

STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

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Abstract

For several decades courts have struggled to determine when, if ever, public schools should have the power to restrict student expression that does not occur on school grounds during school hours. In the last several years, courts have struggled with this same question in a new context—the digital media. The dramatic increase in the number of student speech cases involving the Internet, mobile phones, and video cameras begs for a closer examination of the scope of school officials’ authority to censor the expression of minors as well as the scope of juvenile speech rights generally. This Article takes a close look at all the various justifications for limiting juvenile speech rights and concludes that none of them supports granting schools broad authority to limit student speech in the digital media, even with respect to violent or harassing expression. Furthermore, this Article argues that the tests most courts and commentators have applied to determine whether a school may control student speech grant schools far too much authority to restrict juvenile speech rights. The Article concludes that the primary approach schools should take to most digital speech is not to punish or restrict such expression, but instead to educate students about how to use digital media responsibly.

I. INTRODUCTION

Last year, the Supreme Court missed an opportunity to determine whether public schools have authority to restrict student speech that occurs off school grounds. In *Morse v. Frederick*,¹ Joseph Frederick unfurled a banner proclaiming “BONG HiTS 4 JESUS” during the Olympic torch relay as it passed through his hometown in Alaska.² Although the Court noted that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents,” it paid little attention to Frederick’s argument that the school lacked authority to restrict his speech because he displayed his sign on a public sidewalk, off school property, at

1. 127 S. Ct. 2618 (2007).

2. *Id.* at 2622.

an event attended by the general public.³ Instead, the Court accepted the school's contention that Frederick was under its authority at the time of the parade because the students attended the parade as part of a school-sanctioned activity.⁴

The Court's refusal to address Frederick's argument was unfortunate. For several decades lower courts have struggled to determine when, if ever, public secondary schools should have the power to restrict student expression that does not occur on school grounds during school hours.⁵ Until recently, most of these cases involved underground newspapers that students wrote, published, and distributed off school property.⁶ In the last several years, however, courts have struggled with this same question in a different context—the digital media. Around the country, increasing numbers of courts have been forced to confront the authority of public schools to punish students for speech on the Internet. In most cases, students are challenging punishments they received for creating fake websites mocking their teachers⁷ or school administrators⁸ or for making offensive comments on websites or in instant messages.⁹

3. *Id.* at 2622, 2624.

4. *Id.* at 2624.

5. This Article does not concern the speech rights of private school students. Because the protections of the First Amendment do not apply unless the entity restricting the freedom of expression is a state actor, private school students cannot claim that their schools have infringed upon their free speech rights under the U.S. Constitution. *See, e.g.,* *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (noting that the Constitution applies only to state actors). This Article also does not concern the First Amendment rights of public university students. As adults, they are entitled to the full protection of the First Amendment, and courts have rejected as unconstitutional attempts to restrain student speech rights in hate speech codes. *See, e.g.,* *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1166, 1181 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 352 (E.D. Mich. 1989). This Article addresses only the rights of public secondary school students.

6. *See infra* notes 245–55 and accompanying text.

7. *See, e.g.,* *M.K. v. Three Rivers Local Sch. Dist.*, No. 1:07CV1011 (S.D. Ohio Dec. 28, 2007) (granting preliminary injunction to students who were expelled for creating and posting a parody profile of a teacher on Facebook.com); *Requa v. Kent Sch. Dist.* No. 415, 492 F. Supp. 2d 1272, 1273–74 (W.D. Wa. 2007) (rejecting student's request for a temporary injunction enjoining his school from suspending him for posting video mocking his teacher on YouTube.com).

8. *Snyder v. Blue Mountain Sch. Dist.*, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008) (rejecting First Amendment claims of student who created fake personal profile for principal on MySpace.com); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp.2d 587 (W.D. Pa. 2007) (granting summary judgment in favor of student who claimed school violated his First Amendment rights by punishing him after he created an unflattering mock profile of his principal on MySpace.com); *see also* *Moriah Balingit, Ind. High School Student Punished for Calling Administrator an "Ass" on Facebook*, Student Press Law Center (Oct. 12, 2007), available at http://splc.org/newsflash_archives.asp?id=1627&year=2007.

9. *See, e.g.,* *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 202, 206 (D. Conn. 2007) (upholding punishment of student who called school principal a “douchebag[]” on her social networking website); *see also* *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008) (upholding the suspension of student based on a crude but threatening sketch

Permitting school officials to restrict student speech in the digital media expands the authority of school officials to clamp down on juvenile expression in a way previously unthinkable. For young people today, digital media is an essential part of their everyday lives. Almost all of them are accessing websites on the Internet; many have social networking sites, produce and edit videos to post on YouTube.com and elsewhere, and engage in instant messaging. In addition, the use of cell phones—particularly sending text messages and taking photographs and video footage—has become an increasingly important way in which young people communicate with each other. The importance of these new technologies to the development of not only their social and cultural connections but also their identities should not be underestimated.

Although *Morse* provided little guidance to lower courts confronting off-campus student speech cases, it did continue the trend of the Court to move away from the robust vision of student speech rights it embraced in *Tinker v. Des Moines Independent School District*¹⁰—rights that could be overcome only in the most compelling of circumstances—in favor of emphasizing the need to defer to school authorities.¹¹ In *Morse*, the Court held that it was constitutional for a school to restrict Frederick’s “BONG HiTS 4 JESUS” banner because the school had reasonably regarded the sign as promoting illegal drug use.¹² Although the Court explicitly stated that its decision was limited to student speech concerning illegal drug use,¹³ as a theoretical matter it is difficult to accept such a narrow view of the holding. Instead, the decision emphasizes the control and responsibility schools have over their students and the need for courts to defer to the decisions of school officials.¹⁴

The decision in *Morse*, as well as the dramatic increase in the number of student speech cases involving the digital media, begs for a closer examination of the scope of school officials’ authority to censor the expression of minors as well as the scope of juvenile speech rights generally. Permitting schools to restrict student speech in the digital media would necessarily interfere with the free speech rights juveniles enjoy when they are outside the schoolhouse gates. Those scholars who support

of his teacher that the student attached to the instant messages that he sent only to his friends); J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (upholding school’s decision to expel student for website he created titled “Teacher Sux”).

10. 393 U.S. 503, 509 (1969) (“In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution.”).

11. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (“The First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use].”).

12. *Id.* at 2622, 2624–25.

13. *Id.* at 2629.

14. *Id.* at 2628–29.

ensorship to protect children do not contend that children fall entirely outside the protection of the First Amendment, but some have argued that they are entitled to lesser or reduced rights.¹⁵ Some point to the line of Court decisions upholding efforts to protect minors from sexually explicit expression as evidence that minors have limited speech rights.¹⁶ Others contend that the theoretical justifications for the First Amendment—the promotion of self-government, the search for truth in the marketplace of ideas, and the fostering of autonomy and self-fulfillment—apply with limited force to minors and warrant reduced protection.¹⁷ For their part, various members of the Supreme Court have suggested that the need to defer to school officials outweighs student speech rights due to the importance of supporting parental decision-making, the *in loco parentis* doctrine, the inherent differences between children and adults, and the so-called “special characteristics” of the school environment.¹⁸

This Article takes a close look at all these justifications for limiting juvenile speech rights and concludes that none of them supports granting schools broad authority to limit student speech in the digital media. Furthermore, the tests that most courts and commentators have applied to determine whether student speech falls within a school’s authority to act grant schools far too much authority to restrict juvenile speech rights in general.

Part II discusses how young people today use digital media and the important role that it plays in their lives. Part III discusses the Supreme Court’s jurisprudence with respect to the First Amendment rights of juveniles at school. Part IV reviews the various approaches courts around the country have taken to student speech cases involving digital media. Part V examines the possible theoretical justifications for limiting juvenile speech rights on or off campus. Part VI concludes that schools should generally not be permitted to punish students for speech in the digital media. Instead, schools should focus on educating their students about using digital media responsibly and largely leave the business of punishing juveniles for their digital expression to parents and to the civil and criminal justice systems.

15. See Alan Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 579–81 (2005) (addressing the arguments of child-protection censorship proponents).

16. *Id.* at 568–71.

17. *Id.* at 580.

18. See *infra* Part V.B.2–5.

II. ADOLESCENTS AND DIGITAL MEDIA

Digital technology is part of almost every aspect of a teenager's life.¹⁹ Computers, mobile phones, and the Internet play critical roles in their social and cultural development.²⁰ Given their dependence on and expertise with digital media, this generation of teenagers is frequently referred to as the "Net Generation," "Digital Generation," and "cyberkids."²¹

Adolescents use technology to communicate with one another and with the general public through both computer-mediated communications (such as e-mail, instant messaging, online chatrooms, video sharing, and social networking sites) and mobile telephony (live conversations, text messaging, and video sharing). Of course, not all young people have cell phones or access to computers at home or school, and not all of those who have such access have become engaged users of the technology.²² But it cannot be denied that rapidly increasing numbers of young people have become dependent upon their computers and cell phones to communicate with each other and with the world at large. In 2004, the Pew Research Foundation reported that eighty-seven percent of people aged twelve to seventeen had some Internet access;²³ undoubtedly that percentage has increased in the last four years.

Social networking sites are extremely popular with teenagers. Generally, social networking sites have similar features: they permit users to post profiles, contribute public comments, and publicly display lists of persons in the network identified as "friends."²⁴ In addition, many have bulletin boards for displaying messages to friends as well as a sort of

19. This Article does not advocate that a school's authority to punish student speech varies based on the age of the student. That said, as a practical matter it is generally (although not always) junior high and high school students who bring cases challenging school speech restrictions. Accordingly, from time to time this Article refers to "teenagers" and "young adults." This terminology is not intended to be exclusionary.

20. Laura M. Holson, *Text Generation Gap: U R 2 Old (JK)*, N.Y. TIMES, Mar. 9, 2008, at BU1.

21. Susan Herring, *Questioning the Generational Divide: Technological Exoticism and Adult Constructions of Online Youth Identity*, in YOUTH, IDENTITY, AND DIGITAL MEDIA 71, 71 (David Buckingham ed., 2008); Susan McKay, Crispin Thurlow & Heather Toomey Zimmerman, *Wired Whizzes or Techno-Slaves? Young People and Their Emergent Communication Technologies*, in TALKING ADOLESCENCE 185, 185 (Angie Williams & Crispin Thurlow eds., 2005).

22. McKay, Thurlow & Zimmerman, *supra* note 21, at 187–89 (discussing how race, ethnicity, and socioeconomic background can affect access to and use of emerging technologies).

23. AMANDA LENHART, MARY MADDEN & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS & THE INTERNET: FINDINGS SUBMITTED TO THE HOUSE SUBCOMMITTEE ON TELECOMMUNICATIONS & THE INTERNET 2 (2006), <http://www.pewinternet.org/ppt/Pew%20Internet%20findings%20-%20-%20teens%20and%20the%20internet%20-%20final.pdf>.

24. Danah Boyd, *Why Youth ♥ Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in YOUTH, IDENTITY, AND DIGITAL MEDIA, *supra* note 21, at 119, 123–24.

instant messaging feature.²⁵ A very popular way of communicating within social networks is by posting messages on another user's profile or by sending a bulletin or group message to a number of people within the network.²⁶ The profile template, which is modeled on the style of profiles from dating services, typically contains demographic details (such as name, sex, location), a photograph, and lists of likes and dislikes (favorite books and bands, interests, etc.).²⁷ Many users post highly personal information on their profiles, including blow-by-blow accounts of their love lives and pictures of themselves and their friends. Some websites allow their users to be very creative in the way they develop their profiles, leading one commentator to remark that at times profiles bear resemblance to the stereotypical messy teenage bedroom.²⁸ Other profiles contain more incriminating information and pictures, such as photographs of the user and friends engaging in drug use or underage drinking.²⁹ A recent survey reported that fifty-five percent of teens aged twelve to seventeen with Internet access use social networking sites, and that sixty-four percent of teens aged fifteen to seventeen had profiles.³⁰

Social networking sites serve many functions for young people. On the surface, these websites allow users to keep in touch with their "offline" friendships as well as to expand their social circles.³¹ While adult users of social networks tend to enjoy using their social network sites to connect with strangers, younger users seem to prefer to connect with friends they

25. *Id.* at 124 n.20.

26. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, SOCIAL NETWORKING WEBSITES AND TEENS: AN OVERVIEW 6 (2007), http://www.pewinternet.org/pdfs/PIP_SNS_Data_Memo_Jan_2007.pdf.

27. Boyd, *supra* note 24, at 123.

28. *Id.*

29. Alex Koppelman, *MySpace or OurSpace?*, SALON, June 8, 2006, http://www.salon.com/mwt/feature/2006/06/08/my_space/.

30. LENHART & MADDEN, *supra* note 26, at 1, 3. MySpace.com is the most popular social networking site in the United States, attracting more traffic than either eBay.com or Google.com. Press Release, Nielsen//Netratings, User-Generated Content Drives Half of U.S. Top 10 Fastest Growing Web Brands, According to Nielsen//Netratings (Aug. 10, 2006), http://www.nielsen-netratings.com/pr/PR_060810.PDF. In June 2008, Facebook.com overtook MySpace.com in the number of unique visitors to the website worldwide. Press Release, comScore.com, Inc., Social Networking Explodes Worldwide as Sites Increase Their Focus on Cultural Relevance (Aug. 12, 2008), <http://www.comscore.com/press/release.asp?press=2396>. Other popular social networking sites include Xanga.com, TaggedIn.com and Bebo.com. *See, e.g.*, Press Release, comScore, Inc., Social Networking Goes Global (July 31, 2007), <http://www.comscore.com/press/release.asp?press=1555>; Press Release, FTC, Do You Know Who Your Kids Are Talking To? (May 9, 2006), <http://www.ftc.gov/opa/2006/05/socialnetworking.shtm>.

31. McKay, Thurlow & Zimmerman, *supra* note 21, at 191. Ninety-one percent of users report using social networks to make plans with friends they see often; eighty-two percent report that they use social networks to keep in touch with people they see less often. LENHART & MADDEN, *supra* note 26, at 2.

already know from the “offline” world as well as with various celebrities.³² As some social scientists have suggested, social networking sites in many ways serve as a replacement for the dwindling numbers of available offline social hangouts;³³ teenagers hang out on the Internet and their mobile phones just like “they used to hang out on street corners before.”³⁴

Social networks are not the only way in which adolescents engage with digital media. Some young people have produced online magazines in which they create text to share with their peers and frequently the broader public.³⁵ Others have created web logs, or blogs, that typically resemble a diary in which the creator and author chronicles his or her daily activities, displays photographs, and discusses favorite movies, books, and stores.³⁶ Blogs and home pages provide young people an opportunity to engage in autobiographical expression and “cathartic storytelling”³⁷ that can promote self-realization and self-reflection. Some students may turn to social networking sites to find a community of like-minded individuals they cannot find at school. Oftentimes students who have difficulty finding a community at school seek a community on the Web. Self-proclaimed “nerds” have discussed the importance of having a forum to deal with the often demoralizing experience of school.³⁸

Teenagers also frequent video- and photo-sharing websites, such as YouTube.com and Flickr.com. YouTube.com is a free video-sharing website where users post and view movies, television clips, advertisements, music videos, and video blogs.³⁹ The materials available on YouTube.com range widely, from major network television shows, to amateur videos and cartoons, to images taken on a cell phone.⁴⁰ Flickr.com similarly permits users to engage in media and content sharing.⁴¹

32. Boyd, *supra* note 24, at 122 (noting the popularity of MySpace.com due to a function that allows fans and popular musicians to communicate).

