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## Be“Yondr” the Schoolhouse Gate: Law and Policy for Student Cell Phone Restriction in Public High Schools

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# BE“YONDR” THE SCHOOLHOUSE GATE: LAW AND POLICY FOR STUDENT CELL PHONE RESTRICTION IN PUBLIC HIGH SCHOOLS

*William Thompson*

*“In trying to teach children a great deal in a short time, they are treated not as though the race they were to run was for life, but simply a three-mile heat.”*<sup>1</sup>

## I. INTRODUCTION

This note discusses the legal and policy implications of a growing trend in United States public high schools where students are required to lock their cell phones inside magnetically-sealing pouches during school hours.<sup>2</sup> Proponents raise valid concerns in support of these policies.<sup>3</sup> However, poorly applied quick-fixes like these pouches, used to combat real problems of student distraction, bullying, and cheating, impedes student and parental rights and raises broader questions about the messages we convey to our youth about their ability to exercise self-restraint and function in society.<sup>4</sup> This piece argues that school phone restriction policies should take a more nuanced approach than complete restriction.<sup>5</sup> Public high schools and cell

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<sup>1</sup> Horace Mann, THOUGHTS SELECTED FROM THE WRITINGS OF HORACE MANN 222 (Lee and Shepard, 1872).

<sup>2</sup> See, e.g., Tony Wan, *The Surprisingly Low-Tech Way Schools Are Keeping Students Off Tech*, EDSURGE (November 2, 2022, 7:31 PM), [<https://perma.cc/B3TA-V9GT>] (overviewing Yondr pouch-based school cell phone restriction policies); Haeven Gibbons, *Richardson ISD Approves Locking Up Student Cell Phones—In One Pilot School*, THE DALLAS MORNING NEWS (Aug. 12, 2022, 6:00 AM), [<https://perma.cc/R3KS-YZJA>]; Kristen A. Graham, *Philly Schools Will Vote to Spend \$5 Million to Keep Students’ Cell Phones Locked Up*, PHILADELPHIA INQUIRER (Oct. 19, 2022), [<https://perma.cc/7CY3-5SXV>]; Andrew Freeman, *Some New York Schools Starting the New Year with No-phone Policies*, SPECTRUM NEWS 1 (Sept. 7, 2022, 7:38 AM), [<https://perma.cc/2QQ4-3SVT>] (noting adoption of Yondr restriction policies).

<sup>3</sup> See Wan, *supra* note 2 (quoting school principal’s finding of “‘increase[d] attention and engagement in class”); see also Breanna Carels, *Changing our Mindset in Regards to Cellphones in the Classroom*, 11 B.U. J. OF GRADUATE STUDIES IN EDUC. 9, 11 (2019), [<https://perma.cc/V45N-VKET>] (citing “inappropriate cell phone use in the classroom” as detrimental to student focus and “lead[ing] to poorer academic outcomes”).

<sup>4</sup> See *infra* Part III-IV.

<sup>5</sup> See *infra* Part IV.

phones are at the forefront of contemporary American society, and therefore care needs to be taken when establishing policies that effect both.<sup>6</sup>

In the past century there have been rather few Supreme Court rulings delineating the scope of parental rights or student rights in public schools.<sup>7</sup> In the seminal cases, there has been a trend towards deference to school officials and confusion about how to reconcile the few disparate rulings about student expression in public schools.<sup>8</sup> However, the factual situations surrounding school phone restriction plans, like those discussed here, easily lend themselves to application of the classic material and substantial disruption test, which lower courts have been readily employing in many diverse circumstances.<sup>9</sup> Judicial deference to school officials will be a significant obstacle to court challenges of these restrictions.<sup>10</sup> However, officials should be scrutinized, and issues can be overcome without resorting to litigation with sound appeals to precedent and policy.<sup>11</sup>

This piece proceeds in four major parts; Part II will illustrate the prominence of the public education system in America, the ubiquity of cell phones in modern American society, and provide examples of the restriction policies now appearing in American public high schools.<sup>12</sup> It also will outline how the Supreme Court has been involved in other cell phone cases.<sup>13</sup> Part III will survey the caselaw applicable to parents and their schoolchildren, concluding by focusing on two particular cases whose takeaways will be useful to those at odds with Yondr-style public school cell phone restrictions.<sup>14</sup> Part IV will argue that Yondr-esque cell phone restrictions in American public high schools are unsound public policy, subject to constitutional challenge, and that there are better ways to ensure student attention and development.<sup>15</sup> While unchecked cell phone use is detrimental to the education of American youth, more cost-effective and empirically supported cures should be employed than the prophylactic applications of Yondr pouches or similar restrictive measures.<sup>16</sup> To that end, the closing of this

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<sup>6</sup> See *infra* Part II.A-B.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969) (articulating material and substantial disruption test); see also *infra* Part IV.B.

<sup>10</sup> See *infra* Part III-IV.

<sup>11</sup> See *infra* Part IV.A.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part II.A-B.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Part IV.A-B.

<sup>16</sup> See Carels, *supra* note 3, at 9-10 (describing detrimental mental health effects suffered by phone deprivation); see also Emily Bodreau, *Weighing the Costs and Benefits of Cellphones in Schools*, HARV. GRADUATE SCHOOL OF EDUC.: NEWS & EVENTS (Aug. 10, 2022),

note proposes a sample policy statement for public schools, which provides school officials, their legal counsel, and potential opponents a framework in which to bracket their arguments within the dictates of the law and the necessities of modern-day American life.<sup>17</sup>

## II. FACTS

### A. American Public Schools in Legal Context

Most weekdays in America, nearly fifty million students attend a public school.<sup>18</sup> During school hours these students, their teachers, administrators, and involved guardians represent nearly a sixth of the U.S. population.<sup>19</sup> High schools, serving students in grades nine through twelve, account for around sixteen million of these youth.<sup>20</sup>

The cultural impact of the American educational system is equally significant.<sup>21</sup> Schools, the Supreme Court posits, are the foundation of our

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[<https://perma.cc/6GJ8-YMZN>] (interviewing Harvard education researcher on pros and cons of school phone restriction); Erica Berry, *Banning Phones in Class? Not So Fast*, WIRED (Sept. 7, 2022, 7:00 AM), [<https://perma.cc/66U2-CDM8>] (discussing problems with student cell phone bans); Brian M. Galla & Angela L. Duckworth, *More Than Resisting Temptation: Beneficial Habits Mediate the Relationship Between Self-Control and Positive Life Outcomes*, J. OF PERS. & SOC. PSYCH. 41 (AMERICAN PSYCHOLOGICAL ASSOCIATION 2015), [<https://perma.cc/R4XY-PKF4>] (“[T]he current research suggests that self-control is also reliably associated with beneficial habits, those automatic action dispositions forged by repeating a particular behavior in stable circumstances,” rather than mere resistance to temptation); *infra* Part IV.C (proposing model high school phone policy).

<sup>17</sup> See *infra* Part IV.C.

<sup>18</sup> See JUSTIN DRIVER, *THE SCHOOL HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 9 (Pantheon Books 2018).

<sup>19</sup> See *id.*

<sup>20</sup> See UNITED STATES CENSUS BUREAU, *School Enrollment in the United States: October 2020 - Detailed Tables: Table 2-1* (2020), [<https://perma.cc/3FGY-CRLV>]; see also NAT’L CTR. FOR EDUC. STAT., *Digest of Education Statistics: Table 203.30. Public School Enrollment in Grades 9 Through 12, by Region, State, and Jurisdiction: Selected Years, Fall 1990 Through Fall 2030* (2022), [<https://perma.cc/5DAX-WU6A>] (chronicling nearly continuous growth in high school enrollees, peaking at over fifteen million in 2021).

<sup>21</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (acknowledging importance of education). The unanimous *Brown* court observed:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied

society.<sup>22</sup> Such laudatory praise has been dispensed despite more frequent and misplaced desires to leave public school matters to state and local officials.<sup>23</sup> When the Supreme Court has entered this debate, it has often spoken with two voices.<sup>24</sup> This piece predicts that a bias in favor of local-decision parochialism gathers strength on appeal, but might be weaker in earlier litigation—better yet, court activities could be precluded entirely by better policy.<sup>25</sup> In addition to Court opinion doublespeak, the opinions in these cases are fractured and divisive.<sup>26</sup> High emotion and caustic commentary from the Supreme Court is not too surprising, however, given widespread differences of opinion about how to shepherd the development of our youth.<sup>27</sup>

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the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Id.*

<sup>22</sup> See, e.g., *id.* (emphasizing value of school systems); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted . . . knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (referring to educating American youth as “process . . . not confined to books, the curriculum, and the civics class,” where “schools must teach by example the shared values of a civilized social order”).

<sup>23</sup> See JOEL KLEIN, *LESSONS OF HOPE: HOW TO FIX OUR SCHOOLS* (Harper-Collins 2014) (attacking this state-deference trope). Klein, the former Chancellor of the New York City Public School system, criticizes the “historically quaint notion” assuming that local communities should control the totality of their children’s education—writing that this assumption has not led to “active citizen involvement,” in local education but rather to “Balkanized fiefdoms” subject to the control of political interests. See *id.* The local-control-is-best-notion has the adverse effect of germinating conflict between local, state, and national education policies. See Joanne E.K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights*, 56 S.C. L. REV. 1, 5 (2004) (basing reasoning on diversity of school environments with varying needs across country).

<sup>24</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (noting court reluctance to address issues involving First Amendment in public schools).

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems . . . .

*Id.* Directly after this the Court wrote: “[o]n the other hand, ‘[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,’ before proceeding to a “narrower” resolution of the issue. *Id.* at 104-06 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>25</sup> See *infra* Part IV.

