CHAPTER ONE

PRO-GAY AND ANTI-GAY SPEECH IN SCHOOLS

A. Introduction

Under First Amendment jurisprudence, it is “a bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 1 But despite robust protections of speech for adults, children receive lesser protections. According to the Supreme Court, while students do not “shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,” 2 schools have a “comprehensive authority” to “prescribe and control conduct in the schools” that goes beyond the authority the state has outside of that context. 3 Thus, the Court allows speech restrictions in schools when speech would “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school” or “collid[e] with the rights of others.” 4

Applying this test to prohibitions of speech that insults or victimizes other students — bullying speech — has proved to be extraordinarily difficult. Over the past two decades, numerous high-profile cases of bullying have vaulted the issue of harmful student speech into the national spotlight. 5 That such speech is injurious to its recipients cannot be seriously controverted. 6 Moreover, the greater extent of bully-

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1 Texas v. Johnson, 491 U.S. 397, 414 (1989). A state may not prohibit a white supremacist from marching through a Jewish neighborhood in Nazi regalia, see Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), jail a protester for wearing a jacket sporting the phrase “Fuck the Draft” in a courthouse, see Cohen v. California, 403 U.S. 15 (1971), or prevent activists from shouting anti-gay and anti-American slurs near a Marine’s funeral, see Snyder v. Phelps, 131 S. Ct. 1207 (2011) (upholding Westboro Baptist Church members’ right to protest while holding placards reading, inter alia, “God Hates the USA/Thank God for 9/11,” “God Hates Fags,” and “You’re Going to Hell,” id. at 1213 (internal quotation marks omitted)). Speech may be prohibited only if it falls within a “well-defined and narrowly limited class[[]” that includes “the lewd and obscene, the profane, the libelous, and . . . ‘fighting’ words,” Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942), or if it constitutes child pornography, see New York v. Ferber, 458 U.S. 747 (1982).
3 Id. at 507.
4 Id. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).
5 See, e.g., Jesse McKinley, Several Recent Suicides Put Light on Pressures Facing Gay Teenagers, N.Y. TIMES, Oct. 4, 2010, at A9; see also Sam Winston, Comment, From Bullying to Pure Political Speech: Updating the Supreme Court’s Student Speech Jurisprudence with a Substantial Harm Rule, 58 LOY. L. REV. 415, 416 n.2 (2012) (“collecting articles”).
6 If it were contested, empirical data supports this claim of injury. See, e.g., AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 21–38 (Jodi Lipson ed., 2001) (noting that 27% of students in grades eight through eleven experience some form of sexual harassment “often,” id. at 21, and that, among various negative effects, of those students who experienced sexual harassment, 22% report
ing toward, and the heightened effect of bullying on, LGBT youth is clear. As such, it is no surprise that all states but one have enacted antibullying statutes requiring local schools to adopt policies regarding bullying.

Despite these compelling interests, it is an open question what type of anti-gay speech schools can prohibit as bullying. The circuit courts have divided on this issue. In Harper v. Poway Unified School District, for instance, the Ninth Circuit held that schools likely could, within the bounds of the First Amendment, prohibit a student from wearing a shirt that read “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’” On the other hand, in Zamecnik v. Indian Prairie School District No. 204, the Seventh Circuit held that a school could not, absent a showing of a substantial disruption to academic activities, prohibit a student from wearing a shirt that read “Be Happy, Not Gay.” The Supreme Court has not weighed in on this conflict.

“[n]ot want[ing] to go to school,” 20% “[f]ind it hard to pay attention in school,” and 13% report that sexual harassment causes a “lower grade on a test or paper,” id. at 37 fig.26).

7 See, e.g., JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN 3 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_summary.pdf (“Those who expressed a transgender identity or gender non-conformity while in grades K–12 reported alarming rates of harassment (78%) . . . [leading] almost one-sixth (15%) to leave a school in K–12 settings or in higher education.” (emphases omitted)); David M. Huebner et al., Experiences of Harassment, Discrimination, and Physical Violence Among Young Gay and Bisexual Men, 94 AM. J. PUB. HEALTH 1200, 1200 (2004) (“[G]ay, lesbian, or bisexual adolescents . . . are more likely than other adolescents to report being involved in fights or to be the targets of harassment.”); Courtney Weiner, Note, Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX, 37 COLUM. HUM. RTS. L. REV. 189, 225–26 (2005) (describing findings that, among teenage victims of anti-gay discrimination in particular, “75% had a drop in academic performance, 39% had truancy problems and 28% dropped out of school,” id. at 225). For a discussion of bullying of transgender students in particular, see infra ch. II, pp. 1722–45.


9 445 F.3d 1166 (9th Cir. 2006), vacated, 549 U.S. 1262 (2007).

10 Id. at 1171 (internal quotation marks omitted).

11 636 F.3d 874 (7th Cir. 2011).

12 Id. at 875 (internal quotation marks omitted).

As schools and courts have grappled with regulating such anti-gay speech, cases have simultaneously arisen involving school efforts to quash pro-gay speech. In an early case, the United States District Court for the District of Rhode Island required a school to allow a gay male high school student to bring a boy to prom because doing so was a political statement protected by the First Amendment.\footnote{Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980).} A similar challenge in Mississippi in 2010 resulted in an identical holding.\footnote{McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010).} And in 2008, the United States District Court for the Northern District of Florida held that a school’s prohibition on pro-gay clothing and buttons was an unconstitutional speech restriction.\footnote{Gillman ex rel. Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008).}

This Chapter makes two claims: First, the Supreme Court’s free speech doctrine offers no clear answers regarding the constitutionality of prohibiting many forms of anti-gay speech. Second, given this lack of clarity, the line of cases upholding the right of gay students and their allies to express gay sexual identities and pro-gay messages should motivate those defending antibullying statutes to use caution. The same reasoning that led courts to defend rightfully a student’s right to promote pro-gay messages, wear gender-bending outfits, and take a same-sex partner to prom should also counsel in favor of allowing a student to wear a shirt that reads “Be Happy, Not Gay,” despite its injurious effects on other students, due to the important political ideas such speech espouses. Section B of this Chapter focuses on the short line of Supreme Court cases regarding speech in schools. Section C describes the rise of antibullying statutes, as well as two groups of cases: those addressing school restrictions on anti-gay speech, and those addressing similar restrictions on pro-gay speech. Section D makes the two claims described above. Section E concludes.