33. *Id.* at 134–35.

34. Richard Harper, *From Teenage Life to Victorian Morals and Back: Technological Change and Teenage Life*, in THUMB CULTURE: THE MEANING OF MOBILE PHONES FOR SOCIETY 101, 102 (Glotz et al. eds., 2005).

35. McKay, Thurlow & Zimmerman, *supra* note 21, at 192.

36. *Id.*

37. *Id.*

38. Henry Jenkins, *Introduction to Jon Kate Book Based on His “Voices from Hellmouth” Columns*, Henry Jenkins Blog, <http://web.mit.edu/cms/People/henry3/Intro-Katz.html> (last visited Sept. 20, 2008) (arguing that there is “something fundamentally wrong with a school system” that legally requires students to attend school and withstand abuse from their classmates while at the same time giving the students “no space to speak back to [their] abusers”).

39. See YouTube Home Page, <http://www.youtube.com>.

40. See, e.g., Chloe Albanesius, *Who Needs a TV? Web Video Viewing Doubles*, EXTREMETECH.COM, Sept. 4, 2008, available at <http://www.extremetech.com/article2/0,2845,2329476,00.asp>; Denise Martin, *MTV Gives Video Music Awards New Life*, L.A. TIMES, Sept. 4, 2008.

41. See, e.g., Jefferson Graham, *Flickr Rules in Photo Sharing, As Video Tiptoes In*, USA

In the last couple of years, text messaging—the use of a cell phone to send a message—has become an increasingly popular form of electronic communication among teenagers.⁴² Social scientists theorize that text messages have become popular with young people not merely because of the ease and immediacy of the medium, but also for a variety of complex psychological reasons.⁴³ Parents tend to entrust their children with cell phones in the name of safety and immediate access, but paradoxically many young people find their mobile phones provide them with independence from their parents and a sense of control over their own lives.⁴⁴ They enjoy communicating with abbreviations and expressions that are often incomprehensible to adults.⁴⁵ In addition, text messaging is a less conspicuous method of communication; students report that they enjoy the ability to text each other even while in class or in the library without being noticed and without causing a disruption.⁴⁶ While some adults have expressed concern that young people are ruining the English language through the lingo they use in text messages,⁴⁷ other social scientists have admired the creative means that young people are using to make new technology work best for them.⁴⁸

Adults tend to have conflicting reactions to children and digital media. On the one hand, there is a push to promote computer literacy. Efforts to provide computers in every classroom across the country and indeed the world are applauded as the public embraces efforts to equip students to work on computers and the Internet so that they “will be able to ride the new e-commerce economy into better jobs and new educational opportunities, that they may be able to fulfill the utopian dreams of global communication and democratic decision-making.”⁴⁹ On the other hand, the public worries that the Internet is exposing our children to all sorts of bad influences, from scammers to pornographers.⁵⁰

The current hysteria about children and digital media reflects the same historical tendency of adults to work themselves up into a panic in the face of cultural change. As one author has described it, “[h]abits adopted by young people are frequently the targets of moral panic, with each generation of the middle-aged lamenting the downfall of the nation’s

TODAY, May 7, 2008, at 3B.

42. See Holson, *supra* note 20.

43. McKay, Thurlow & Zimmerman, *supra* note 21, at 195.

44. *Id.*

45. Crispin Thurlow, *Generation Txt? Exposing the Sociolinguistics of Young People’s Text-Messaging*, DISCOURSE ANALYSIS ONLINE, 2003, at 14, <http://extra.shu.ac.uk/daol/articles/v1/n1/a3/thurlow2002003.html>.

46. McKay, Thurlow & Zimmerman, *supra* note 21, at 196.

47. Herring, *supra* note 21, at 74.

48. McKay, Thurlow & Zimmerman, *supra* note 21, at 197.

49. Jenkins, *supra* note 38.

50. *Id.*

teenagers and the perceived deviation from a better past.”⁵¹ In generation after generation, the media consumption of the young has been blamed for diminished performance in school and general apathy.⁵² Thus, in the 1950s, there were efforts to ban crime and horror comic books, which were blamed for causing juvenile delinquency.⁵³ In 1954, the U.S. Congress Subcommittee on Juvenile Delinquency held hearings on the harm comic books were causing American youth.⁵⁴ An anti-comic book crusader testified before Congress that children should not be permitted to read *Superman* because it generated ““phantasies of sadistic joy in seeing other people punished . . . while you yourself remain immune.””⁵⁵ In the 1960s, the FBI tried to figure out whether sadistic lyrics could be heard if a 45-RPM record of “Louie Louie” were played backward;⁵⁶ the hysteria about hidden lyrics continued through the rise of heavy metal music. More recently, Tipper Gore campaigned against rap music⁵⁷ and Joe Lieberman crusaded against violent movies.⁵⁸ Henry Jenkins has written about testifying before Congress in hearings concerning violence in the media where “[s]enators were discussing with shock and outrage films they hadn’t seen, television shows they’d never watched, games they’d never played, and music they’d never listened to, based on precise scribbles on little index cards provided to them by congressional staffers.”⁵⁹

Although social networks, blogs, and text messaging are relatively new technologies, what young people do with them is, at bottom, not that much different from what prior generations did without technology. Not surprisingly, young people commonly use digital media to discuss school—their teachers, the school administrators, their fellow students, and the events of their daily lives. The difference is that instead of keeping a handwritten diary, they keep blogs. Instead of talking on landline phones, they talk on cell phones and use text messaging and instant messaging. Instead of speaking in “pig Latin” or using some other code, they use abbreviations and other creative forms of language to signal their “in-group identity.”⁶⁰ Instead of gossiping about their teachers and fellow students at the soda shop or while walking around the mall, they send each

51. Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 115 (2003).

52. McKay, Thurlow & Zimmerman, *supra* note 21, at 197.

53. Caplan, *supra* note 51, at 115.

54. *Id.*

55. *Id.* (quoting MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 52–54 (2001)).

56. *Id.* at 115–16.

57. *Id.* at 116.

58. *Id.*

59. Jenkins, *supra* note 38.

60. Herring, *supra* note 21, at 77.

other e-mails, instant messages, or text messages.⁶¹ For many young people, the technology is beside the point; what matters is what they do with it. And for most of them, what they do with it is the same thing young people have been doing for generations.⁶²

Cases and news articles indicate that adolescents use digital media for various forms of expressive activity. Much of the expression that has been the subject of litigation seems quite harmless and at worst tasteless. Other adolescent speech, however, is not as innocuous. The death of Megan Meier, who committed suicide after she was tormented on MySpace, has brought national attention to the problem of cyber-bullying and harassment.⁶³ Rather than harass their classmates in the locker room, hallways, and bathrooms, students engage in “electronic aggression,” often in the form of malicious rumors or humiliating or threatening speech spread on social networking sites, e-mails, instant messages, chat rooms, text messages, and blogs.⁶⁴ In Pennsylvania, for example, law enforcement officials have been investigating the dissemination of pornographic videos and photographs of two high school girls transmitted by cell phones to dozens of the girls’ classmates and to other members of the general public.⁶⁵

Poking fun at teachers and harassing other students is not new conduct. Rather, what is new in the digital age is that adults can see what minors are saying much more easily. Before the Internet, in order to obtain access to the inner thoughts of the younger generation school officials would have to confiscate passed notes, illicit underground newspapers, or the occasional personal diary inadvertently brought to school. Now, school officials can simply log onto the Internet to see those same inner thoughts, and when they see something they do not like, many of them react by punishing the student responsible. As a result, much student expression that would have escaped the attention of school officials in another time now is the subject of suspensions, expulsion, and other forms of significant punishment. The challenge facing courts is how much authority schools should have to punish students for speech in the digital media.

61. *Id.* Or they videotape their conversations and post them on YouTube. In Los Angeles, a school suspended a student for two days after he posted on YouTube a conversation among eighth graders in which the students called one of their classmates a “slut” and a “spoiled brat.” Victoria Kim, *Suit Blends Internet, Free Speech, School*, L.A. TIMES, Aug. 3, 2008, at B1.

62. Herring, *supra* note 21, at 77.

63. Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, § 9, at 9.

64. Tara Parker-Pope, *More Teens Victimized by Cyber-Bullies*, N.Y. TIMES, Nov. 27, 2007, <http://well.blogs.nytimes.com/2007/11/27/more-teens-victimized-by-cyber-bullies/?scp=1-b&sq=cyber-bullies&st=nyt> (Nov. 27, 2007, 3:41 EST); *see also* Renee Servance, Comment, *Cyberbullying, Cyberharassment, and the Conflict between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216–24 (2003) (listing examples of cyber-bullying and harassment).

65. Michael Rubinkam, *Cell Phone Porn Scandal Hits U.S. School*, MSNBC.COM, Jan. 25, 2008, <http://www.msnbc.msn.com/id/22840727/print/1/displaymodel/1098/>.

III. STUDENT SPEECH RIGHTS

When the Court first approached student speech right cases, it did so with the understanding that minors were entitled to full constitutional rights that might need to be adjusted slightly given the context of the school environment. The Court tended to emphasize the role of parents, rather than the public schools, in inculcating democratic values. In its more recent student speech cases, the Court has retreated from its defense of student speech rights in favor of emphasizing deference to school authorities.

A. *The Early Cases*

In its earliest cases addressing student speech rights—*West Virginia Board of Education v. Barnette*⁶⁶ and *Tinker v. Des Moines Independent Community School District*⁶⁷—the Court gave schools little authority to restrict student expression. The Court first recognized students' freedom of thought and expression in *West Virginia Board of Education v. Barnette*, which challenged the constitutionality of a resolution passed by the West Virginia State Board of Education during World War II requiring all students to salute the flag as a means of expressing national unity and of teaching citizenship during the “formative” period of their youth.⁶⁸ Anyone who failed to salute the flag was considered insubordinate and expelled.⁶⁹ A group of Jehovah's Witnesses brought a successful challenge to the law under the speech and religion clauses of the First Amendment (as incorporated to apply to the states through the Fourteenth Amendment).⁷⁰ Although the Court recognized that it lacked expertise in school administration, it nevertheless declared that “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁷¹ The Court recognized that schools “have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”⁷²

The Court continued to offer students strong speech right protections in *Tinker v. Des Moines Independent Community School District* in 1969.⁷³ John

66. 319 U.S. 624 (1943).

67. 393 U.S. 503 (1969).

68. *Barnette*, 319 U.S. at 626 & n.2.

69. *Id.* at 629.

70. *Id.* at 629, 637, 642.

71. *Id.* at 637.

72. *Id.*

73. 393 U.S. 503, 513–14 (1969).

Tinker, who was fifteen years old, his sister Mary Beth, who was thirteen years old, and their friend Christopher Eckhardt, sixteen years old, had decided, together with their parents, to wear black armbands to symbolize their objections to the Vietnam War.⁷⁴ The principals in the Des Moines school district got wind of this plan and adopted a policy prohibiting any student from wearing armbands to school.⁷⁵ The students, aware of this new policy, wore their armbands to school anyway and were promptly suspended until they agreed to take them off.⁷⁶ The students, through their fathers, brought a lawsuit seeking nominal damages and an injunction restraining the schools from enforcing their anti-armband policy.⁷⁷

The Supreme Court viewed the case as a conflict between the speech rights of students and the need for schools to control conduct in schools.⁷⁸ On the one hand, the Court explained, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁷⁹ To support this point, the Court cited *Barnette* as well as a long line of due process clause decisions striking down statutes that interfered with the liberty of teachers, parents, and students.⁸⁰ On the other hand, the Court recognized 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.”⁸¹

The Court ultimately struck the balance in favor of the students, holding that there was “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.”⁸² Although outside the classrooms a few students made hostile remarks to the students wearing armbands, no violence or threats of violence occurred on school premises.⁸³ Citing *Terminiello v. City of Chicago*,⁸⁴ the Court explained that schools cannot repress student speech based on “undifferentiated fear or apprehension of disturbance,”⁸⁵ even though “[a]ny 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.”⁸⁶

74. *Id.* at 504.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 507.

79. *Id.* at 506.

80. *Id.* at 506–07.

81. *Id.* at 507.

82. *Id.* at 508.

83. *Id.*

84. 337 U.S. 1 (1949).

85. *Tinker*, 393 U.S. at 508.

86. *Id.*

In perhaps the most strongly worded portion of the majority opinion, *Tinker* declared that schools cannot be “enclaves of totalitarianism” with “absolute authority over their students.”⁸⁷ Instead, “[s]tudents in school as well as out of school are ‘persons’ under our Constitution” who “are possessed of fundamental rights.”⁸⁸ Accordingly, states should not regard students as “closed-circuit recipients” of only the information the states wish to communicate; nor can the expression of students “be confined to the expression of those sentiments that are officially approved.”⁸⁹ Instead, student speech, whether in the classroom or on the playground, is an important part of the “marketplace of ideas,”⁹⁰ and “personal intercommunication among the students” is “an important part of the educational process.”⁹¹ The Court expressed particular concern in *Tinker* that the school’s regulation was aimed at a particular viewpoint on a particular subject—in this case, opposition to the Vietnam War.⁹²

The Court tempered its broad defense of student speech rights by recognizing that such rights must be “applied in light of the special characteristics of the school environment.”⁹³ The Court gave schools leeway to restrict student speech rights if the speech at issue would cause “material and substantial interference with schoolwork or discipline,”⁹⁴ or “invasion of the rights of others.”⁹⁵ The Court concluded that the school failed to prove that the “silent, passive” wearing of black armbands met this standard.⁹⁶ Although the armbands provoked discussion, they did not cause a disruption.⁹⁷

The concurring and dissenting opinions filed in *Tinker* plainly revealed that not all the Justices believed that students were entitled to such strong speech rights. Justice Stewart contributed a concurring opinion in which he noted that he “cannot share the Court’s uncritical assumption that,

87. *Id.* at 511.