<sup>26</sup> See *infra* Part III.A-B.; see also Justin Driver, *Public Schools and the U.S. Supreme Court*, AMERICAN BAR ASSOCIATION (Oct. 18, 2021), [<https://perma.cc/7GDV-W62F>] (commenting on Justice Black’s “vehement” twenty minute reading of dissent in *Tinker v. Des Moines*).

<sup>27</sup> See DRIVER, *supra* note 18, at 11 (noting “the cultural anxieties that pervade the larger society” are most emotionally charged when viewed through the “prism” of public school system);

### B. Cell Phones in American Life and Legal Context

Cell phones, like public schools, represent another prominent feature of modern American life.<sup>28</sup> As with education, the courts eventually become involved.<sup>29</sup> More significantly, Americans use cell phones almost constantly, and in ways that implicate constitutional questions with potentially antiquated answers.<sup>30</sup>

High school-aged students are no exception to these trends.<sup>31</sup> Their cell phone use is numerically substantial, and their rights in this regard have also been judicially scrutinized at the highest level.<sup>32</sup> A widely held and likely true belief is that teens are risking their long-term mental health and development by overuse of their cell phones.<sup>33</sup> However, teenagers use

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DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 12 (Harvard University Press 2003) (overviewing longstanding public debate and argument about how to best conduct public schooling). The conversation turns heated, Tyack writes, “[a]t certain times of tension, when the republic seem[s] threatened, Americans have become especially self-conscious about the civic values that schools should teach.” See TYACK, *supra* at, 12.

<sup>28</sup> See PEW RESEARCH CENTER, *Mobile Fact Sheet: Mobile Phone Ownership Over Time* (Apr. 7, 2021), [https://perma.cc/9CBL-4BDG] (detailing quantity of cell phone ownership in United States). Today, eighty-five percent of Americans own a smartphone, up from thirty-five percent in 2011, an enormous increase over the last decade, and ninety-seven percent of Americans “own a cellphone of some kind.” See *id.*

<sup>29</sup> See *Riley v. California*, 573 U.S. 373, 385 (2014) (“[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”); *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (U.S. 2018) (observing “[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people”). See also PEW RESEARCH CENTER, *supra* note 28 (noting large quantity of cell phones in America); AMANDA LENHART, ET AL., *TEENS, SOCIAL MEDIA AND TECHNOLOGY OVERVIEW 2015: SMARTPHONES FACILITATE SHIFTS IN COMMUNICATION LANDSCAPE FOR TEENS 2* (2015), [https://perma.cc/LN7L-D5RR] (reporting frequency of cell phone use).

<sup>30</sup> See *Riley*, 573 U.S. at 393 (noting cell phones are emergent phenomena, requiring “any extension of [past precedential] reasoning to digital data has to rest on its own bottom”).

<sup>31</sup> See LENHART, ET AL., *supra* note 29, at 2 (“Nearly three-quarters of teens have or have access to a smartphone and 30% have a basic phone, while just 12% of teens 13 to 17 say they have no cell phone of any type.”). This is not an entirely new trend: teens are digital natives and have grown up surrounded by and utilizing cell phones. See LENHART, ET AL., *TEENS AND MOBILE PHONES 2* (2010), [https://perma.cc/QK6N-YRDK] (noting three quarters of all twelve to seventeen year-olds owned cell phones as early as 2010). Though it is an evolving issue, teen access to smartphones increased significantly in just the past five years. See EMILY A. VOGELS, ET AL., *TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022 6* (2022), [https://perma.cc/2WBC-XLZG] (reporting ninety-five percent of teens now have access to cell phones).

<sup>32</sup> See LENHART, ET AL., *supra* note 29, at 2 (noting number of teens using cell phones); see also *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042-43 (U.S. 2021) (analyzing off-campus First Amendment rights of profane, Snapchatting student school-critic).

<sup>33</sup> See RIEHM, ET AL., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA 1266, 1269 (Sept. 11, 2019), [https://perma.cc/2396-UCVB] (noting positive correlation between social media use and depression and anxiety); LENHART, ET AL., *supra* note 29, at 25 (observing seventy-six percent of teens

smartphones for necessary and important connection and communication in a rapidly digitizing world.<sup>34</sup> As such, learning institutions have a duty to teach students about these risks and benefits in an effective way.<sup>35</sup> High schools should foster environments for appropriate, healthy, and productive teenage phone use.<sup>36</sup> Some school districts, however, are simply trying to remove cell phones from the equation entirely.<sup>37</sup>

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are “enthusiastic users of social media sites”); VOGELS, ET AL., *supra* note 31, at 16 (reporting significant numbers of teens feel they use social media too much).

<sup>34</sup> See Carolyn Thompson, *Cellphones Gaining Acceptance Inside US Schools*, AP NEWS (Apr. 2, 2018), [<https://perma.cc/Y7NL-Q54K>] (providing justifications and concerns about public school phone bans); LENHART, ET AL., *supra* note 29, at 2 (identifying cell phone texting as “preferred” communication method between teens and cell-calling “a close second”); see also Jonas Kiedrowski, et al., *Cellular Phones in Canadian Schools: A Legal Framework*, 19 EDUC. & L.J. 41, 61 (2009) (arguing learning proper use of cellular phones “should be considered a vital life skill for students”); Berry, *supra* note 16 (recalling utility of phones and similar devices during COVID-19 pandemic). Berry, a schoolteacher, acknowledges the unquestionably negative impacts of phone overuse and abuse by teens, but observes how the COVID-19 pandemic cemented the effects of drastic technologic change in the classroom. See Berry, *supra* note 16. Furthermore, the pandemic appears to have been a threshold event for an explosion of other cultural warring within American schools. See JOHN ROGERS, ET AL., *Educating for a Diverse Democracy: The Chilling Role of Political Conflict in Blue, Purple, and Red Communities*, UCLA INST. FOR DEMOCRACY, EDUC., AND ACCESS 6 (November 2022), [<https://perma.cc/XHQ3-2N7B>] (recounting instances of parental conflict with schools over restrictions related to COVID-19). The Rogers team noted that a majority of principals surveyed “shared stories of political conflict, often highlighting the ways that the stress and isolation of the pandemic have led community members to feel and express greater dissatisfaction and anger.” Rogers, *supra*, at 9.

<sup>35</sup> See CLAUDIA FERNANDA GIRALDO-JIMÉNEZ, ET AL., *Smartphones Dependency Risk Analysis Using Machine-Learning Predictive Models*, NATURE (SCIENTIFIC REPORTS) 2 (Dec. 31, 2022), [<https://perma.cc/ENT3-3BQ7>] (identifying need for instructional guidance to teach students efficient technological management skills). Cell phones are a pervasive technology which has created a “need to propose new strategies to offer students guidance using efficient management of technical resources, to strengthen the learning process.” *Id.*

<sup>36</sup> See, e.g., ALICIA A. STACHOWSK, ET AL., *Exploring Student and Faculty Reactions to Smartphone Policies in the Classroom*, 14 INT’L J. FOR THE SCHOLARSHIP OF TEACHING & LEARNING 1, 1 (2020), [<https://perma.cc/SEQ4-SV8Q>] (noting positive and negative uses of cell phones in classrooms); Juanita Villena-Alvarez, *Academia’s Challenge: Training Faculty to Teach Millennials In The Digital Age*, INT’L J. OF ARTS & SCIS. 373, 377-79 (2016) (discussing learning preferences in Digital Age and proposing steps to enhance learning by leveraging technology); William T. Smale, et al., *Cell Phones, Student Rights, and School Safety: Finding the Right Balance*, 195 CAN. J. OF EDUC. ADMIN. & POL. 49, 50-51 (2021) (overviewing benefits and detriments of cell phone use in classrooms). As tools that can enhance learning cell phones are unique from other devices because of their portability and familiarity. See Villena-Alvarez, *supra* at 376 (calling smartphones “man’s best friend and a student’s most reliable companion/resource”). As a constant companion, educators have co-opted the cell phone into “clickers” to encourage responding and critical thinking during lecture and leveraged them as tools for research. See STACHOWSK, ET AL., *supra* at 1.

<sup>37</sup> See *supra* notes 2-3 and accompanying text (overviewing Yondr policies and student cell phone usage); see also SPRINGFIELD SCH. COMM., MINUTES FROM 6/23/2022, at 9, [<https://perma.cc/M9RL-TPV2>] (focusing on eliminating student distraction); CHICOPEE HIGH SCH., *Cellphone Letter*, at 1, [<https://perma.cc/684W-4ANH>] (extolling Yondr benefits). But see GREENFIELD PUB. SCH., SCH. COMM. MEETING MINUTES: WEDNESDAY, AUGUST 10, 2022, at 1,

### C. Yondr Phone Restriction Policies

Yondr—a San Francisco startup—offers an appealingly simple solution to the problems posed by cell phones in schools.<sup>38</sup> The company markets small, magnetically-sealing pouches designed to prevent people from accessing their cell phones.<sup>39</sup> Initially adopted by entertainers concerned with audience engagement and intellectual property protections, the pouches have recently garnered some support from a judiciary troubled by the disruptive impacts of phones in courthouses.<sup>40</sup>

Yonder provides schools a simple solution to cell phone distraction: containment.<sup>41</sup> Yondr has received some praise from schools that have adopted its product.<sup>42</sup> This piece paints a fuller picture by noting the negative impacts, by acknowledging that the modern world heavily relies (sometimes to a fault) on cell phones, that schools are supposed to prepare students for that world, and that there are legally valid and policy-sound ways to prepare students and prevent over-reliance.<sup>43</sup>

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[<https://perma.cc/S2MA-GF7P>] (capturing concerned parental opposition). One such parent voiced concerns that removing cell phones from school settings only addresses “a symptom, not the direct problem,” and that “behavioral addiction need[s] deeper solutions.” *Id.*

<sup>38</sup> See Wan, *supra* note 2 (calling Yondr restriction measures “mind-numbingly simple: [p]eople lock up their phones before school . . . starts and can only unlock it afterward”); YONDR, *How it Works*, (last visited Dec. 21, 2023) [<https://perma.cc/EE45-MNWE>]. Reducing screentime may indeed aid in school and societal function. See KAYLA BRODERSON, ET AL., *Smartphone Use and Mental Health among Youth: It Is Time to Develop Smartphone-Specific Screen Time Guidelines*, YOUTH, 2, 33 (Feb. 7, 2022), [<https://perma.cc/C4QF-EME8>] (finding “youth who reported high smartphone use in general were more likely to report poorer mental health”).