### B. Speech in Schools Before the Supreme Court

Although the First Amendment requires broad protection of speech outside of schools,\footnote{See supra note 1; see also Terminiello v. Chicago, 337 U.S. 1, 3 (1949) (upholding the petitioner’s right to “condemn[ ] the conduct of [a] crowd . . . and vigorously, if not viciously, criticize[ ] various political and racial groups whose activities he denounced as inimical to the nation’s welfare”). Though the Court allowed restrictions on speech that was merely “threatening, profane or obscene” and “likely to cause a fight” in Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), subsequent commentary has treated Chaplinsky as “nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression,” Stephen W. Gard, Fighting Words as Free Speech, 58 WASH. U. L.Q. 531, 536 (1980).} the scope of protections is narrower within them.\footnote{Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507, 513 (1969).} The Supreme Court has not addressed frequently the issue of student speech rights and has not spoken to the specific issue of bullying regu-
lations or anti-gay speech. The Court’s few school speech opinions are the only indication of how it might treat an eventual case challenging such regulations. Considered as a whole, those cases — *Tinker v. Des Moines Independent Community School District*, 19 *Bethel School District No. 403 v. Fraser*, 20 and *Morse v. Frederick* 21 — demonstrate the Court’s strong desire to afford special protection to political speech in schools.

In *Tinker*, a public school suspended three students for wearing black armbands in protest of the conflict in Vietnam. 22 The Supreme Court held the school’s action unconstitutional. 23 According to the Court, the students’ speech “involve[d] direct, primary First Amendment rights akin to ‘pure speech.’” 24 And the Court noted that “[t]here is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.” 25 Thus, the Court reasoned, restriction of such speech was unacceptable:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. 26

The Court set down a rule: “[W]here there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ . . . or impinge upon the rights of other students,” the speech may not be restricted. 27 Such a rule respected the Court’s understanding that students “are ‘persons’ under our Constitution . . . [and] are possessed of fundamental rights which the State must respect.” 28

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19 393 U.S. 503.
22 *Tinker*, 393 U.S. at 504.
23 Id. at 514.
24 Id. at 508.
25 Id.
26 Id. at 508–09 (citation omitted).
27 Id. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).
28 Id. at 511; see also id. ("[S]chool-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."); id. ("In our system, stu-
substantial disruption of school activities would occur, and no disruption in fact occurred, the school could not constitutionally prohibit Tinker’s speech.29

Following Tinker, the Court curtailed student speech rights in Fraser and Morse but reaffirmed the principle of specially protecting political speech in each case. In Fraser, the Court held that a school could permissibly restrict a student’s lewd and vulgar speech at an assembly.30 For the Court, there was a “marked distinction between the political ‘message’ of the armbands in Tinker and the sexual content of respondent’s speech in this case.”31 Although students have “undoubted freedom to advocate unpopular and controversial views in schools and classrooms,” schools also have a “countervailing interest in teaching students the boundaries of socially appropriate behavior.”32 As such, “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”33 Thus, the Court held that Fraser’s “lewd and indecent speech” could be prohibited as “underminin[g] the school’s basic educational mis-

29 Id. at 514. Note that the Tinker Court did not address or apply the “rights of others” prong — save for its mention in the statement of the test itself. There is some controversy about whether Tinker requires the disruption to be caused by the speaker. As noted, the Court stated that where there is no finding that speech “would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’” it may not be constitutionally prohibited. Id. at 509 (quoting Burnside, 363 F.2d at 749). This passage arguably implies that any material and substantial disruption, regardless of who effectuates it, as long as it was caused by the speech, could be prohibited. Other courts have adopted this formulation. See, e.g., Gillman ex rel. Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008) (“If a student’s conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to punish the disruptive student, not the student whose speech is lawful.”). In another place, however, the Tinker Court enunciated the test as whether the “conduct by the student . . . materially disrupts classwork or involves substantial disorder.” Tinker, 393 U.S. at 513 (emphasis added). This passage implies that the test requires that the disruption actually be effectuated by the speaker’s speech.

30 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986). The speech nominated a fellow student for student office, and included the following language: “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 . . . is firm . . . Jeff is a man who will go to the very end — even the climax, for each and every one of you.” Id. at 687 (Brennan, J., concurring in the judgment) (first omission in original) (internal quotation mark omitted).

31 Id. at 680 (majority opinion).

32 Id. at 681. The Court quoted a lower court judge’s assertion that “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s [‘Fuck the Draft’] jacket.” Id. at 682 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)).

33 Id. at 683.
sion,” particularly since his speech was “unrelated to any political viewpoint.”

Likewise, in *Morse v. Frederick*, the Court allowed a school to prohibit a student from unfurling a banner reading “BONG HiTs 4 JESUS” during a school-sanctioned event. Though it admitted that this message was “cryptic,” the Court determined that a school could reasonably conclude that the message advocated illegal drug use. And because “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use,” the restriction was constitutional. But in so holding, the Court rejected an expansive reading of *Fraser*: a rule allowing speech restrictions for merely “offensive” speech “stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of ‘offensive.’” Indeed, “much political and religious speech might be perceived as offensive.”

In short, the precedent relevant to bullying regulations is quite limited. And although the Court created exceptions for lewd speech and speech involving advocacy of drug use, the Court repeatedly reaffirmed that political speech, even on topics offensive to some, is protected in schools.

**C. Regulating Pro- and Anti-Gay Expression: Statutes and Lower Court Decisions**

Over the past two decades, every state but one has enacted some form of antibullying statute — a trend likely to increase speech restriction in schools. Yet only a handful of cases challenging restrictions on anti-gay speech under antibullying regulations in public schools

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34 Id. at 685. One might argue that a student’s speech nominating a fellow student to class office is political speech and therefore should not be punished, but the Court did not address that argument.

35 511 U.S. 393, 397 (2007).

36 Id. at 401.

37 Id.

38 Id. at 397.

39 Id. at 409.

40 Id.

41 The Court has addressed the First Amendment rights of students in some other capacities, but no case is directly applicable to the issue of bullying regulations and anti-gay speech. The Court has held that a school need not allow students to publish messages in a school-sponsored newspaper that offend its interest in inculcating certain values, see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that a high school principal could prohibit students from publishing an article about other students’ experiences with pregnancy and divorce in a school-sponsored newspaper), but the premise of that decision was the fact that the school would be required to “affirmatively . . . promote” student speech with which it disagreed, id. at 270–71. The Court has also held, in a plurality opinion, that a school may not remove books with certain messages from the school library, see *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982), but that case dealt with a student’s right to “receive ideas,” not the right to express them, id. at 867.
have made their way to the courts of appeals. Simultaneously, cases challenging restrictions on students’ pro-gay messages or expression have been brought before district courts. This section will summarize these statutes and holdings.