88. *Id.*

89. *Id.*

90. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

91. *Id.*

92. *Id.* at 510–11. Although some courts have interpreted *Tinker* as condemning only those school speech restrictions that are viewpoint-based, *see, e.g.*, *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442 (5th Cir. 2001), this is not a sustainable reading of the decision. Nothing in *Tinker* indicates whether the school permitted students to express pro-war views. For more discussion of this issue, *see Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431–32 & n.26 (9th Cir. 2008), which noted that *Tinker* applies to any content-based speech restriction, even if not viewpoint-based, because content-based speech restrictions are “equally pernicious,” and *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 677 (7th Cir. 2008) (Rovner, J., concurring), which noted that *Tinker* should be seen as “a discussion about subject matter discrimination.”

93. *Tinker*, 393 U.S. at 506.

94. *Id.* at 511.

95. *Id.* at 513.

96. *Id.* at 514.

97. *Id.*

school discipline aside, the First Amendment rights of children are co-extensive with those of adults” because they are “not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”⁹⁸ Justice Stewart cited the Court’s then-recent decision in *Ginsberg v. New York*,⁹⁹ where the Court declared that a “[s]tate may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”¹⁰⁰

In dissent, Justice Black argued that although he believed the government has no authority to regulate the content of speech, he had “never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases,”¹⁰¹ and that students are sent to public school “to learn, not teach.”¹⁰² He viewed the black armbands as significantly disruptive to the school day; even though the students wearing the armbands did not make obscene remarks or behave in a boisterous manner, they provoked comments and warning from other students, they “practically ‘wrecked’” a mathematics class, and they certainly diverted the students’ attention from their classwork.¹⁰³ In addition, Justice Black emphasized the importance of school discipline as “an integral and important part of training our children to be good citizens—to be better citizens.”¹⁰⁴ He argued that by striking down the armband regulation, the Court had inappropriately taken into its own hands the control of the school environment that should rest in the discretion of school officials.¹⁰⁵

Justice Black predicted that by giving students rather than teachers the right to control schools, students in schools across the country “will be ready, able, and willing to defy their teachers on practically all orders,” especially since students “all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.”¹⁰⁶ Echoing Justice Black, Justice Harlan argued in a short separate dissent that “school officials should be accorded the widest authority in maintaining discipline and good order in their institutions.”¹⁰⁷ Justice Harlan suggested that school speech restrictions should be tolerated unless a challenger can

98. *Id.* at 514–15 (Stewart, J., concurring).

99. 390 U.S. 629 (1968). In *Ginsberg*, the Court rejected a challenge to a state law that criminalized the distribution of obscene material to minors under age seventeen. *Id.* at 631, 636–37.

100. *Tinker*, 393 U.S. at 515 (quoting *Ginsberg*, 390 U.S. at 649–50).

101. *Id.* at 517 (Black, J., dissenting).

102. *Id.* at 522.

103. *Id.* at 517–18.

104. *Id.* at 524.

105. *Id.* at 517–20.

106. *Id.* at 525.

107. *Id.* at 526 (Harlan, J., dissenting).

prove that the restriction “was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view”¹⁰⁸

Courts have applied *Tinker*’s “substantial disruption”¹⁰⁹ standard with varying levels of scrutiny. Most seem to agree that a school can act to restrict speech before there is evidence that the expression at issue caused an actual disruption. As discussed below in Section IV.B.4, the level of disruption a court requires can make a big difference on whether restrictions on electronic expression can satisfy *Tinker*.

Although virtually all the student speech cases applying *Tinker* have focused on its material-and-substantial-disruption¹¹⁰ prong, it is possible that the alternative prong of *Tinker*—interference with the rights of others¹¹¹—will become more important, particularly in the context of harassing or demeaning speech. Although courts have generally ignored this alternative justification for restricting student speech,¹¹² the Ninth Circuit recently gave this theory new life in a case involving anti-gay T-shirts.¹¹³ In *Harper v. Poway Unified School District*, the court held that it was constitutional for a school to prohibit a student from wearing a T-shirt that stated “HOMOSEXUALITY IS SHAMEFUL” because it undermined “the rights of other students.”¹¹⁴ The court explicitly refused to rely on *Tinker*’s substantial disruption standard in reaching its decision.¹¹⁵ Rejecting the argument that the phrase “rights of others” meant

108. *Id.*

109. *Id.* at 514 (majority opinion).

110. *Id.* at 513.

111. *Id.*

112. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (stating that it is unaware of any court decision relying solely on the “invasion of rights of others” prong of *Tinker* to uphold a student speech regulation); Emily Gold Waldman, *A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 477 (2008) (noting that until recently no court had applied the “invasion of rights” justification of *Tinker*); Brian J. Bilford, Note, *Harper’s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. (forthcoming) (same); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear . . .”).

113. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, 127 S. Ct. 1484 (2007). The Supreme Court vacated the judgment and remanded the case to the Ninth Circuit for dismissal of the appeal of the preliminary injunction as moot because in the meantime the district court had entered final judgment against plaintiff. *Harper*, 127 S. Ct. at 1484. Accordingly, the Ninth Circuit dismissed the appeal as moot. *Harper v. Poway Unified Sch. Dist.*, 485 F.3d 1052, 1052 (9th Cir. 2007). For subsequent litigation on a motion for reconsideration, see *infra* note 219.

114. *Harper*, 445 F.3d at 1171, 1178 (quoting *Tinker*, 393 U.S. at 508).

115. *Id.* at 1175 (“Although we, like the district court, rely on *Tinker*, we rely on a different provision—that schools may prohibit speech that ‘intrudes upon . . . the rights of other students.’” (quoting *Tinker*, 393 U.S. at 508)). The court specifically distinguished its decision from *Saxe*, 240 F.3d at 217, where the Third Circuit suggested that harassing speech may not be restricted under *Tinker* unless it causes substantial disruption. *Harper*, 445 F.3d at 1179 n.21. The Ninth Circuit stated that “[t]he two *Tinker* prongs are stated in the alternative.” *Id.* It is unlikely that the Ninth

simply that schools could protect students against assault, defamation, invasion of privacy, extortion, and blackmail,¹¹⁶ the court declared that under *Tinker* schools are entitled to restrict any speech that undermines “their right to learn.”¹¹⁷ The court cited studies demonstrating that the relatively weaker academic performance of gay students is most likely due to the abuse and harassment they receive from their peers.¹¹⁸

In an apparent attempt to limit its potentially sweeping ruling and to protect the ability of students “to engage in full and open political expression, both in and out of the school environment,”¹¹⁹ the court declared that its holding was limited to “instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.”¹²⁰ Although its holding would expressly permit schools to engage in viewpoint-based speech restrictions, the court concluded that such restrictions are permissible because “[a] school need not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school.”¹²¹ Accordingly, the court explained, “public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.”¹²²

The *Harper* decision has been heavily criticized,¹²³ and other courts appear reluctant to follow its lead.¹²⁴ As Judge Kozinski argued in his

Circuit’s decision could have stood on the substantial disruption prong given the lack of evidence that the plaintiff’s T-shirt materially disrupted school activities. *See id.* at 1193–94 (Kozinski, J., dissenting). If anything, the speech that the school promoted on the “Day of Silence,” when students were permitted to tape their mouths to symbolize the silencing effect of intolerance upon gays and lesbians, seems at least as disruptive to the work of the school (if not more so) than the plaintiff’s passive wearing of a T-shirt. *See id.* at 1171 (majority opinion).

116. *Harper*, 445 F.3d at 1178 n.18.

117. *Id.* at 1180.

118. *Id.* at 1178–79.

119. *Id.* at 1182.

120. *Id.* at 1183. The court specifically noted that it was not reaching the issue of whether its holding would reach comments based on gender, even though it recognized that gender discrimination existed in all levels of education. *Id.* at 1183 n.28.

121. *Id.* at 1185 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (second alteration in original)).

122. *Id.*

123. *See, e.g.,* Douglas D. Frederick, *Restricting Student Speech that Invades Others’ Rights: A Novel Interpretation of Student Speech Jurisprudence in Harper v. Poway Unified School District*, 29 U. HAW. L. REV. 479, 480 (2007) (arguing that Ninth Circuit should have applied *Tinker*’s “substantial disruption” test instead of the “invasion of others’ rights” test); Waldman, *supra* note 112, at 476–78 (arguing that *Harper* did not adequately explain why the verbal bullying of minority students is more disruptive to the educational experience than bullying generally); John E. Taylor, *Tinker and Viewpoint Discrimination* 53 (working paper, Social Science Research Network draft), available at <http://ssrn.com/abstract=1137909> (arguing that *Harper* opens the door to rampant viewpoint-based speech discrimination).

124. *See, e.g.,* *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 672 (7th Cir. 2008)

scathing dissent, the acceptance of homosexuality is, unfortunately, very much subject to “political disagreement and debate.”¹²⁵ As proof of this debate, Judge Kozinski cited the controversy surrounding San Francisco Mayor Gavin Newsom’s decision to issue same-sex marriage licenses.¹²⁶ Instead of banning speech pertaining to just one side of the debate, he suggested it would be preferable to ban discussion of the subject entirely.¹²⁷ In addition, Judge Kozinski noted that “[t]he interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect.”¹²⁸ In order to bridge the gap between the two, Judge Kozinski suggested that perhaps the school’s authority to limit harassing speech could be “limited to those situations where the speech is so severe and pervasive as to be tantamount to conduct,” and not extended to include “simple acts of teasing and name-calling.”¹²⁹ He called into question the majority’s conclusion that the plaintiff’s T-shirt had any meaningful psychological effect on other students because his speech was part of a broader political “give-and-take” during the Day of Silence.¹³⁰ Judge Kozinski also criticized the court’s holding that schools can restrict speech that undermines the educational experience of minority students only.¹³¹ He asked, “if interference with the learning process is the keystone to the new right, how come it’s limited to those characteristics that are associated with minority status?”¹³² He noted that students could have their self-esteem bruised as a result of any number of comments that do not pertain to their minority status, such as being poor, overweight, or suffering from an acne problem.¹³³ In addition, he noted the difficulties of defining “minority group” for purposes of the majority’s new approach.¹³⁴

It is unclear whether the Ninth Circuit would apply its expansive rights-of-others analysis to cyberspeech. At several points in its opinion,

(rejecting the argument that schools can prohibit derogatory comments in order to “protect the ‘rights’ of the students against whom [they] are directed”).

125. Harper, 445 F.3d at 1197 (Kozinski, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.* at 1198.

129. *Id.* (quoting Davis v. Monroe County Bd. of Educ., 562 U.S. 629, 658 (1999)). In *Nuxoll v. Indian Prairie School District #204*, Judge Posner also seems to reject the Harper majority’s broad interpretation of Tinker’s “rights” prong. 523 F.3d 668, 672 (7th Cir. 2008). Although Judge Posner did not mention Harper directly, he did reject the school district’s argument that its policy banning derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability was constitutional because “all it [did was] protect the ‘rights’ of the students against whom” such comments were made. *Id.* Judge Posner explained that “people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life.” *Id.*

130. Harper, 445 F.3d at 1200 (Kozinski, J., dissenting).

131. *Id.* at 1200–01.

132. *Id.* at 1201.

133. *Id.*

134. *Id.*

the court emphasized that public schools have the authority to restrict speech at school that the government could not restrict outside school.¹³⁵ On the other hand, the school policy at issue in the case does not appear to have much in the way of geographic restrictions.¹³⁶ In his dissent, Judge Kozinski asked whether the majority would permit a student to “post criticism of the Day of Silence on his MySpace page,”¹³⁷ but that question goes unanswered.

B. *From Fraser to Morse*

In its more recent student speech cases, the Court has retreated from its broad protection of student speech rights in *Barnette* and *Tinker* and has instead become increasingly deferential to school officials who punish students for their expressive activities.

In *Bethel School District No. 403 v. Fraser*,¹³⁸ the Court took a much more restrictive view of student speech rights than it had in *Tinker* and gave great deference to school officials to censor student speech in the name of promoting “socially appropriate behavior.”¹³⁹ In that case, Chief Justice Burger, writing for the majority, upheld a school’s decision to discipline a high school student who had given a speech with a sexual metaphor and suggestive innuendos when nominating a fellow student for elective office at a school assembly.¹⁴⁰ The school suspended the student,

135. See, e.g., *id.* at 1176 (majority opinion) (“Harper’s shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting . . .”); *id.* at 1185 (“A school need not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school.”) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (alteration in original)).

136. See *id.* at 1203–05 (Kozinski, J., dissenting) (noting the policy’s “vast and uncertain geographic sweep”).

137. *Id.* at 1206.

138. 478 U.S. 675 (1986).

139. *Id.* at 681.

140. *Id.* at 677–78, 685. Although Chief Justice Burger described Fraser’s speech as containing an “elaborate, graphic, and explicit sexual metaphor,” *id.* at 678, the speech did not seem to warrant any of those three adjectives, see *id.* at 689 n.2 (Brennan, J., concurring) (“Indeed, to my mind, [Fraser]’s speech was no more ‘obscene,’ ‘lewd,’ or ‘sexually explicit’ than the bulk of programs currently appearing on prime time television or in the local cinema.”). The content of Fraser’s speech was as follows:

‘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.’

Matthew Fraser, pursuant to a school policy providing that “[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”¹⁴¹ The school considered his speech to fall within the policy’s meaning of obscene¹⁴² (although, as Justice Stevens’s dissent points out, that assertion was far from clear¹⁴³).

Although the Court majority gave lip service to *Tinker*’s declaration that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’”¹⁴⁴ *Fraser* was less concerned with students’ free speech rights than with deferring to the school’s “basic educational mission”¹⁴⁵ to inculcate the “fundamental values necessary to the maintenance of a democratic political system.”¹⁴⁶ The Court explained that although democratic values include “tolerance of divergent political and religious views,” they also include “teaching students the boundaries of socially appropriate behavior.”¹⁴⁷ The Court majority emphasized that in this case, unlike *Tinker*, “the penalties imposed . . . were unrelated to any political viewpoint.”¹⁴⁸ Famously stating that “the First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket,”¹⁴⁹ the Court made clear that the free speech rights of students were not co-extensive with the rights of adults.¹⁵⁰ The Court also stated that federal courts should defer to the school board’s determination of what speech is appropriate in a school assembly.¹⁵¹

Although the Court noted that some students in the audience “hooted and yelled” and “graphically simulated the sexual activities pointedly alluded to in respondent’s speech,” and that one teacher was required to devote part of her lecture to a discussion of the speech,¹⁵² its decision did

Id. at 687.

141. *Id.* at 677–78 (majority opinion).

142. *Id.* at 679.

143. *Id.* at 694 (Stevens, J., dissenting) (noting that not only does the rule apply to “conduct” and not “speech,” but also that “even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent’s speech”).

144. *Id.* at 680 (majority opinion) (quoting *Tinker*, 393 U.S. at 506).

145. *Id.* at 685.

146. *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

147. *Id.*

148. *Id.* at 685.