<sup>39</sup> See Wan, *supra* note 2; YONDR, (last visited Dec. 21, 2023) [<https://perma.cc/HPF9-739H>].

<sup>40</sup> See Wan, *supra* note 2 (noting Dave Chappell, Jack White, and John Mayer as Yondr utilizers); MASS. ACCESS TO JUST. COMM’N, REP. OF THE WORKING GRP. ON POSSESSION AND USE OF CELL PHONES AND SIMILAR DEVICES IN THE COURTS OF MASSACHUSETTS, 10 (2019), [<https://perma.cc/2AS6-MZZS>]. The Commission recommended Yondr pouching “[a]fter an extensive investigation . . . conclu[ding] that cell phone bans create unacceptable hardships and should be phased out in favor of alternative security measures” to meet both court security and personal needs. MASS. ACCESS TO JUST. COMM’N, *supra*, at 3.

<sup>41</sup> See *supra* note 37 and accompanying text.

<sup>42</sup> See CHICOPEE HIGH SCHOOL, *supra* note 36 (citing without source, large percentage improvements in academic performance, student behavior, and classroom engagement).

<sup>43</sup> See *supra* Part II.A-B; *infra* Part III-IV.



## III. HISTORY

A. *Early Supreme Court Involvement in Education*

Early Supreme Court forays into the public educational system prominently featured substantive due process concerns.<sup>44</sup> Equally noteworthy was the Court's recognition of its venturing into the traditionally local and legislative territory of schools.<sup>45</sup> This intermeddling drew predictable ire from legal scholars and the public.<sup>46</sup> Yet another feature of these early cases was the Court's recognition of the power and importance of education.<sup>47</sup> Finally, it must be noted that the Court's early ventures into the educational system were constitutionally based on the fundamental rights of parents to raise their children, not the rights of students themselves.<sup>48</sup>

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<sup>44</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (basing right to educate in languages other than English within fundamental rights of parents); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (applying *Meyer*'s due process analysis to parental school choice rights); *Farrington v. Tokushige*, 273 U.S. 284, 299-300 (1927) (extending parental school choice rights in Territorial Hawaii).

<sup>45</sup> See *Meyer*, 262 U.S. at 401 (noting legislative intent to "promote civic development," but ruling language bans violate fundamental rights); *Pierce*, 268 U.S. at 535 (refusing to enforce referendum "forcing [children] to accept instruction from public teachers only" because it interfered with parental rights). *Meyer* put a stop to the post-World War I American trend of requiring schools—public or private—to teach only in English. See *Meyer*, 262 U.S. at 403. The Court noted that "[t]he desire of the Legislature to foster a homogeneous people with American ideals. . . [was] easy to appreciate," given "[u]nfortunate experiences during the late war," before ruling against it. *Id.* at 402. Likewise in *Pierce*, the Court declined to allow state legislation mandating only public school attendance. See *Pierce*, 268 U.S. at 535. The *Pierce* ruling was, like *Meyer*, based on fundamental parental rights to "nurture . . . and direct" their children. *Id.* It can be contextualized further though: like the anti-nativist language legislation in *Meyer*, the proposed Oregon law at issue in *Pierce* had xenophobic underpinnings. See DRIVER, *supra* note 18, at 50-51 (explaining Ku Klux Klan's sponsoring of referendum was attempt to Americanize "'these mongrel hordes'" of immigrants).

<sup>46</sup> See DRIVER, *supra* note 18, at 53-55, 59-60 (noting legal academia's criticism of *Pierce* as "unprecedented, unjustified intrusion into the child-parent relationship," and wider (whiter) public's disfavor of *Farrington* due to racial prejudices against Japanese immigrants).

<sup>47</sup> See *Meyer*, 262 U.S. at 401-02 (praising American education as compared to Ancient Greece). The Court noted a trend where "[i]n order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians." *Id.* Justice McReynolds opined that agoge's compelled and controlled adherence to a state-instilled value system was "wholly different" from the values "upon which our institutions rest." *Id.* at 402. The American regard of "education and acquisition of knowledge as matters of supreme importance which should be diligently promoted," simply could not be shoehorned into a similar procedure. See *id.* at 400-01.

<sup>48</sup> See *id.* at 400 (linking American regard for education to "natural duty of the parent"); *Pierce*, 268 U.S. at 534-35 (noting while "[t]he child is not the mere creature of the state," parents "have the right, coupled with the high duty, to recognize and prepare" them); *Farrington*, 273 U.S. at 409 ("The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.").

W. Va. State Bd. of Educ. v. Barnette<sup>49</sup> opened the door for more extensive judicial oversight in public schools by recasting the role of the Court in school business when “liberty is infringed.”<sup>50</sup> At the height of U.S. involvement in World War II, and barely three years after the Court had upheld a similar statute because of an unwillingness “to stigmatize legislative judgment,” the Court again adjudicated compulsory recitation of the Pledge of Allegiance and an accompanying salute of the U.S. flag.<sup>51</sup> The students—Jehovah’s Witnesses whose faith informed them that the Pledge of Allegiance was sinful idolatry—faced severe consequences for not complying.<sup>52</sup> By framing the issue in *Barnette* as freedom of speech rather than freedom of religion, and reimagining the Court’s role as an essential umpire in such public school cases, Justice Jackson, writing for the majority, enabled future Court excursions beyond the schoolhouse gate in furtherance of student rights, not just those of their parents.<sup>53</sup>

### B. Seminal Student Free Speech Cases

The “schoolhouse gate” phrase comes from *Tinker v. Des Moines Independent Community School Dist.*<sup>54</sup> *Tinker* is the most important student freedom of speech case in the Supreme Court’s history.<sup>55</sup> The case gives more than epigrammatic language; it provides the foundational test for whether student speech in public schools may be restricted.<sup>56</sup> The *Tinker*

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<sup>49</sup> 319 U.S. 624 (1943).

<sup>50</sup> *Id.* at 640. Justice Jackson, writing for the majority, noted that the Court could not “because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court.” *Id.*

<sup>51</sup> *See* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597 (1940), *overruled by* W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 625 (1943) (directing Jehovah’s Witnesses, and ostensibly others opposed to State-mandated Pledges of Allegiance or other compelled speech, to “fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena”); *see also id.* at 626 (quoting state statute then requiring student pledging and saluting).

<sup>52</sup> *See Barnette*, 319 U.S. at 629-30 (“Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.”).

<sup>53</sup> *See id.* at 642 (ruling Court would intervene when “the action of the local authorities . . . transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control”).

<sup>54</sup> 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

<sup>55</sup> Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left Of Tinker?*, 48 *DRAKE L. REV.* 527, 527 (2000) (explaining significance of *Tinker* in student freedom of speech caselaw).

<sup>56</sup> *See Tinker*, 393 U.S. at 509 (articulating material and substantial disruption standard).

test begins under the assumption that “pure speech” activity by students will be afforded greater protection than other types of expressive conduct.<sup>57</sup> The Court imposed on schools seeking to regulate student speech a prerequisite finding that the speech be materially and substantially disruptive, because it reasoned that the Constitution requires risk taking at times to allow full expression of individual rights.<sup>58</sup> The disruption need not actually occur; if school officials can reasonably foresee a material or substantial disruption, they may move to limit the predicted speech or expression.<sup>59</sup>

*Tinker*, like *Barnette* before it, came with lengthy and highly acerbic dissent.<sup>60</sup> In both cases, the dissenting justices based some of their arguments on a recurrent theme of deference to local schoolboards.<sup>61</sup> Justice Black, dissenting in *Tinker*, challenged the majority about the facts of the case, what he perceived as undemocratic judicial meddling, and prophesied a parade of horrors sure to follow permissive student expression.<sup>62</sup>

Five significant Supreme Court cases involving student freedom of speech and expression in public schools followed *Tinker*.<sup>63</sup> While none have

<sup>57</sup> See *id.* at 507-08 (differentiating anti-Vietnam armband wearing from school regulation of dress, hairstyle, and behavior).

<sup>58</sup> See *id.* at 508-509 (“[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).

<sup>59</sup> See *id.* at 514 (noting record in *Tinker* did not “demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred”).

<sup>60</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting); *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

<sup>61</sup> See *Barnette*, 319 U.S. at 666 (Frankfurter, J., dissenting) (shaming Court’s encroachment into “the most sensitive areas of public affairs” in “social and political domains wholly outside [its] concern”); *Tinker*, 393 U.S. at 517 (Black, J., dissenting) (“[T]he Court arrogates to itself, rather than to the State’s elected officials charged with running the schools, the decision as to which school disciplinary regulations are ‘reasonable.’”).