1. The Rise of Antibullying Legislation. — As of this publication, every state except Montana has enacted a statute requiring that schools address bullying in some capacity.42 The statutes vary greatly, and this Chapter will provide only a broad outline of them using an overview compiled by the Berkman Center for Internet and Society at Harvard University in winter 2012,43 before South Dakota and the District of Columbia passed their antibullying statutes. Among the forty-eight states in that study, most include similar “process” rules: schools are generally required to create procedures for investigating and reporting incidents of bullying and for establishing disciplinary consequences for bullying.44 A handful of states make certain bullying behavior a crime.45 Some states require counseling or other support services, while other states require reporting of bullying incidents for compiling statistics.46 And the vast majority of states require schools to provide some kinds of bullying education or prevention programs, whether for students, staff, parents, or all of the above.47

The definitions of bullying in state law, however, vary widely. Forty-one states in the Berkman Center’s study provide statutory definitions of bullying, while the remainder leave the definition up to a state’s department of education or local school districts.48 According to the study, although “researchers have traditionally defined bullying as a repeated pattern of aggressive behavior that involves an imbalance of power and that purposefully inflicts harm on the bullying victim,”49 most states do not follow that traditional definition.50 Only thirteen states require that bullying be repetitive or pervasive, only sixteen states require some form of mens rea, and only four states require some kind of power differential.51 Finally, eighteen states require certain differentiating characteristics of the victim, such as religion, disability, gender, national origin, race, and sexual orientation.52

42 See supra note 8.
43 STATE ANTI-BULLYING LEGISLATION, supra note 8, at 3.
44 Id. at 7–8.
45 Id. at 9.
46 Id. at 10.
47 Id. at 11.
48 Id. at 4.
49 Id. (alteration omitted) (quoting U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES i (2011)).
50 Id. at 4–5.
51 Id.
52 Id. at 5.
Although these statutes do not create more legal authority for schools to regulate bullying speech than they already had, the statutes require districts and administrators to address the issue. It is therefore particularly important to discuss the constitutional limits controlling school speech today. Addressing the facial constitutionality of each of these state statutes is an endeavor beyond the scope of this Chapter. Some state statutes may be unconstitutionally overbroad: for instance, under Kentucky’s statute, a person could be penalized when, with “intent to . . . annoy,” the person “makes an offensively coarse . . . display.”53 In truth, however, most of these state statutes are probably not, on their face, constitutionally problematic. The vast majority do not treat merely offensive or annoying conduct as bullying: they instead refer to terms like “harassment,” “intimidation,” or “threats”54 — conduct that, while speech, is almost certainly not constitutionally protected.55 However, the likely facial constitutionality of these statutes does not alter the fact that they may be applied in a way that exceeds constitutional bounds.

2. Recent Cases Regarding Anti-Gay Expression. — A number of cases have come before courts regarding censorship of anti-gay speech as bullying.56 Recently, two courts of appeals addressed the constitu-

53 KY. REV. STAT. ANN. § 525.070 (West 2006 & Supp. 2013) (“A person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she . . . [i]n a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present.”). The Third Circuit in Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001), struck down a school code that had similarly expansive language as overbroad. Id. at 202. The school code at issue in that case would have applied to “verbal . . . conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of . . . creating an . . . offensive environment.” Id. Examples of harassment included “any unwelcome verbal . . . conduct which offends . . . an individual because of any of the characteristics described above;” and could include “display or circulation of written material or pictures.” Id. at 202–03.

54 See, e.g., ALASKA STAT. § 14.33.250(2) (2012) (defining “harassment, intimidation, or bullying” as “an intentional written, oral, or physical act, when the act is undertaken with the intent of threatening, intimidating, harassing, or frightening the student” (internal quotation marks omitted)); ARK. CODE ANN. § 6-18-514(b)(2) (2013) (“Bullying means the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student . . . .”); 105 ILL. COMP. STAT. 5/21-23.7(b) (2012) (“Bullying . . . may take various forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying.”).

55 Cf. Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding, without considering First Amendment implications, that a school district may be liable for student-on-student harassment where the district acts with deliberate indifference to known acts of harassment); see also Saxe, 240 F.3d at 209 (admitting that some “application of anti-harassment law to expressive speech can survive First Amendment scrutiny”).

56 An early district court opinion affirmed the right of a student to wear a T-shirt with the message “Straight Pride,” Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001), and a court of appeals rejected a school speech regulation as overbroad where it prohibited “any unwelcome
tionality of restricting anti-gay speech; they propose different approaches and come to different conclusions.

(a) Harper v. Poway Unified School District. — Harper came before the Ninth Circuit in 2005. There, Harper, a high school student, was detained for wearing a shirt to school stating: “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27’” and “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED.” He wore that shirt on the “Day of Silence,” an annual event to “teach tolerance of others, particularly those of a different sexual orientation.” Harper sought a preliminary injunction, but the district court denied his motion because, in part, his First Amendment claim was unlikely to succeed on the merits.

The Ninth Circuit affirmed on the ground that schools may prohibit speech that “intrudes upon . . . the rights of other students,” Tinker’s second prong. Rejecting Harper’s argument that “a student must be physically accosted in order to have his rights infringed,” the court held that “vulgar, lewd, obscene, indecent, and plainly offensive speech ‘by definition, may well impinge[] upon the rights of other students.’” Harper’s T-shirt did just that: “Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.”

58 Id. at 1171 (internal quotation marks omitted).
59 Id. (internal quotation marks omitted).
60 Id. at 1173, 1187.
61 Id.
62 As part of a determination to grant or deny a preliminary injunction motion, a district court must determine, inter alia, the plaintiff’s likelihood of success on the merits. See, e.g., Univ. of Tex. v. Camenisch, 451 U.S. 390, 392 (1981). An appellate court reviews a district court’s grant or denial of a preliminary injunction for abuse of discretion. See, e.g., El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003).
63 Harper, 445 F.3d at 1175 (omission in original) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (internal quotation marks omitted). For that reason, the court had “no cause to decide whether the evidence would be sufficient to warrant denial of a preliminary injunction under the ‘substantial disruption’ prong as well.” Id. at 1184.
64 Id. at 1177.
65 Id. (alteration in original) (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)) (internal quotation marks omitted).
66 Id. at 1178. The court distinguished between protected speech in public schools, where “minor[s] are subject to mandatory attendance requirements,” and speech “ordinarily protected outside the school context,” noting that the former was a smaller category. Id.
their psychological health and well-being, but also to their educational development.”

