the import of the *Fraser* holding).

only that *Fraser* stands for two propositions.<sup>41</sup> First, a student's free speech rights in public school are not the same as those of an adult in other settings, and second, *Tinker's* standard is not the only one on which schools can rely to regulate student speech.<sup>42</sup>

### 3. School-Sponsored Speech Sanctions and Subsequent Supreme Court Cases Addressing First Amendment Rights

The last of the Court's three pillars of student speech rights jurisprudence, *Hazelwood School District v. Kuhlmeier*, involved a challenge to a school's removal of certain articles from its student-run newspaper.<sup>43</sup> The Court held that schools may restrict student speech in school-sponsored expressive activities if the school's "actions are reasonably related to legitimate pedagogical concerns."<sup>44</sup> The Court distinguished the student speech at issue in *Tinker* and *Fraser* from the student speech in *Kuhlmeier* on that basis.<sup>45</sup>

<sup>41</sup> See *supra* note 38 (discussing the definitive propositions that the Supreme Court has distilled from the *Fraser* opinion).

<sup>42</sup> See *Morse*, 551 U.S. at 404–05.

<sup>43</sup> 484 U.S. 260, 262 (1988). The two articles in question were removed from the paper due to the principal's concerns about their content. *Id.* at 263–64. The first article addressed the pregnancies of three of the school's students and the other dealt with the impact of divorce on students at the school. *Id.* at 263. The principal's chief concerns about the pregnancy article were that the false names used may not have been sufficient to keep the girls' identities secret, and that the references to sexual activity and birth control may be inappropriate for some of the younger students. *Id.* His chief concern with the divorce article was that the student's parents had not been allowed to respond to the remarks in the article or consent to its publication. *Id.* The principal felt that he had to make an immediate decision because there was not enough time to make changes to the paper and any delay in printing would prevent the paper from being published by the end of the school year. *Id.* at 263–64.

<sup>44</sup> *Id.* at 273. The Court believed that a school must be able to set standards for speech that is "disseminated under its auspices" higher than those outside of the school environment and that schools may refuse to disseminate any of its students' speech that does not meet these higher standards. *Id.* at 271–72. Not to allow this would "unduly constrain[] [schools] from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.'" *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). First, the Court summed up its holding by stating that the standard it established was to be used to determine when a school may decide not to lend its name and resources to student expression. *Id.* at 272–73. Secondly, the Court said that the First Amendment was only violated when the decision to censor an expressive activity had no valid educational purpose is the First Amendment is violated. *Id.* at 273.

<sup>45</sup> *Id.* at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). "The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises." *Id.* at 271.

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*Kuhlmeier* stands for the proposition that educators have greater authority to control student speech that can be reasonably perceived as “bear[ing] the imprimatur of the school” than to control speech that cannot be perceived as school-sponsored or acknowledged.<sup>46</sup> This is a narrow category of student speech—speech that could be perceived as attributable to the school.<sup>47</sup> Thus, in *Tinker*, *Fraser*, and *Kuhlmeier*, the Supreme Court established three standards for measuring student speech rights in the school setting.<sup>48</sup>

In *R.A.V. v. City of St. Paul, Minnesota*, the Court once again dealt with a sanction affecting First Amendment rights.<sup>49</sup> Justice Scalia, writing for a plurality of the Court, found a St. Paul, Minnesota, ordinance prohibiting cross burning and which relied on the “fighting words” doctrine facially unconstitutional because of over breadth and held that content-neutrality is constitutionally necessary for any speech regulation.<sup>50</sup> The reasoning of the Court appears to create a new formulation of how and why “fighting words” and other categories of speech may be regulated.<sup>51</sup> Thus, any regulation of speech must be

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“The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* The Court believed that this second category of activities “may be fairly characterized as part of the school curriculum,” as long as they are supervised by faculty and designed to impart knowledge or skills to students. *Id.* The Court stated that educators have greater control over this second form of student expression. *Id.*

<sup>46</sup> *Id.* at 271. The Court supported this holding by stating that this greater control was permitted to “assure that participants [in school activities] learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” *Id.*

<sup>47</sup> *Id.* See *supra* notes 21–23 and accompanying text.

<sup>48</sup> See *supra* Parts II.A.1–3 (discussing *Tinker*, *Fraser*, and *Kuhlmeier* and the standards they established for regulating student speech).

<sup>49</sup> 505 U.S. 377 (1992).

<sup>50</sup> *Id.* at 381. The Court found the ordinance unconstitutional because it prohibited speech otherwise permissible solely on the basis of the content of the speech. *Id.* Justice Scalia stated that “fighting words” as well as other presumably less-protected categories of speech could only “consistently with the First Amendment[] be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” *Id.* at 383–84.

<sup>51</sup> *Id.* at 386 (“[T]he exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication. Fighting words are thus analogous to a noisy sound truck[.]”). The Court stated that, in the context of proscribable speech such as fighting words, obscenity, and defamation, regulation did not violate the First Amendment if “the basis for the content discrimination

entirely content-neutral, but the lack of a clear majority consensus, as well as the vehemence with which the Justices critiqued each other's opinions, suggest that *R.A.V.* does not establish a bright-line rule.<sup>52</sup>

The Court's latest student speech case is *Morse v. Frederick*, which involved a sign that a portion of the Court found promoted illegal drug use.<sup>53</sup> The majority upheld the suspension and also held that a school official may, consistent with the First Amendment, restrict student speech that can be reasonably interpreted as promoting illegal drug use.<sup>54</sup> In reaching this conclusion, the Court appealed to its student speech precedents in *Tinker*, *Fraser*, and *Kuhlmeier*.<sup>55</sup> It is unclear whether *Morse* establishes a new standard for measuring only student expression promoting illegal drug use or whether it changes the entire landscape of student speech regulation.<sup>56</sup> There is, however, another possible

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consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388.

<sup>52</sup> See *id.* at 398 (White, J., concurring) ("In the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong."). "Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence . . . are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment." *Id.* at 402. "I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening." *Id.* at 415 (Blackmun, J., concurring). Justice Stevens stated that the majority's position "lacks support in our First Amendment jurisprudence," "wreaks havoc in an area of settled law," and "cannot withstand scrutiny." *Id.* at 425-26 (Stevens, J., concurring). See, e.g., Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences If They Do Not*, 28 AKRON L. REV. 187, 192-94 (1995) (discussing the strong, differing opinions on the reasoning used to invalidate the ordinance in *R.A.V.*).

<sup>53</sup> 551 U.S. 393 (2007). The sign was held by a student (Frederick) standing along the street in front of his school as the Olympic Torch Relay passed by. *Id.* at 396. The principal asked Frederick to take the sign down, but he refused to do so. *Id.* The principal then ordered Frederick to her office and suspended him for ten days under a school policy that prohibited assembly or expression advocating substances illegal to minors. *Id.* at 398.

<sup>54</sup> *Id.* at 403. The Court reasoned that "[t]he 'special characteristics of the school environment[]' . . . and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." *Id.* at 408.

<sup>55</sup> *Id.* at 403-06. The Court recognized the following propositions from its precedent: (1) the continuing viability of *Tinker's* material disruption standard; (2) that *Fraser* meant at least that the mode of analysis employed in *Tinker* is not absolute and that students' constitutional rights in school are not coextensive with those of adults in other settings; and (3) that schools have a greater right to restrict speech that can reasonably be attributed to them. *Id.*

<sup>56</sup> Compare Charles Chulack, *The First Amendment Does Not Require Schools to Tolerate Student Expression That Contributes to the Dangers of Illegal Drug Use: Morse v. Frederick*, 46

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standard stemming from congressional legislation that has been deemed constitutional by the Court.

*B. Permissible Regulations of Harassing or Discriminatory Speech*

1. Title IX and Student-on-Student Harassment

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in any federally funded education program or activity.<sup>57</sup> The plaintiff in *Davis v. Monroe County Board of Education* brought a Title IX claim for student-on-student harassment.<sup>58</sup> The Supreme Court definitively established a private cause of action seeking damages under Title IX.<sup>59</sup> An even more recent decision from the Third Circuit, *Saxe v. State College Area School District*, casts doubt on the extent to which a school policy based on harassment can be used to curb student speech, but the Supreme Court has not commented on the reasoning or impact of this decision.<sup>60</sup>

*a. Title IX’s Scope and Constitutionality Established*

In *Davis v. Monroe County Board of Education*, the Supreme Court established a private cause of action against a school district for student-on-student sexual harassment.<sup>61</sup> This case involved a fifth-grade student’s mother who brought a claim against the board of education alleging that her daughter had been the victim of sexual harassment by another student in her class.<sup>62</sup> The crux of the petitioner’s argument was

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DUQ. L. REV. 521 (2008) (treating *Morse* as simply setting a standard by which a school can regulate speech advocating illegal drug use), and Christy L. Young, *Constitutional Law – First Amendment Rights – The First Amendment Does Not Require Public Schools to Tolerate Student Speech Reasonably Interpreted as Encouraging Illegal Drug Use*, 38 CUMB. L. REV. 371 (2008) (same), with Martha McCarthy, *Anti-Harassment Provisions Revisited: No Bright-Line Rule*, 2008 BYU EDUC. & L.J. 225, 225 (2008) (stating that the *Morse* opinion does not help clarify the law surrounding school policies prohibiting harassment, leaving lower courts to issue rulings that are inconsistent).

<sup>57</sup> 20 U.S.C. § 1681(a) (2006). The statute reads in pertinent part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” *Id.*

<sup>58</sup> 526 U.S. 629 (1999).

<sup>59</sup> *Id.*

<sup>60</sup> 240 F.3d 200 (3d Cir. 2001).

<sup>61</sup> 526 U.S. 629 (1999).

<sup>62</sup> *Id.* at 632. The suit sought both injunctive and monetary damages under Title IX of the Education Amendments of 1972. *Id.* at 632–33. This harassment was alleged to have occurred over several months and happened under the supervision of three separate teachers. *Id.* at 633–34. Petitioner’s daughter (LaShonda) purportedly reported each of these incidents to the supervising teacher, but no disciplinary action was taken against the

that the school did not take steps to alleviate the harassing situation despite repeated reports of incidents to teachers and the principal.<sup>63</sup>

The Court held that, in limited circumstances, intentional indifference by a school to known acts of harassment amounts to a violation of Title IX and justifies a private action for damages.<sup>64</sup> In its opinion, the Court cited precedent recognizing that Title IX focuses on the benefited class and not the perpetrator, an implied private right of action under Title IX exists, and money damages are available in such suits.<sup>65</sup> In determining whether the school district could be held liable,

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student. *Id.* LaShonda's mother also followed up two of the complaints by directly contacting the supervising teacher. *Id.* at 634. On the first of these occasions, LaShonda's mother was assured that the school principal (Principal Query) had been informed of the incidents. *Id.* The harassment finally ceased when the student was charged with, and pleaded guilty to sexual battery. *Id.* at 634. In addition, it was claimed that LaShonda was not the only student to suffer from this student's sexual conduct, and a group of female students led by LaShonda attempted to complain directly to Principal Query about the student's conduct. *Id.* at 635. This group of students was told simply that "If Query wants you, he'll call you [ ]", and their complaints were not communicated to the Principal. *Id.* (quoting Complaint ¶ 10, *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363 (M.D. Ga. 1994) (Civ. A. No. 94-140-4-MAC (WDO))). LaShonda claimed that due to the harassment she was unable to concentrate on her studies and suffered a drop in her previously-high grades. *Id.* It was also shown that she had composed a suicide note that her father discovered. *Id.*

<sup>63</sup> *Id.* Petitioner alleged that no disciplinary action whatsoever was taken against the student. *Id.* Petitioner even contacted Principal Query to inquire about what steps the school was planning to take against the student. *Id.* Principal Query simply responded that "I guess I'll have to threaten him a little bit harder." *Id.* (quoting Complaint ¶ 12, *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363 (M.D. Ga. 1994) (Civ. A. No. 94-140-4-MAC (WDO))). Neither was any action taken to separate LaShonda from the student, and she was only allowed to change seats to get away from the student three months after the harassment began. *Id.*; see *supra*, note 34 and accompanying text (for the proposition that the incidents were repeatedly reported to LaShonda's teachers and school supervisors).