149. *Id.* at 682–83 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)). In *Cohen v. California*, the Court upheld the right of an adult to wear a jacket proclaiming “Fuck the Draft.” *Cohen v. California*, 403 U.S. 15, 16–17 (1971).

150. *Fraser*, 478 U.S. at 682.

151. *Id.* at 683.

152. *Id.* at 678.

not rest on an application of *Tinker*'s substantial disruption standard.¹⁵³ Instead, the *Fraser* decision echoed the concurring and dissenting opinions in *Tinker* almost twenty years earlier. The *Fraser* majority opinion followed Justice Black's argument in his *Tinker* dissent that the Court must give school officials deference to maintain discipline in their institutions; indeed, the Court even cited a lengthy passage from Justice Black's dissent to support its argument.¹⁵⁴ The *Fraser* majority also drew on Justice Stewart's *Tinker* concurrence,¹⁵⁵ citing a series of decisions from *Ginsberg v. New York* to *FCC v. Pacifica Foundation* to support its argument that schools should play an important role in protecting minors from sexually explicit, indecent, or lewd speech.¹⁵⁶ The Court held that Fraser's speech was "plainly offensive to both teachers and students—indeed to any mature person," "acutely insulting to teenage girl students," and "seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."¹⁵⁷

Justice Brennan wrote a concurring opinion to make clear that he joined the Court's judgment only on the narrow, fact-specific ground that "school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."¹⁵⁸ Justice Brennan correctly explained that Fraser's speech did not fall into the unprotected category of "obscene" speech,¹⁵⁹ and was "to my mind, . . . no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema."¹⁶⁰ He also questioned the Court's assumption that the speech was "'insulting'" to female students and was "'seriously damaging'" to other fourteen-year-olds when there was no evidence in the record to support either conclusion.¹⁶¹ Brennan specifically noted, citing *Cohen*, that "[i]f respondent had given the same speech outside of the school environment,

153. The Court confirmed this in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988).

154. *Fraser*, 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526) (Black, J., dissenting)). *Fraser* also echoed Justice Harlan's dissent in *Tinker*. See *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) (arguing that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions" and that student speech restrictions should be tolerated unless "a particular school measure was motivated by other than legitimate school concerns").

155. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (arguing that it is appropriate to limit student speech rights at least in some instances because a child, similar to a member of a captive audience, may not be capable of making an individual choice).

156. *Fraser*, 478 U.S. at 684–85. See detailed discussion of these cases *infra* Part V.A.

157. *Fraser*, 478 U.S. at 683.

158. *Id.* at 689 (Brennan, J., concurring).

159. *Id.* at 688.

160. *Id.* at 689 n.2.

161. *Id.*

he could not have been penalized simply because government officials considered his language inappropriate.”¹⁶²

In a dissenting opinion, Justice Marshall criticized the Court for not requiring the school to satisfy *Tinker*’s materially disruptive standard. He stated that although “the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school’s educational mission . . . where speech is involved, we may not unquestioningly accept a teacher’s or administrator’s assertion that certain pure speech interfered with education.”¹⁶³ Justice Stevens also filed a dissent, in which he argued, among other things, that the student’s speech was not disruptive to the school’s educational mission.¹⁶⁴ Quoting the lower court, Stevens elaborated that “‘a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fails to rise to the level of material interference with the educational process’”¹⁶⁵ In addition, Stevens contended that the speech did not amount to an “obvious impropriety.”¹⁶⁶ While recognizing that the speech would be inappropriate in the classroom and other more formal settings, it would most likely be regarded as “routine comment” in a school locker room or in the school hallways.¹⁶⁷ Given this, Justice Stevens reasoned, it is hard to imagine the student should have known that he would be punished for the same speech delivered to an audience of his peers.¹⁶⁸

Recently, the Supreme Court made the remarkable concession that “[t]he mode of analysis employed in *Fraser* is not entirely clear.”¹⁶⁹ This is an understatement; the Court’s analysis was a dramatic deviation from the Court’s treatment of First Amendment rights generally and from *Tinker* specifically. In *Fraser*, the Court did not find that the speech was materially disruptive nor did it find that the speech interfered with the rights of other students, as *Tinker* would seem to require.¹⁷⁰ Noting the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content” of *Fraser*’s speech, the Court seemed to read *Tinker* as narrowly applying only to restrictions of political speech,

162. *Id.* at 688 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

163. *Id.* at 690 (Marshall, J., dissenting).

164. *Id.* at 693–94 (Stevens, J., dissenting).

165. *Id.* at 694 (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1360 (9th Cir. 1985), *rev’d*, 478 U.S. 675 (1986)).

166. *Id.* at 696.

167. *Id.*

168. *Id.*

169. *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007).

170. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (reasoning that the students “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others” and therefore the Constitution did not permit the state to deny the students their expression).

particularly when viewpoint-based.¹⁷¹ And in a subsequent case, the Court conceded that had Fraser made the same speech in a public forum, his speech would have enjoyed complete constitutional protection, even though it was sexually suggestive.¹⁷²

In its next student speech case, *Hazelwood School District v. Kuhlmeier*,¹⁷³ the Court upheld a public school's decision to censor a student newspaper, created as part of a journalism class, that contained articles about pregnant students and the effect of divorce on students at the school.¹⁷⁴ The Court held that schools had broad authority to restrict the "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."¹⁷⁵ The Court made it clear that the school's authority to curb such speech was not limited to expression that substantially interfered with its work or with the rights of other students.¹⁷⁶ Instead, drawing on *Fraser's* broad language suggesting that federal courts should defer to school administrators' decisions to restrict speech that is "inconsistent with its 'basic educational mission,'"¹⁷⁷ the Court held that educators are permitted to control student speech in school-sponsored activities provided that "their actions are reasonably related to legitimate pedagogical concerns."¹⁷⁸ The Court said that this conclusion was consistent with its longstanding view that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."¹⁷⁹ Justice Brennan, joined by Justices Marshall and Blackmun, authored a lengthy dissent in which he attacked the majority for abandoning the fundamental principles of *Tinker*.¹⁸⁰ Among other things, Justice Brennan noted that in *Tinker* the Court rejected the argument that school officials should be able to censor any speech that offends them or that might be incompatible with the school's pedagogical mission.¹⁸¹ In addition, Justice

171. *Fraser*, 478 U.S. at 680.

172. *Morse*, 127 S. Ct. at 2626 (citing *Cohen v. California*, 403 U.S. 15 (1971); *Fraser*, 478 U.S. at 682–83); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (noting that under the Court's analysis in *Fraser*, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school" (citation omitted)); *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) ("If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . .").

173. 484 U.S. at 260.

174. *Id.* at 276.

175. *Id.* at 271.

176. *Id.*

177. *Id.* at 266–67 (citing and quoting *Fraser*, 478 U.S. at 683, 685).

178. *Id.* at 273.

179. *Id.*

180. *Id.* at 277–91 (Brennan, J., dissenting).

181. *Id.* at 280–81.

Brennan argued that the Court could not rest its decision on the distinction between personal student speech and school-sponsored speech, when this distinction had never before appeared in the Court's jurisprudence.¹⁸²

In *Morse v. Frederick*,¹⁸³ the Supreme Court's first student speech case in twenty years, the Court continued to erode student speech rights when it held that it is constitutional for a school to restrict student speech that is reasonably regarded as promoting illegal drug use.¹⁸⁴ In this case, high school senior Joseph Frederick unfurled a banner proclaiming "'BONG HiTS 4 JESUS'" during the Olympic Torch Relay as it passed by the school.¹⁸⁵ The Court conceded that the meaning of the banner was "cryptic," and that it might be "offensive to some, perhaps amusing to others."¹⁸⁶ Frederick, the student who made the banner, testified that the words were intentionally nonsensical and designed to catch the attention of the television cameras covering the relay.¹⁸⁷ The Court dismissed his explanation as going merely to his motive for holding up the sign, not to its meaning.¹⁸⁸ The Court concluded that even though the phrase might be "[g]libberish," the principal's interpretation of the banner as promoting illegal drug use was "plainly a reasonable one,"¹⁸⁹ particularly given its "undeniable reference to illegal drugs."¹⁹⁰ It was also "reasonable," the Court held, for the principal to believe that failing to react to the sign "would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."¹⁹¹ Similar to its decision in *Fraser*, the Court rejected arguments that the principal had restricted speech conveying a political or religious message, proclaiming that "this is plainly not a case about political debate over the criminalization of drug use or possession."¹⁹²

In reaching its conclusion, the Court made clear that *Tinker*'s materially disruptive analysis was not the only governing standard for permissible restrictions of student expression.¹⁹³ Instead, the Court emphasized that the important principle flowing from *Tinker* and *Fraser* is that students in public schools simply do not enjoy the same level of constitutional rights as adults due to the "special characteristics of the

182. *Id.* at 281–82.

183. 127 S. Ct. 2618 (2007).

184. *Id.* at 2629.

185. *Id.* at 2622.

186. *Id.* at 2624.

187. *Id.*

188. *Id.* at 2625.

189. *Id.* at 2624–25.

190. *Id.* at 2625.

191. *Id.* at 2629.

192. *Id.* at 2625.

193. *Id.* at 2627.

school environment.”¹⁹⁴ To support its finding, the Court cited its recent Fourth Amendment cases in which it upheld various searches of students in school that would be otherwise unconstitutional.¹⁹⁵ In these cases, the Court has emphasized that Fourth Amendment rights, like First Amendment rights, are lesser in public schools than elsewhere, and that courts “cannot disregard the schools’ custodial and tutelary responsibility for children.”¹⁹⁶ Given the school’s “important—indeed, perhaps compelling” interest in preventing drug use, the principal’s decision to punish Frederick for his banner did not arise out of an “abstract desire to avoid controversy,” which the Court suggested would have been unconstitutional.¹⁹⁷ To support its point, the Court pointed to statistics concerning drug use among young people as well as Congress’s support for state and local drug-prevention programs.¹⁹⁸

While the school won the case, it did not win on all its legal arguments. The school and several of its supporting amici had argued for an expansion of *Fraser* that would permit public schools to restrict not just lewd or obscene speech but any student expression that they might determine to be offensive to the school’s educational mission.¹⁹⁹ In rejecting this argument, the majority expressed concern that “much political and religious speech might be perceived as offensive to some.”²⁰⁰

Although Chief Justice Roberts’s opinion had five votes, three Justices who joined that opinion also filed or joined important concurrences. Justice Thomas’s concurring opinion argued that rather than create another exception to *Tinker*, the Court should simply overrule that case.²⁰¹ Drawing on cases from colonial times and from the nineteenth century in which schoolmasters were given broad, discretionary power to control their pupils,²⁰² Justice Thomas argued that “[a]s originally understood, the Constitution does not afford students a right to free speech in public schools.”²⁰³ Justice Thomas’s position harkened back to Justice Black’s dissenting opinion in *Tinker*, and in fact Justice Thomas quoted Justice

194. *Id.* at 2626–27 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

195. *Id.* at 2627–28 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) and citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995)).

196. *Id.* at 2627–28 (quoting *Earls*, 536 U.S. at 829–30 (quoting *Vernonia*, 515 U.S. at 656)).

197. *Id.* at 2628–29.

198. *Id.* at 2628.

199. *Id.* at 2629; see also *id.* at 2637 (Alito, J., concurring).

200. *Id.* at 2629 (majority opinion).

201. See *id.* at 2634 (Thomas, J., concurring).

202. *Id.* at 2630–33.

203. *Id.* at 2634.

Black at length.²⁰⁴ Throughout his concurrence, Justice Thomas emphasized the *in loco parentis* principle, by which parents who send their children to public school are deemed to have granted the school the power to act in their stead.²⁰⁵ Justice Thomas argued that parents have a choice whether to send their children to public or private schools, and to the extent they do not approve of how a public school disciplines its students, the parents can advocate for change through political bodies, send their children to private school, home school the children, or “simply move.”²⁰⁶ Justice Thomas’s draconian view that public school students should have no free speech rights at all appeared to have no support from any other member of the Court.

Justice Alito, joined by Justice Kennedy, authored a concurring opinion that placed important limitations on the potentially broad scope of the majority opinion. Justice Alito emphasized that the holding of the majority’s opinion was narrow and that nothing it said should be construed to permit a school to restrict unpopular religious or political speech simply because it was in tension with the school’s “educational mission.”²⁰⁷ Justice Alito argued that permitting schools to prohibit speech that conflicts with their self-defined educational mission “would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed,”²⁰⁸ a proposition that would undermine the very core of the First Amendment. This part of Justice Alito’s opinion seems aimed directly at decisions like the Ninth Circuit’s decision in *Harper v. Poway Unified School District*,²⁰⁹ discussed above, that permitted schools to restrict anti-gay speech on the ground that such speech is inconsistent with the school’s educational mission.²¹⁰

Justice Alito also emphasized that any theory permitting greater restriction of student expression cannot be based on a premise that parents have delegated their authority to the schools, as Justice Thomas argued,²¹¹ because most parents have little choice but to send their children to public schools.²¹² Instead, Justice Alito argued, the constitutionality of speech restrictions in public secondary schools must rest on “some special

204. *Id.* at 2633–34 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 522, 525, 526 (1969) (Black, J., dissenting)).

205. *Id.* at 2631–33.

206. *Id.* at 2635.

207. *Id.* at 2637 (Alito, J., concurring) (quoting Brief of Petitioner at 21, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278)).

208. *Id.*

209. 445 F.3d 1166 (9th Cir. 2006).

210. *Id.* at 1171–72, 1185 (9th Cir. 2006); *see also supra* notes 113–37 and accompanying text.

211. 127 S. Ct. at 2635 (Thomas, J., concurring).

212. *Id.* at 2637 (Alito, J., concurring).

characteristic of the school setting.”²¹³ Although Justice Alito had rejected reliance on the in loco parentis principle, he emphasized that “schools can be places of special danger,” and parents are unable to protect their children from “threatening individuals and situations.”²¹⁴ He concluded that Frederick’s banner posed a “threat to the physical safety of students” that was “just as serious” as a threat of actual violence because it advocated illegal drug use.²¹⁵ Justice Alito argued that schools must have the authority to intervene “before speech leads to violence,” and that the *Tinker* “substantial disruption” standard allows them to do just that.²¹⁶ Justice Alito did not explain how Frederick’s sign posed anything more than an “undifferentiated fear or apprehension” that students will use illegal drugs, a basis that under *Tinker* is insufficient for restricting student speech.²¹⁷

Although the Court emphasized that its holding in *Morse* was limited to speech concerning illegal drug use,²¹⁸ it is hard to accept such a narrow view of the holding as a theoretical matter. Indeed, some lower courts have held that a school may now restrict the expression of its students whenever school officials reasonably believe that the speech is harmful or threatening to the students. For example, a federal district court in California recently held that *Morse* permits a school to prohibit its students from wearing T-shirts that condemn homosexuality on the grounds that such speech may reasonably be considered “harmful” to its students.²¹⁹ And the Courts of Appeals for the Fifth and Eleventh Circuits have similarly read *Morse* broadly to permit school administrators to punish speech that threatens harmful activity, without evaluating the potential for material disruption under *Tinker*.²²⁰

213. *Id.* at 2638.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).