The majority also countered assertions by the dissent. Though admitting that there is “political disagreement regarding homosexuality in this country” and that schools should allow debate on the topic, the majority responded that it is impossible to “condemn homosexuality without condemning homosexuals.” Further, though the individuals participating in the “Day of Silence” would no doubt “acknowledge that their status is not universally admired or respected,” this acknowledgement does not “lessen[] the injurious effect” of the T-shirt. Finally, the Ninth Circuit cautioned that its holding applied only to “the wearing of T-shirts on high school campuses . . . that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury.”

(b) Nuxoll v. Indian Prairie School District No. 204. — This case came before the Seventh Circuit twice. In its first iteration in 2008, Nuxoll sought a preliminary injunction preventing a school from censoring his T-shirt reading “Be Happy, Not Gay.” The school determined the speech violated a school rule forbidding “‘derogatory comments,’ oral or written, ‘that refer to race, ethnicity, religion, gender, sexual orientation, or disability.’”

The court upheld the school’s rule facially but granted plaintiff’s preliminary injunction with regard to the phrase “Be Happy, Not Gay.” Regarding the facial challenge, though the court agreed that

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67 Id. at 1178–79.
68 Id. at 1181.
69 Id.
70 Id. at 1200 (Kozinski, J., dissenting).
71 Id. at 1181 (majority opinion).
72 Id. at 1182. While the majority would condone a school prohibiting students from wearing shirts reading “Negroes: Go Back To Africa,” id. at 1180 (internal quotation marks omitted), a school could not prohibit students from wearing shirts reading “Young Democrats Suck,” id. at 1182. Additionally, the majority would not condone a school prohibiting “offensive words directed at majority groups such as Christians or whites,” since there is “a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status.” Id. at 1183 n.28.
73 Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 669 (7th Cir. 2008) (internal quotation marks omitted). The court noted that the Supreme Court believes that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (internal quotation marks omitted), and therefore that the school could prevail only if the plaintiff’s claim is “demonstrably weak.” Nuxoll, 523 F.3d at 670.
74 Nuxoll, 523 F.3d at 670.
high school students should not be “raised in an intellectual bubble,” 75 it noted that the “contribution that kids can make to the marketplace in ideas and opinions is modest.” 76 As such, a school may constitutionally prohibit more speech among students than society may prohibit among adults. 77 A rule prohibiting derogatory comments based on certain vulnerable characteristics can reasonably help “maintain a civilized school environment conducive to learning, and it [would do] so in an even-handed way.” 78

But in analyzing the phrase “Be Happy, Not Gay,” the court determined that it was “only tepidly negative,” not “derogatory” or ‘de-meaning,’ 79 and that the school had not sufficiently shown that such speech would lead to substantial disruption. 80 It was merely speculative whether permitting the plaintiffs to wear their anti-gay shirts would in any way “poison the educational atmosphere”; such speculation was “too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.” 81 Thus, the court held that Nuxoll had a high likelihood of success on the merits of his First Amendment claim applied to his speech in particular, and reversed the denial of a preliminary injunction. 82

The court addressed those merits when the case returned to the Seventh Circuit at the summary judgment stage in 2011. It held that, while the First Amendment does not “establish a generalized ‘hurt feelings’ defense to a high school’s violation of the First Amendment rights of its students,” “[s]evere harassment . . . blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth.” 83 The court left schools discretion to determine when student speech crosses that line. 84

75 Id. at 671 (quoting Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)) (internal quotation marks omitted).
76 Id. Judge Rovner, concurring in the judgment, disagreed vehemently with the majority’s assessment. See id. at 677–78 (Rovner, J., concurring in the judgment) (arguing that the majority “repeatedly denigrates” the “value of the speech and speech rights of high school students,” id. at 677, and that “youth are leading a broad, societal change in attitude towards homosexuals, . . . a dialogue in which Nuxoll wishes to participate,” id. at 678).
77 Id. at 674 (majority opinion) (noting that adults “can handle such remarks better than kids can and . . . adult debates on social issues are more valuable than debates among children”).
78 Id. In particular, the court reasoned that while “Nuxoll can’t say ‘homosexuals are going to Hell’ (though he can advocate heterosexuality on religious grounds[,] . . . it [also] cannot be said back to him that ‘homophobes are closeted homosexuals.’” Id.
79 Id. at 676.
80 Id. Facts to show disruption, according to the court, could have included “a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.” Id. at 674.
81 Id. at 676.
82 Id.
83 Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877 (7th Cir. 2011).
84 Id. at 877–78.
ticular instance, however, the court again maintained that a shirt with the inscription “Be Happy, Not Gay” may not be prohibited. Although the plaintiff’s statement “easily fits[] the school’s definition of ‘disparaging’ and would [have met] that standard for most listeners,” it was “not the kind of speech that would materially and substantially interfere with school activities.” The First Amendment allows for “debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive.” The plaintiffs’ speech, according to the court, was anything but disruptive.

Harper and Nuxoll offer two different modes of analysis and come to two different conclusions about when schools may prohibit anti-gay speech. Harper’s holding is stark: the court applied the “rights of others” prong of Tinker — the first court to rely on it solely — and held that schools may prohibit “the wearing of T-shirts” with “demeaning slogans . . . that may cause [particularly vulnerable students] significant injury.” Under Harper’s reasoning, a school may well be able to prohibit a student from wearing the T-shirt in Nuxoll: “Be Happy, Not Gay.” In contrast, Nuxoll, applying the traditional first Tinker prong, drew a finer line: the court upheld a school’s general prohibition of “derogatory” comments on the basis of certain prohibited characteristics, but overturned censoring the shirt “Be Happy, Not Gay” because such language could not justifiably support a fear of disruption.

Though the Nuxoll court believed its holding would allow a school to prohibit a shirt reading “homosexuals are going to Hell” — a phrase similar to that on the Harper T-shirt — this reasoning presents line-drawing problems between unacceptably derogatory comments based on prohibited characteristics and offensive but permissible student speech. Regardless, the decisions are in tension insofar as the standard in Harper likely covers more speech than the standard in Nuxoll.