<sup>62</sup> See *Tinker*, 393 U.S. at 517-18, 522 (Black, J., dissenting). Justice Black chafed at the majority’s ushering in what he “deem[ed] to be an entirely new era in which the power to control pupils by the elected ‘officials of state supported public schools’ in the United States is in ultimate effect transferred to the Supreme Court.” *Id.* at 515. He purported to divine from the record overwhelming evidence “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.” *Id.* at 518. He colorfully stated “[o]ne does not need to be a prophet or the son of a prophet to know that after the Court’s holding today . . . students . . . in all schools will be ready, able, and willing to defy their teachers on practically all orders.” *Id.* at 525. Justice Black forecasted wild “groups of students all over the land . . . already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins,” would “soon believe it [was] their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.” *Id.*

<sup>63</sup> See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 855 (1982); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988); *Morse v. Frederick*, 551 U.S. 393, 396 (2007); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042 (U.S. 2021).

expressly overruled it or its material and substantial disruption test, most have faithfully cited to the *Tinker* rule before carving out significant exceptions to it.<sup>64</sup>

The first to move in a different direction was *Bethel Sch. Dist. No. 403 v. Fraser*.<sup>65</sup> In *Fraser*, a pun-happy teen campaigned for his friend at a school assembly for students running for class office.<sup>66</sup> The Court's majority blanched at what they considered an extended "elaborate, graphic, and explicit sexual metaphor."<sup>67</sup> Appearing to be setting up a material and substantial disruption analysis-a-la-*Tinker*, the Court referenced the effects and reactions of the speech on students and teachers.<sup>68</sup> Perhaps because the disruption was not all that substantial, or perhaps for other reasons, the Court proceeded to distinguish *Tinker*.<sup>69</sup> In a wide-ranging discussion about the roles of schools in the United States, the Rules of Debate in the Senate, and caselaw dealing with obscenity, the Court came down in favor of restricting what it labelled "vulgar" speech.<sup>70</sup> The Court further buttressed the ability

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<sup>64</sup> See *Fraser*, 478 U.S. at 685 (adopting different standard from *Tinker*); *Pico*, 457 U.S. at 868 (citing limits of *Tinker*); *Kuhlmeier*, 484 U.S. at 266 (referencing checks against *Tinker*); *Morse*, 551 U.S. at 406 (noting *Tinker* is "not the only basis for restricting student speech"); *Mahanoy*, 141 S. Ct. at 2045-46 (considering *Tinker* applicable off campus but to unspecified extent).

<sup>65</sup> 478 U.S. 675 (1986).

<sup>66</sup> See *id.* *Fraser's* brief oration on behalf of a fellow student running for election was delivered to around "600 high school students, many of whom were 14-year-olds," and who chose to attend the assembly rather than report to the alternative study hall. *Id.*

<sup>67</sup> See *id.* at 677-78. Justice Brennan did not at the time, reprinting the entirety of the speech in his concurrence:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

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

<sup>68</sup> See *id.* at 678 (referencing hooting and gesturing of "some students" during speech). As a result, the following day, "one" teacher had to deviate from their lesson plan. See *id.*

<sup>69</sup> See *id.* at 681 (noting "marked distinction between the political 'message' of armbands in *Tinker* and sexual content of respondent's speech in this case").

<sup>70</sup> See *Fraser*, 478 U.S. at 681-84. As to the role of schools: "[P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)). The majority referenced the Rules of Debate in the Senate as an example of model restraint: "In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate." *Id.* As to obscenity, Justice Brennan's concurrence again provides insight: "[i]f respondent had given the same speech outside of the

of schools to restrict student speech by concluding that the school had “acted entirely within its permissible authority[.]”<sup>71</sup> The Fraser Court tellingly quoted from Justice Black’s furious dissent in the latter lines of their ruling, implying the wrongheadedness of *Tinker*.<sup>72</sup> Justice Marshall, the lone *Tinker* test holdout who would become a recurring advocate of the test and (apparently) students in similar cases, acknowledged the discretion afforded to local school districts, but not to the deleterious extent (on students) that the majority did.<sup>73</sup>

Just two years later in *Hazelwood Sch. Dist. v. Kuhlmeier*,<sup>74</sup> Justice Marshall would again advance a *Tinker* approach in dissent.<sup>75</sup> *Kuhlmeier* arose following a school principal’s removal of student-authored school newspaper pieces dealing with pregnancy and divorce.<sup>76</sup> The school principal, who reviewed the paper before printing, directed the removal of two pages containing the stories.<sup>77</sup> After cursory citation to *Tinker*, the Court proceeded to a forum analysis for the freedom of expression issue in the case.<sup>78</sup> Characterizing the issue not as whether a school must tolerate student speech, but as whether the school must facilitate it, led to a decisive no.<sup>79</sup> The imposition of a forum-based analysis gave the Court the ability, for all

school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.” *Id.* at 688 (Brennan, J., concurring). Furthermore, Justice Stevens noted that the speech might not have been obscene to the audience. *See id.* at 692 (Stevens, J., dissenting).

<sup>71</sup> *See id.* at 684 (ruling school officials can prevent broadcast of sexually explicit speech). “[S]chool authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech” should be able to effectively cover the ears of their charges lest their impressionable minds be corrupted.” *Id.*

<sup>72</sup> *Id.* at 685-86 (citing to amorphous “fundamental values” rather than precedential law).

<sup>73</sup> *See id.* at 690 (noting lower courts found no “disruption of the educational process”).

<sup>74</sup> 484 U.S. 260 (1988).

<sup>75</sup> *See id.* at 281 (Marshall, J., dissenting) (writing *Tinker*’s material or substantial disruption test “struck the balance”).

<sup>76</sup> *See id.* at 264; *see also* DRIVER, *supra* note 18, at 103-04 (quoting paper’s layout editor, Cathy Kuhlmeier). Kuhlmeier said the pieces were designed “[t]o make a change with the school’s paper and not just write about school proms, football games and piddling stuff.” DRIVER, *supra*, at 103-04.

<sup>77</sup> *See Kuhlmeier*, 484 U.S. at 264.

<sup>78</sup> *See id.* at 266-67 (citing *Tinker*’s schoolhouse gate phrase before moving on). The split Court determined that *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 38 (1983), not *Tinker*, controlled this case. *See id.* at 270 (“It is this standard, rather than our decision in *Tinker*, that governs this case.”).

<sup>79</sup> *See id.* at 273 (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”). As to the forum analysis, the Court wrote that school facilities could not receive the wider latitude for free expression afforded to public forums because they demonstrated no policy, practice, or intent to open the pages of the school paper to “indiscriminate use[.]” *See id.* at 270 (quoting *Perry*, 460 U.S. at 47).

practical purposes, to bypass *Tinker*.<sup>80</sup> There was mention of the necessity in deferring to school officials as local leaders.<sup>81</sup> The Court again struck a blow to student expression, writing that unless schools could “set high standards,” perhaps higher than those “demanded in the ‘real’ world,” they would ill-prepare their pupils for life in it.<sup>82</sup> In short, the Court elucidated another circumstance where schools could limit or restrict student speech outside of the *Tinker* test criteria.<sup>83</sup>

While *Kuhlmeier* validated the power of schools and school officials to limit student dissemination of information, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*<sup>84</sup> did something much narrower.<sup>85</sup> When a public school board attempted to remove books from its district’s junior high and high school, students raised First Amendment claims.<sup>86</sup> Some board members described the books as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,” and concluded that it was their duty and moral obligation “to protect the children in our schools from this moral danger as surely as from physical and medical dangers.”<sup>87</sup>

Both parties agreed at the district court that the books were not obscene.<sup>88</sup> This meant that *Fraser* would be of limited use.<sup>89</sup> *Tinker* received its now traditional salutation and little more, before the Court took on a new tact by carving out another critical exception.<sup>90</sup> Harkening back to *Barnette*,

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<sup>80</sup> *See id.* at 266 (admitting Court of Appeals found “no evidence in the record” which could have led principal to reasonably forecast material disruption to “classwork or give[] rise to substantial disorder in the school”).

<sup>81</sup> *See id.* at 275 (“[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

<sup>82</sup> *See Kuhlmeier*, 484 U.S. at 272 (“[O]therwise . . . schools would be unduly constrained 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 to adjust normally to his environment.’” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

<sup>83</sup> *See id.* at 272-73 (“Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”).

<sup>84</sup> 457 U.S. 853 (1982).

<sup>85</sup> *See id.* at 871-72 (reminding readers of narrow holding).

<sup>86</sup> *See id.* at 856-59 (providing factual background). While attending a politically conservative conference hosted by an organization of “parents concerned about education legislation in the State of New York,” the board members obtained lists of books which they described as “objectionable,” and “improper fare for school student.” *See id.* at 856.

<sup>87</sup> *See id.* at 857.

<sup>88</sup> *See id.* at 856 n.2.

<sup>89</sup> *See Pico*, 457 U.S. at 864 (citing *Tinker* while omitting *Fraser* entirely).

<sup>90</sup> *See id.* The Court repeated that student First Amendment rights remain applicable “in light of the special characteristics of the school environment.” *Id.* at 866 (quoting *Tinker*, 393 U.S. at 506).

the Court reminded local leaders that their discretion in matters of education could not conflict with the First Amendment.<sup>91</sup> From here, however, the Court turned and strode onto new ground, beyond the schoolhouse gate.<sup>92</sup> It declared that the First Amendment encompasses students' rights to receive information in public schools.<sup>93</sup> Despite the factual and deliberate narrowness of the holding, the case had strong internal opposition within the Court.<sup>94</sup>

Pico contained a total of six opinions including one dissenting Justice's special appendix.<sup>95</sup> The divided Court's language exemplifies recurring themes about the role of the judiciary in public education.<sup>96</sup> The results of Pico can be viewed from an additional angle: while the decision's lack of a true majority appears to create questions about its staying power or force,

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<sup>91</sup> See *id.* at 864 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943)).

<sup>92</sup> See *id.* at 866-67 (advancing right to receive information theory).