<sup>64</sup> *Davis*, 526 U.S. at 643. These limited circumstances are ones in which the school district "exercises substantial control over both the harasser and the context in which the known harassment occur[ed]." *Id.* at 645. The Court further stated that a school will be found deliberately indifferent only where its response, or lack thereof, was clearly unreasonable under the circumstances then known. *Id.* at 648. The Court also limited schools' responsibility by requiring simply that they "respond to known . . . harassment in a manner that is not clearly unreasonable." *Id.* at 649. Schools were therefore not required to proactively work to remedy peer harassment or to ensure that students conform their behavior to certain rules. *Id.* at 648.

<sup>65</sup> *Id.* at 639 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-92 (1979) ("There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct . . .")); *Id.* at 639 (citing *Cannon*, 441 U.S. at 691); *Id.* at 639-40 (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)).

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the Court focused on its misconduct.<sup>66</sup> The Court recognized that because Title IX had been treated as an exercise of congressional power under the Spending Clause, private damages were available only where adequate notice exists to the funding recipients that they may be liable for the conduct at issue.<sup>67</sup> This private right of action echoes previous Supreme Court decisions pertaining to the hostile work environment standard used in Title VII regulation and jurisprudence and which has had the effect of creating a hostile educational environment concept under Title IX.<sup>68</sup>

To prove a damages claim for student-on-student sexual harassment under Title IX, a plaintiff must show that the sexual harassment is “severe, pervasive, and so objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>69</sup> A prima facie case for money damages claiming student-on-student harassment under Title IX involves four

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<sup>66</sup> *Id.* at 641–42. The Court cited *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), for the proposition that the focus in a Title IX action claiming damages for sexual harassment was the intentional misconduct of the federal funding recipient and not the misconduct of a third party. *Davis*, 526 U.S. at 641–42. *Gebser* involved a claim seeking monetary damages under Title IX for teacher-on-student sexual harassment. *Gebser*, 524 U.S. at 277–79. In *Gebser*, the Court rejected the use of agency principles to impute liability for a teacher’s misconduct to the school district, and also rejected the use of a negligence standard (the school district knew or should have known about the misconduct) to hold the school district liable. *Id.* at 283.

<sup>67</sup> *Davis*, 526 U.S. at 640 (citing *Gebser*, 524 U.S. at 287, for the proposition that Title IX is of a contractual nature because it is a manifestation of congressional power under the Spending Clause, conditioning receipt of federal funds on compliance with the statute; citing *Franklin*, 503 U.S. at 74–75 for the requirement that there must be adequate notice to the recipient of federal funds of liability for the conduct at issue before a private damages action will be available); see *infra* Part II.D (discussing congressional power under the Spending Clause).

<sup>68</sup> See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (clarifying and defining the hostile workplace environment standard); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (formulating the hostile workplace environment standard for Title VII challenges); see also John E. Matejkovic & David A. Redle, *Proceed at Your Own Risk: The Balance between Academic Freedom and Sexual Harassment*, 2006 BYU EDUC. & L.J. 295, 309 (2006) (stating that sexual harassment in the educational context borrows many of the standards and concepts from Title VII); Susan P. Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243, 253 (2006) (stating that in the *Davis* decision, Justice O’Connor relied on the Title VII test for same-sex sexual harassment that the Court had used in a case decided the previous year, *Oncala v. Sundowner Offshore Service, Incorporated*, 523 U.S. 75 (1998)); OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited Nov. 12, 2008) (“[T]he *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX.”).

<sup>69</sup> 526 U.S. at 650.

elements.<sup>70</sup> First, the harassment must be severe, pervasive, and objectively offensive.<sup>71</sup> Second, the conduct must deny the victim equal access to the school's educational functions.<sup>72</sup> Third, the school district must have actual knowledge of the harassment.<sup>73</sup> Finally, the school district must show deliberate indifference that subjects the victim to the sexual harassment at issue.<sup>74</sup> After *Davis*, courts have evaluated anti-harassment codes designed to protect schools against Title IX liability according to the requirements of the First Amendment.

*b. Title IX as an Answer to School Harassment Called into Question*

The most important of these cases is *Saxe v. State College Area School District*, in which the Third Circuit faced a challenge to a public school

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<sup>70</sup> Stuart, *supra* note 68, at 251–56. A prima facie case claiming damages for peer sexual harassment under Title IX requires four elements per *Davis*: (1) there must be proof of actionable harassment: conduct that is severe, pervasive and objectively offensive; (2) the conduct must deny the victim equal access to the federal funding recipient's educational opportunities and resources (the author mentions that the Court relied on Title VII hostile workplace environment precedent to determine if this element was met); (3) the school district must have "actual knowledge of the peer sexual harassment in an educational activity"; (4) deliberate indifference on the part of the school district that subjects the student to sexual harassment or makes him or her liable to be subject or vulnerable to it, must be shown. *Id.*

<sup>71</sup> *Id.* at 253–54. Stuart stated that Justice O'Connor relied on a Title VII test for proof of a hostile working environment as articulated in *Oncale*, and that using this "the Court determined that actionable conduct could cover circumstances when the school 'is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's [educational opportunity] and create an abusive [school] environment.'" *Id.* at 253 (quoting *Oncale*, 523 U.S. at 78) (changes made in article). Also, under this standard, the proof of a hostile environment "depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.'" *Id.* (quoting *Oncale*, 523 U.S. at 82).

<sup>72</sup> *Id.* at 254 ("[T]he pervasive nature of the harasser's conduct must be systemic and 'so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.'" (quoting *Davis*, 526 U.S. at 651). According to Stuart, the Court relied on *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), and referred to the test used therein for the proposition that actionable harassment must simply alter the conditions of employment and create an abusive environment. *Id.*

<sup>73</sup> *Id.* at 255 (citing *Davis*, 526 U.S. at 644–45). Deliberate indifference by the school district subjects a student to sexual harassment or makes him or her liable to be subject or vulnerable to it. *Id.* The school district's behavior must also be shown to be "clearly unreasonable in light of the known circumstances," and the school district must simply respond in a reasonable manner. *Id.* at 255–56 (quoting *Davis*, 526 U.S. at 649).

<sup>74</sup> *Id.* at 254–55 (stating that direct evidence of sexual harassment as well as reports of harassment to teachers and principals seem sufficient to find the school district to have actual knowledge).



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district's anti-harassment policy.<sup>75</sup> The court rejected the school district's claim that the policy covered only speech already restricted under federal and state anti-discrimination laws.<sup>76</sup> The court also rejected the school district's claim that harassment is not protected activity under the First Amendment.<sup>77</sup> The court found the policy unconstitutional because

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<sup>75</sup> 240 F.3d 200 (2001). The challenge was brought by a Pennsylvania State Board of Education member on behalf of two students from the school district for whom he was legal guardian. *Id.* at 203. The suit alleged that the students feared punishment under the policy for expressing their religious beliefs, which compelled them to speak about moral issues, including the sinfulness and harmfulness of homosexuality. *Id.* The District Court found the policy constitutional because the standard contained in it was similar to those used to define Title VII and Title IX harassment. *Id.* at 204. The District Court, as well as the Third Circuit, found the operable definition of harassment contained in the policy's second paragraph as follows:

Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.

*Id.* at 202 (emphasis added).

<sup>76</sup> *Id.* at 210. The court determined that the prohibition of harassment based on personal characteristics was outside the scope of permissible harassment regulation contained in Title VI and Title IX. *Id.* The court also found the portion of the policy proscribing negative comments about a person's values struck "at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment." *Id.* According to the court, no court or legislature has ever even suggested that this type of speech may be prohibited under an anti-discrimination policy. *Id.* Also, the policy created liability for speech that has only the purpose of harassing another, and no effect is required. *Id.* This focuses on the speaker's intent and allows the policy to cover speech that is merely "simple acts of teasing and name-calling", which the Court in *Davis* explicitly held to be insufficient to find liability. *Id.* at 210-11 (quoting *Davis*, 526 U.S. at 652). See Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205, 222-23 n.116 (1999) (noting that the majority of Title IX hostile environment cases that have reached the courts "have included some physical touching or other conduct in addition to harassing speech").

<sup>77</sup> *Saxe*, 240 F.3d at 204. See *id.* at 207 (stating that the Supreme Court has not to this date expressly addressed whether harassment is exempt from First Amendment protection when it is in the form of pure speech); see also *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 863 (Cal. 1999) (Werdegar, J., concurring) ("No decision by the United States Supreme Court has, as yet, declared that the First Amendment permits restrictions on speech creating a hostile work environment..."). But see *Saxe*, 240 F.3d at 207-09 (discussing that in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court "suggested in dictum that at least some harassing speech does not warrant First Amendment protection"). The *Saxe* court did not accept this to mean that all anti-discrimination laws are immune from First Amendment challenge when used to prohibit speech on the sole basis of the expressive content of the speech. *Id.*

it was substantially overbroad and likely to envelop or chill constitutionally-protected speech.<sup>78</sup>

The court found that anti-discrimination policies—when applied to harassment claims based on verbal, pictorial, or literary matter—imposed “content-based, viewpoint discriminatory restrictions on speech.”<sup>79</sup> This kind of policy is subject to the most exacting First Amendment standard: strict scrutiny.<sup>80</sup> The policy cannot be justified by recourse to the speech’s secondary effects because the emotive impact of speech on the audience it reaches is not considered a secondary effect.<sup>81</sup>

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<sup>78</sup> *Id.* at 217. “A regulation is unconstitutional on its face on over breadth grounds where there is a ‘likelihood that the statute’s very existence will inhibit free expression’ by ‘inhibiting the speech of third parties who are not before the Court.’” *Id.* at 214 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). “To render a law unconstitutional, the over breadth must be ‘not only real but substantial in relation to the statute’s plainly legitimate sweep.’” *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

<sup>79</sup> *Id.* at 206 (quoting *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596–97 (5th Cir. 1995)). The court noted that disparaging comments directed at another person’s sex, race, or other personal characteristic have the potential to create a hostile environment and therefore fit within the ambit of anti-discrimination laws because of the subject matter and viewpoint expressed. *Id.* See, e.g., Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 433 (1996); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 SUP. CT. REV. 1, 8 (all supporting the proposition that anti-harassment laws raise the specter of content and viewpoint based discrimination); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 571–72 (1995). But see Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the “Reasonable Person”*, 58 OHIO ST. L.J. 1217 (1998) (suggesting that Title VII law is based on content neutral principles).

<sup>80</sup> *Saxe*, 240 F.3d at 207. After making this statement, the court looked to the opinion in *R.A.V. v. City of St. Paul* in which the Supreme Court found that even a prohibition on fighting words, which is an unprotected category of speech, is unconstitutional when the prohibition discriminated on the basis of content and viewpoint. *Id.* The Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). The *Saxe* court concluded from this that anti-harassment laws may pose some of the same problems that the Court found with the ordinance in *R.A.V. v. City of St. Paul*. *Saxe*, 240 F.3d at 207. The problem is that the laws may regulate speech within a category of deeply offensive or potentially disruptive speech, due at least in part to the speech’s subject matter and viewpoint. *Id.*

<sup>81</sup> *Saxe*, 240 F.3d at 209 (relying on *Texas v. Johnson*, 491 U.S. 397, 414 (1989), for the proposition that ideas which society finds offensive or disagreeable are a bedrock principle of the First Amendment). The court recognized that the Supreme Court has “made it clear . . . that the government may not prohibit speech under a ‘secondary effects rationale’ based solely on the emotive impact that its offensive content may have on a listener.” *Id.* The court then quoted *Boos v. Barry*, 485 U.S. 312, 321 (1998) (“The emotive impact of speech on its audience is not a ‘secondary effect’”) (internal quotations omitted). See also *United States v. Playboy Entm’t Group*, 529 U.S. 803, 811 (2000) (“The overriding justification for the regulation is concern for the effect of the subject matter on

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Anti-harassment policies have also been employed in other contexts, such as Title VII, to avoid liability under congressional statutes that aim to deter discrimination and harassment.