85 Id. at 878 (quoting Nuxoll, 523 F.3d at 679 (Rovner, J., concurring in the judgment)).
86 Id. (quoting Nuxoll, 523 F.3d at 679 (Rovner, J., concurring in the judgment)).
87 Id.
90 Id. at 1181 (emphasis added).
91 Nuxoll, 523 F.3d at 674–76.
92 Id. at 674 (internal quotation marks omitted).
93 The idea that a gay student would be psychologically injured, that test scores would decline, or that truancy would increase more if the “homosexuals are going to Hell” shirt were worn instead of the “Be Happy, Not Gay” shirt is speculative at best. Perhaps some religious gay students might be more traumatized by being told they are going to Hell than if they were told not to
3. Recent Cases Regarding Pro-Gay Expression. — The First Amendment has not been used to defend only anti-gay speech; its power has been wielded to protect LGBT students’ and their allies’ pro-gay speech as well. This section will describe two such cases. Though both cases apply the Tinker prongs, they conclude that students have the right to express their sexuality and speak on behalf of gay rights despite disruptive consequences among other students.

(a) Gillman ex rel. Gillman v. School Board. — Gillman,\(^94\) a case from 2008, addressed a public high school’s prohibition of T-shirts, armbands, stickers, and buttons that advocated “acceptance of and fair treatment for persons who are homosexual.”\(^95\) Gillman, a student at that school, filed a motion for partial summary judgment on First Amendment grounds, which the district court granted.\(^96\) Reaffirming Tinker’s two-prong standard,\(^97\) the court held that pro-gay speech within the school’s ban was “not vulgar, lewd, obscene, plainly offensive, or violent.”\(^98\) The court found “no connection . . . between the gay pride speech and any disruptions that may have resulted” at the school,\(^99\) and any disruptions “were not material and substantial.”\(^100\) The speech at issue was “indistinguishable from the typical background noise of high school.”\(^101\)

Even assuming that there was materially and substantially disruptive behavior, the court reasoned that consequently prohibiting Gill-
man’s speech would allow for a heckler’s veto: “If a student’s conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to punish the disruptive student, not the student whose speech is lawful.” The “[s]tudents who advocated tolerance and acceptance of homosexuals at Ponce de Leon did not force their views and opinions on other students,” and “[s]tudents were free to disagree with the message or walk away.” Such protection of pro-gay messages would abide by the spirit of the First Amendment: “[P]olitical speech involving a controversial topic such as homosexuality is likely to spur some debate, argument, and conflict,” but “[t]he nation’s high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.”

(b) McMillen v. Itawamba County School District. — In McMillen, the plaintiff challenged her school’s decision to prevent her from bringing her girlfriend and wearing a tuxedo to the school prom. After an initial suit was filed, the school board cancelled the prom to prevent “distractions to the educational process,” and encouraged private individuals to “organize an event for the juniors and seniors.” McMillen alleged that the school “effectively banned her from peacefully conveying her social and political viewpoints that ‘it is appropriate for gay and lesbian students to bring same-sex dates to the prom,’ and that ‘it is appropriate for female students to wear tuxedos despite traditional notions of . . . dress.’” She sought a preliminary injunction requiring the school to hold a prom and allowing her to attend with her preferred date and in her preferred outfit. The court compared this case to an early, factually similar case in the District of Rhode Island, in which that court held that a high
school boy’s desire to bring another boy to prom “would have a certain political element and would be a statement for equal rights and human rights” — “exact[ly] [the] type of conduct’ that ‘can be considered protected speech.”111 The Rhode Island district court rejected the argument that a boy bringing another boy to prom would fall within either of Tinker’s prongs: It would not be a substantial and material disruption because “[t]here ha[d] been no disruption at the school; classes [were] not . . . cancelled, suspended, or interrupted.”112 There was no collision with the rights of others because the student’s “conduct [was] quiet and peaceful; it demand[ed] no response from others and — in a crowd of some five hundred people — c[ould] be easily ignored.”113

Adopting this reasoning, the McMillen court held that the plaintiff had a substantial likelihood of success on the merits of her First Amendment claim. The court noted that “the ‘expression of one’s identity and affiliation to unique social groups’ may constitute ‘speech’ as envisioned by the First Amendment.”114 McMillen herself intended to “communicat[e] to the school community her social and political views that women should not be constrained to wear clothing that has traditionally been deemed ‘female’ attire.”115 As such, the court found that “this expression and communication of her viewpoint is the type of speech that falls squarely within the purview of the First Amendment.”116 Additionally, the only disruptions raised were the emails and phone calls the school received from parents regarding the controversy, and such disruptions did not affect classroom decorum.117

McMillen (and the Fricke case it cites), as well as Gillman, affirm a student’s right to express pro-gay messages. And the courts made little attempt to square the holdings with the “material disruption” analysis from Tinker. The Gillman holding effectively argued that nonviolent, pro-gay messages are protected regardless of the likelihood of material disruption by those who find such speech offensive.118 Fricke similarly

112 Fricke, 491 F. Supp. at 387.
113 Id. at 388.
114 McMillen, 702 F. Supp. 2d at 703 (quoting Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001)). In that case, the Fifth Circuit noted that “[c]lothing may . . . symbolize ethnic heritage, religious beliefs, and political and social views.” Canady, 240 F.3d at 440.
115 McMillen, 702 F. Supp. 2d at 704.
116 Id. at 705.
117 Id. Nonetheless, the court held that it could not “go into the business of planning and overseeing a prom hosted by Defendants, especially in light of the fact that the parents of [the students] ha[d] already undertaken such tasks.” Id. at 706. Thus, although the court found a strong likelihood of success on the merits, with little countervailing interest on the part of the school, it did not grant the preliminary injunction motion. Id.
dismissed the heckler’s veto in the context of proms. These cases contrast with Harper and Zamecnik, cases that certainly considered disruption by or offense to third parties as grounds for prohibiting speech.

D. Looking Forward: The Constitutionality of Restricting Anti-Gay Speech

Having described the state of the law, this section will provide some analysis: First, Supreme Court precedent provides no clear answers to the constitutionality of prohibiting anti-gay speech. Second, some anti-gay speech should be tolerated based on the same reasoning that has caused courts to justifiably protect pro-gay speech. In other words, activists should use caution before fighting for stringent prohibitions of all anti-gay speech, even purely political statements, for fear of rolling back protections of pro-gay student expression.