<sup>93</sup> See *id.* at 868 (“[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”).

<sup>94</sup> See *Pico*, 457 U.S. at 871-72 (reinforcing that because they were only “concerned in this case with the suppression of ideas,” their holding only effected the discretion to remove books). Specifically, the Court stated: “In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books[.]” *Id.* at 872. Justice Rehnquist, in dissent, took a staunch opposition to this. See *id.* at 910 (Rehnquist, J., dissenting). He opposed not only the application of a right to receive information by students to the facts of the case, but the existence of the right for them at all. See *id.* at 910, 914 (“[S]tudents hav[ing] a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.”).

<sup>95</sup> See *id.* at 897-903 (providing Justice Powell's appendix with excerpts from books).

<sup>96</sup> See *id.* at 885, 894, 921 (Burger, C.J., Powell, J., O'Connor, J., dissenting together and separately) (deferring to school board decisions). The Chief Justice phrased his opposition in terms of Court meddling, fearing it was perilously close to “becoming a ‘super censor’ of school board library decisions.” *Id.* at 885 (Burger, C.J., dissenting). He viewed the problem as one beyond the ken of the Court. See *id.* (speculating facetiously as to “[W]hether local schools are to be administered by elected school boards, or by federal judges and teenage pupils”). Furthermore, he opposed the Court's involvement in a local valuation of “morality, good taste, and relevance to education” of school library books. *Id.* Likewise, Justice Powell viewed the “decision with genuine dismay.” *Id.* at 894. He expressed concern with Court involvement in the “uniquely local and democratic institutions” of school boards. *Id.* These he viewed with special reverence, writing: “[U]nlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country.” *Id.* For these reasons, he would have deferred to what he called the “traditional . . . agency of government” closer than any other to the “people whom it serves,” the school board and its parents. See *id.* Finally, Justice O'Connor crisply noted: “[i]f the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library.” *Id.* at 921.

it has often sufficed to meet the needs of students in similar factual situations.<sup>97</sup>

The theme of the *Pico* dissents—that courts, especially the Supreme Court, must not involve themselves in public school matters out of a deference to local educators—appear to have gained steam as the makeup of the Court has trended conservatively in the latter decades of the twentieth century; accordingly, there are few opinions from the Supreme Court in this area.<sup>98</sup> The next case of import here is significant for two reasons: first, like *Kuhlmeier* and *Fraser*, it also digresses into rather strained analogy to reach a favorable ruling for school limitations on expression; and second, it establishes another basis for restricting student speech while hinting that more are yet to be discovered.<sup>99</sup>

In *Morse*, a tardy student, joined his peers at a school-sanctioned excursion to watch the passing of the Olympic Torch Relay in Juneau, Alaska.<sup>100</sup> The student joined his friends across the street from the school to watch the event, and as torchbearers and camera crews passed by, he “unfurled a 14-foot banner bearing the phrase: ‘BONG HiTS 4 JESUS.’”<sup>101</sup> The principal crossed the street, confiscated the banner, and subsequently suspended the student for ten days, spurring five years of litigation which traveled down from Alaska and across the continent to Washington, D.C. along the appellate ladder.<sup>102</sup>

The Supreme Court briefly puzzled over what the banner might have meant.<sup>103</sup> Determining it to be a pro-drug message, the Court reasoned the expression was rightly subject to school suppression.<sup>104</sup> After a paternalistic recount on the dangers of drugs, the Court refused to adopt the school’s request to allow suppression of the speech under the *Fraser* standard.<sup>105</sup> The Court routed around *Tinker* as well, writing that neither *Tinker*, *Fraser*, nor

<sup>97</sup> See *DRIVER*, *supra* note 18, at 113-14 (noting lack of clarity on one hand, but usefulness nonetheless on other). *Driver* writes “[d]espite the absence of a clean First Amendment holding, *Pico*’s bottom line has enjoyed considerable vitality in lower courts that have subsequently addressed the issue [of schools removing books from their libraries out of political animus].” *Id.*

<sup>98</sup> See Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 *LOY. U. CHI. L.J.* 111, 125 (2004) (noting “remarkably few rulings [from the Burger or Rehnquist Courts] concerning students’ speech, despite hundreds of lower court decisions on the topic”).

<sup>99</sup> See *Morse v. Frederick*, 551 U.S. 393, 409-10 (2007).

<sup>100</sup> *Id.* at 397.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 398.

<sup>103</sup> See *id.* at 401 (calling signage “cryptic”).

<sup>104</sup> See *Morse*, 551 U.S. at 402-03 (“[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”).

<sup>105</sup> See *id.* at 407-09 (charting national drug epidemic before refusing to “stretch[.]” *Fraser* further than rhetorically sound).



Kuhlmeier controlled wholly in this case.<sup>106</sup> It went on to remark that Morse could stand, like Fraser, as an exception confirming “that the rule of Tinker is not the only basis for restricting student speech.”<sup>107</sup> Some scholars contend this holding has muddied the waters considerably.<sup>108</sup> Others, however, call for either ending Tinker entirely or, at the very least, significantly modifying it.<sup>109</sup>

Analyzing student freedom of speech in a schools (or at a school-sponsored event, as in Morse) may appear to come down to a judicial toss-up.<sup>110</sup> Outside of schools, the current freedom of speech frameworks are also somewhat strained.<sup>111</sup> Despite this murkiness, the Tinker test is far from dead.<sup>112</sup> While there has been some grappling with the meaning of the terms “material or substantial disruption,” there also appears to be coalescence around certain common factual scenarios.<sup>113</sup> A student threatening violence

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<sup>106</sup> See *id.* at 405-06 (citing these cases for principles, instruction, and example rather than applicable rules).

<sup>107</sup> See *id.* at 406 n.2 (adducing ability to rule in differing ways based on “special characteristics of the school environment” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Ultimately the Court held “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.” *Id.* at 402-03.

<sup>108</sup> See Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 209-11 (2007) (writing *Morse* was “an opportunity to say something useful,” which instead relied on “a highly unrepresentative case,” narrowly decided); see also David L. Hudson, *Tinker at 50: Student Activism on Campus: Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1116 (2020) (exploring “disagreement among courts, school officials, parents, and commentators”).

<sup>109</sup> See Jay Braiman, Note, *A New Case, an Old Problem, A Teacher’s Perspective: The Constitutional Rights of Public School Students*, 74 BROOK. L. REV. 439, 441 (2009) (“A constitutional standard for students rights as against school authority is too great a burden for teachers and principals to bear and encourages young people to act recklessly instead of reasonably.”); *Morse*, 551 U.S. at 422 (Thomas, J., concurring) (“I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”); see also Shannon M. Raley, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 797-98 (2011) (advancing seven-factor balancing test when student internet speech appears materially or substantially disruptive).

<sup>110</sup> See *Doninger v. Niehoff*, 642 F.3d 334, 353-54 (2d Cir. 2011) (explaining difficulty of legal analysis). The *Doninger* Court noted “[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies . . . *Tinker*, . . . *Fraser*, *Hazelwood*, or *Morse*.” *Id.*

<sup>111</sup> See Tony Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 365 (2014) (calling freedom of speech doctrine “an analytical and theoretical morass”).

<sup>112</sup> See DRIVER, *supra* note 18, at 125 (calling “[r]eports of *Tinker’s* demise . . . greatly exaggerated”). But see Chemerinsky, *supra* note 55, at 546 (concluding in “years after *Tinker*, students do leave most of their First Amendment rights at the schoolhouse gate”).

<sup>113</sup> See *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674 (7th Cir. 2008) (asking “[b]ut what is ‘substantial disruption’? Must it amount to ‘disorder or disturbance’? Must classwork be disrupted and if so how severely?” before charting course in case at bar).

will certainly satisfy the test, whether made on or off school grounds.<sup>114</sup> More nebulous threats to student safety will also do.<sup>115</sup> If anything, lower courts seem quite comfortable distinguishing the widely-applicable Tinker from other student speech cases.<sup>116</sup> What remains to be seen is how Tinker can apply in cell phone restriction cases.<sup>117</sup>

### C. Student Cell Phone Cases

Though Tinker was not the basis of the final decision, *Price v. New York City Bd. of Educ.*,<sup>118</sup> involving the New York City public school system's ban on student cell phones in 2006, provides a snapshot of the conditions and contingencies surrounding such restrictions.<sup>119</sup> Under the auspice of student safety, New York City's public schools began confiscating student phones in early 2006.<sup>120</sup> The phone restriction led to a "cottage industry of

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<sup>114</sup> See, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 398 (5th Cir. 2015) (en banc) (noting substantial disruption could be forecasted due to student's threatening video directed at school community); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013) (allowing restriction when "[c]onfronted with messages that could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons and brought to the school's attention by fellow students"); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113-14 (2d Cir. 2012) (upholding summary judgment for school district that suspended student for writing about their wish to "blow up the school with all the teachers in it" on class assignment).

<sup>115</sup> See, e.g., *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 773, 776 (9th Cir. 2014) (allowing school officials to compel students to remove clothing bearing images of American flag after learning of "evidence of nascent and escalating violence" due to racial tension); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010) (holding school could ban wearing clothing with Confederate Flag imagery when record contained "uncontested evidence of racial violence, threats, and tensions"); *Brown ex rel. Brown v. Cabell Cnty. Bd. of Educ.*, 714 F. Supp. 2d 587, 596 (S.D.W. Va. 2010) (noting student's display of gang slogan, though "passive and peaceful is not dispositive precisely because it took place in a larger context of hostility and intimidation").