2. Title VII and the Hostile Work Environment

In the employment setting, Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for an employer to discriminate against an employee because of his or her race, color, religion, sex, or national origin.<sup>82</sup> In the regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”) to enforce Title VII, the EEOC established the concept of a hostile environment arising from harassment in the workplace.<sup>83</sup> The seminal hostile work environment case, *Meritor Savings Bank, FSB v. Vinson*, illustrates the Supreme Court’s adoption of the hostile work environment concept for purposes of Title VII liability.<sup>84</sup> This decision was further clarified and explained by the Court in *Harris v. Forklift Systems, Inc.*<sup>85</sup>

a. *The Hostile Workplace Environment as a Framework to Analyze Workplace Harassment*

In *Meritor*, the Supreme Court confronted important questions regarding workplace sexual harassment claims under Title VII.<sup>86</sup> This case involved claims by a female employee about sexual harassment by

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[listeners]. . . . This is the essence of content-based regulation.”); *Saxe*, 240 F.3d at 209. See generally *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (establishing the concept of “secondary effects” as a permissible reason for which government may establish content-discriminatory speech restrictions so long as the restriction is justified with reference to the effects that come with the speech and not the speech itself).

<sup>82</sup> 42 U.S.C. § 2000e-2(a)(1) (2006). The full text of the applicable portion of the statute reads:

(a)Employer Practices

It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .

*Id.*

<sup>83</sup> 29 C.F.R. § 1604.11(a)(3) (2010). Under this regulation, conduct that “[h]as the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” will lead to liability under Title VII. *Id.*

<sup>84</sup> 477 U.S. 57 (1986).

<sup>85</sup> 510 U.S. 17 (1993).

<sup>86</sup> 477 U.S. at 57.

her male boss.<sup>87</sup> The Supreme Court held that a claim of hostile work environment sexual harassment under Title VII is actionable.<sup>88</sup> The Court stated that the D.C. Circuit Court of Appeals had erred in extending absolute liability to employers for sexual harassment by their supervisors.<sup>89</sup>

While the decision in *Meritor* was limited to a claim of sexual harassment, it established that a claim for harassment or discrimination under Title VII may be proven by demonstrating that the harassment or

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<sup>87</sup> *Id.* at 60. *Meritor* involved a claim of sexual harassment occurring over the course of several years. *Id.* Plaintiff Vinson alleged that while she had engaged in sexual intercourse forty to fifty times during this period, she felt compelled to do so out of fear of losing her job. *Id.* She also claimed that her boss fondled her in front of other employees, followed her into the female bathroom, demanded sexual favors both at work and after business hours, and exposed himself to her. *Id.* The district court had found that any sexual activity was voluntary on Vinson's part, and that she had not been the victim of sexual harassment or discrimination at work. *Id.* at 61. They further concluded that even if the sexual activity had not been voluntary, the bank would not be liable because it had not been put on notice due to the absence of complaints of sexual harassment against Vinson's boss. *Id.* at 62. The D.C. Circuit court reversed, finding that the question of the voluntariness of Vinson's conduct had no effect on the fact that her boss's conduct had created a hostile environment, as this concept is formulated in the EEOC's Guidelines on Discrimination Because of Sex. *Id.* at 62-63 (citing 29 C.F.R. § 1604.11(a) for the proposition that the EEOC had set out hostile environment as a type of sexual harassment claim). The Circuit Court also found that the bank would be liable by interpreting Title VII's definition of employer and the guidelines established by the EEOC to mean that an employer is absolutely liable for a supervisory employee's sexual harassment, even without notice. *Id.* at 63.

<sup>88</sup> *Id.* at 73. The Court quoted the Eleventh Circuit's decision in *Henson v. Dundee*, 682 F.2d 897 (1982), in which the court stated that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.* at 66-67 (quoting *Henson*, 682 F.2d at 903). The Court also recognized that other courts have applied the hostile environment concept to race, see, e.g., *Firefighter's Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 515-16 (8th Cir. 1977), *cert. denied, sub nom. Banta v. United States*, 434 U.S. 819 (1977); religion, see, e.g., *Compston v. Borden, Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976); and national origin, see, e.g., *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977).

<sup>89</sup> *Meritor*, 477 U.S. at 72. The Court reasoned that the decision by Congress to define "employer" to include an "agent" of the employer sets limits on an employer's liability for the acts of its employees. *Id.* While agreeing with the EEOC that Congress had intended common-law agency principles to guide determinations of employer's liability for the acts of its employees, the Court noted that the concepts of common-law agency may not always be transferrable for Title VII purposes. *Id.* Because of Congress's intent to incorporate agency principles into Title VII to at least some degree, the Court found that the absence of notice to an employer does not necessarily insulate them from liability under Title VII. *Id.* But the Court noted that the EEOC suggests that for a sexual harassment claim of hostile environment under Title VII, actual knowledge is required unless the employee has a reasonable avenue available to make his or her complaint known to management officials. *Id.* at 71. In this case, the Court found Vinson's failure to initiate a complaint against her boss through the established grievance procedure did not necessarily insulate the bank from liability, but declined to issue a definitive rule on employer liability. *Id.* at 72.

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discrimination caused the workplace to become a hostile work environment.<sup>90</sup> In reaching its decision, the Court concluded that for harassment to be actionable under a hostile work environment theory, the harassment “[m]ust be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>91</sup> In addition, the Court followed the EEOC’s guidelines by stating that the existence of harassment must be analyzed by viewing the totality of the circumstances.<sup>92</sup>

*b. The Hostile Workplace Environment Clarified*

The Supreme Court clarified the standard established in *Meritor* seven years later in *Harris v. Forklift Systems, Inc.*<sup>93</sup> In *Harris*, a female employee sued her previous employer claiming that the sexual harassment she suffered at work created an “abusive work environment” which caused her to quit.<sup>94</sup> The Court granted certiorari to resolve a circuit split concerning whether a Title VII plaintiff claiming an abusive work environment must prove that his or her psychological well-being was seriously affected or that he or she suffered an injury.<sup>95</sup>

*Harris* reaffirmed the standard established in *Meritor*, which the Court characterized as being a middle ground between making merely offensive conduct actionable, and requiring a tangible psychological

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<sup>90</sup> See *supra* note 58 and accompanying text. Title VII is violated when harassment is “[s]ufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor*, 477 U.S. at 67.

<sup>91</sup> *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

<sup>92</sup> *Id.* at 69. The Court stated that the EEOC guidelines made clear that the “[t]rier of fact must determine the existence of sexual harassment in light of ‘the record as a whole’ and ‘the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” *Id.* (quoting 29 C.F.R. § 1604.11(b) (1985)).

<sup>93</sup> 510 U.S. 17 (1993).

<sup>94</sup> *Id.* Plaintiff Teresa Harris claimed that her supervisor, Charles Hardy, sexually harassed her at work over the course of her employment there. *Id.* at 19. Harris claimed that Hardy told her in the presence of other employees, “[Y]ou’re a woman, what do you know,” and called her “a dumb ass woman.” *Id.* Harris also claimed that Hardy would ask her and other female employees to grab coins out of his front pants pocket, throw coins on the floor and ask them to pick them up, and make sexual innuendos about their clothing. *Id.* During Harris’s period of employment, Hardy purportedly made several other remarks of a sexual nature to Harris in front of other employees. *Id.* After over two years of this treatment, Harris quit and sued Forklift Systems, Inc., claiming that Hardy’s conduct created an abusive work environment. *Id.*

<sup>95</sup> *Id.* at 20. The Court cited *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (requiring a serious effect on psychological well being) and *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting a requirement of serious effect on psychological well being), as examples of the opposing viewpoints the Court was attempting to reconcile. *Id.*

injury.<sup>96</sup> *Harris* established an objective, reasonable person standard which requires the conduct to be so severe or pervasive that a reasonable person would find the environment it creates hostile or abusive.<sup>97</sup> Also, the victim must subjectively perceive the environment created by the conduct as hostile or abusive.<sup>98</sup> In closing, the Court reaffirmed the totality of the circumstances approach put forth in *Meritor* as the proper method to determine whether an environment is hostile or abusive.<sup>99</sup> The Court stated that while the psychological well-being of the plaintiff is relevant to whether he or she finds the environment subjectively hostile or abusive, no single factor is required.<sup>100</sup> In response to Title IX liability, and looking to Title VII for guidance, states have begun to enact anti-bullying statutes that often center on harassment, a form of psychological harm that is perpetuated through expression.

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<sup>96</sup> *Id.* at 21. The Court stated that Title VII is violated prior to the harassing conduct producing a nervous breakdown. *Id.* at 22. The Court noted that “[a] discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” *Id.* Also, the Court felt that “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.” *Id.* In addition, the conduct and especially egregious examples of harassment found in *Meritor* did “not mark the boundary of what is actionable.” *Id.* Title VII does not require concrete psychological harm and is not limited to conduct that produces such a result. *Id.* So long as a workplace environment is found to be hostile or abusive, “there is no need for it also to be psychologically injurious.” *Id.* But see Catharine A. MacKinnon, *Directions in Sexual Harassment Law*, 31 NOVA L. REV. 225, 225 (2007) (stating that “the abusiveness that hostile workplace environment cases are required to allege to survive summary judgment has observably become more extreme, generally speaking”).

<sup>97</sup> *Harris*, 510 U.S. at 21. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” *Id.*; see *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

<sup>98</sup> *Harris*, 510 U.S. at 21–22; see *Faragher*, 524 U.S. at 787.

<sup>99</sup> *Harris*, 510 U.S. at 23. The Court recognized that because of the nature of the inquiry, there was not and could not be a mathematically precise test for making this determination. *Id.* at 22.

<sup>100</sup> *Id.* at 23. The Court provided a list of factors that may be used to determine if an environment is hostile or abusive for purposes of Title VII. *Id.* These factors include: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.*

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## C. State Anti-Bullying Legislation

In response to the problems with bullying in public schools, forty-one states have adopted anti-bullying legislation as of April 9, 2010.<sup>101</sup> The laws vary in their definitions of bullying and the determination of what constitutes bullying is often left to the individual school boards.<sup>102</sup> However, nearly all of the statutes have three common elements:<sup>103</sup> (1) either an identification of who will determine the definition of bullying or a definition of bullying itself; (2) ways to report bullying; (3) and the consequences for bullying.<sup>104</sup> Some go further, requiring schools to adopt affirmative measures to prevent bullying.<sup>105</sup> The most important element addressed by these statutes, for the purposes of this Note, is the definition of bullying.

Definitions of bullying can be characterized in one of two ways.<sup>106</sup> One commentator has proposed five categories by focusing on the content of the definition.<sup>107</sup> Two other commentators place the definitions into three categories based on the definition's focus to determine if the conduct is bullying.<sup>108</sup> Because the definition of bullying is the most crucial element of an anti-bullying statute and because it is the focus of this Note, the approach that focuses on the content of the definition is the most important for developing a comprehensive anti-bullying policy.<sup>109</sup>

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<sup>101</sup> Bully Police USA, *supra* note 4.

<sup>102</sup> See Hart, *supra* note 6, at 1135-46 (noting five bases of definitions for anti-bullying legislation); Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 62 (2005) (noting most anti-bullying laws do not explicitly define bullying, but defer instead to the discretion of individual school boards, and that those that do define bullying vary greatly as to what conduct is subject to the law). Kosse and Wright also believe that the problems created by these differing standards contribute to the ineffectiveness of state anti-bullying statutes. Kosse & Wright, *supra*, at 71.

<sup>103</sup> Kosse & Wright, *supra* note 102, at 62 (stating that nearly all anti-bullying legislation as of 2005 have three common elements).

<sup>104</sup> *Id.* at 62 (stating that while most statutes differ in how they approach the elements, nearly all include a definition of bullying or a method for creating one, facilitate the reporting of bullying, and enumerate the consequences of bullying).

<sup>105</sup> *Id.* See, e.g., COLO. REV. STAT. ANN. § 22-32-109.1 (2008) (requiring schools to adopt "a specific policy concerning bullying prevention and education").

<sup>106</sup> See Kosse & Wright, *supra* note 102, at 62-63.

<sup>107</sup> Hart, *supra* note 6, at 1135-46 (proposes that definitions of bullying in anti-bullying legislation can be tort-based, based on the *Tinker* substantial disruption standard, on the creation of a hostile environment, on the fighting words doctrine, or on intent to ridicule).

<sup>108</sup> Kosse & Wright, *supra* note 102, at 62-63 (proposing that most statutes defining bullying focus on either the intent of the student who is accused of bullying, the reasonable of the student's actions, or the effect that the conduct has another student).