1. Applying Supreme Court Precedent. — When assessing the constitutionality of prohibitions of anti-gay speech in schools, Supreme Court precedent is of little assistance: none of its cases offers a clear answer as to the constitutionality of antibullying regulations. First, though Tinker allows schools to prohibit speech that actually disrupts or is reasonably likely to disrupt school activities, the Court never answered what must occur to trigger a “material and substantial disruption” or a reasonable fear of such a disruption. An actual disruption in the classroom — like shouting down a teacher — could probably be prohibited regardless of whether it contained pure political speech. But the Court has not addressed calmer demonstrations aside from Tinker’s armbands. For instance, would speech that does not literally interrupt a class, but prompts truancy, qualify? And questions remain over whether a past history of disruptions can justify a belief that future disruptions might occur.

119 Fricke v. Lynch, 491 F. Supp. 381, 388 (D.R.I. 1980) (arguing that the school can use “meaningful security measures” to counter any “concerns of a possible disturbance”).

120 See Francisco M. Negrón, Jr., Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools, 11 FIRST AMEND. L. REV. 364, 380 (2013) (“There has yet to be a definitive, Supreme Court decision to help schools navigate the tension between the student speech issues and the increasing national demands for safe learning environments.”).

Even if the Court provided an answer to those questions, the material and substantial disruption prong could allow a heckler’s veto. *Fricke v. Lynch* is instructive. There, the court assumed arguendo that a boy bringing another boy to prom would “lead[], or may lead, to a violent reaction from others.”\(^{123}\) In other words, there *would* be a substantial and material disruption under *Tinker*, just not caused by the speaker himself. However, the district court noted that “allowing [those committing violence] to decide — through prohibited and violent methods — what speech will be heard” contravenes the First Amendment’s underlying principles, which reject such a “heckler’s veto.”\(^{124}\) As such, the First Amendment requires that a school protect the speaker and restrict the heckler.\(^{125}\) But such an outcome — though certainly justifiable under free speech’s first principles — does not follow from a plain reading of *Tinker*’s test.

*Tinker*’s “rights of others” prong is even more difficult to parse. There is little discussion in *Tinker* about what that prong means, particularly since that case was decided only on the fact that the armbands would not cause a material and substantial disruption.\(^{126}\) *Harper* — the first case to base its decision solely on the second prong\(^{127}\) — held that “verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation” fit the definition.\(^{128}\) But as the *Harper* dissent correctly points out, “[s]urely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech.”\(^{129}\) Where would the slippery slope end? “Students may well have their self-esteem bruised by being demeaned for being white or Christian, or having bad acne or weight problems, or being poor or stupid or any one of the infinite number of characteristics” that are at least ostensibly immutable.\(^{130}\)

On the other hand, a narrow reading of the “rights of others” prong prompts the question of why it exists in the Court’s opinion in the first place. The dissent in *Harper* would read “collision with the rights of
others” to mean merely “traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.”131 But read narrowly, the term does little constitutional work, as it merely reiterates that speech not protected by the First Amendment among adults would similarly be unprotected among children.132 In short, as with Tinker’s first prong, there appears to be no clear answer to the question of what “collision with the rights of others” means — and it is therefore difficult to know how the Court would apply it to specific cases of anti-gay bullying.

Even if the “rights of others” prong could decisively point toward restricting all anti-gay speech in schools, such restriction may conflict with some of the broader motivations underlying the Court’s opinions beginning in Tinker, continuing in Fraser, and ending in Morse. In Tinker itself, numerous passages suggest that speech in schools must be tolerated when others may disagree or find such speech offensive, and even when speech causes a downright “fear . . . of disturbance.”133 We must “take [c] risk” of such disturbances in order to protect the “hazardous freedom” that the First Amendment guarantees.134 Applying this language to anti-gay speech, it would not do to restrict students only to the “expression of those sentiments that are officially approved.”135 Thus, the argument would go: though a school may determine that its official policy is to promote inclusion and acceptance of all students regardless of sexual orientation, that policy cannot, under Tinker, be used to trump a student’s expression that homosexuality is sinful. The view that homosexuality is sinful is one still held by a large minority of Americans,136 and Tinker protects speech even when it is “controversial.”137

Although Fraser opened the door to some prohibitions of offensive speech,138 it is clear that the Court sought to exclude political speech

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131 Id. at 1198.
132 See supra note 1.
133 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (emphasis added); see also, e.g., id. at 513 (noting that a student “may express his opinions, even on controversial subjects”); id. (“Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.”).
134 Id. at 508.
135 Id. at 511.
136 See Frank Newport & Igor Himelfarb, In U.S., Record-High Say Gay, Lesbian Relations Morally OK, GALLUP (May 20, 2013), http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx (noting that, in 2013, 38% of Americans responded in a poll that “[g]ay or lesbian relations” were “[m]orally wrong”).
137 Tinker, 393 U.S. at 513.
138 See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the ‘fundamental values necessary to the maintenance of a democrat-
from that exception. The Fraser Court repeatedly noted that while lewd or obscene speech — like the speech at issue there — could be prohibited, speech on political or religious views, even if unpopular, could not.139 It was critical that “the penalties imposed . . . were unrelated to any political viewpoint,” but rather, dealt only with “vulgar and lewd speech.”140 Similarly, Morse reaffirmed that the First Amendment protects political speech in schools. Though the Court’s holding addressed only drug-related speech,141 it said more in dicta regarding the reach of the exception. It would go too far, according to the Court, to “adopt the broader rule that [the student’s] speech is proscriptible because it is plainly ‘offensive’” since “much political and religious speech might be perceived as offensive to some.”142 In other words, political and religious speech is granted protection, and a rule that “offensive” speech could be banned would be overbroad because it would cover political and religious speech. Justice Alito, joined by Justice Kennedy, confirmed this interpretation in his concurrence.143 Morse may bolster the case that anti-gay speech would receive protection under the Supreme Court’s precedents, given Morse’s protection of political and religious speech. To the extent one thinks statements like “Homosexuality is shameful” or “Be Happy, Not Gay” express political or religious views, they would be protected under this reading of Supreme Court precedent.

ic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others.” (quoting Ambach v. Norwich, 441 U.S. 68, 77 (1979)).

139 See id. at 680 (noting the “marked distinction between the political ‘message’ of the armbands in Tinker and the sexual content of [the Fraser student’s] speech”); id. at 681 (noting that First Amendment values “must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular”).