<sup>116</sup> See, e.g., *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 528-29 (9th Cir. 1992) (categorizing student speech as school-sponsored; vulgar, lewd, obscene, and plainly offensive; or neither); *C.H. v. Bridgeton Bd. of Educ.*, No. CIV. 09-5815, 2010 WL 1644612, at \*14-15 (D.N.J. Apr. 22, 2010) ("[I]f student speech is not lewd, school-sponsored, or advocating drug use, the speech can only be prohibited if it is likely to cause a disruption."); *Pyle by & Through Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 166 (D. Mass. 1994) ("These cases reveal at least three approaches to the First Amendment rights of high school students . . . 'vulgar' (Fraser-type speech) . . . school-sponsored speech (Hazelwood-type speech) . . . speech that is neither . . . (Tinker-type speech) . . .").

<sup>117</sup> See *infra* Part IV.B.

<sup>118</sup> 855 N.Y.S.2d 530 (N.Y. App. Div. 2008) (*Price II*).

<sup>119</sup> See *id.* at 533 (detailing ban). The Chancellor of the New York City Department of Education, Joel Klein (quoted *supra*, note 22, at xv) intended the ban to "'maintain[] security in the schools,'" by prohibiting "[b]leepers and other communication devices . . . on school property, unless a parent obtains the prior approval from the principal/designee for medical reasons." *Id.*

<sup>120</sup> See *id.* (describing students being scanned by metal detectors before entering school, their phones detected, and confiscated). "The intended target of the scans was 'weapons and dangerous

cell phone storage businesses near schools across the city,” a three-thousand signature petition to stop the ban, and a parental lawsuit.<sup>121</sup> The state trial court considered and rejected parental claims of interference with their constitutional rights.<sup>122</sup> A state appellate court viewed the issue through a justiciability lens.<sup>123</sup> The parents lost again, in some ways for what by now is a familiar line of thought: deference to school officials.<sup>124</sup> Even if the court had reached the merits, the parents still would not have prevailed because the court would have applied the highly permissive rational basis scrutiny to the issues instead of anything more searching.<sup>125</sup> Ultimately, political change brought an end to the policy; however, the practical lessons for the advocate from this episode are numerous and can, along with the historical developments discussed so far, be applied to the circumstances of Yondr phone restriction in American public high schools.<sup>126</sup>

Likewise, *Mahanoy Area Sch. Dist. v. B.L.*<sup>127</sup> is significant because of its recent, concise summation of current Supreme Court student speech doctrine around a cell phone-related issue.<sup>128</sup> In *Mahanoy*, off-campus and

instruments[.]” but the school confiscated phones as well as small numbers of the more deadly items pursuant to their restriction policy. *Id.*

<sup>121</sup> See Reuters Staff, *New York City Ends Ban on Cellphones in Public Schools*, REUTERS (Jan. 7, 2015, 10:10 AM), [<https://perma.cc/NZX9-QWBN>] (describing how students would “stash their phones for the day at nearby grocery stores or in vans that roam outside school gates for a small fee, typically a dollar or so” leading some families to spend upwards of \$180 a year for child’s phone storage fees); see also *id.* (describing parental and student advocacy group’s petition to stop policy).

<sup>122</sup> See *Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507, 530 (Sup. Ct. 2007) (*Price I*) (acknowledging parental Constitutional rights inapplicable to schools).

Accordingly, this Court finds that whatever constitutional rights a parent may have under Supreme Court precedent to void a State law or regulation for having interfered with the parents’ fundamental rights to make decisions concerning the care, custody and control of their children, such rights do not apply to the controversy here.

*Id.* The trial court turned to federal law after finding no state law basis in “substantive due process” for the parents, noting “New York does not afford right under its due process clause greater than that accorded under the due process clause of the Federal Constitution.” See *id.* at 525.

<sup>123</sup> See *Price II*, 855 N.Y.S.2d at 537 (considering issue nonjusticiable).

<sup>124</sup> See *id.* at 539 (“Ultimately, while the Parents present cogent reasons why they would like their children to carry cell phones during the school day, our role is not to choose between two legitimate but competing interests. Because the cell phone policy was within the Department’s power, judicial interference is not warranted.”)

<sup>125</sup> See *id.* at 540 (“Finally, even if it had been appropriate for the court to consider the rationality of the cell phone ban on the merits, it did not exceed the bounds of what it was permitted to consider in determining whether the policy was rational.”)

<sup>126</sup> See Kate Taylor, *Ban on Cellphones in New York City Schools to Be Lifted*, N.Y. TIMES (Jan. 6, 2015), [<https://perma.cc/835L-XJ2U>] (discussing end of ban after change in mayoral leadership).

<sup>127</sup> 141 S. Ct. 2038 (U.S. 2021).

<sup>128</sup> See *id.* at 2045 (collecting and contextualizing cases).

outside of school hours, a failed varsity cheerleader candidate launched into a profane Snapchat tirade, visually expressing frustrations with her school and team.<sup>129</sup> The school suspended the student from the junior varsity cheerleading squad.<sup>130</sup> Twice, lower federal courts looked to *Tinker*, and both times, ruled in favor of the student.<sup>131</sup> Undaunted, the school board petitioned for and was granted certiorari from the Supreme Court.<sup>132</sup> Again, the student prevailed.<sup>133</sup>

The majority noted that the nature and function of schools did not always mean that they could not reach beyond the schoolhouse gate to enforce on-campus norms.<sup>134</sup> Uncertain as to how far this enforcement power can or should extend, the Court provided three rules of thumb.<sup>135</sup> First, off-campus speech should normally fall to parents or guardians to regulate; second, courts ought to be skeptical of off-campus student speech regulation, because it could lead to 24-hour student speech monitoring; and third, schools have an interest in protecting unpopular student expression within the “marketplace of ideas” because schools are “the nurseries of democracy.”<sup>136</sup>

Applying these three factors, the Court ruled that the student’s off-campus, profane Snapchat story was protected by the First Amendment.<sup>137</sup> It did so clear-eyed to the fact that the speech was of a sort schools can and often do attempt to curtail.<sup>138</sup> Ultimately deciding that it is crucial at times “to protect the superfluous in order to preserve the necessary,” the Court provided a significant victory to expressive students along with a noteworthy

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<sup>129</sup> See *id.* at 2042-43 (describing actions of junior varsity relegated cheerleader).

<sup>130</sup> See *id.* at 2043 (justifying suspension based on school policies prohibiting “profanity in connection with a school extracurricular activity”).

<sup>131</sup> See *id.* at 2043-44. The district court found no substantial disruption, while a majority of a panel of the Third Circuit focused on the location of the expression, holding that *Tinker* could not apply to off-campus speech. See *id.* at 2044.

<sup>132</sup> See *Mahanoy*, 141 S. Ct. at 2044 (asking whether *Tinker* permits regulation of materially and substantially disruptive student speech occurring off campus).

<sup>133</sup> *Id.* at 2042.

<sup>134</sup> See *id.* at 2045 (“We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.”).

<sup>135</sup> See *id.* at 2045-46 (illustrating features that “might call for First Amendment leeway”).

<sup>136</sup> See *id.* at 2046.

<sup>137</sup> See *Mahanoy*, 141 S. Ct. at 2046 (holding speech neither legally obscene nor construable as fighting words).

<sup>138</sup> See *id.* at 2047 (considering “the school’s interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community”).

policy heuristic to guide student speech restriction in a cell phone-saturated era.<sup>139</sup>

#### IV. ANALYSIS

Yondr pouches were designed to enhance one form of expression at the expense of another.<sup>140</sup> As utilized by a growing number of public school districts across the United States today, they are merely a trigger in a larger trend toward student rights limitation.<sup>141</sup> While the ill-effects of classroom distraction should not be disregarded, neither should restrictions of expression, parental rights to communicate with their children, or the exceedingly strong policy considerations opposing the Yondr measures.<sup>142</sup> These areas of law and policy are the major focus of the remainder of this piece.<sup>143</sup>

Yondr-esque phone restriction policies are too blunt a measure to effectively satisfy current social realities or public policy necessities.<sup>144</sup> Contextual and policy motivations underpinning the American public school system will first be considered.<sup>145</sup> Then, a recommended public high school phone policy will be presented.<sup>146</sup>

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<sup>139</sup> *Id.* at 2048. In vindicating the particular student in this case, the Court cautioned that schools nonetheless maintained generally strong regulatory interests for certain off-campus student speech:

The school's regulatory interests remain significant in some off-campus circumstances . . . . These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

*Id.* at 2045.

<sup>140</sup> See Wan, *supra* note 2 (relating why comedians and musicians have employed pouches at shows). Entertainers like Dave Chappelle, Jack White, and John Mayer have specific motivations in protecting the intellectual property of their performances that extend beyond the scope of this piece but are obviously quite different from those of public educators. See also SPRINGFIELD SCH. COMM. and CHICOPEE HIGH SCH., *supra* note 36 (illustrating school goals vis-à-vis Yondr pouches).

<sup>141</sup> See Chemerinsky, *supra* note 55, at 528 (observing “in the thirty years since *Tinker*, schools have won virtually every constitutional claim involving students’ rights”); DRIVER, *supra* note 18 at 426 (summarizing “botched” areas of Supreme Court jurisprudence related to protection of student freedoms).

<sup>142</sup> See *supra* Part II.B; *infra* Part IV.A.

<sup>143</sup> See *infra* Part IV.A-B.

<sup>144</sup> See Bery, *supra* note 16 (characterizing bans as “an overcorrection [at best], and at worse . . . an abdication of responsibility”); Bodreau, *supra* note 16 (opining on impact on parents).

<sup>145</sup> See *infra* Part IV.A.

<sup>146</sup> See *infra* Part IV.C.