218. *See Morse*, 127 S. Ct. at 2628–29.

219. *Harper v. Poway Unified Sch. Dist.*, No. 04-CV-1103, slip op. at 9 (S.D. Cal. Feb. 11, 2008). The district court rejected the plaintiff’s motion to reconsider the decision granting summary judgment to the school that had prohibited a student from wearing a T-shirt declaring “Homosexuality is shameful. Romans 1:27.” *Id.* at 2, 10. Previously, the Ninth Circuit had affirmed the denial of the plaintiff’s motion for preliminary injunction; later, after the district court granted summary judgment to the defendants, the Supreme Court vacated the Ninth Circuit’s decision as moot due to the summary judgment. *Id.* at 2; *see also supra* note 113. Subsequently, the district court considered the present motion for reconsideration on limited remand from the Ninth Circuit. *Harper*, No. 04-CV-1103, slip op. at 3. In ruling on the motion for reconsideration, the district court relied on the findings in the Ninth Circuit’s vacated case as the law of the case. *Id.*

220. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007) (finding that Justice Alito’s concurring opinion makes it clear that “speech advocating a harm that is

IV. LOWER COURT TREATMENT OF STUDENT SPEECH IN THE DIGITAL MEDIA

The Court's school cases provide little direct guidance to the lower courts concerning the authority of school officials to punish student speech involving the digital media. On the one hand, all the Court's school speech cases to date have involved speech on school grounds or during a school-sponsored activity; this fact arguably renders all their cases inapplicable to digital speech, which typically is created, shared, and viewed off the school grounds.²²¹ On the other hand, the Court's increasing deference to school administrators indicates that the Court is willing to give schools wide berth when it comes to disciplining their students for their expression, regardless of which medium they use. As a result of the lack of clear guidance from the Court, it is perhaps not surprising that the lower courts have reached different conclusions on student speech rights in the digital age.

A. *Guidance—or Lack Thereof—from the Supreme Court*

All four of the Court's student speech cases involve situations where the student expression at issue either took place on school grounds or during a school-sanctioned activity off campus (*Morse*, *Fraser*, and *Tinker*)²²² or was considered school-sanctioned speech (*Hazelwood*).²²³ Furthermore, because most digital speech cases do not have a geographic nexus to the school, there is a necessary disconnect between the challenged expression and any actual disruption to the classroom or learning environment.

Although in *Morse* the Court had an opportunity to offer some guidance on schools' authority to restrict speech outside school grounds, it dodged the issue. In that case, the student had argued that the school lacked authority to restrict his speech because he displayed his sign on a public sidewalk, off school property, at an event attended by the general public.²²⁴ The Court gave short shrift to this argument and instead accepted the school's contention that the students were participating in a school-

demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected"); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (reasoning that the rationale of *Morse* "applies equally, if not more strongly, to speech reasonably construed as a threat of school violence").

221. See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 269–70 (2001) (noting that none of the Supreme Court's student speech cases involve off-campus speech).

222. *Morse*, 127 S. Ct. at 2624; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986); *Tinker*, 393 U.S. at 504.

223. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

224. *Morse*, 127 S. Ct. at 2622.

sanctioned activity with adult supervision and that accordingly it was a typical school speech case.²²⁵ At the same time, the majority recognized that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.”²²⁶ Only Justice Alito’s concurring opinion suggested that a distinction between on-campus and off-campus speech might be warranted. He argued that the reason schools have greater leeway to regulate student expression is that parents are not present during school hours to protect and guide their children, who “may be compelled on a daily basis to spend time at close quarters with other students who may do them harm.”²²⁷ In contrast, Justice Alito argued, when students are away from school, “parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate.”²²⁸

Morse effectively expanded the school’s authority to punish student expression, and this holding could have ramifications for speech on the Internet. The speech at issue in that case did not cause any material disruption to the school’s activities or to the rights of others.²²⁹ And the Court conceded that *Hazelwood* had no application because “no one would reasonably believe that Frederick’s banner bore the school’s imprimatur.”²³⁰ Instead, *Morse* gave tremendous deference to school officials’ interpretation of the meaning and likely effect of student speech.²³¹ The Court’s apparent willingness to continue to erode student speech rights and to expand the power of school officials to punish student

225. *Id.* at 2624. In a footnote, Justice Stevens remarked that Frederick may not have realized that the school policy governing student expression applied to his speech because it did not take place on school premises and did not occur at a school social event or class trip, as the school policy appears to require. *Id.* at 2647 n.2 (Stevens, J., dissenting). But Justice Stevens’s comments appear directed only at how to interpret the school policy, not the jurisdiction of the school over student speech.

226. *Id.* at 2624 (majority opinion) (citation omitted).

227. *Id.* at 2638 (Alito, J., concurring).

228. *Id.*

229. *Id.* at 2627–29 (majority opinion) (pointing out that the *Tinker* framework for analyzing school speech restrictions is not absolute and concluding that schools could restrict student speech that is reasonably interpreted as speech promoting drug use).

230. *Id.* at 2627.

231. As Justice Stevens persuasively argued in his dissent, it was not very reasonable to interpret the phrase “BONG HiTS 4 JESUS” as expressly advocating illegal drug use. *Id.* at 2646 (Stevens, J., dissenting). Justice Stevens conceded that some high school students are “dumb,” but “most students know dumb advocacy when they see it,” and no reasonable student would be persuaded to engage in illegal drug use as a result of seeing this banner. *Id.* at 2649. Justice Stevens accused the Court of “abdicat[ing] its constitutional responsibility,” *id.* at 2647, pointing to a long line of Supreme Court cases in which the Court has been unwilling to accept the subjective interpretation of expression by either a listener or a legislature, *id.* at 2647–50. In this case, even if it is unclear what the message means, Stevens argued that “the tie would have to go to Frederick’s speech, not to the principal’s strained reading of his quixotic message.” *Id.* at 2649.

expression indicates that, at least on a theoretical basis, the Court might be willing to give schools broader authority to punish student speech in the digital media.

B. *Various Approaches of the Lower Courts*

Given that all the Supreme Court's student speech cases involve speech on campus or during a school-sponsored activity,²³² it is not surprising that some lower courts confronting a student speech issue first ask whether the expression at issue can be considered on-campus or off-campus speech.²³³ Among those courts grappling with this question, two general approaches to answering it have developed. The first is to consider whether the speech at issue is physically on campus, which can mean that it was accessed by someone electronically on campus or that a copy of the speech at issue was brought onto campus.²³⁴ The second, more expansive approach is to consider whether the speech is either "aimed" at the school or whether it should have been "reasonably foreseeable" to the student that the speech would come to the attention of the school authorities.²³⁵

Interestingly, most courts to confront student speech cases—including those that have taken a more restrictive view of a school's jurisdiction over student speech—have suggested that they might be willing to apply *Tinker* in any student expression case, even if the student speech is plainly off campus, as long as the speech causes a substantial disruption at the school.²³⁶ At the same time, most courts have been unwilling to apply *Fraser* to off-campus student speech.

1. Territorial Approach

Many courts confronting a student speech case first consider whether the student-speaker used school computers or servers to create, print, or view the expression, or whether they or other students brought hard copies of the material onto the school's campus.²³⁷

232. See *supra* notes 222–23 and accompanying text.

233. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (listing cases that involve on-campus speech, off-campus speech later brought onto campus, and Internet speech). This is also the approach courts have generally taken to student speech rights cases that do not involve digital media, such as cases involving "underground" or unofficial student newspapers distributed off campus. See *infra* notes 245–55 and accompanying text.

234. See *infra* Part IV.B.1.

235. See *infra* Part IV.B.2. At least one commentator has argued that because the Internet can be accessed anywhere, and because students frequently talk about material posted on the Internet while they are at school, speech on the Internet is "'virtually' on campus." See Susan Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 920 (2001). Not surprisingly, no court has taken this approach.

236. See *infra* Part IV.B.3.

237. See *Boucher v. Sch. Bd.*, 134 F.3d 821, 828–29 (7th Cir. 1998) (holding that Supreme

Most courts taking this sort of territorial approach make clear that it must be the student-speaker himself—and not another pupil or school administrator—who has accessed the speech at school or otherwise caused the speech or a copy of it to physically appear on campus.²³⁸ In other words, for these courts the speech cannot become on-campus speech simply whenever a third party or a school official brings or accesses the material on the Internet at school.²³⁹ This approach has its roots in cases involving diaries and underground newspapers circulating in hard copy. For example, in *Porter v. Ascension Parish School Board*,²⁴⁰ the Fifth Circuit held that a school district lacked authority to punish a student for a violent sketch contained in a notebook that had been brought to campus unwittingly by the student's younger brother, after it had been sitting in a closet for two years.²⁴¹ The court emphasized that the sketch was “never intended by [the student] to be brought to campus” and that “[h]e took no action that would increase the chances that his drawing would find its way to school.”²⁴² The court concluded that under such circumstances, the speech was “not exactly speech on campus or even speech directed at the campus.”²⁴³ That the sketch clearly concerned the school—it depicted his school under siege by a gasoline tanker truck, missile launcher, and armed persons, contained disparaging remarks about the principal, and depicted a brick being hurled at him²⁴⁴—made no difference to the court's analysis.

Court's student speech cases applied in case where unofficial student newspaper was distributed on campus, especially since it advocated hacking into the school's computers); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1072, 1074–75 (5th Cir. 1973) (holding that school had authority to punish student for underground newspaper published off campus that was distributed near campus); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850–51, 865 (Pa. 2002) (holding as a threshold matter that a student website created off campus called “Teacher Sux” constituted “on-campus speech” because he had accessed the website at school, showed it to a fellow student and had informed other students of the existence of the website). *But see* *Layschock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591–92, 599–601 (W.D. Pa. 2007) (applying *Fraser* and *Tinker* tests and holding that school lacked authority to punish student for creating fake MySpace.com profile for principal even though student had showed the profile to other students and accessed the profile from school twice); *Calvert*, *supra* note 221, at 265–67 (arguing that if a student downloads or otherwise “brings” his off campus website to school, “schools may properly act as a quasi-official third arm of the justice system and punish that expression”).

238. One exception to this general rule is *Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008). In that case, the court held that there was a sufficient connection between the website at issue and the school campus because, in addition to other factors, a student had brought a paper copy of it to school. *Id.* at *7. There is no indication in the court's opinion that the student who created the website brought it to school himself. *See id.* at *2 (noting that “a student” gave the principal a copy of the website).

239. *See Calvert*, *supra* note 221, at 266.

240. 393 F.3d 608 (5th Cir. 2004).

241. *Id.* at 615.

242. *Id.*

243. *Id.*

244. *Id.* at 611.

A panel of the Second Circuit took a similar approach in *Thomas v. Board of Education*.²⁴⁵ *Thomas* involved the publication to the school community of a satirical underground newspaper that contained some vulgar and offensive content.²⁴⁶ In that case, the students did most of the publication work after school hours in a classroom where they occasionally asked a teacher grammatical and other questions.²⁴⁷ Although the students sold the paper in town, they stored extra copies of the newspaper in the classroom closet.²⁴⁸ The Second Circuit held that the school lacked authority to restrict the newspaper because “all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate.”²⁴⁹ The *Thomas* court declared that the “limited abrogation of First Amendment guarantees” that the Supreme Court has permitted in cases like *Tinker* “is wholly out of place here for in those cases all activities were conducted on school property.”²⁵⁰ Instead, the Second Circuit declared that a schoolmaster’s authority “does not reach beyond the schoolhouse gate,” and that accordingly any school restrictions on off-campus speech had to meet the same standards any government actor restricting speech must meet.²⁵¹ The court discussed the dangers inherent in giving a well-meaning school official broad authority to act as “both prosecutor and judge”; the court explained that “[the school official’s] intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy.”²⁵² Although the court explained it was resigned to accepting this discretion with respect to on-campus speech, it rejected “the imposition of such sanctions for off-campus expression.”²⁵³ The court seemed particularly concerned that if schools were given deference to regulate off-campus speech, they would be in danger of intruding upon the role of parents: “Parents still have their

245. 607 F.2d 1043 (2d Cir. 1979).

246. *Id.* at 1045.

247. *Id.*

248. *Id.*

249. *Id.* at 1050. After being warned to keep the paper off the school grounds, the students made efforts to sever the publication’s connection to the school. *Id.* at 1045. Among other things, the students added a disclaimer, produced the paper at a local community business, and sold it to classmates at a local store. *Id.* Although the students did not distribute the newspaper at school, they did store copies in a teacher’s closet, with his permission. *Id.* The Second Circuit did not find it significant that the students occasionally used school typewriters to transcribe articles or that they stored unsold copies of the newspaper in the teacher’s closet. *Id.* at 1050.

250. *Id.* at 1049–50.

251. *Id.* at 1044–45; see also *Klein v. Smith*, 635 F. Supp. 1440, 1440–41 (D. Me. 1986) (holding that a school lacked authority to discipline a student who had made a vulgar gesture to a teacher after school hours and off school grounds, and holding that the connection between the gesture and the orderly operation of the school was “too attenuated”).

252. *Thomas*, 607 F.2d at 1051.

253. *Id.*

role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *parens patriae*.”²⁵⁴ The court ultimately concluded that the best approach would be to declare that schools had no authority to restrict speech that takes place off school grounds.²⁵⁵

In *J.S. v. Bethlehem Area School District*,²⁵⁶ the Pennsylvania Supreme Court applied the territorial approach to a website. The court held that speech will be considered on-campus speech “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator.”²⁵⁷ Applying this rule to the case before it, the court concluded that a student’s website was on-campus speech because although the student had created the objectionable “Teacher Sux” website off campus, he had accessed the website at school, shown it to another student, and told other students about his website.²⁵⁸

2. More Expansive “Directed” and “Foreseeable” Approaches

Other courts have been willing to conclude that student speech constitutes on-campus speech whenever the student has directed his speech to campus, or when it is reasonably foreseeable that the speech will come to the attention of school authorities.²⁵⁹

A panel of the Second Circuit took this expansive approach in *Wisniewski v. Board of Education*.²⁶⁰ Led by Judge Newman,²⁶¹ the panel

254. *Id.*; see also *id.* at 1052 n.18 (expressing concern about interfering with the role of parents and noting that parents who had no objections to the paper would be powerless against the imposed sanctions).

255. *Id.* at 1052.

256. 807 A.2d 847 (Pa. 2002).

257. *Id.* at 865.