140 Id. at 685. The line between lewd speech and political speech may be difficult to draw in some cases, particularly cases where speech could easily be qualified as both simultaneously. See, e.g., B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013) (holding that a school’s ban on breast cancer awareness bracelets that read “I ♥ Boobies! (KEEP A BREAST)” violated the First Amendment because the bracelets were not plainly lewd and commented on a political or social issue); see also Recent Case, 127 HARV. L. REV. 1049 (2014). But the speech in Harper and Zamecnik was not lewd. The dictionary definition of “lewd” is “sexual in an offensive or rude way,” Lewd, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/lewd (last visited Mar. 1, 2014), and “Be Happy, Not Gay” and “Homosexuality Is Shameful” cannot be characterized as “sexual” unless any reference to sexual orientation is by definition sexual.

141 Morse v. Frederick, 551 U.S. 393, 403 (2007) (“The question thus becomes whether 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.”).

142 Id. at 409.

143 See id. at 423 (Alito, J., concurring) (arguing that “[t]he opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission’” (quoting Brief for Petitioners at 21, Morse, 551 U.S. 393 (No. 06-278); Brief for the United States as Amicus Curiae Supporting Petitioners at 6, Morse, 551 U.S. 393 (No. 06-278))).
Admittedly, Fraser and Morse do not define political speech. Indeed, dictum in Fraser mentions the possibility of prohibiting a T-shirt reading “Fuck the Draft” in schools, even though such speech is political, because children in school do not deserve “the same latitude” as adults in different situations. But treating any anti-gay speech as inherently harmful and prohibiting it for that same reason would prevent all debate about same-sex marriage — at least to the extent a student disfavors it. Schools would be allowed to prohibit saying “gay couples are unnatural and are thus bad parents” because to “condemn homosexuality” would by definition “condemn[ ] homosexuals.” Such embargos on political debate would create the “enclaves of totalitarianism” that the Supreme Court has explicitly and justifiably sought to avoid in Tinker and its progeny. At the very least, this tension is simply another reason why the Court’s holdings are unclear.

The Court’s prior rulings, therefore, do not answer which anti-gay speech may be prohibited in schools. Tinker’s first prong does not apply well to the anti-gay speech context, and a strong reading of that prong may allow for a heckler’s veto in schools. The second prong is difficult to apply because of its vagueness, but could be used to prohibit any anti-gay speech. However, such an application would probably conflict with the broader principle of tolerance of opposing political views, despite their offensiveness, which permeates the Court’s jurisprudence regarding speech in schools.

2. Defending the Right to Express Anti-Gay Views. — Despite this lack of clarity, the pro-gay speech cases from section C.3 should counsel gay rights activists to tolerate some anti-gay speech in schools. Broad protection of speech rights in school, particularly speech that pertains to social, political, and religious debates, was what allowed individuals to speak in favor of gay rights, whether through overt political messages or through choice of clothing or date to prom. Pro-gay speech is what allows LGBT individuals to express their sexuality.

144 Fraser, 478 U.S. at 682. The Fraser Court refers to Cohen v. California, 403 U.S. 15 (1971), which overturned a man’s conviction for wearing a jacket reading “Fuck the Draft” in a courthouse.
147 See, e.g., Edward Stein, Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace, 38 HARV. C.R.-C.L. L. REV. 159, 177 (2003) (noting that “[t]he closet is a distinctive, pervasive, and, some have argued, singular feature of lesbian and gay existence,” and describing “the energy and emotional stress involved [for LGBT people] in hiding an important part of their lives from family, friends, neighbors, and coworkers”). Individual autonomy is certainly an important First Amendment value. See, e.g., Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties,” and that “[t]hey valued liberty both as an end and as a means”), overruled on other grounds by Brandenburg v. Ohio, 395 U.S. 444, 449
and part of what has changed the hearts and minds of Americans on the issue of gay rights. 148 But attempting to squelch anti-gay views could, based on the same reasoning, roll back the clock and threaten cases like Fricke, Gillman, and McMillen.

Consider Fricke. Each of the factors that weighed in favor of protecting Fricke’s bringing a boy to prom weighs in favor of protecting a shirt that reads “Homosexuality Is Sinful.” First, “[t]here has been no disruption at the school; classes have not been cancelled, suspended, or interrupted.” 149 Second, “even a legitimate interest in school discipline does not outweigh a student’s right to peacefully express his views in an appropriate time, place, and manner.” 150 The school can use “meaningful security measures” to counter any “concerns of a possible disturbance.” 151 Admittedly, to borrow Fricke’s articulation, “[s]ome may feel that . . . [an anti-gay student’s] message . . . is trivial . . . , but to engage in this kind of a weighing in process is to make the content-based evaluation forbidden by the first amendment.” 152 Indeed, an anti-gay student’s “conduct is quiet and peaceful; it demands no response from others and . . . can be easily ignored.” 153 In short, the groundbreaking analysis in 1980 that allowed a boy to bring another boy to prom should also protect more benign anti-gay speech like “Be Happy, Not Gay.”

The same is true of Gillman. Gillman sought to wear pro-gay buttons and rainbow paraphernalia to school. How did the court justify protecting such conduct? First, the district court judge’s “task . . . [w]as not to judicially determine which side — supporters or opponents of gay rights — is correct.” 154 However, the effects of Gillman’s speech were difficult to distinguish from “the typical background noise of high school.” 155 Students did not “skip classes, ignore teachers, force other students to display the messages and symbols at

148 See, e.g., Lymari Morales, Knowing Someone Gay/Lesbian Affects Views of Gay Issues, GALLUP (May 29, 2009), http://www.gallup.com/poll/118931/ knowing-someone-gay-lesbian-affects-views-gay-issues.aspx (noting that, in 2009, 49% of Americans who personally knew someone who was gay or lesbian supported gay marriage, while only 27% of Americans who did not personally know someone who was gay or lesbian supported gay marriage); see also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 678 (7th Cir. 2008) (Rovner, J., concurring in the judgment) (“[Y]outh are leading a broad, societal change in attitude towards homosexuals . . . .”).

150 Id.; see also id. (“The first amendment does not tolerate mob rule by unruly school children.”).
151 Id. at 388.
152 Id.
153 Id.
155 Id. at 1373.
issue, or invade classrooms.”\textsuperscript{156} Indeed, “[s]tudents who advocated toler-
ance and acceptance of homosexuals . . . did not force their views and opinions on other students,” and “[s]tudents were free to disagree with the message or walk away.”\textsuperscript{157} If there was any fear of retribu-
tion from other students, “the law requires school officials to punish the disruptive student, not the student whose speech is lawful.”\textsuperscript{158} As the court concluded, “political speech involving a controversial topic such as homosexuality is likely to spur some debate, argument, and conflict,” but “[t]he nation’s high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.”\textsuperscript{159} Could all the same not be said for students wearing shirts with “Homosexuality is Shameful”?