A. *Reality and Policy*

Two undeniable features of modern American life are the proliferation of cell phones and the immense impact of public education.<sup>147</sup> As tools of modern life, cell phones can be used for many purposes: audio and visual communication, artistic expression, research and document preparation, and more.<sup>148</sup> Public education, especially in public high schools, on the other hand, has more transcendent purposes.<sup>149</sup>

How the experiences in American public high schools are perceived, contextualized, and carried forward by students should be concerns for all citizens.<sup>150</sup> Teachers and school administrators are some of the first and most involved authority figures many young Americans will encounter outside of their homes; they are the functionaries of a well-established, well-

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<sup>147</sup> See *supra* Part II.A; Part II.B.

<sup>148</sup> See, e.g., Bodreau, *supra* note 16 (reporting nothing “inherently bad about cellphones” as objects in and of themselves); SMALE, ET AL., *supra* note 36, at 51-53 (exploring negative uses of cell phones such as e-cheating, cyberbullying, and sexting); Carels, *supra* note 3, at 3 (listing research-backed methods for positively use of cell phones in classrooms). Carels writes:

Teachers will now have the ability to differentiate and personalize learning opportunities with cell phones whose features are already familiar to the students. These personal devices can assist in student organization, overall participation, and the flexibility to connect to information in any setting. Teachers should encourage students to use their phones to record important dates so that they remember their homework, assignment, test, and project deadlines. There are several organizational tools on phones, including calendars, clock/alarms, and downloaded homework apps. Student engagement can be improved by allowing students to use their phones to respond to questions, polls, or website quizzes. Audio/video recording lessons, using the camera, accessing the internet, or downloading educational apps are also ways to engage students. These phones also offer flexibility because teachers can connect with students both inside and outside the classroom setting.

Carels, *supra* note 3, at 3. (internal citations omitted).

<sup>149</sup> See e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“[E]ducating the young for citizenship” described as key public school function); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (considering public education “the very foundation of good citizenship”); DRIVER, *supra* note 18, at 12 (observing how Supreme Court has “repeatedly, and convincingly, highlighted the importance of . . . [public schools] for shaping attitudes towards the nation’s governing document”).

<sup>150</sup> See DRIVER, *supra* note 18, at 428-29 (recounting Supreme Court case of childless adult seeking position on school board). Driver correctly observes that the case ended favorably for the adult, and that the vignette stands for the proposition that the “constitutional conditions of the nation’s public schools carr[y] great relevance for every member of our society.” *Id.* at 429.

intentioned hierarchy.<sup>151</sup> This structure comes with a nurturing imperative.<sup>152</sup> The Supreme Court, fractured and divisive as it has been in many public education cases, expects, and demands even, like the rest of America, public educators to ‘do right’ by American children.<sup>153</sup> Exactly what doing right means, however, is subject to considerable confusion and disagreement.<sup>154</sup>

The restriction of cell phones in United States public high schools is a multifaceted issue, but evaluation should lead to less restrictive solutions because of the inherent risks to parental and student rights that blunt measures like Yondr pose, and because of the ineffectual public policy they advance.<sup>155</sup> Yondr-esque cell phone restrictions in public high schools ignore the realities of our modern, phone-centric world.<sup>156</sup> These bans present

<sup>151</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (noting Supreme Court “has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools”); see also *Morse v. Frederick*, 551 U.S. 393, 412 (2007) (Thomas, J., concurring) (waxing historic on apparent historical benefits of hierarchy). Thomas opined: “In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.” *Morse*, 551 U.S. at 412 (Thomas, J., concurring).

<sup>152</sup> See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (U.S. 2021) (“America’s public schools are the nurseries of democracy.”).

<sup>153</sup> See e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto.”); *Tinker*, 393 U.S. at 524 (Black, J., dissenting) (“School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.”); *Morse*, 551 U.S. at 412-15 (Thomas, J., concurring) (discussing importance of *in loco parentis* doctrine).

<sup>154</sup> See ROGERS, ET AL., *supra* note 34, at 9 (overviewing recent spike in animosity felt by educators from their communities); Larson, *supra* note 23, at 4 (describing circular nature of confusion). Larson observes both the obvious benefits of local education decisions being designed and implemented close to home because they focus on the “needs of students at a particular time in a specific place,” and the unfortunate happening where “popular school district policies . . . fail to pass legal muster” despite being perceptively better for the local community. See Larson, *supra* note 23, at 4. See also Klein, *supra* note 22, at xvi (remarking “powerful forces maintaining the status quo in one community are doing the same thing [to an equal and opposite extent] in all the others”).

<sup>155</sup> See Bodreau, *supra* note 16 (“[F]rom a parent’s perspective, the calculus is a bit different, and the cost of not being able to get a hold of their kid(s) may outweigh any potential benefit accrued from the ban.” (quoting Dylan Lukes, Ph.D. ‘22)).

<sup>156</sup> See PEW RESEARCH CENTER, *supra* note 28 (“Reliance on smartphones for online access is especially common among younger adults, lower-income Americans and those with a high school education or less.”); Kiedrowski, et al., *supra* note 34, at 61 (“[T]oday’s educators must recognize that . . . [cell]phones . . . [are not] a passing trend but is instead becoming a staple of society. Therefore, learning the proper use of cellular phones, and not just the proper restrictions, should be considered a vital life skill for students.”); Berry, *supra* note 16 (implying schools should “create a shared vocabulary around tech addiction and educational norms,” lest “teachers carry the burden not only of inventing and enforcing tech standards in their class, but of trying to describe to students why they exist at all”).

a whiplash effect following a technology-enabled attempt at school curriculum regularity during the COVID-19 pandemic.<sup>157</sup> Likewise, they highlight disparity in judicial reasoning where cell phones are concerned, raising issues involving the First and Fourth Amendments.<sup>158</sup> Furthermore, limiting student access to technology at the same time as their teachers innovate and adopt creative ways to leverage it is at least facially contradictory, if not outright counterproductive.<sup>159</sup> Most importantly, these bans compel basic obedience rather than instilling more important self-discipline, which may actually encourage deviant behavior.<sup>160</sup> In sum, the policy effects of student cell

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<sup>157</sup> See Berry, *supra* note 16 (editorializing COVID-19's effects on educators, students, and school systems).

The pandemic normalized a terminology of school as either 'remote' or 'in-person,' dependent on the location of students' physical bodies. If school is 'hybrid,' this logic goes, some bodies are on-site while others are at home. But in education, another kind of 'hybrid' has become the norm, with bodies in the classroom—legs twitching, heads nodding—while students and teachers simultaneously converse online. The classroom environment has changed more in the past few years than perhaps any window of time prior[.]

*Id.* She further speculates that “as the tide of pandemic policy recedes . . . a new window of possibility for tech education has opened.” *Id.* Additionally, smartphones may have less effect on improving student mental health than other interventions. See BRODERSON, ET AL., *supra* note 38, at 34 (finding “high weekend smartphone screen time is associated with a higher number of poor health outcomes relative to weekdays”). However, scholars have noted that further research was needed in this area because “perhaps students are using internet time during the week to complete homework or other learning activities, whereas on the weekend, they may be more engaged in social media or passive activities.” See *id.*

<sup>158</sup> Compare *Riley v. California*, 573 U.S. 373, 401, 403 (2014) (holding warrants “generally required” before cell phones may be searched because they “are not just another technological convenience”), with *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”) (emphasis added). The *Riley* Court noted “[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” *Riley*, 573 U.S. at 392. Similarly, the “special characteristics of the school environment,” play a key role in deciding to limit student expressive rights, but “[w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.” *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2048 (U.S. 2021) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

<sup>159</sup> See STACHOWSK, ET AL., *supra* note 36, at 1 (highlighting enhancing uses of technology in classrooms); Carels, *supra* note 3, at 3 (describing other enriching uses).

<sup>160</sup> See e.g., Kiedrowski, et al., *supra* note 34, at 43 (“Because of cellular phones’ small size and predominance in society, a complete ban would not solve the problem of policing students, and, in fact, might result in more detriment than benefit to the learning environment because of the administrators’ perceived heavy-handedness and lack of responsibility in treating students.”); Berry, *supra* note 16 (recounting “one grinning student[’s] reference to her parents’ harsh tech guidelines: ‘Tell me I can’t do something and I’ll figure out a way to do it’”); Galla & Duckworth, *supra* note 16, at 47 (revising “portrait of the self-controlled person as someone who relies upon beneficial habits to adhere to, and ultimately attain, enduringly valued goals”).



phone restrictions are worse than their intended ends, and the caselaw discussed above offers workable solutions for students, parents, and school officials.<sup>161</sup>

### B. *Yondr-esque Cell phone Restrictions and the Law*

Yonder-esque public high school cell phone restrictions will be more successfully challenged through community movements to re-write high school phone policies than in courtrooms where traditional judicial deference to educators will often prevail—especially at higher levels.<sup>162</sup> Two general theories, synthesized from the case law and studies previously described, are useful in these efforts: the first is primarily focused on parents, and the second on students.<sup>163</sup> The three early Supreme Court decisions previously discussed demonstrate that parents have the right to raise their children as they see fit.<sup>164</sup> This method's reliance on general sentiment in a school district will require significant investments of time, money, and energy to successfully inform, message, and encourage parents to oppose the school committees that implemented the restrictions through valid democratic processes.<sup>165</sup> Moreover, this approach will require concrete examples of actual harm to parent-child relationships or real threats to student safety, rather than generalized anxieties about such.<sup>166</sup> Despite these barriers, this method carries no

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<sup>161</sup> See *supra* Part III.

<sup>162</sup> See *supra* Part III.

<sup>163</sup> See *infra* notes 164-73 and accompanying text.

<sup>164</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (articulating liberty to “bring up children . . . may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect”); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (vindicating “liberty of parents and guardians to direct the upbringing and education of children”); *Farrington v. Tokushige*, 273 U.S. 284, 299-300 (1927) (overturning act depriving parents of fair opportunity “to procure for their children instruction which they think important and we cannot say is harmful”).