<sup>109</sup> See *supra* Part I (setting out the thesis and goals of this Note).

The first of these categories includes legislation using a tort-based definition of bullying.<sup>110</sup> Tort-based definitions can be narrow and often include only intentionally tortious conduct such as assault and battery, thereby sanctioning only behavior that is already illegal.<sup>111</sup> Alternatively, tort-based definitions can be broad and include written, verbal or physical acts, or the threat of a physical act.<sup>112</sup>

A second category defines bullying based on the substantial disruption standard put forth by the Court in *Tinker*; for instance, New Jersey's statute focuses on conduct that causes a disruption within the school environment.<sup>113</sup> While this standard is constitutional because it is taken directly from a Supreme Court opinion, very few states have used this standard in their anti-bullying statutes.<sup>114</sup> Other statutes focus on a portion of the *Saxe* opinion to interpret *Tinker* as allowing schools to prohibit speech which "substantially interfere[s] with a student's educational performance."<sup>115</sup>

<sup>110</sup> Hart, *supra* note 6, at 1135-37.

<sup>111</sup> See, e.g., GA. CODE ANN. § 20-2-751.4(a) (2008) (providing that bullying means "[a]ny willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so; or [a]ny intentional display of force such as would give the victim reason to fear or expect immediate bodily harm"); NEV. REV. STAT. § 388.129 (2006) (defining intimidation as "[a] willful act or course of conduct that is not otherwise authorized by law and: [I]s highly offensive to a reasonable person; and [p]oses a threat of immediate harm or actually inflicts harm to another person or to the property of another person").

<sup>112</sup> See, e.g., LA. REV. STAT. ANN. § 17:416.13(B)(2)(a) (2008); R.I. GEN. LAWS ANN. § 16-21-26(a)(2)(i) (2008); WASH. REV. CODE ANN. § 28A.300.285(2)(a) (West 2008).

<sup>113</sup> N.J. STAT. ANN. § 18A:37-14 (West 2008), which includes in its definition of harassment, intimidation or bullying, "[a]ny gesture, any written, verbal or physical act, or any electronic communication . . . that has the effect of insulting or demeaning any student or group of students in such a way as to cause a substantial disruption in, or substantial interference with, the orderly operation of the school." See also Hart, *supra* note 6, at 1137; *supra* note 23 and accompanying text (stating the standard established by *Tinker*).

<sup>114</sup> See, e.g. WASH. REV. CODE ANN. § 28A.300.285(2)(b), (d), which includes in its definition of harassment, intimidation, and bullying, "intentional electronic, written, verbal, or physical act[s] [that] . . . [have] the effect of substantially interfering with a student's education; or . . . [have] the effect of substantially disrupting the orderly operation of the school." But see Hart, *supra* note 6, at 1139 (reasoning that the ambiguity of the *Tinker* standard makes its application inconsistent and does not give adequate notice to students of what conduct is prohibited).

<sup>115</sup> Hart, *supra* note 6, at 217 (finding that because a school's mission is to educate students, conduct that interferes with that mission is disruptive to the school environment). See, e.g., OR. REV. STAT. § 339.351(2) (2007) (prohibiting "any act that substantially interferes with a student's educational benefits, opportunities or *performance*") (emphasis added). See also H.R. 4776(g)(12)(B), (13)(B), 108th Cong. (2004) (including in its definition of both bullying and harassment conduct that "adversely affects the ability of a student to participate in or benefit from the school's educational programs or activities") (this is a bill proposed in the House to establish a national bullying and harassment prevention program by amending the Safe and Drug Free Schools and Communities Act).



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A third category defines bullying in terms of a hostile educational environment.<sup>116</sup> These statutes expand the standard for sexual harassment established in *Davis* to include other forms of discrimination and harassment.<sup>117</sup>

A fourth category defines bullying based on the “fighting words” doctrine and has been adopted in only one state.<sup>118</sup> New Hampshire’s anti-bullying statute prohibits “[i]nsults, taunts, or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response.”<sup>119</sup> Legislation in this category would most likely be analyzed under *Tinker* with consideration of the Supreme Court decision in *R.A.V. v. City of St. Paul* as well.<sup>120</sup>

Finally, a fifth defines bullying based on the intent of the alleged bully.<sup>121</sup> Legislation in this category employs the broadest definition of bullying<sup>122</sup> because it focuses on the actor’s mental state and not on the effect of the behavior.<sup>123</sup> For example, Connecticut’s anti-bullying statute defines bullying as “any overt acts by a student or a group of students directed against another student with the intent to ridicule, harass, humiliate or intimidate the other student.”<sup>124</sup>

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<sup>116</sup> Hart, *supra* note 6 at 1141. Examples include DEL. CODE ANN. tit. 14, § 4112D (2008); FLA. STAT. § 1006.147 (2008); LA. REV. STAT. ANN. § 17:416.13(B)(2)(b) ; MD. CODE ANN., EDUC. § 7-424.1 (West 2008); OR. REV. STAT. § 339.351(2)(c); R.I. GEN. LAWS ANN. § 16-21-26(a)(2)(ii); WASH. REV. CODE ANN. § 28A.300.285(2)(c); H.R. 4776(g)(13)(C), 108th Cong. (not expressly providing the hostile environment language, but suggesting this idea).

<sup>117</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). See *supra* Part II.B.1.a (discussing *Davis*, the standard established by it, and the factors for determining if a school may be held liable under Title IX).

<sup>118</sup> N.H. REV. STAT. ANN. § 193-F:3 (2008). See Hart, *supra* note 6, at 1144 (stating that New Hampshire is the only state to adopt anti-bullying legislation relying on the fighting words doctrine).

<sup>119</sup> N.H. REV. STAT. ANN. § 193-F:3(II)(a) (this statute requires that a report is to be made by any school employee who witnesses such conduct and that the parents of the victim are to be notified within forty-eight hours and the decision as to how to remedy the problem is left to the discretion of the local school board).

<sup>120</sup> 505 U.S. 377 (1992). In *R.A.V.* the Court down an ordinance banning hate speech as an impermissible content-based restriction of speech by using fighting-words-based-analysis. *Id.* See also Hart, *supra* note 6, at 1145 (stating that this legislation would be analyzed under *Tinker* and *R.A.V.*).

<sup>121</sup> See e.g. CONN. GEN. STAT. ANN. § 10-222d (West 2008); W. VA. CODE § 18-2c-5 (2008).

<sup>122</sup> Hart, *supra* note 6, at 1145 (stating that the focus on the actor’s mental state makes these anti-bullying statutes the most broad and therefore probably violative of the First Amendment on over breadth grounds).

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

<sup>124</sup> CONN. GEN. STAT. ANN. § 10-222d. The definition of bullying in this statute requires in addition that the bullying take place “on school grounds, at a school-sponsored activity or on a school bus,” and that the “acts are committed more than once against any student during the school year.” *Id.*

State anti-bullying statutes are imposed directly by state legislatures. The United States Congress has not passed similar legislation, although the idea has been raised in Congress.<sup>125</sup> One way for Congress to pass anti-bullying legislation is to use its power under the Spending Clause to condition receipt of federal funds on adopting some type of uniform, national anti-bullying or anti-harassment policy.

*D. Congressional Power under the Spending Clause*

Congress is empowered by the Spending Clause to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States.”<sup>126</sup> Congress may use this power to place conditions on the receipt of federal funds.<sup>127</sup> Congress has repeatedly exercised this power under the Spending Clause to further broad policy objectives by conditioning receipt of federal funds on the recipient’s compliance with federal statutory and administrative directives.<sup>128</sup> Through the Spending Clause, objectives that are not actionable through exercise of the enumerated legislative powers of the Constitution can be achieved by the conditional grant of federal funds.<sup>129</sup>

This broad spending power is not unlimited and is subject to several general restrictions.<sup>130</sup> Congress’s exercise of the Spending Clause power can be seen as contractual in nature.<sup>131</sup> Thus, the first limitation on

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<sup>125</sup> H.R. 4776 108th Cong. (2004) (legislation proposed in the House and referred to a subcommittee, but never voted on or re-proposed).

<sup>126</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>127</sup> *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *see, e.g., United States v. Am. Library Ass’n, Inc.*, 593 U.S. 194, 203 (2003) (same); *Davis v. Monroe County Sch. Bd.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (same); *New York v. United States*, 505 U.S. 144, 167 (1992) (citing to *Dole*). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968); *Oklahoma v. CSC*, 330 U.S. 127 (1947).

<sup>128</sup> *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)). *See, e.g., Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127, 143–44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>129</sup> *Dole*, 483 U.S. at 207 (citing to *United States v. Butler*, 297 U.S. 1, 65 (1936)).

<sup>130</sup> *Id.* *See, e.g., Pennhurst*, 451 U.S. at 17 n.13; *Steward*, 301 U.S. at 585.

<sup>131</sup> *Pennhurst*, 451 U.S. at 17.

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.”

*Id.*

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Congress's power under the Spending Clause is that Congress must exercise the power in pursuit of the "general welfare."<sup>132</sup> The second limitation is that if Congress conditions the States' receipt of federal funds, "it 'must do so unambiguously, . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"<sup>133</sup> The next limitation is that conditions on federal funds will be found illegitimate if they are not related "'to the federal interest in particular national projects or programs.'"<sup>134</sup> There may be an independent bar on the conditional grant of federal funds from other constitutional provisions.<sup>135</sup>

In sum, the Supreme Court has allowed student speech in schools to be restricted under three separate standards, also known as the three pillars.<sup>136</sup> Congress has the power to condition receipt of federal funds under the Spending Clause.<sup>137</sup> This power could be used to establish a national anti-bullying or anti-harassment standard to remedy concerns about the scope and effectiveness of state anti-bullying legislation, but such a standard would be subject to the limitation of the First Amendment. National legislation would also establish a uniform answer to the question of what to do about bullying and harassment in schools.

## III. ANALYSIS

The standards discussed above for regulation of speech have varying degrees of scope and effectiveness. This Note will now analyze those standards. Below, Part III.A begins with a discussion of the effectiveness and scope of the Supreme Court standards for regulating student speech

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<sup>132</sup> *Dole*, 483 U.S. at 207 (also stating that in considering whether a particular expenditure is in pursuit of the general welfare, substantial deference should be given to the judgment of Congress). See *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *Butler*, 297 U.S. at 65; *Miller v. Tex. Tech Univ. Health Sci.*, 421 F.3d 342, 348 n.15 (5th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004); *Hodges v. Thompson*, 311 F.3d 316, 318 (4th Cir. 2002).

<sup>133</sup> *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17); *Miller*, 421 F.3d at 348 n.15; *Benning*, 391 F.3d at 1305; *Hodges*, 311 F.3d at 318.

<sup>134</sup> *Dole*, 483 U.S. at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

<sup>135</sup> *Dole*, 483 U.S. at 208 (citing *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968)).

<sup>136</sup> *Supra* Part II.A.

<sup>137</sup> *Supra* Part II.D.

in an anti-bullying statute.<sup>138</sup> Part III.B examines the permissible regulation of harassing and discriminatory speech under Titles VII and IX and their possible application to crafting an effective and constitutional anti-bullying statute.<sup>139</sup> Part III.C describes the effectiveness of state anti-bullying statutes to regulate student speech.<sup>140</sup> Finally, Part III.D analyzes the ability of Congress to condition the receipt of federal funds on schools adopting a nationwide student anti-bullying statute through Congressional Spending power.<sup>141</sup>

A. *The Effectiveness of Supreme Court Standards for Regulating Student Speech in an Anti-Bullying Statute*

1. The Ineffectiveness of *Tinker*'s Material Disruption Standard

The ability of Congress to pass an anti-bullying statute that infringes expression implicates *Tinker* and later cases. While expressly upholding *Tinker*, the Court in *Fraser* and *Kuhlmeier* distinguished *Tinker*.<sup>142</sup> Justice Black's dissent suggested that the majority in *Tinker* did not give schools enough power to regulate student speech.<sup>143</sup> Justice Black's concerns seem prophetic when viewing the current status of school environments.<sup>144</sup> This tension is furthered by the Supreme Court's decision in *Fraser*.<sup>145</sup> The Court in *Fraser* did not employ the substantial disruption standard that it had established in *Tinker* and instead focused

<sup>138</sup> See *infra* Part III.A (analyzing the scope and effectiveness of the Supreme Court's opinions in *Tinker* and *Fraser* for the purpose of crafting effective and constitutional student speech regulations; the inapplicability of *Kuhlmeier* to anti-bullying statutes, and finally, the impact of *R.A.V.* and *Morse*).