Some will argue that speech against minority groups with immutable characteristics that have previously faced a history of persecution should be treated differently, and that speech against them should be held to a different standard.\textsuperscript{161} Though the Supreme Court has largely rejected such a distinction among adults,\textsuperscript{162} perhaps such a distinc-
tion should be allowable for speech among children — who are inherently more vulnerable — in schools, which children are forced to attend. Likewise, a similar line of reasoning would suggest that due to

\begin{footnotes}
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\item[156] Id.
\item[157] Id.
\item[158] Id. at 1374 (citing Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1276 (11th Cir. 2004)).
\item[159] Id.; see also id. (“Indeed, the issue of equal rights for citizens who are homosexual is presently a topic of fervent discussion and debate within the courts, Congress, and the legislatures of the States, including Florida.”).
\item[160] Note, of course, that many continue to believe that homosexuality is a choice, so to prevent anti-gay speech because homosexuality is immutable would be a circular argument to them, only begging the very question they contest.
\item[161] Harper makes that distinction. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 n.28 (9th Cir. 2006) (declining to extend the holding regarding offensive speech directed at students’ minority status to allow a school to prohibit “offensive words directed at majority groups such as Christians or whites,” since there is “a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status”), vacated, 540 U.S. 1262 (2007).
\item[162] See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In that case, the Court held that a St. Paul ordinance that criminalized placing a “symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,” on “public or private property” was an unconstitutional content-based restriction of speech. Id. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). According to the Court, “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” Id. at 391. Prohibiting “fighting words” that invoke race, color, creed, religion, or gender, but allowing similar words “unless they are addressed to one of the specified disfavored topics,” id., would “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules,” id. at 392.
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the documented harmful effects of anti-gay speech\textsuperscript{163} — with no similar documentation for pro-gay speech — a school may prohibit solely anti-gay speech based on its uniquely harmful content. But although pro-gay speech may not be harmful in the same ways as anti-gay speech is harmful, pro-gay speech can nonetheless cause offense and insult.\textsuperscript{164} Presumably, there will be a time when those advocating anti-gay views will be a tiny minority of the population.\textsuperscript{165} At that time, would the Constitution not allow pro-gay speakers to proclaim that “Bigots Are Shameful,” no matter how deeply held those religious beliefs and how harmful that speech to the listener?

Without question, this reasoning would allow nasty, albeit political, student speech — but that is a necessary consequence of protecting all speech. For instance, the Fourth Circuit recently held that a school may prohibit students from wearing T-shirts printed with the Confederate flag because a history of racial tension in the school could justify believing that substantial disruption is likely to occur.\textsuperscript{166} But what types of disruptions were forecast? The school pointed to recent examples of a teacher having to “calm the class down in response to [a student wearing a Confederate] flag,” and one student telling another wearing a Confederate flag belt buckle that “[i]f you don’t take that belt off, we’re going to take it off of you.”\textsuperscript{167} But a school should protect the speaker, not the hecklers who would seek to silence him. And the same reasoning could be used to prohibit the flying of a gay pride flag, where it offends the sensibilities of others.\textsuperscript{168} If what is required to prevent an individual from sporting a rainbow flag is past violence against openly gay students at a particular high school, surely countless high schools would fit the bill.

In short, applying the reasoning of Fricke, Gillman, and McMillen, there is a strong argument to be made that some political anti-gay messages should be protected. Without question, making judgments about when speech is truly political anti-gay speech and when it goes too far, like targeted harassment, will be an extraordinarily difficult

\textsuperscript{163} See supra note 7.
\textsuperscript{164} See infra ch. IV, p. 1775 (noting that the mere existence of a sexual minority can trigger hatred in a political majority).
\textsuperscript{165} The trend lines certainly suggest as much. See supra Introduction, p. 1686.
\textsuperscript{166} Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 438 (4th Cir. 2013). The court noted that the school had been segregated until 1970, and since then racial tensions had “diminished” but not “completely disappeared.” Id.
\textsuperscript{167} Id. at 433.
\textsuperscript{168} This scenario is no mere academic hypothetical. See Chris Cannon, Controversial Flag Sparks Controversy at MTSU, NEWSCHANNEL5.COM, http://www.newschannel5.com/story/23615357/controversial-flag-sparks-controversy-at-msu (last updated Oct. 5, 2013, 4:38 PM) (describing the complaints that came to a dean’s office at Middle Tennessee State University after a school gay rights group displayed a version of the American flag made up of rainbow stars and stripes).
endeavor — one beyond the scope of this Chapter. But at the very least, a T-shirt reading “Be Happy, Not Gay,” and perhaps even one reading “Homosexuality Is Sinful,” should be protected.169

E. Conclusion

This Chapter argues that although Supreme Court precedent is unclear on the matter, the reasoning behind cases that have upheld pro-gay speech counsels in favor of protecting some anti-gay speech in schools as well. No doubt some LGBT advocates will dislike (and disagree with) this outcome. But importantly, under this theory, although speech like “Be Happy, Not Gay” would be protected, most anti-gay bullying would not. Intimidation, provocation, and harassment — the conduct most anti-gay bullying statutes target170 — would still be prohibited. Without question, the line-drawing endeavor is difficult. As Judge Posner noted in Zamecnik, “[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission.”171 But carefully drawing such a line will protect LGBT students in schools while ensuring that students can have free and open debates about political and religious ideas; in other words, ensuring that students do not “shed their constitutional rights to freedom of speech . . . at the schoolhouse gate.”172

169 That a school would punish a student for entirely nondisruptive, nonlewd, nonharassing, anti-gay speech also is not some fanciful hypothetical. In Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist., No. 2:11-cv-15481, 2013 WL 3148272 (E.D. Mich. June 19, 2013), a student was removed from class and reprimanded for stating, without disruption and without targeting a particular student, that he did not “accept gays” because he was Catholic during an open classroom discussion about bullying. Id. at *3. The teacher conveyed to the student that “it was fine if [the student’s] religion was opposed to homosexuality but that saying such things was inappropriate in a classroom setting.” Id. The court, finding no material disruption or infringement of the rights of others, rightfully held that the student’s First Amendment rights had been violated. Id. at *7–9 (upholding the student’s right to say he does not “accept gays” because “the speech did not identify particular students for attack but simply expressed a general opinion — albeit one that some may have found offensive — on the topic of homosexuality,” id. at *8).

170 See statutes cited supra note 54.

171 Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877–78 (7th Cir. 2011).