<sup>165</sup> See *SPRINGFIELD SCHOOL COMMITTEE*, *supra* note 36, at 9 (voting to approve Yondr program); *GREENFIELD PUBLIC SCHOOLS*, *supra* note 36, at 2-3 (holding vote to approve use of Yondr in schools). *But see* Reuters Staff, *supra* note 121 and accompanying text (revealing three-thousand signature parental petition was insufficiently dispositive in *Price* court’s eyes).

<sup>166</sup> See *Price v. New York City Bd. of Educ.*, 855 N.Y.S.2d 530, 541 (N.Y. App. Div. 2008) (“The Parents characterize the need for cell phones when the children are outside of school as a safety issue.”). Feelings about safety can be subjective, and some consider them misplaced. See *Bodreau*, *supra* note 16 (“[S]tudents likely feel safer having access to a phone. But [critical to] . . . school safety is how students use phones . . . . This might include things like bullying, harassment, videotaping, and posting to social media. Those . . . could potentially be accelerators of negative student behavior.”). Furthermore, generalized feelings, alone, will not survive judicial scrutiny. See *Price*, 855 N.Y.S.2d at 541-42 (“[T]he due process clause of the Fourteenth Amendment ‘is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of

small amount of rhetorical weight; it may be quite useful in persuading local parents to consider the detriments of public school phone restrictions when coupled with student-focused arguments.<sup>167</sup>

The second theory is premised on the understanding that students possess deep-rooted First Amendment rights even when within and adjacent to their public school campus.<sup>168</sup> The relatively recent Mahanoy decision articulates and summarizes the extent of these freedom of speech and expression rights:

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) “indecent,” “lewd,” or “vulgar” speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes “illegal drug use;” and (3) speech that others may reasonably perceive as “bear[ing] the imprimatur of the school,” such as that appearing in a school-sponsored newspaper. Finally, in *Tinker*, we said schools have a special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>169</sup>

Thus, *Tinker* should often guide the discussion in student phone restriction challenges.<sup>170</sup> *Tinker*’s material and substantial disruption test should be the starting point for student speech analysis unless another specified test exists, such as ones for lewd or vulgar speech, speech perceived to be carrying the imprimatur of the school, or speech promoting illegal drug use.<sup>171</sup> *Tinker* expressly allows preemptive restrictions, but only when they

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safety and security[.]” (quoting *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989)) (alteration in original) (internal quotations omitted).

<sup>167</sup> See Reuters Staff, *supra* note 121 (noting parents’ and New York City Mayor Bill de Blasio’s concerns for children’s safety). Admittedly, Yondr restriction policies could allow students to maintain access to their cell phones during transit. See *CHICOPEE HIGH SCHOOL*, *supra* note 36, at 1 (“Every student will secure their phone in a personally assigned Yondr pouch when they arrive at school. Students will maintain possession of their phones and will not use them until their pouches are opened at the end of the school day.”).

<sup>168</sup> See *supra* Part III.

<sup>169</sup> See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (U.S. 2021) (internal citations to cases discussed *supra* Part III.B omitted).

<sup>170</sup> See *supra* notes 112-16 and accompanying text (demonstrating *Tinker*’s utility and vitality).

<sup>171</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . .”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (“[E]ducators [may exercise] authority over . . . activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”); *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (“[S]chools may take

are based on “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>172</sup> Cell phones today are not armbands of the Tinker era, and the topic here is not about expressive “pure speech,” but the ability to speak (via cell phone during the school day) and the development of individual awareness to effectively avoid disruptive speech (via cell phones during the school day) within a fair framework that is in-step with modern realities.<sup>173</sup>

Of course phones can be distractions that disrupt the learning process, but the solution to that problem can and should be more holistic than a Yondr Band-Aid—ripped off (magnetically unlocked) daily at the release bell, ultimately at graduation—without any meaningful guidance or experience in practicing healthier cell phone habits.<sup>174</sup> Thus, the legal approaches rest fundamentally upon a public policy dictate: schools must prepare students for more than just standardized tests; they must prepare them for life in our society which values, among other things, digital literacy (a modern phenomenon) and free speech (an historic principle); and such preparation requires that they keep with the times and facilitate youthful actualization of the privileges and responsibilities of citizenship.<sup>175</sup>

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steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”)

<sup>172</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

<sup>173</sup> Compare *id.* at 505-06 (viewing message behind students’ armbands akin to strongly protected pure speech), with *Price v. New York City Bd. of Educ.*, 855 N.Y.S.2d 530, 541 (N.Y. App. Div. 2008) (characterizing need for students to have access to cell phones as safety issue by parents), Berry, *supra* note 16 (describing a “new normal of ‘post-pandemic’ tech dependence”), and Galla & Duckworth, *supra* note 16, at 5 (suggesting “[t]he adaptive value of self-control for fulfilling long-term goals extends beyond single acts of inhibiting maladaptive impulses”). Certainly, non-speech activities involving cell phones or those causing detractions from a classroom’s intended activities should be prohibited. See generally SMALE, ET AL., *supra* note 36, at 51-53 (explaining reasonable actions to prohibit).

<sup>174</sup> See Berry, *supra* note 16 (“I want them [her students] to recognize the ways their attention has been hijacked. I want them to know how to turn off the internet, turn on the timer, and stand sentry for what comes next.”); see also Galla & Duckworth, *supra* note 16, at 47 (demonstrating “across six studies the salutary effects of beneficial habits for reducing effortful inhibition and motivational interference, facilitating greater goal adherence, and promoting long-term outcomes”) (omitting internal citations).

<sup>175</sup> See Villena-Alvarez, *supra* note 35, at 381 (discussing necessary evolution of higher educators in service of students). Writing in 2016, Villena-Alvarez advocated in collegiate context, but the basic premise translates to public high schools today as well:

What is the end goal? For higher education and Academia, it is to improve life. To improve lives in general and in every feasible detail that can ever be conceived of, now and in the future. For our students, it is also to improve life—their lives and their future generations’ lives . . . [I]t behooves us as academicians to make the effort at learning—a trait that we constantly and fervently enforce in our students to endeavor.

*Id.*

*C. Proposed Public High School Cell phone Policy Statement*<sup>176</sup>

The [Insert School Name] community considers education to be one of the most important functions of our state and local government, the foundation of good citizenship, and vitally important to our democratic society. Mediated access to cell phones during the school day and during school-sponsored activities prepares students for effective participation in the society in which they will soon be adult members. In preparing our students for the varied aspects of life as adults in the United States, [Insert School Name] shall foster a learning environment which respects the realities of our present, connected, digital world by restricting cell phone use only when it materially or substantially disrupts the legitimate educational interests of [Insert School Name] by promoting or enabling violence, harassment, bullying, or cheating. These types of violations shall result in reasonable punishment up to and including expulsion or referral to law enforcement.

Otherwise, the [Insert School Name] staff shall guide and assist our community's young people in developing healthy and respectful cell phone use habits. School officials shall serve as positive role-models by actively engaging with students and restricting non-educational phone use in class or school events only and immediately following a reminder of this policy. This restriction will require students demonstrate to staff that they have turned off their devices and placed them out of sight. Student failure to adhere to this measure may result in referral to the Vice Principal's Office [or other officials charged with enforcing student discipline at the school] for reasonable disciplinary action, up to and including in-school suspension [or other school disciplinary action which enables students to stay up to date with their classwork in a way that is nondisruptive to others].

## V. CONCLUSION

What kind of country do we want? That is the underlying question when examining public high school cell phone policies. Those which seek short-term group compliance rather than long-term self-mastery are not good answers. The growing trend of using Yondr-like cell phone restrictions in public high schools is symptomatic of more pressing issues in modern America. Yondr-based public school phone restriction policies are panaceas, not cures. Cell phones can be incredibly distracting and their use can even be dangerous. But they are also quickly becoming (if not already) necessary implements of modern life and vital tools of communication and expression.

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<sup>176</sup> This policy template makes use of the judicial language, legal standards, and policy mores discussed throughout this Note, *supra* notes 1-175 and accompanying text.

The takeaway proposals are twofold. First, true material and substantial disruptions to the school environment, such as those precipitating violence, are subject to reasonable circumscription through a well-established and articulable standard. Second, rather than eliminate a channel of communication which potentially implicates established parental and student rights, schoolboards should allow high school students access to their cell phones, while simultaneously requiring attention in class. Succumbing to the temptations to check texts or TikTok when the student's focus should be on the classroom lesson is a teachable moment. Achieving this may mean that phones stay on silent and in pockets, purses, or bags. Or it may mean that they be pulled out occasionally to participate in a cell phone quiz game of Kahoot!. It almost certainly means there will need to be consequences for misuse of cell phones. All of this can satisfy the law, and more importantly, serve public policy.

American public schools play a substantial role in teaching children, young adults, and budding citizens how to utilize and control all their faculties. At early levels, schools allow educators to reinforce interpersonal courtesy, respect, and even help us learn how to use our "indoor voices." At higher levels they prepare us for collegiate education and facilitate the learning of rudimentary vocational and domestic skills. At all levels, schools represent the most direct and focused civic involvement many Americans will ever encounter for extended duration. Do we want this involvement to ignore modern realities while simultaneously advocating STEM-based education? Do we want this involvement to interfere with parental rights to communicate with their children? Do we want this involvement to not only stifle, but completely forestall a critical avenue of modern expression?

The simplistic solution Yondr provides to schools is not the type we should be seeking. Self-control, including the ability to deliberately avoid using one's phone—to be mindful, present, and engaged with classroom material—is not always easy, but it is the objective we should be pursuing. The legal theories discussed herein are but support for that end.