<sup>139</sup> See *infra* Part III.B (analyzing the possible application of Title VII "hostile workplace environment" law to the school environment and the partial integration of this standard into Title IX's student-on-student sexual harassment law).

<sup>140</sup> See *infra* Part III.C (analyzing the effectiveness of the different standards employed by state anti-bullying statutes in accomplishing their goal of reducing harassment and bullying in public schools).

<sup>141</sup> See *infra* Part III.D (analyzing the ability of Congress to condition receipt of federal funding on schools adopting a comprehensive student anti-bullying statute).

<sup>142</sup> See *supra* note 31 and accompanying text (discussing how the Court in *Fraser* distinguished *Tinker*); *supra* note 43 and accompanying text (discussing how the Court in *Kuhlmeier* distinguished *Tinker*).

<sup>143</sup> The record, in Justice Black's view, "overwhelmingly [showed] that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war." *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 518 (1969).

<sup>144</sup> See *supra* note 34 and accompanying text (discussing how Justice Black's dissent has been quoted by a majority of the Court in student speech cases after *Tinker*).

<sup>145</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

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on the content of the student's speech.<sup>146</sup> The fact that the Court did not use the substantial disruption standard in *Fraser*, *Kuhlmeier*, and more recently, *Morse*, seemingly reduces *Tinker*'s scope and application.<sup>147</sup>

Reinforcing this conclusion is the fact that lower courts have been inconsistent in establishing the requirements under *Tinker* and its impact on student speech rights.<sup>148</sup> In addition, some lower courts have required a physical disturbance to find that student speech constitutes a material and substantial disruption.<sup>149</sup> This inconsistency shows that as applied in lower courts, *Tinker* is not a uniform standard across the nation.<sup>150</sup> The ambiguity of *Tinker* does not give definitive guidance with which school officials can craft a speech regulation or feel confident in doling out punishment, and other standards established by the Supreme Court for student speech regulation are no more effective than *Tinker* in helping schools discipline students for their speech.

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<sup>146</sup> See *supra* note 32 and accompanying text (describing the Court's departure from *Tinker*'s standard in *Fraser*).

<sup>147</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007); Part II.A.2-3.

<sup>148</sup> See Mostoller, *supra* note 39, at 540. For example, the Fifth Circuit treats *Tinker* as simply a case dealing with viewpoint discrimination. *Id.* See *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442 (5th Cir. 2001). The Tenth Circuit applies *Tinker*'s substantial disruption standard to student speech that is not considered government or school-sponsored speech. Mostoller, *supra* note 39, at 540. See *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923 (10th Cir. 2002) ("Student speech that 'happens to occur on the school premises' is governed by *Tinker* . . ."). The Seventh Circuit states that the Supreme Court has cast some doubt in its decisions following *Tinker* as to "the extent to which students retain free speech rights in the school setting." Mostoller, *supra* note 39, at 543 (quoting *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994)). The Third and Ninth Circuits apply *Tinker* to a catch-all category of student speech not within the narrow categories carved out in *Fraser* and *Kuhlmeier*. Mostoller, *supra* note 39, at 539. See *Spyniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254 (3d Cir. 2002) ("Defendants do not contend the Foxworthy shirt contained indecent language; nor was the shirt school-sponsored. Accordingly, under *Saxe*, the shirt is subject to *Tinker*'s general rule. . .") (internal quotations omitted); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("[S]peech that falls into neither [*Fraser*'s nor *Kuhlmeier*'s category] is governed by *Tinker*."). Additionally, the Sixth, Eighth, and Eleventh Circuits use more of an ad hoc approach to student speech restrictions, allowing a more expansive view of permissible speech restrictions. Mostoller, *supra* note 39, at 541.

<sup>149</sup> See *Hart*, *supra* note 6, at 1139 (stating that emerging from the lower court opinions is an "overall impression that the substantial disruption standard requires some likelihood of actual, physical disturbance"). Also, *Hart* notes that several lower courts have upheld anti-harassment codes only "where the circumstances surrounding its adoption indicated a high likelihood that an identifiable, physical disturbance would result from the prohibited speech." *Id.* *Hart* also proposes that regulations based on *Tinker*'s "substantial disruption" standard likely cover only physical abuse or speech leading to a confrontation. *Id.*

<sup>150</sup> See *supra* notes 148-49 and accompanying text (discussing some of the different views lower courts have taken in interpreting *Tinker*).

2. *Fraser* and *Kuhlmeier*'s Ineffectiveness as Standards for Regulating Student Speech in an Anti-Bullying Statute and the Impact of Subsequent Decisions on Anti-Bullying Legislation

*Kuhlmeier* allows schools to regulate speech if the regulation is reasonably related to legitimate pedagogical concerns.<sup>151</sup> Only speech that is or reasonably can be seen as bearing the imprimatur of the school is subject to this standard.<sup>152</sup> But bullying is almost never speech that can be attributed to the school, and therefore *Kuhlmeier* is not relevant for purposes of this Note.<sup>153</sup> The *Fraser* standard, while it has problems, is more useful for anti-bullying legislation and will therefore be discussed in more detail.<sup>154</sup>

The two propositions that the Court promulgated in *Fraser* are neither standards nor tests that can be used to regulate student speech.<sup>155</sup> Reading *Fraser* as simply recognizing that *Tinker* is not an exclusive standard for student speech, and that students' constitutional rights are not the same as those of adults, does nothing to establish a standard under which schools can regulate student speech.<sup>156</sup> These propositions do not set a definitive standard, nor do they provide guidance to school officials as to when student speech may be prohibited or punished. The lack of guidance from *Fraser* is further evidenced by the conflicting views of the Court's holding by the Circuit Courts.<sup>157</sup> The Third and Ninth Circuits view *Fraser* as permitting school regulation of a category of lewd, vulgar, obscene, and plainly offensive speech.<sup>158</sup> This category of

<sup>151</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 258, 273 (1988).

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

<sup>153</sup> See *supra* Part II.A.3 (discussing *Kuhlmeier* and the narrow scope of its holding).

<sup>154</sup> See *infra* notes 150–62 and accompanying text (analyzing *Fraser*'s standard for its effectiveness in an anti-bullying statutes).

<sup>155</sup> *Morse v. Frederick*, 551 U.S. 393, 404 (2007).

<sup>156</sup> *Id.* The Court recognized that all that could be definitively taken from the *Fraser* decision is that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings[.]” and that “the mode of analysis set forth in *Tinker* is not absolute.” *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

<sup>157</sup> See *e.g.*, Mostoller, *supra* note 39, at 539–43. In an analysis of United States Appellate Court application of the student speech standards, Mostoller highlights the different interpretations of Supreme Court precedent. *Id.*

<sup>158</sup> *Id.* at 539–40. See *e.g.*, *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002) (“[T]he determination of what manner of speech . . . is inappropriate properly rests with the school board.’ We have interpreted *Fraser* as establishing that ‘there is no First Amendment protection for ‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech in school.’”) (quoting *Fraser*, 478 U.S. at 683; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001)); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001) (“[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,’ rather than with the federal

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speech is then regulated subject to a reasonableness standard that gives deference to the decisions of school officials.<sup>159</sup> Other Circuits have taken a more expansive approach in interpreting *Fraser*.

The Sixth, Seventh, Eighth, and Eleventh Circuits read *Fraser* as granting more expansive regulatory power to schools in managing student speech.<sup>160</sup> This interpretation of *Fraser* leads to an *ad hoc* approach that allows school administrators to regulate speech as teachers of “habits and manners of civility.”<sup>161</sup> A possible consequence of this interpretation is that *Fraser* allows schools to create a speech code that is in effect a general civility code regulating manners and interaction among students.<sup>162</sup> Adding to this variety in interpretation of *Fraser*, the Fourth Circuit rejects the above approach and interprets *Fraser* as limited to school-sponsored speech as in *Kuhlmeier*.<sup>163</sup>

The ambiguity of *Fraser* lessens the effect it can have for regulating student speech pursuant to an anti-bullying statute. The fact that the Court has questioned the clarity of its own decision and analysis causes

courts[;] . . . vulgar, lewd, obscene and plainly offensive speech is governed by *Fraser* . . .” (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 258, 267 (1988)).

<sup>159</sup> See *supra* note 154 and accompanying text (looking at the Third and Ninth Circuit Court of Appeals’ view of *Fraser*).

<sup>160</sup> See e.g., *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1272 (11th Cir. 2000) (“Supreme Court decisions since *Tinker* indicate that the teaching of civility and the inculcation of tradition moral, social, and political norms may override student expression, or at least that it is permissible for a school board to so order its educational priorities.”) (citing *Fraser*, 478 U.S. at 681, 683; *Kuhlmeier*, 484 U.S. at 271–72)); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (“students’ First Amendment rights ‘in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior’” (quoting *Fraser*, 478 U.S. at 681)); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1536 (7th Cir. 1996) (“Public education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility[;] . . . [t]hese ‘habits and manners of civility’ must ‘take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.’” (quoting *Fraser*, 478 U.S. at 681)); *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (“Local school officials . . . must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted.”).

<sup>161</sup> *Fraser*, 478 U.S. at 681. See Mostoller, *supra* note 39, at 541–42.

<sup>162</sup> Mostoller, *supra* note 39, at 541–42.

<sup>163</sup> See *Crosby v. Holsinger*, 852 F.2d 801, 802 (4th Cir. 1988) (reading *Fraser* along with *Kuhlmeier* to stand for the proposition that “school officials need not sponsor or promote all student speech”). See also Mostoller, *supra* note 39, at 542 (“This interpretation is contrary to the view that school sponsorship is central to the *Fraser* holding, and that the more flexible standard in *Fraser* and *Hazelwood* stems from a school’s interest in suppressing student expression only when such expression could be perceived as school-endorsed.”); Jonathan Pyle, Note, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 633 (2002) (“[A]lthough many courts have interpreted *Fraser* to carve out an exception to the *Tinker* disruption standard for vulgar speech in any context, the *Hazelwood* case clarified *Fraser*’s holding, confining it to the school-sponsored context.”).

further confusion over this opinion and its precedential value.<sup>164</sup> Thus, it seems schools may regulate lewd or vulgar speech under *Fraser*, but the questionable scope of this general rule and its inherent vagueness gives no guidance to school officials and opens regulations to challenges under the void for vagueness standard.<sup>165</sup> Additionally, the lack of clear factors and reasoning in *Fraser* make it hard to discern how to regulate bullying without overbreadth problems.<sup>166</sup> Lower federal courts have done nothing to crystallize *Fraser's* holding and have only added to the divergent, conflicting interpretations of the opinion.<sup>167</sup>

Two later cases have possible impact on to the ability to effectively craft anti-bullying statutes.<sup>168</sup> First, *R.A.V.* seems to disallow any regulation of expression that is content-based.<sup>169</sup> That the Supreme Court did not look to *R.A.V.* in either *Davis* or *Morse* suggests that either the Court does not deem *R.A.V.* applicable to the school setting or that *R.A.V.'s* precedential value is minimal in that context.<sup>170</sup> *Morse* can be and has been interpreted as creating a standard by which a school can prohibit only expression that advocates illegal drug use.<sup>171</sup> Because bullying behavior is not advocacy of illegal drug use, *Morse* is not useful for crafting an anti-bullying statute.

In sum, the standards for permissible regulation of student speech established by the Supreme Court have inherent problems preventing them from being fully and clearly applicable to student bullying

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<sup>164</sup> See *Morse*, 551 U.S. at 404 (stating that the mode of analysis employed in *Fraser* is not entirely clear).

<sup>165</sup> Snook, *supra* note 27, at 672 (noting that a regulation based on the *Fraser* standard may be found “unconstitutional if it is written in such vague terms as to not adequately give students notice of speech that is prohibited”).

<sup>166</sup> See *id.* at 673 (stating that a regulation based on *Fraser* “could lend itself to a substantial number of impermissible applications; . . . the regulation may deter protected expression, and school officials would have to enforce it in a way that avoids such unconstitutional application”).