258. *Id.* In addition, the court noted that school officials were able to access the site because it was not password-protected, and the subject matter of the website concerned teachers at that school. The court concluded that “it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property.” *Id.*

259. Some commentators have advocated for variations of this approach. See Caplan, *supra* note 51, at 163 (“An exception to the rule against treating off-campus speech that affects school as if it occurred on-campus may exist for conduct that is directed exclusively at the school (as opposed to the world at large), that is maliciously intended for the purpose of disrupting school, and that has a high likelihood of succeeding in its purpose.”); Servance, *supra* note 64, at 1239 (arguing that schools should have authority to punish cyberbullying or harassment when it has an impact on campus and proposing a test for determining whether such impact occurred).

260. 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 127 S. Ct. 1741 (2008).

261. Judge Newman had written a concurring opinion in *Thomas* criticizing the Second Circuit for adhering to a rigid territoriality principle, *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (Newman, J., concurring). In *Thomas*, Judge Newman argued that a school should have the authority to restrict student speech that is “aimed at students of a particular school, is sold exclusively to students of that school, and is distributed near the school grounds” because such speech clearly concerns the school community. *Id.*

held that a school can apply the *Tinker* standard to student speech on the Internet as long as there is a “reasonably foreseeable risk that [the speech] would come to the attention of school authorities”²⁶² Judge Newman held that it was constitutional for a public school to punish eighth-grade student Aaron Wisniewski for sending instant messages from his home computer to fifteen friends (some of whom were classmates) with an icon depicting a pistol firing a bullet at a person’s head and the words ““Kill Mr. VanderMolen,”” Wisniewski’s English teacher.²⁶³ Although Wisniewski did not IM his teacher or any other school official, VanderMolen learned about his icon when another student heard about the icon and told the teacher about it.²⁶⁴ The teacher in turn informed school officials, who contacted the police, the superintendent, and Wisniewski’s parents.²⁶⁵ VanderMolen said that the icon scared him and made him feel sick to his stomach; the school agreed to remove him from teaching Wisniewski’s class.²⁶⁶ The police concluded after an investigation that Wisniewski posed no threat to VanderMolen or any school official; the psychologist who evaluated Wisniewski also concluded that Wisniewski meant the icon as a joke and had no violent intent.²⁶⁷ Despite these findings, the Board of Education approved a one-semester suspension for threatening a teacher in violation of student handbook regulations and for creating a disruption in the school environment.²⁶⁸ After serving out his suspension, Wisniewski returned to school for a term, but due to school and community hostility, the family later moved out of town.²⁶⁹

Wisniewski’s family filed a lawsuit on his behalf, arguing among other things that the icon was protected speech under the First Amendment and did not constitute a ““true threat.””²⁷⁰ The district court granted the summary judgment to the school,²⁷¹ and the Second Circuit upheld the decision on appeal.²⁷² Judge Newman, writing for the panel, emphasized that “[t]he fact that [the student]’s creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.”²⁷³ Judge Newman explained that the *Tinker*

262. *Wisniewski*, 494 F.3d at 38.

263. *Id.* at 35–36, 40.

264. *Id.* at 36. The student-informant did not receive the icon from Wisniewski himself; he learned about the icon from another student. *Wisniewski v. Bd. of Educ.*, No. 5:02-CV-1403, 2006 WL 1741023, at *1 (N.D.N.Y. June 20, 2006), *aff’d*, 494 F.3d 34 (2d Cir. 2007).

265. *Wisniewski*, 494 F.3d at 36.

266. *Wisniewski*, 2006 WL 1741023, at *3.

267. *Wisniewski*, 494 F.3d at 36.

268. *Id.* at 36–37.

269. *Id.* at 37.

270. *Id.*

271. *Wisniewski*, 2006 WL 1741023, at *9.

272. *Wisniewski*, 494 F.3d at 40.

273. *Id.* at 39.

standard governed because it was “reasonably foreseeable” that Wisniewski’s icon would come to the attention of school authorities and that it would “materially and substantially disrupt the work and discipline of the school.”²⁷⁴ The icon disrupted school operations because it diverted the attention of school officials, required the replacement of the threatened teacher (who refused to teach Wisniewski any more), and required officials to interview students during class time.²⁷⁵ Given this, the court ruled, it was irrelevant whether the student’s icon constituted a true threat because “we think that school officials have significantly broader authority to sanction student speech than the [Supreme Court’s true threat] standard allows.”²⁷⁶

Judge Newman did not spend much time outlining the contours of his novel “reasonably foreseeable” test. He did note that the panel disagreed about whether it would be necessary to consider the reasonable foreseeability of speech reaching the school in cases like this one, in which it is undisputed that the speech did in fact reach the school.²⁷⁷ It is hard to understand how a panel would not be required to determine whether it was in fact reasonably foreseeable whether Wisniewski’s IM icon would come to the attention of school officials, given that the icon appeared only on private communications Wisniewski sent to his friends, he did not use a school computer to send these communications, and the icon came to the school’s attention only weeks later when another student, who had not received an e-mail from Wisniewski himself,²⁷⁸ told the teacher about it.²⁷⁹

274. *Id.* at 38–39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

275. *Id.* at 36.

276. *Id.* at 37–38.

277. *Id.* at 39. Judge Newman wrote:

In this case, the panel is divided as to whether it must be shown that it was reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability. We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.

Id. One judge was concerned that an irrebutable presumption of reasonable foreseeability, arising once a message actually reaches the school authorities, would lead to punishment in situations when a student hides a message and another student steals it and brings it to the attention of the school, analogous to the one that occurred in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004). *Id.* at 39 n.4.

278. *Wisniewski v. Bd. of Educ.*, No. 5:02CV1403, 2006 WL 1741023, at *1 (N.D.N.Y. June 20, 2006).

279. *Id.* It is impossible to reconcile *Wisniewski* with *Thomas*, the Second Circuit’s 1979 opinion concerning off-campus newspapers. In that case, the students did some work on the papers at school, occasionally consulted with a teacher, and left some copies of the papers in a school

In a subsequent case, another panel of the Second Circuit refined this “reasonably foreseeable” test. In *Doninger v. Niehoff*,²⁸⁰ junior class secretary Avery Doninger was frustrated with a decision of school officials regarding a music festival she had been planning and wrote about her concerns on her blog at Livejournal.com.²⁸¹ On this publicly accessible website, she called school officials “douchebags” and asked students and parents to call the school to complain.²⁸² When school officials learned about the comments Doninger had made on her website, they punished her by disqualifying her from running for class secretary during her senior year.²⁸³

The district court rejected her claim on two separate grounds. First, the district court concluded that because Doninger was not suspended or expelled from school but simply barred from participating in an extracurricular activity, neither *Tinker* nor *Fraser* applied.²⁸⁴ Instead, the district court explained, school officials are given broad latitude to decide whether students are permitted to participate in extracurricular activities because such participation is a privilege rather than a right.²⁸⁵ Here, the court held, Doninger’s blog “clearly violate[d] the school policy of civility and cooperative conflict resolution” and was inconsistent with her role as a student leader.²⁸⁶

Second, in an alternative holding, the district court concluded that the school had broad authority to restrict Doninger’s blog because it could be considered on-campus speech under *Wisniewski*’s “reasonably foreseeable” test.²⁸⁷ The court reasoned that

the content of the blog itself indicated that Avery knew other [high school] community members were likely to read it. After all, she chose the blog as a means of communicating her displeasure with the administration’s decisions and encouraging others to contact school officials with their own opinions, a choice that would have been senseless if no other students were likely to receive her message.²⁸⁸

Given that the blog could be considered on-campus speech, the court held

closet. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979). Of course, Judge Newman wrote a concurring opinion in *Thomas*, *id.* at 1053 (Newman, J., concurring), while in *Wisniewski* he drafted the majority opinion, *Wisniewski*, 494 F.3d at 35.

280. 527 F.3d 41 (2d Cir. 2008).

281. *Id.* at 44–45.

282. *Id.* at 45.

283. *Id.* at 46.

284. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213 (D. Conn. 2007).

285. *Id.* at 213–14.

286. *Id.* at 214–15.

287. *Id.* at 216–17.

288. *Id.* at 217.

that the school could restrict it under *Fraser* because it interfered with the school's "'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse.'"289

The district court did not discuss whether the school could also punish Doninger under *Tinker*. Apparently recognizing the breadth of its holding, the district court attempted to limit it to the facts of the case, noting that it "would be reluctant to find no First Amendment violation in other factual contexts or if the discipline imposed on Doninger were different."²⁹⁰ The court also stated that because Doninger's punishment for her blog was simply prohibition of running for student office during her senior year, the court "need not—and does not—decide whether . . . and when a school can suspend, discipline, or remove a student because of the content of a blog or email the student prepared off-campus."²⁹¹

On appeal, the Second Circuit affirmed the district court's decision, but on more narrow grounds.²⁹² Holding that the *Tinker* standard was sufficient to resolve the case, the court declined to determine whether off-campus student speech could be restricted under *Fraser*.²⁹³ Like the district court, the Second Circuit first concluded that it was "reasonably foreseeable" that Doninger's blog posting, although created off-campus, would reach the campus."²⁹⁴ This preliminary holding would appear to limit the broad scope of *Wisniewski*, where the panel had declined to determine whether it was necessary to decide whether it is reasonably foreseeable that off-campus speech would reach campus.²⁹⁵ After concluding that it was reasonably foreseeable that Doninger's speech would reach campus, the court concluded that the school could punish her under *Tinker* because it was foreseeable that her post would create a risk of substantial disruption at the school.²⁹⁶ The court explained that there were three factors that supported its conclusion.²⁹⁷ First, her language was not merely offensive but "potentially disruptive of efforts to resolve the ongoing controversy" with school officials.²⁹⁸ Second, the court highlighted that Doninger's post contained misleading, if not false, information that Jamfest had been canceled, when in fact school administrators simply wanted to reschedule

289. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (alteration in original)).

290. *Id.*

291. *Id.* at 212.

292. *Doninger v. Niehoff*, 527 F.3d 41, 54 (2d Cir. 2008).

293. *Id.* at 49–50.

294. *Id.* at 50.

295. *Id.* at 48 n.1 ("The *Wisniewski* panel divided on the question whether it was necessary in that case to show that it was reasonably foreseeable that the expression at issue would reach school property."); see also *supra* note 277 and accompanying text.

296. *Doninger*, 527 F.3d at 50–51.

297. *Id.* at 50.

298. *Id.* at 50–51.

it.²⁹⁹ The court concluded that “[i]t was foreseeable in this context that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery’s post.”³⁰⁰ Finally, the court reasoned that because Doninger was a student leader, her speech risked frustrating “the proper operation of [her high school]’s student government and undermining of the values that student government, as an extracurricular activity, is designed to promote.”³⁰¹ Like the district court, the Second Circuit hedged the scope of its decision by noting that it had “no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.”³⁰²

At least one federal district court recently engaged in a more expansive analysis of off-campus speech. In *Snyder v. Blue Mountain School District*,³⁰³ the district court held that an “off-campus” MySpace.com parody profile of the principal had a sufficient connection with the campus because the website concerned the principal of the school, students at the school were the intended audience, a paper copy of the website was brought to school, and the website was discussed at school.³⁰⁴

3. Direct Application of School Speech Cases

Although some courts ask as a threshold matter whether the student speech at issue constitutes on-campus or off-campus expression, others skip this inquiry and simply apply *Tinker*’s material disruption test directly. Thus, for example, in *Killion v. Franklin Regional School District*,³⁰⁵ a federal district court held that *Tinker* applied to student e-mail containing offensive remarks about a faculty member even though the student “did not print or copy the list to bring it on school premises” and even though an unknown student brought a copy of the e-mail to campus.³⁰⁶ To add to the confusion, some courts that do make a point of

299. *Id.* at 51.

300. *Id.*

301. *Id.* at 52.

302. *Id.* at 53.

303. No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

304. *Id.* at *7.

305. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

306. *Id.* at 448–49; *see also* *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974–75 (5th Cir. 1972) (implicitly suggesting that school can exercise authority over off-campus expression if it causes or may foreseeably cause substantial disruption on campus); *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying Supreme Court’s student speech cases to website created off campus); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177–78, 1180 (E.D. Mo. 1998) (applying *Tinker* to student’s home page created off campus but concluding that standard was not met under facts of the case; mentioning but not discussing significance of facts that student did not intend the home page to be accessed or viewed at his school, and that the student who brought the web page to the school’s attention did so without the

asking as a threshold matter whether speech is on- or off-campus expression nevertheless leave open the possibility that the *Tinker* test could apply regardless of the answer to that question.³⁰⁷

4. Inconsistent Application of *Tinker*

The lower courts are all over the map in the way in which they apply *Tinker*'s requirement that the expression cause a material-and-substantial disruption or interfere with the rights of others. This confusion indicates that one key to determining whether schools can restrict student expression is to decode *Tinker* itself.

Some courts conclude that *Tinker*'s material-and-substantial disruption standard is met when other students distribute, read, and react to the material at issue, or even when only the school administration reacts to the speech. For example, in one Minnesota case, a district court concluded that the school had demonstrated that an underground newspaper distributed in the school lunchroom caused a substantial disruption of school activities when students other than the plaintiffs disrupted the classes that followed "by passing around, reading, and reacting to plaintiff's paper."³⁰⁸ In *Wisniewski*, the recent Second Circuit case discussed above,³⁰⁹ the court found that an icon attached to instant messages sent to some students outside school was materially disruptive to the school merely because the school administrators had to spend time investigating it, including time interviewing students during class time, and the teacher who was the subject of the icon refused to teach the student ever again.³¹⁰ Following *Wisniewski*, a federal district court held that it was constitutional for a school to suspend a fifth grader for writing on one of his assignments that he would "blow up the school with all the teachers in it," even though only the teacher saw the assignment and there was no indication that the student intended to do any violence to the school or its students.³¹¹ Instead,

creator's authorization or knowledge); *Fenton v. Stear*, 423 F. Supp. 767, 769 (W.D. Pa. 1976) (upholding school punishment of student who called teacher a "prick" in an off-campus parking lot on a Sunday, holding that "[t]o countenance such student conduct . . . could lead to devastating consequences in the school").

307. See, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (stating that the Supreme Court's student speech cases do not apply to off-campus speech, but leaving open the possibility of applying *Tinker* in a case where off-campus speech causes substantial on-campus disruption); *J.S. ex rel H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 n.11 (Pa. 2002) ("Although not before our court, we do not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied.").

308. *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987).