<sup>167</sup> See *supra* notes 154–60 and accompanying text (looking at the Circuit Courts’ differing views of *Fraser's* holding).

<sup>168</sup> See *supra* notes 49–56 and accompanying text (discussing the possible ramifications of *R.A.V.* for anti-bullying legislation and the possible new standard arising in *Morse*).

<sup>169</sup> See *supra* note 50 and accompanying text (setting out the requirement of content-neutrality set by *R.A.V.*).

<sup>170</sup> See *supra* Part II.B.1.a (discussing *Davis*, which does not cite *R.A.V.*); *supra* notes 53–56 (discussing *Morse*, the Court’s latest student speech case, which also does not cite *R.A.V.* a single time).

<sup>171</sup> See *supra* note 56 and accompanying text (stating that while the true impact of *Morse* on student speech rights is unclear at this time, many commentators conclude it creates a narrow standard allowing for regulation of student expression advocating illegal drug use; citing two of many articles articulating this point).



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regulations.<sup>172</sup> The opinions provide abundant, oft-quoted language that can justify certain speech codes or regulations.<sup>173</sup> However, there is significant ambiguity in *Tinker* and *Fraser*, and many questions pertaining to their import and scope as applied to student speech.<sup>174</sup>

B. *The Effectiveness of Congressional Regulations on Harassing or Discriminatory Speech*

1. Effectiveness of Title IX for Regulating Student Speech

Title IX prohibits discrimination based on sex in any educational program or activity that receives federal funding.<sup>175</sup> The Supreme Court's decision in *Davis v. Monroe County Board of Education* established a private right of action for victims of student-on-student sexual harassment under Title IX.<sup>176</sup> This decision has motivated schools to take affirmative steps to prevent student-on-student sexual harassment.<sup>177</sup>

In *Davis*, the Supreme Court cited examples of conduct that would not give rise to liability under Title IX.<sup>178</sup> These examples illustrate the high burden of proof required to prove a claim of student-on-student sexual harassment.<sup>179</sup> In addition, it has proven difficult to meet the "severe and pervasive" standard established in *Fraser*.<sup>180</sup> The Court further limited its holding by distinguishing Title IX law from Title VII law because of the difference in the age and maturity of the protected

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<sup>172</sup> See *supra* Part III.A (analyzing the efficacy of the Supreme Court's decisions in *Tinker*, *Fraser*, and *Kuhlmeier* for regulating student speech in an anti-bullying statute).

<sup>173</sup> See *supra* Part II.A (setting out and discussing the "three pillars" of Supreme Court student speech jurisprudence: *Tinker*, *Fraser*, and *Kuhlmeier*, and the major standards they established).

<sup>174</sup> See *supra* Parts III.A.1-2 (discussing the effectiveness and problems of using *Tinker* and *Fraser* as standards for regulating student speech through an anti-bullying statute).

<sup>175</sup> 20 U.S.C. § 1681(a) (2006).

<sup>176</sup> See *supra* Part II.B.1.a (discussing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

<sup>177</sup> See *e.g.*, Matejkovic, *supra* note 68, at 305-06 ("Courts have regularly held that Title IX imposes duties on educational institutions to prevent sexual harassment of students in the same fashion that Title VII imposes duties on employers to prevent sexual harassment of employees.").

<sup>178</sup> *Davis*, 526 U.S. at 652. The Court took for granted that "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-52. The Court next stated that "[d]amages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender." *Id.* at 652. Thus, the Court decided that these acts would not give rise to a Title IX action. Mostoller, *supra* note 39, at 545-46.

<sup>179</sup> See Mostoller, *supra* note 39, at 545-46.

<sup>180</sup> See Mostoller, *supra* note 39, at 547 (noting that "lower courts have required relatively extreme behavior to satisfy the severe and pervasive standard").

classes, lessening the scope of its opinion and raising questions as to the viability of the standard for older students.<sup>181</sup>

The Sixth and Tenth Circuits addressed extreme and egregious conduct in school by finding peer sexual harassment actionable under Title IX.<sup>182</sup> Federal district courts have not considered verbal harassment alone as satisfying *Davis's* severe and pervasive standard.<sup>183</sup> Therefore, extreme and egregious behavior is required to trigger a violation of Title IX.<sup>184</sup> In *Saxe*, the Third Circuit Court of Appeals restricted the ability of schools to limit their own liability under Title IX by applying the First Amendment overbreadth doctrine to a school anti-harassment policy.<sup>185</sup>

While these limitations lessen schools' potential liability under Title IX, regulations promulgated under Title IX can be used to fashion a student anti-bullying statute because Title IX has been tested before the Court.<sup>186</sup> However, because verbal harassment alone does not trigger liability, schools likely will not be motivated to restrict student speech that is viewed as simply teasing, even though it is often the most damaging verbal harassment. The Court has also pointed out that, while Title IX law has been fashioned with an eye to Title VII, the difference in age and maturity of the protected classes affords less protection to students.<sup>187</sup> Thus, Title IX law does not reach all the types of bullying that are harmful to young children and that can lead to physical confrontation.<sup>188</sup> Additionally, the relationship between Title IX law on

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<sup>181</sup> *Davis*, 526 U.S. at 651-52. The Court stated that courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Id.* at 651. The Court also observed that "at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-52.

<sup>182</sup> Mostoller, *supra* note 39, at 547.

<sup>183</sup> Hart, *supra* note 6, at 1143 (noting that "lower courts interpreting the *Davis* standard have so far required physical conduct to hold schools liable under *Davis*; in some cases, they have dismissed claims because they involved only verbal abuse"); Mostoller, *supra* note 39, at 547-48.

<sup>184</sup> See Mostoller, *supra* note 39, at 548 (stating that "lower courts have interpreted the severe and pervasive standard to require extreme behavior that must include some physical conduct beyond verbal harassment").

<sup>185</sup> *Id.* at 217.

<sup>186</sup> See *supra* notes 107-09 (introducing the category of state anti-bullying statutes that employ the hostile environment standard, established by the Supreme Court in *Davis*, as the standard for analyzing Title IX claims).

<sup>187</sup> See Hart, *supra* note 6, at 1143 (stating that "the *Davis* standard gives children less legal protection in school than adults receive in the workplace under Title VII," and that the Court has acknowledged and accepted this fact).

<sup>188</sup> See *supra* notes 7-8 and accompanying text (discussing types of bullying other than physical abuse that can lead to violence and psychological damage).

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sexual harassment and First Amendment freedom of speech remains unclear.<sup>189</sup> Therefore, the extent to which sexually harassing speech can be regulated under the First Amendment is unclear. But at least it can be said that sexually harassing speech can be prohibited in schools to protect students, which is all that is required for the purpose of crafting an anti-bullying statute. Standards for other types of harassing speech may also be effective in prohibiting bullying in schools.

2. The Possible Applicability of Title VII Standards to the School Setting

The Supreme Court based part of its opinion in *Davis* on previous decisions about the workplace context under Title VII of the Civil Rights Act of 1964.<sup>190</sup> In addition, the Court invoked Title VII precedent in formulating its test for Title IX liability.<sup>191</sup> At the same time, the *Davis* Court expressly stated that speech and conduct actionable under Title VII when performed by adults would not be actionable under Title IX if performed by children.<sup>192</sup> Therefore, the Supreme Court has indicated that children who are being bullied in school have less protection under Title IX than adults who are harassed in the workplace under Title VII.<sup>193</sup>

Title VII law has been used as guidance by the Court in fashioning its Title IX jurisprudence and has been used by the Office of Civil Rights to provide guidance to schools complying with Title IX.<sup>194</sup> This concept

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<sup>189</sup> See Mostoller, *supra* note 39, at 556-59. There are three possibilities Mostoller describes:

(A) there is a discrete point at which First Amendment protections end and impermissible harassment begins; (B) there is a gap between the two standards where school officials may suppress speech that falls short of harassment and still avoid liability for First Amendment violations; or (C) the two standards overlap, leaving schools helpless to regulate expression that is both protected by the First Amendment and triggers liability under Title IX.

*Id.* at 556-57 (the author believes that choice (B) is the proper state of the law at this time and that the gap between the two standards might be quite wide judging from precedent).

<sup>190</sup> See Stuart, *supra* note 68, at 253 (stating that in *Davis*, the Court looked to Title VII law in developing the hostile education environment and that the Department of education did the same when crafting regulations under Title IX); Matejkovic, *supra* note 68, at 309 (same).

<sup>191</sup> See Stuart, *supra* note 68, at 253-54. See also *Oncala v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75 (1998) (dealing with a Title VII claim; this case was decided the year before *Davis* and Justice O'Connor quoted and cited liberally to it in her majority opinion in *Davis*).

<sup>192</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651-52 (1999).

<sup>193</sup> See Hart, *supra* note 6, at 1143.

<sup>194</sup> See Stuart, *supra* note 68, at 254 ("Clearly, Justice O'Connor relied on Title VII's hostile work environment test in establishing whether a student has been discriminated against in her access to the educational program."). See also Matejkovic, *supra* note 68, at 309 (stating

goes beyond Title IX regulation in prohibiting harassment or discrimination based upon race, color, religion, sex, or national origin.<sup>195</sup>

Title VII has at least two distinct advantages over Title IX in the context of student speech regulation. First, Title VII's hostile workplace environment regulation is not limited to discrimination or harassment based on sex.<sup>196</sup> Second, Title VII has a well-established, thorough, and constitutional framework and regulatory system already in place.<sup>197</sup> The standard of proof is still high, but this has not discouraged the promulgation of an entire regulatory scheme.<sup>198</sup> Although the Court would have to revise part of the precedent set in *Davis*, Title VII and the regulations promulgated under it by the EEOC could be used to fashion a student anti-bullying statute that would reach much of the speech associated with bullying. Such a statute would give students the same protection against harassment and discrimination that adults enjoy in the workplace, and would reach bullying that is not merely sexual in nature.

### C. *The Effectiveness of State Anti-Bullying Legislation*

State Anti-Bullying legislation, created as a bulwark against Title IX liability and the ongoing problem of bullying, offers different definitions of "bullying" and has varying levels of effectiveness.<sup>199</sup> The first category as described above includes legislation employing a tort-based definition of bullying.<sup>200</sup> While this legislation may be constitutional, it does not reach verbal and psychological bullying and therefore implicates only a small percentage of bullying incidents.<sup>201</sup>

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that concepts and standards from Title VII jurisprudence have been borrowed to provide proof of sexual harassment or discrimination in the school environment under Title IX); DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 70 (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> ("[T]he *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX.").

<sup>195</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>196</sup> See *supra* note 72 and accompanying text (setting out the different types of discrimination that Title VII prohibits).

<sup>197</sup> See *supra* Part II.B.2 (discussing Title VII law and introducing the EEOC Guidelines as adopted by the Supreme Court in its decisions).

<sup>198</sup> See *supra* note 89 and accompanying text (defining the specific standard set by the Court in *Meritor* for establishing a prima facie claim under Title VII).

<sup>199</sup> See *supra* Part II.C (discussing the various approaches different states have taken in fashioning anti-bullying legislation).

<sup>200</sup> See Hart, *supra* note 6, at 1137; *supra* notes 101-03 and accompanying text (introducing state anti-bullying statutes that use a tort-based definition of bullying).

<sup>201</sup> Hart, *supra* note 6, at 1136-37.

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The second category contains definitions based on the substantial disruption standard proffered by *Tinker*.<sup>202</sup> While this standard is constitutional because it is taken directly from *Tinker*, few states use this standard in their anti-bullying statutes.<sup>203</sup> The effectiveness of this definition for anti-bullying statutes is diminished by the uncertainty over the continued viability, scope, and application of *Tinker*'s substantial disruption standard.<sup>204</sup> *Tinker*'s standard is also ineffective in preventing much of the bullying that occurs in school without a prior history or the likelihood of an actual, physical disturbance.<sup>205</sup> Other statutes have seized on a portion of the *Saxe* opinion to interpret *Tinker* as allowing schools to prohibit speech that "substantially interfere[s] with a student's educational performance."<sup>206</sup> This is an improvement on definitions

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<sup>202</sup> *Id.* at 1137. See *supra* notes 104–06 and accompanying text (introducing anti-bullying statutes that employ a definition of bullying based on *Tinker*).