309. See *supra* notes 259–78 and accompanying text.

310. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

311. *Cuff v. Valley Cent. Sch. District*, 559 F. Supp. 2d 415, 417, 420–21 (S.D.N.Y. 2008).

the court said that school officials “could reasonably have viewed [the student]’s writing as a general indication of violent intention or propensity, notwithstanding the fact that he might have been unable to perform the specific violent act he threatened.”³¹² The court added that it was irrelevant that the student’s speech did not actually disrupt the functioning of the school in any way.³¹³

Other courts have applied the material disruption standard much more strictly.³¹⁴ For example, in *Klein v. Smith*,³¹⁵ a student gave a teacher the finger at a restaurant parking lot after school hours.³¹⁶ A district court in Maine rejected the teacher’s claim, supported by his colleagues, that this gesture undermined the ability of the teacher to discipline students at school.³¹⁷ The court explained:

The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know that the prophecy implied in their testimony will not be fulfilled. I think that they know that, too.³¹⁸

Similarly, another district court rejected a school’s argument that an e-mail containing offensive remarks about a faculty member met the *Tinker* standard because the e-mail interfered with the school’s ability to discipline its students.³¹⁹ The court responded: “We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrators’ abilities to discipline students and maintain control.”³²⁰ Some district courts have taken a similar approach in cases involving parody profiles of teachers and school administrators on the Internet. In *M.K. v. Three Rivers Local Sch. Dist.*,³²¹ for example, a federal district court rejected the school’s claim that “decreased morale among the teachers, the loss of valuable administrative time on the matter, and

312. *Id.* at 422.

313. *Id.* at 422 n.3.

314. *See, e.g.,* *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1178–80 (E.D. Mo. 1998) (finding *Tinker* standard not met where principal made decision to discipline student “immediately upon seeing the homepage” because the principal was upset by its content, not because he had a reasonable fear of substantial disruption, and noting that only disruption in classroom was caused by delivery of disciplinary notices to the student).

315. *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986).

316. *Id.* at 1440–41.

317. *Id.* at 1141 & n.4.

318. *Id.* at 1441 n.4.

319. *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448, 456 (W.D. Pa. 2001).

320. *Id.* at 456.

321. No. 1:07CV1011, slip op. at 5–6 (S.D. Ohio Dec. 28, 2007).

teachers' uneasiness and anxiety about being the target of similar attacks by students" constituted material-and-substantial disruption under *Tinker*. In *Layshock v. Hermitage School District*,³²² another federal district court likewise concluded that administrators' efforts to shut down student access to the profile on school computers and the student "buzz" about the profile resulted in a "rather minimal" disturbance and did not satisfy the *Tinker* standard.³²³

Unfortunately, most courts that apply the *Tinker* standard are far too deferential to the schools' claims that the speech at issue caused a reasonable fear of a substantial disruption.³²⁴ In addition, courts generally permit the unreasonable reaction of teachers and school officials to constitute a disturbance. In several cases, teachers have refused to teach in the face of speech that would be protected speech if uttered by anyone other than a student.³²⁵ Given that teachers are arguably public figures,³²⁶ the willingness of courts to give credence to such thin-skinned behavior is striking.

Since the Columbine High School Massacre in 1999 that left twelve students and one teacher dead,³²⁷ almost no school has demonstrated tolerance of student speech that contains even the slightest reference or depiction of violence. For example, in *LaVine v. Blaine School District*,³²⁸ the Ninth Circuit upheld the expulsion of a student who had brought his teacher a poem he had written entitled "'Last Words'" that depicted the shooting of fellow students.³²⁹ The teacher passed along the poem to school officials and the school contacted police.³³⁰ Law enforcement and

322. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

323. *Id.* at 600.

324. *See, e.g.,* Cuff v. Valley Centr. Sch. Dist., 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008) (noting deferential approach of courts to First Amendment challenges to schools disciplining students); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389–92 (D. Minn. 1987) (noting that deference to school officials is not limitless, yet concluding that school could punish student even though distribution of underground newspaper did not disrupt any regular school activity).

325. *See, e.g.,* Bystrom, 686 F. Supp. at 1390 (noting that one teacher named in an underground newspaper "left the school grounds altogether rather than face the students' reaction to the article"); J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852, 859, 869 (Pa. 2002) (finding that website caused substantial disruption on campus because teacher who was subject of offensive speech was unable to return to school for the rest of the school year and received medical leave for the following year, even though, by court's own admission, the website was "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody . . . [that] did not reflect a serious expression of intent to inflict harm").

326. Sewell v. Brookbank, 581 P.2d 267, 270 (Ariz. Ct. App. 1978); Kelley v. Bonney, 606 A.2d 693, 709–10 (Conn. 1992); Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1102–03 (Okla. 1978). *But see* True v. Ladner, 513 A.2d 257, 262–64 (Me. 1986).

327. Evelyn Nieves, *Terror in Littleton: The Mourning; Long Week of Funerals Finally Comes to an End*, N.Y. TIMES, Apr. 30, 1999, at A26.

328. 257 F.3d 981 (9th Cir. 2001).

329. *Id.* at 983–84.

330. *Id.* at 984–95.

mental health professionals interviewed the student and concluded that he had no access to weapons and was not a danger to himself or his community.³³¹ Notwithstanding this conclusion, the school decided to expel the student, and the Ninth Circuit held that this decision was constitutional.³³² Recognizing that “schools cannot expel students just because they are ‘loners,’ wear black and play video games,” the court concluded that the school officials in this case had struck the proper balance between “protecting the safety and well-being of their students and respecting those same students’ constitutional rights.”³³³ In *Bystrom v. Fridley High School*,³³⁴ a federal district court similarly permitted a school to punish students who distributed on campus an underground newspaper that advocated violence against teachers (the opinion contained no specifics of this advocacy) even though the newspaper “[fell] far short of the standards by which adults could be punished for advocating violence.”³³⁵ The court reasoned that because the Supreme Court in *Fraser* permitted schools to regulate indecent speech that would otherwise be protected speech, deferring to the authority of the school officials to maintain order and inculcate traditional values, “this court must conclude that the Supreme court would defer to the school authorities in the same manner with respect to their decision to discipline the plaintiff students for advocating violence against their teachers.”³³⁶

As discussed above,³³⁷ the Court’s recent decision in *Morse v. Frederick* serves only to confirm this prediction. Indeed, the Fifth Circuit recently decided a case in which it relied heavily on *Morse* in rejecting a challenge to the expulsion of a student who wrote about a violent fantasy of engaging in Columbine-style violence at the school.³³⁸ The court reasoned that under *Morse*, it was unnecessary to consider the intent of the student in creating his diary (he said it was just a fantasy)³³⁹ and that the school must be given wide latitude to act to protect students from potentially great harms without having to satisfy *Tinker*’s substantial disruption test.³⁴⁰

Courts rarely recognize that there are limits to the authority of schools to punish expression that contains some threatening elements. In one such case, a student created a website in which he included mock obituaries of his classmates, and as part of the website asked visitors to vote on who should “‘die’” next—in other words, who should be the subject of the next

331. *Id.* at 985.

332. *Id.* at 983.

333. *Id.* at 987.

334. 686 F. Supp. 1387 (D. Minn. 1987).

335. *Id.* at 1392–93.

336. *Id.* at 1393.

337. *See supra* Part IV.A.

338. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007).

339. *Id.* at 771 n.3.

340. *Id.* at 769–70.

mock obituary.³⁴¹ A federal district court in Washington State held that the student was likely to succeed on his claim challenging his suspension for this website despite the school's claims that students felt threatened.³⁴² The court reasoned that students could not be punished for non-school-sponsored speech "on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials,"³⁴³ especially since the student did not intend to threaten anyone and had not "manifested any violent tendencies whatsoever."³⁴⁴

5. Hesitancy to Apply *Fraser*

One interesting wrinkle in many of the digital student speech cases is that several courts that are perfectly willing to extend *Tinker* to digital speech have been hesitant to apply *Fraser* to the same expressive activity.³⁴⁵ For example, in *Killion v. Franklin Regional School District*,³⁴⁶ a district court found that the *Tinker* standard applied equally to on-campus and off-campus speech,³⁴⁷ but that the *Fraser* prohibition against profanity did not apply to speech that "occurred within the confines of [the student]'s home, far removed from any school premises or facilities."³⁴⁸ The court in *Layshock v. Hermitage School District* took the same approach. Although it was willing to apply the *Tinker* test to a parody profile of the principal on MySpace.com, the court concluded that *Fraser* does not give schools authority to punish lewd and profane speech

341. *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

342. *Id.* at 1090.

343. *Id.* (quoting *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988)).

344. *Id.*; see also *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 782, 786 (E.D. Mich. 2002) (finding that school lacked authority to punish student for website that suggested that the reader should kill someone for no reason and in the process rejecting school's argument that website was unprotected true threat because there was no evidence that the student had communicated the statements on the website to anyone else, the website contained no threat against any of the students, and the website contained a disclaimer indicating that he did not wish anyone to die).

345. Not all courts share this reluctance. In *Snyder v. Blue Mountain School District*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), for example, the court did not hesitate to apply *Fraser* to uphold the suspension of student who posted an unflattering parody of his principal on MySpace.com that admittedly did not cause a substantial disruption under *Tinker* because it considered the parody to be particularly offensive and vulgar. See *id.* at *6–8. Interestingly, the court suggested that schools do not have unlimited authority to punish their students for lewd and offensive speech on the Internet but rather that they have such authority when the expression is particularly offensive. See *id.* (noting repeatedly that the website at issue in the case was especially lewd, vulgar, and offensive).

346. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

347. *Id.* at 445. The court ultimately concluded that the school had failed to demonstrate that the speech at issue created a substantial disruption or reasonable fears of such a disruption. *Id.* at 455–56.

348. *Id.* at 456–57.

that occurs off campus.³⁴⁹ In *Coy v. Board of Education*,³⁵⁰ an Ohio federal district court held that *Fraser* did not apply to a website containing indecent language when the school administration, at the time the student was expelled, did not have any evidence that any other student viewed the student's website; unlike *Fraser*, the court explained, there was no captive audience.³⁵¹ The Supreme Court of Pennsylvania voiced similar concerns in *J.S. v. Bethlehem School District*,³⁵² where it noted that the case, which involved offensive speech on the Internet, was not "on all fours" with *Fraser* because the website "was not . . . expressed at any official school event or even during a class, subjecting unsuspecting listeners to offensive language."³⁵³ Instead, the court required the school to satisfy *Tinker*'s substantial disruption test.³⁵⁴

Although these courts do not provide a detailed analysis of their reasoning, it may be that courts are more reluctant to apply *Fraser* to off-campus speech than *Tinker* because at least *Tinker* requires a showing that the expression disrupted or could reasonably be expected to disrupt school activities; *Fraser* does not.³⁵⁵ In other words, courts must recognize that even if they conclude that the *Tinker* test applies to off-campus speech, that test still requires schools to meet the substantial disruption standard prong of *Tinker*. As a result, some courts applying *Tinker* to Internet speech have nevertheless rejected the authority of school officials to regulate that speech when officials fail to demonstrate that it materially disrupted the school.³⁵⁶ *Fraser*, in contrast, does not require the school to make any showing that the offensive language disrupted the school's activities;³⁵⁷ as a result, schools could restrict any indecent speech by a student, anywhere regardless of where he engages in it, without any additional showing. The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students' expression.

349. 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007).

350. 205 F. Supp. 2d 791 (N.D. Ohio 2002).

351. *Id.* at 799–800, 799 n.3.

352. 807 A.2d 847 (Pa. 2002).

353. *Id.* at 866.

354. *Id.* at 868; *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 nn.17–18 (2d Cir. 1979) (stating in one footnote that it would consider the possibility of applying *Tinker*'s substantial disruption test to off-campus speech, but indicating in the following footnote that it would not permit a school to regulate off-campus speech solely because it is indecent).

355. Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (noting that the school authorities failed to introduce any evidence that would lead to an expectation of substantial disruption or that any disruption actually occurred), with *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that the school acted permissibly under the First Amendment when it sanctioned the student for speech it considered "lewd" and "indecent").

356. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455–56 (noting that the school had failed to satisfy the *Tinker* test as it failed to show either that school activities were actually disrupted or that the school could expect disruption).

357. See *supra* note 356 and accompanying text.

When applied vigorously, *Tinker*'s material-and-substantial-disruption test provides an important—although, as I will argue below,³⁵⁸ ultimately insufficient—check on this authority.

V. POSSIBLE JUSTIFICATIONS FOR RESTRICTING JUVENILES' FIRST AMENDMENT RIGHTS

This Part begins with an examination of how the Court has treated the free speech rights of juveniles outside the school context. This inquiry is essential because permitting schools to exercise authority over student speech in the digital media would have dramatic ramifications for minors' speech rights generally. Accordingly, at the heart of the student-speech rights debates lies a deeper dispute about the constitutional rights children enjoy. In order to determine the scope of a school's authority to punish students for their digital speech, it is essential to examine closely the various justifications the Court has given for restricting the speech rights of minors both on school grounds and off.

A. *Speech Rights Outside School*

The Supreme Court has frequently held that the government has a right to protect children outside school from exposure to certain kinds of expression. The Court has been most willing to uphold restrictions on children's access to sexually explicit expression. Notably, the Court has ceded to state and local governments this authority without much analysis of the reasoning for restricting minors' rights in this way. Typically the Court assumes, with little analysis, that the speech restriction at issue—which almost always involves sexually explicit or indecent speech—is necessary to protect the emotional and moral development of children.

The Supreme Court first confronted the balance between the freedom of speech and the state's asserted interest in protecting children in *Ginsberg v. New York*,³⁵⁹ which involved a challenge to a state law that criminalized the distribution to anyone under age seventeen of publications that were obscene for minors.³⁶⁰ It was undisputed that the materials at issue in the case were not obscene for adults, and the law did not bar the storeowner from selling the magazines to adults.³⁶¹ The defendant argued that it was unconstitutional for the government to prohibit minors from receiving sexually explicit material that was otherwise permissible for adults.³⁶² The Court rejected this argument, concluding that the law did not

358. See *infra* Part VI.B.

359. 390 U.S. 629 (1968).

360. *Id.* at 631.

361. *Id.* at 634–35.

362. *Id.* at 636.

infringe the First Amendment rights of minors.³⁶³ The Court emphasized that “even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’”³⁶⁴ At the same time, the Court recognized the primary role parents have in controlling the right of children to access sexually explicit speech and noted that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”³⁶⁵ The Court regarded the New York law as one that supported, but did not interfere with, the ability of parents to regulate the morals of their children, emphasizing that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”³⁶⁶ The Court concluded that it was “not irrational” for the New York legislature to conclude that the material condemned by its law was harmful to the ethical and moral development of young people, even though, as the Court recognized, such a conclusion was hardly a scientifically proven fact.³⁶⁷

In a concurring opinion, Justice Stewart noted that “[a] doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute.”³⁶⁸ Nevertheless, he believed the law withstood constitutional scrutiny because the protections of the First Amendment presupposed a capacity to choose:

I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.³⁶⁹

This explanation—that some restrictions on the constitutional rights of minors is permissible because children lack the emotional and intellectual experience and judgment to make rational decisions—has been used to justify other restrictions on minors’ constitutional rights.³⁷⁰

363. *Id.* at 637.