<sup>203</sup> See *supra* Part II.A.1 (discussing the *Tinker* opinion and standard). But see Hart, *supra* note 6, at 1139 (reasoning that the ambiguity surrounding the *Tinker* standard makes its application inconsistent and does not give adequate notice to students of what conduct is prohibited).

<sup>204</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 417–18 (2007) (Thomas, J., concurring) (Justice Thomas concurs in the opinion because he feels it "creates another exception [to *Tinker* and] [i]n doing so, we continue to distance ourselves from *Tinker*"). He also states that *Morse* "erodes *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so." *Id.* at 422. See, e.g., *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (stating that it is not clear whether *Tinker* applies to all non-school sponsored student speech, only political speech, or only political viewpoint-based discrimination, "[n]or is *Tinker* entirely clear as to what constitutes 'substantial disorder' or 'substantial disruption' of or 'material interference' with school activities" (quoting *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 513–14 (1969))); Strossen, *supra* note 22, at 458–59, ("Unfortunately, *Tinker* was in many ways a high-water mark for students' rights, and we have seen some sad backsliding in Supreme Court decisions about students' rights since then . . . the Supreme Court has tended to look less favorably on constitutional rights and civil liberties.").

<sup>205</sup> Hart, *supra* note 6, at 1139 (pointing out that lower courts have often required an anti-harassment code to be accompanied by "a high likelihood that an identifiable, physical disturbance would result from the prohibited speech"). See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (citing *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000) in support of the proposition that, under *Tinker*, "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction [on student speech] may pass constitutional muster").

<sup>206</sup> *Saxe*, 240 F.3d at 217 (finding that because a school's mission is to educate students, conduct that interferes with that mission is disruptive to the school environment). See, e.g., OR. REV. STAT. § 339.351(2) (2007) (prohibiting any act that "[s]ubstantially interferes with a student's educational benefits, opportunities or performance") (emphasis added). See also H.R. 4776, 108th Cong. (2004) (bill proposed in the House to establish a national bullying and harassment prevention program by amending the Safe and Drug Free Schools and Communities Act). The bill included in its definition of both bullying and harassment

employing the *Tinker* standard, but it is not wholly adequate to curtail bullying in schools.

The third category of anti-bullying legislation includes statutes that attempt to define bullying in terms of a hostile educational environment.<sup>207</sup> These statutes expand the standard established in *Davis* for sexual harassment to include other forms of discrimination and harassment.<sup>208</sup> *Saxe* gives reason to doubt whether anti-bullying statutes using the hostile or abusive educational environment definition can withstand judicial scrutiny.<sup>209</sup> Also, lower courts' treatment of *Davis* indicates that verbal abuse alone is not enough without some physical conduct.<sup>210</sup>

The fourth category of legislation bases its definition of bullying on the fighting words doctrine.<sup>211</sup> Because this standard focuses on the effects that words have on their listeners, it would most likely be found unconstitutional under *R.A.V.* because the emotive impact on listeners is outside the scope of the fighting words doctrine.<sup>212</sup> In addition, appellate courts have typically required a finding of physical disruption in addition to mere offense to words before the *Tinker* standard can be met.<sup>213</sup> By the time the "fighting words" doctrine or *Tinker* come into play due to substantial, often physical disruption, this sort of legislation has already failed to curtail bullying.<sup>214</sup>

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conduct that "adversely affects the ability of a student to participate in or benefit from the school's educational programs or activities." *Id.*

<sup>207</sup> Hart, *supra* note 6, at 1141. See also *supra* note 107-09 and accompanying text (describing hostile educational environment based anti-bullying legislation).

<sup>208</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>209</sup> See *supra* Part II.B.1.b.

<sup>210</sup> Mostoller, *supra* note 39, at 547 (stating that of the Federal District Courts that had examined the severe and pervasive standard of *Davis*, none had at that point found verbal harassment alone to be enough to satisfy the standard). See generally *Doe v. Dallas Ind. Sch. Dist.*, 2002 WL 1592694 (N.D. Tex. 2002); *Johnson v. Ind. Sch. Dist. No. 47*, 194 F. Supp. 2d 939 (D. Minn. 2002); *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917 (C.D. Ill. 2002); *Benjamin v. Metro. Sch. Dist. of Lawrence Township*, 2002 WL 977661 (S.D. Ind. 2002); *Wilson v. Beaumont Ind. Sch. Dist.*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *Manfredi v. Mount Vernon Bd. of Ed.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000); *Kindred*, *supra* note 76 (noting that the majority of Title IX hostile environment cases that have been before the courts "have included some physical touching or other conduct in addition to harassing speech").

<sup>211</sup> See Hart, *supra* note 6, at 1145-46; *supra* notes 110-12 and accompanying text (introducing anti-bullying legislation that uses a fighting-words-based definition of bullying).

<sup>212</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-94 (1992).

<sup>213</sup> See *supra* notes 142-43 (discussing the different views lower Federal courts have as to what is required to meet the *Tinker* standard).

<sup>214</sup> See Hart, *supra* note 6, at 1145 (stating that the "limit [to words that cause more than psychological or emotive impact] likely precludes use of the fighting words doctrine as a vehicle for any meaningful restriction of harassing or abusive speech").

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The fifth category includes legislation with intent-based definitions of bullying.<sup>215</sup> While these definitions would be very successful in identifying bullying, they also would likely be found unconstitutional.<sup>216</sup> In addition, because the focus is on the speaker's intent, it would be hard to demonstrate a substantial disruption or violation of another standard because the effect on the listener is not considered.<sup>217</sup> Unfortunately, these anti-bullying statutes reach the most verbal and psychological bullying.<sup>218</sup>

Thus, the effectiveness and constitutionality of state anti-bullying legislation have not been evaluated, but are problematic, as the preceding section explained.<sup>219</sup> That this legislation has been introduced and passed is a good sign that the problem of bullying is recognized and that attempts are being made to remedy it. Also, certain elements of some of these statutes could be used in fashioning a national standard.<sup>220</sup> Congress could use its power under the Spending Clause to enact anti-bullying legislation and set a national standard to prevent bullying in schools.

*D. Congressional Spending Clause Power Used to Remedy the Differing Standards*

The Spending Clause allows Congress broad power to accomplish objectives that are not within its enumerated legislative powers, by conditioning receipt of federal funds on adoption of Congressional legislation.<sup>221</sup> The Supreme Court views exercise of this power as contractual in nature.<sup>222</sup> A national student anti-bullying statute enacted through Congressional spending power would need to comply with these limitations imposed by the Constitution and Supreme Court decisions.<sup>223</sup>

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<sup>215</sup> See *id.* at 1145-46; *supra* notes 113-15 and accompanying text (introducing anti-bullying statutes that use an intent-based definition of bullying).

<sup>216</sup> See Hart, *supra* note 6, at 1145-46.

<sup>217</sup> *Id.* at 1146.

<sup>218</sup> *Id.*

<sup>219</sup> See *id.* ("constitutional antibullying and antiharassment statutes are largely ineffective in dealing with the verbal and psychological bullying that can lead to more deadly school violence").

<sup>220</sup> See *infra* Part IV.B (proposing a model statute containing some of these elements).

<sup>221</sup> See Part II.D (discussing Congressional power under the Spending Clause generally).

<sup>222</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>223</sup> See *supra* notes 120-23 (discussing generally the limitations on Congressional Spending Clause power).

The first requirement, that the spending power must be exercised in pursuit of the “general welfare,” would be met by such legislation.<sup>224</sup> Attempting to prevent bullying and harassment of school children is within the category of the “general welfare.” The second limitation, requiring Congress to exercise its power unambiguously and give clear notice and a voluntary choice to the States, would also be met.<sup>225</sup> A clear mandate that States must institute an anti-bullying statute crafted by Congress upon receipt of federal funds, would certainly be unambiguous and give clear notice. If a uniform anti-bullying statute is proposed and passed by Congress, the States would have adequate notice of the policy they are accepting. The third limitation requires that the conditions imposed are related to federal interest in a national project or program; this too would be satisfied.<sup>226</sup> Providing a safe and effective learning environment in schools and educational programs is one of the utmost federal interests as schools prepare children to be good and productive citizens and reach their full potential.<sup>227</sup>

The final limitation is that there may be an independent constitutional bar on the conditional grant of federal funds.<sup>228</sup> This limitation would be the most problematic and potentially fatal to a national anti-bullying statute because such a statute would involve restricting free speech rights in schools and would directly confront the First Amendment. The Supreme Court could possibly find that the condition created by national anti-bullying legislation is unconstitutional because it violates the First Amendment by prohibiting students’ constitutionally-protected speech. To avoid this result, the Supreme

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<sup>224</sup> See e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (stating that in considering whether a particular expenditure is in pursuit of the general welfare, substantial deference should be given to the judgment of Congress); *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936); *Miller v. Tex. Tech Univ. Health Sciences*, 421 F.3d 342, 348 n.15 (5th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004); *Hodges v. Thompson*, 311 F.3d 316, 318 (4th Cir. 2002) (all affirming that the Spending power must be exercised in pursuit of the “general welfare”).

<sup>225</sup> *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17); *Miller*, 421 F.3d at 348 n.15; *Benning*, 391 F.3d at 1305; *Hodges*, 311 F.3d at 318. If Congress conditions States’ receipt of federal funds, “it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17).

<sup>226</sup> See *Dole*, 483 U.S. at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (“[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.”).

<sup>227</sup> See e.g. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>228</sup> *Dole*, 483 U.S. at 208 (citing to *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–70 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968)).



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Court would need to be more flexible with its First Amendment jurisprudence to provide greater protection to students in schools. The education of America's youth is extremely important to the future of this country and the next generation of Americans.

IV. AN ANSWER TO BULLYING IN PUBLIC SCHOOLS

Despite continued worries about bullying and its consequences in U.S. public schools, some states still do not have any form of anti-bullying legislation in place.<sup>229</sup> The effectiveness of current state anti-bullying legislation is uncertain but could be greatly enhanced.<sup>230</sup> This Part will discuss the advantages in reducing bullying and its effects that a national statute could provide. A model anti-bullying statute based on existing state anti-bullying statutes and Supreme Court precedent will be suggested and discussed. The model anti-bullying statute proposed in this Part results from compiling sections of current state anti-bullying legislation and then enhances these sections to effectively accomplish the aims of anti-bullying legislation in a constitutional manner. A national anti-bullying statute would provide advantages unavailable through the myriad of state statutes that are currently in force.

A. *Advantages of a Single, National Standard for Anti-Bullying Legislation*

A national anti-bullying statute could be tested a single time in front of the nation's courts. This eliminates the need for continual challenges to student anti-bullying statutes and anti-bullying legislation and for federal courts to interpret the scope and effect of Supreme Court precedent. In trying to protect their students from bullying and its effects, schools have struggled to determine what speech and expression they may constitutionally prohibit. A national standard, once challenged and tested in front of the courts, would provide a definitive answer to this problem. The uniform national standard would also increase the effectiveness of enforcement because all schools would adhere to the same definitions of bullying, prohibited speech and conduct.

In order to accomplish these aims, Congress should condition disbursement of federal education funds on acceptance of this national anti-bullying statute, similar to what Congress has already done with Title IX.<sup>231</sup> This will cause schools and school districts across the nation

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<sup>229</sup> See *supra* Part II.D (introducing the different forms state anti-bullying legislation has taken and acknowledging that fourteen states still have no anti-bullying legislation).

<sup>230</sup> See *supra* Part III.C (discussing the effectiveness of current state anti-bullying legislation in reducing bullying and its negative effects in schools).

<sup>231</sup> See *supra* Part II.B (discussing Title IX law).

to adopt this anti-bullying code. An anti-bullying statute passed pursuant to Congress's Spending Clause power is contractual in nature and requires Congress to speak with a clear voice.<sup>232</sup> These requirements would be satisfied by the type of legislation proposed in this Note.

*B. Components of an Effective and Constitutional Anti-Bullying Statute*

An effective anti-bullying statute must include the substantial, material disruption standard established in *Tinker*.<sup>233</sup> This standard is likely constitutional due to its creation and repeated affirmation by the Supreme Court.<sup>234</sup> The *Tinker* standard allows anti-bullying statutes to encompass disruptive behavior targeted at a student but which may not be prohibited by the other standards set out in this Part.<sup>235</sup> The other two major Supreme Court student speech cases, *Fraser* and *Kuhlmeier*, are not really applicable to anti-bullying statutes because *Fraser's* standard is unclear and *Kuhlmeier's* deals with school-sponsored speech.<sup>236</sup> Title IX offers an existing framework and regulatory scheme for proscribing harassment based on sex in public schools and has passed the Supreme Court's First Amendment requirements. This legislative prohibition of harassment is important as it allows bullying or harassment based on sex to be prohibited by the legislation this Note proposes. In addition, the hostile environment jurisprudence and hostile workplace environment standard that Title IX adopts from Title VII law are helpful in crafting a comprehensive anti-bullying statute.<sup>237</sup> By analogizing Title VII workplace jurisprudence to the school environment, Title VII's prohibitions against discrimination based on race, color, religion, and national origin can be used to protect students against bullying based on these factors.<sup>238</sup>

In addition, because of the fragile psyches of adolescents and children, other characteristics of these individuals, such as physical attributes or socioeconomic status, should be included to make the

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<sup>232</sup> See *supra* Part II.D (discussing the nature of legislation passed by Congress pursuant to its Spending Clause power).

<sup>233</sup> See *supra* Part II.A.1 (examining the facts and reasoning of *Tinker* and the precedents it established, including the substantial, material disruption standard).

<sup>234</sup> See *supra* Part II.A.1-3 (discussing *Tinker*, *Fraser*, and *Kuhlmeier* and recognizing that the Supreme Court reaffirmed *Tinker's* substantial, material disruption standard in both *Fraser* and *Kuhlmeier*).

<sup>235</sup> See *infra* Part IV.C (proposing a model anti-bullying statute).

<sup>236</sup> See *supra* Part III.A.2 (analyzing the effectiveness of *Fraser* and *Kuhlmeier* as standards for prohibiting speech through an anti-bullying statute).

<sup>237</sup> See *supra* Part II.B-C (discussing the Title IX and Title VII hostile environment standard).

<sup>238</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

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statute truly effective. While no Supreme Court precedent or federal statutory provision includes these other characteristics, many state anti-bullying statutes do include these characteristics. For these characteristics to be included constitutionally in a federal statute, the courts, particularly the Supreme Court, would need to recognize and allow for the peculiar and special circumstances in and around the school environment. To avoid the over breadth and vagueness problems that invalidate much legislation when First Amendment challenges are brought, these characteristics must be specifically included. Also, Spending Clause legislation must be precise to give states clear notice so that they may knowingly exercise their choice to adopt it.

C. *Model Federal Anti-Bullying Statute*

This Model Statute borrows the best portions from the most strongly-drafted state anti-bullying legislation. To start, anti-bullying legislation should give a clear purpose statement with strong legislative findings, as New Jersey's anti-bullying statute does. Next, the bullying and harassment to be prohibited by the statute needs to be clearly and unambiguously defined. Maryland's anti-bullying statute does this thoroughly and concisely. The applicability of the statute to school activities must also be stated. Delaware's anti-bullying statute does this well

Also, legislation should provide for a robust system for reporting incidents of bullying and providing immunity to the person reporting an incident. Maryland's statute provides for a detailed and comprehensive reporting system. Florida's statute sets out an immunity provision in a clear, concise manner. The policy should include a requirement that anti-bullying training and education be provided to both students and school staff; West Virginia's statute does this particularly well. Finally, legislation should include a process for handling bullying incidents, as does Florida's statute.

This Note's proposed Model Statute follows:<sup>239</sup>

- (A) ~~The Legislature~~ *Congress* finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a

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<sup>239</sup> This proposed statute is composed of language drawn from various state anti-bullying statutes; this unique compilation is the contribution of the author. Additions to language found in state statutes are italicized.

school's ability to educate its students in a safe environment, *free from fear and potential violence*; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.<sup>240</sup>

(B) "Bullying, harassment, or intimidation" means ~~intentional~~ conduct, including verbal, physical, or written conduct, or an intentional electronic communication, that:

(1) Creates a hostile educational environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being and is:

a. Motivated by an actual or a perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, religion, ancestry, physical attribute, socioeconomic status, familial status, or physical or mental ability or disability; or

b. Threatening or seriously intimidating;

~~(ii) 1. Occurs on school property, at a school activity or event, or on a school bus; or~~

2. Or ~~S~~substantially disrupts the orderly operation of a school.<sup>241</sup>

(C) ~~A statement prohibiting bullying, harassment, or intimidation~~ *Bullying, harassment, or intimidation* of any person on school property or at school functions or by use of data or computer software that is accessed through a computer, computer system, computer network or other electronic technology of a school district or charter school from kindergarten through grade 12 *shall be prohibited by this statute.*<sup>242</sup>

(D) The *State Department of Education* shall require a county board or other school administrative body to report incidents of bullying, harassment, or

<sup>240</sup> N.J. STAT. ANN. § 18A:37-13 (West 2008).

<sup>241</sup> MD. CODE ANN., EDUC. § 7-424.1 (West 2008).

<sup>242</sup> DEL. CODE ANN. tit. 14, § 4112D(b)(2)(a) (2008).

intimidation against students attending a public school under the jurisdiction:

(1) An incident of bullying, harassment, or intimidation may be reported *openly or anonymously* by:

- (a) A student;
- (b) The parent, guardian, or close adult relative of a student; or
- (c) A school staff member.

(2) The Department shall require a county board to report incidents of bullying, harassment, or intimidation against students attending a public school under the jurisdiction of the county board.

(3) Each victim of bullying, harassment, or intimidation report form shall:

- (a) Identify the victim and the alleged perpetrator, if known;
- (b) Indicate the age of the victim and alleged perpetrator;
- (c) Describe the incident, including alleged statements made by the alleged perpetrator;
- (d) Indicate the location of the incident;
- (e) Identify any physical injury suffered by the victim and describe the seriousness and any permanent effects of the injury;
- (f) Indicate the number of days a student is absent from school, if any, as a result of the incident;
- (g) Identify any request for psychological services initiated by the victim or the victim's family due to psychological injuries suffered; and
- (h) Include instructions on how to fill out the form and the mailing address to where the form shall be sent.

(4) A county board shall distribute copies of the victim of bullying, harassment, or intimidation report form to each public school under the county board's jurisdiction.

(5) Each county board shall submit summaries of report forms filed with the county board to the State Board on or before January 31 each year.

(6) A county board shall delete any information that identifies an individual.

(7) The information contained in a victim of bullying, harassment, or intimidation report form in accordance with subsection (3) of this section:

(a) Is confidential and may not be *disclosed again* except ~~as otherwise provided under the Family Education Rights and Privacy Act or this section~~ when deemed necessary by the school or county board to protect the students involved, or other students; and

(b) May not be made a part of a student's permanent educational record.<sup>243</sup>

(8) A school employee, school volunteer, student, or parent who promptly reports in good faith an act of bullying or harassment to the appropriate school official designated in the school district's policy and who makes this report in compliance with the procedures set forth in the policy is immune from a cause of action for damages arising out of the reporting itself or any failure to remedy the reported incident.<sup>244</sup>

(9) To the extent state or federal funds are appropriated for the purposes of this statute, each school district shall:

(a) Provide training on the harassment, intimidation or bullying policy to school employees and volunteers who have direct contact with students; and

(b) Develop a process for educating students on the harassment, intimidation or bullying policy.

(c) Information regarding the county board policy against harassment, intimidation or bullying shall be incorporated into each school's current employee training program.

(10) For use in the event of a properly reported incident according to the provisions of this statute, state, school, or county boards shall establish:

(a) A procedure for providing immediate notification to the parents of a victim of bullying or harassment and the parents of the perpetrator

<sup>243</sup> MD. CODE ANN., EDUC. § 7-424 (West 2008).

<sup>244</sup> W. VA. CODE § 18-2c-4 (2008).

of an act of bullying or harassment, as well as notification to all local agencies where criminal charges may be pursued against the perpetrator.

(b) A procedure to refer victims and perpetrators of bullying or harassment for counseling.

(c) A procedure for regularly reporting to a victim's parents the actions taken to protect the victim.<sup>245</sup>

*D. Commentary on the Proposed Model Statute*

This proposed Model Statute incorporates sections from the best-drafted state anti-bullying statutes currently in force. In each section, the language was enhanced to cover all the different types of bullying in a constitutional way.

Harassment, as defined by Title VII and Title IX, informs the central definition of bullying in this proposed Model Statute. The Supreme Court has found each of these statutes constitutional when challenged. In the school environment, prohibiting harassment based on sex is constitutional under Title IX. Title VII has been found constitutional only in the workplace environment. Nonetheless, students deserve at least as much protection from bullying and harassment in school as adults do in the workplace. Providing students protection from bullying and harassment is only fair and no greater infringement than restrictions on workplace adult speech that have been found constitutional under Title VII.

While *R.A.V.* seems to require strict scrutiny of any speech regulation that is content-based or establishes categories of speech, the special circumstances of the school environment require a different approach; the fact that the Court has not used *R.A.V.* in its subsequent student speech cases, such as *Davis* and *Morse*, is instructive. It indicates that *R.A.V.* and its requirement of strict scrutiny will not be used by the Court to evaluate regulations of student speech in the school environment. The proposed model statute avoids vagueness problems because it grants no discretion to school officials to sanction speech that is not described in the statute.

The proposed Model Statute would reach all types of bullying, but its constitutionality would likely be challenged in the courts. If the Supreme Court was to face a challenge of this proposed statute, it would need to recognize that while students have First Amendment rights, the

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<sup>245</sup> FLA. STAT. § 1006.147(5)(i), (j), (m) (2008).

school environment is special. Peculiar circumstances inherent in the school environment require allowing schools to take measures to prevent the potentially tragic consequences of bullying and to foster a better educational environment for the youth of America. This national standard could be tested a single time to provide a definitive answer as to what conduct schools may prohibit to combat bullying.

#### V. CONCLUSION

School bullying and harassment have resulted in violence and allowed an environment detrimental to learning to persist in public schools. While protecting freedom of speech and respecting the power of the First Amendment are crucial to the American way of life, violence in American schools is a compelling reason to regulate First Amendment speech in the school environment. Bullying is a problem in American schools and its tragic consequences have been witnessed time and again. Other consequences are not as visible, but every child who misses school, does not take advantage of an educational opportunity, or suffers poor grades due to bullying is another reason to remedy this problem.

Current Supreme Court student speech jurisprudence does not allow schools to effectively combat bullying, and neither does any Congressional legislation. While state anti-bullying statutes are valuable steps in the right direction, not all states have adopted legislation of this type. Even those states with anti-bullying statutes in place have yet to face a challenge to their constitutionality. A national standard would provide an opportunity to fully test the constitutionality of an anti-bullying statute. In addition, passing a national anti-bullying statute under the Spending Clause would allow Congress to make the statute applicable in all states and in all public schools across the nation.

A national anti-bullying statute as proposed in this Note would allow schools to address all bullying, whether physical, verbal, or psychological. The proposed model statute draws on Supreme Court standards for student speech, legislation dealing with sexual harassment in schools, and analogizes non-student speech legislation to the school environment. The model statute combines the best sections of state anti-bullying statutes to form a single, uniform, comprehensive standard.

Passage of a federal anti-bullying statute raises the specter of a First Amendment challenge. While the Supreme Court has been rather unbending in its school free speech jurisprudence, the potentially tragic consequences of bullying cannot truly be avoided without restricting some speech in schools. If faced with a First Amendment challenge to this Note's proposed Model Statute, the Court would need to exercise flexibility with its dogged protection of free speech in schools. Various



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state anti-bullying statutes have yet to be tested in court. In balancing competing values and fully appreciating the consequences of unrestrained student free speech rights, the Supreme Court should conclude that to reach their full potential students need a safe school environment and protection from bullying. If an anti-bullying statute such as the one proposed in this Note had been in place in Littleton, Colorado, perhaps the thirteen lives lost that day would still be with us today.

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\* J.D. Candidate, Valparaiso University School of Law (2010); B.A., College of Liberal Arts and Sciences, Indiana University—South Bend (2006). I would like to thank my Mom and Dad for their love, constant support, and unwavering confidence. Also, I would like to thank Professor JoEllen Lind for her comments on this Note and Professor Rosalie Berger Levinson for her ideas and help in developing this Note.