364. *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

365. *Id.* at 639.

366. *Id.* (quoting *Prince*, 321 U.S. at 166).

367. *Id.* at 641–42.

368. *Id.* at 648–49 (Stewart, J., concurring).

369. *Id.* at 649–50 (footnotes omitted).

370. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (noting the different treatment of

In dissent in the *Ginsberg* case, Justice Douglas, joined by Justice Black, remarked that if lack of rationality is the basis for the law, “then [he could] see how modern Anthony Comstocks could make out a case for ‘protecting’ many groups in our society, not merely children.”³⁷¹ Justice Douglas said he had no problem with parents and religious organizations getting involved in censoring speech, but as he “read[s] the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature.”³⁷²

In *FCC v. Pacifica Foundation*,³⁷³ the Court permitted the regulation of indecent speech on broadcast television and radio.³⁷⁴ Although the Court conceded that much indecent speech was entitled to full constitutional protection, it held that the FCC’s regulations were justified for two primary reasons. First, the Court regarded broadcast media as “a uniquely pervasive presence” that reaches citizens even in “the privacy of the home.”³⁷⁵ Second, broadcast media were “uniquely accessible to children.”³⁷⁶ The Court noted that “[a]lthough Cohen’s written message might have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant.”³⁷⁷ The Court cited *Ginsberg* to support its conclusion that “the government’s interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household’ justified the regulation of otherwise protected expression.”³⁷⁸ In a concurring opinion, Justice Powell agreed that the law was a permissible means of providing support for parents to control the moral upbringing of their children; the FCC’s regulation, Powell argued, “leav[es] to parents the decision as to what speech of this kind their children shall hear and repeat”³⁷⁹

The FCC’s indecency regulations and the Court’s decision in *Pacifica* have been significantly criticized.³⁸⁰ As one commentator noted, he was

due process rights of juvenile offenders in the criminal justice system). The Court has also used the limited cognitive development of minors to justify the need to protect minors from generally applicable laws, such as the death penalty. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569–70, 578 (2005) (holding that the execution of individuals who were under age eighteen at the time of their crimes is unconstitutional under the Eighth and Fourteenth Amendments due to the differences between children and adults). *See infra* Part V.B.2.

371. *Ginsberg*, 390 U.S. at 655 (Douglas, J., dissenting).

372. *Id.*

373. 438 U.S. 726 (1978).

374. *Id.* at 750–51.

375. *Id.* at 748.

376. *Id.* at 749.

377. *Id.* The Court was referring to the message “‘Fuck the Draft,’” printed on the back of Cohen’s jacket. *See Cohen v. California*, 403 U.S. 15, 16 (1971).

378. *Pacifica*, at 749–50 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639, 640 (1968)).

379. *Id.* at 758 (Powell, J., concurring).

380. *See, e.g., Robert E. Riggs, Indecency on the Cable: Can It Be Regulated?*, 26 ARIZ. L.

“amused” by the Court’s decision in that case “that it was all right to make sure children didn’t hear the word ‘shit’ on the radio, because the eight-year-old who cuts my grass knows even better ways to get the mower started.”³⁸¹ Minors are exposed to bad language simply walking down the street, and often pick it up from their own parents. In his *Pacifica* dissent, Justice Brennan suggested that by upholding the indecency regulations, the Court permitted the government to regulate culture in a way that would be plainly impermissible if the government had not invoked the need to protect the children.³⁸² Justice Brennan argued that

[t]oday’s decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court’s view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court’s decision may be seen for what, in the broader perspective, it really is: another of the dominant culture’s inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.³⁸³

The government has not always won its argument that censorship laws must be upheld in order to protect children. In some cases, the Court has emphasized that government regulations must not only support, but also not interfere with, the right of parents to control the moral and ethical upbringing of their children.³⁸⁴ As a result, the Court has struck down regulations that would make it impossible for parents to expose their children to indecent expression if they so chose.³⁸⁵ In addition, the Court has also been reluctant to restrict the dissemination of information to children when the methods employed would unduly restrict the dissemination of information to adults, particularly when more narrowly tailored means of protecting children were available.³⁸⁶ The Court has

REV. 269, 286 & n.143 (1984) (listing sources).

381. John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 321 (1979).

382. *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting).

383. *Id.* at 776–77 (footnote omitted).

384. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 865, 878 (1997).

385. *Id.* at 864–65, 885 (1997) (invalidating a provision of the Communications Decency Act that would apply even in cases where parents consented or even participated in providing their children with access to the indecent prohibited material); *Bellotti v. Baird*, 443 U.S. 622, 637–39 (1979) (emphasizing the importance of deferring to parental control).

386. *See, e.g., United States v. Playboy Entm’t Group*, 529 U.S. 803, 806, 826–27 (2000) (striking down law requiring cable broadcasters either to fully scramble or to redirect to late-night hours sexually explicit programming); *Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115, 117, 131

never, however, questioned the assertion that the government has a compelling interest in protecting minors from indecent and sexually explicit speech as well as profanity.³⁸⁷

The Court's child-censorship cases clearly conflict with the rest of its free-speech jurisprudence. In case after case, the Court has rejected attempts to suppress speech on the basis of its "offensive" nature. In *Brandenburg v. Ohio*,³⁸⁸ the Court held that plainly offensive racist speech must be tolerated unless it constituted imminent incitement to violence.³⁸⁹ In *Texas v. Johnson*,³⁹⁰ the Court struck down a flag desecration statute, declaring that "the government may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable."³⁹¹ Even sexually explicit speech cannot be censored unless it meets the definition of "obscenity."³⁹² In *Cohen v. California*,³⁹³ the Court demanded that any bystanders offended by the language on Cohen's jacket ("Fuck the Draft") should bear the burden of simply "averting their eyes."³⁹⁴ Similarly, in *Bolger v. Youngs Drug Products Corp.*,³⁹⁵ the Court noted

(1989) (striking down federal law that prohibited indecent or obscene pre-recorded telephone messages); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (striking down law banning all distribution of material harmful for minors, regardless of the medium; the Court explained that the government may not "reduce the adult population . . . to reading only what is fit for children").

387. See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) (noting that "all Members of the Court appear to agree" that protecting minors from indecent material is a "compelling" government interest); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 743 (1996) (noting that the Court has often concluded that the "need to protect children from exposure to patently offensive sex-related material" is a compelling government interest); *Sable*, 492 U.S. at 126 (observing that protecting minors from literature that is not obscene by adult standards is a compelling interest); see also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 125–26 (Rutgers Univ. Press 2007) (discussing the Court's general acceptance that government has a compelling interest in protecting youth from indecent or sexually explicit speech).

388. 395 U.S. 444 (1969).

389. *Id.* at 446–49.

390. 491 U.S. 397 (1989).

391. *Id.* at 400, 414, 419–20.

392. See generally *Miller v. California*, 413 U.S. 15, 17–25 (1973) (noting that the state may legitimately restrict sexually explicit material only if it is obscene and proceeding to define obscene material as material that portrays sexual conduct in a patently offensive way, that appeals to the prurient interest and that lacks literary, political or scientific value).

393. 403 U.S. 15 (1971).

394. *Id.* at 16, 21; see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) ("[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" (quoting *Cohen*, 403 U.S. at 21) (alteration in original)). Although the *Pacifica* Court distinguished *Pacifica* from *Cohen* on the ground that broadcast media intrudes upon the privacy of the home, this distinction hardly holds water. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 & 749 n.27 (1978). There is no reason to assume the audience for broadcast television and radio is any more a captive audience than the public who had to stand in line at a California courthouse looking at Cohen's provocative jacket.

395. 463 U.S. 60 (1983).

that if homeowners received mail they regarded as offensive, they should simply make the “‘short, though regular journey from mail box to trash can.’”³⁹⁶

Notably, none of the Court’s cases addressing the speech rights of children concerns the right of minors to speak; instead, they all focus on protecting children from hearing or receiving speech that is regarded as harmful. Although there are plenty of reasons to question whether minors are indeed harmed by exposure to indecent speech, such concerns are even less persuasive when it is the minor speaking. Furthermore, all of the Court’s cases involve indecent or sexually explicit expression. It is by no means clear that the Court would extend its protectionist approach to violent speech or to other kinds of expression that are not indecent or profane.

B. *An Examination of the Various Justifications*

Courts and commentators offer at least five different justifications for permitting schools to restrict the speech rights of their students: (1) First Amendment theory; (2) the differences between adults and children; (3) the need to provide support to parents; (4) the *in loco parentis* doctrine; and (5) the “special characteristics” of the school environment. A close examination of these various theories reveals that none of them can support broad authority of a school to restrict student speech in the digital media.

1. First Amendment Theory

The theoretical bases for a right to freedom of expression do not logically exclude minors from the First Amendment’s purview or even explain why minors, particularly adolescents, are entitled to lesser or weaker free speech rights on or off school grounds.³⁹⁷ Granting minors free speech rights promotes the principles animating the right to free speech under the First Amendment: (1) the promotion of democratic self-government;³⁹⁸ (2) the search for truth in the marketplace of ideas; and

396. *Id.* at 72 (quoting *Lamont v. Comm’r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff’d*, 386 F.2d 449 (2d Cir. 1967) (*per curiam*)).

397. No one suggests that somehow the text of the First Amendment itself justifies restrictions on children’s free speech rights. *See* DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 25 (1989) (“[T]he language of the First Amendment provides no indication that it applies only—or even more strongly—to adults.”). In addition, to the extent the framers did not intend the First Amendment to apply to children, it is far more likely that they simply assumed that children would be under the guidance of their parents, and that the government would have little occasion to exercise authority over them. *Id.* at 26.

398. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (2003).

(3) the fostering of autonomy and self-fulfillment.³⁹⁹ All three ideas justify robust free speech rights for adolescents.⁴⁰⁰

To some, minors have a weak claim to free speech rights under the self-government rationale of the First Amendment for the simple reason that they cannot vote and therefore are not meaningfully involved in democracy. For example, Kevin Saunders has argued that

[t]he importance of free speech to self-government is that those who are able to make the decisions have all the information and will be able to convince each other of the wisest course. Children are not among those who make the decisions, so it is at least questionable how strongly the First Amendment, at least on this justification, applies to children.⁴⁰¹

There are several responses to this objection. First, political arguments minors make can have much more influence on the democratic process than other forms of adult speech that receive full constitutional protection, such as artistic speech.⁴⁰² Politically aware young people can have an impact on the political dialogue and influence the way their parents and other adults vote.⁴⁰³ Students are particularly likely to provide their parents and other adults with useful information regarding the operation of their schools and their educational experience. Although students may not have the right to vote themselves, they certainly can play an important part in educating adults who do.

In addition, one goal of public education should be to prepare minors to be political actors by training them to think rationally and critically. Without some education about how to exercise their free speech rights, students would enter the adult world without the necessary skills to contribute to the political world.⁴⁰⁴ As Judge Posner explained in a case

399. MOSHMAN, *supra* note 397, at 28–29.

400. *Id.* at 29.

401. SAUNDERS, *supra* note 398.

402. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 380 (2004).

403. Indeed, denying young people the right to freedom of expression could undermine the right of adults to receive their speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (noting that the First Amendment protects both the right to communicate as well as the right to receive communications from others). *But see* Garvey, *supra* note 381, at 344 (“Except in the case of the most exceptional prodigy, it is undeniable that children’s debates about adult issues serve no immediate social purpose.”).

404. Garvey, *supra* note 381, at 326–27; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 28–31 (1984) (pointing out that compulsory public education is one of the mechanisms through which children are indoctrinated with dominant societal agendas); R. George Wright, *Free Speech Values, Public Schools, and the Role of Judicial*

granting preliminary injunction against a violent video game law, “it is obvious that [minors] must be allowed the freedom to form their political views . . . *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.”⁴⁰⁵ In addition, public schools play an important role in preparing students to be democratic actors. As Justice Stevens argued in his dissenting opinion in *New Jersey v. T.L.O.*, “[t]he schoolroom is the first opportunity most citizens have to experience the power of government. . . . The values they learn there, they take with them in life.”⁴⁰⁶

Granting young people free speech rights can also promote stability by providing an outlet for dissenters. Justice Brandeis perhaps expressed this best in his concurrence in *Whitney*, where he stated that “[t]hose who won our independence . . . [knew] that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”⁴⁰⁷ Much student expression involves speech that poses some challenge to school authority. By calling school officials “douchebags” or creating a video mocking a teacher, the students vent their frustrations with the authority figures in their lives.

Allowing the marketplace of ideas to flourish at school and on the Internet helps prepare students to be participants in democracy that cherishes the free exchange of ideas and diversity of viewpoint.⁴⁰⁸ Given that young people spend the bulk of their time in school acquiring knowledge and developing their belief systems, the theory of the

Deference, 22 NEW ENG. L. REV. 59, 61 (1987) (arguing that a public school student has “a presently enforceable free speech right prohibiting restrictions imposed by the school in such a way as to significantly impair, inhibit, or otherwise ‘stunt’ the development of the student’s future free speech-relevant capacities as an adult”).

405. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577, 579–80 (7th Cir. 2001). More recently, Judge Posner has stepped away from his strong defense of children’s speech rights, arguing that “[t]he contribution that kids can make to the marketplace in ideas and opinions is modest and a school’s countervailing interest in protecting its students from offensive speech by their classmates is undeniable.” *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 671 (7th Cir. 2008). Judge Posner’s apparent change of heart seems at least in part due to low regard for the anti-homosexual speech at issue in the *Nuxoll* case. *See id.* (“Nor . . . is uninhibited high-school student hallway debate over sexuality . . . an essential preparation for the exercise of the franchise.”).

406. *New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985) (Stevens, J., dissenting).

407. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

408. *See Project, Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1441 (1976) (arguing that freedom of speech is needed so that schools can prepare students for life in a heterogeneous society by carrying out “their collectivist functions of academic achievement and socialization”).

marketplace of ideas has particularly strong currency for them.⁴⁰⁹ Communication among young people and with adults plays an important role in their development.⁴¹⁰ Children would be “ill-equipped to participate in the marketplace” of ideas without childhood exposure to a variety of views and practice in sifting through them to determine the truth.⁴¹¹

In a recent case involving a school’s decision to punish a student for wearing an anti-gay T-shirt to school, Judge Posner declared that “[t]he contribution that kids can make to the marketplace in ideas and opinions is modest.”⁴¹² As an empirical matter, it seems extraordinary to conclude that all adolescent expression is low-value speech that is not entitled to full constitutional protection. Indeed, it is even debatable whether anti-gay speech can be properly labeled low-value speech. Judge Kozinski, who dissented in the Ninth Circuit’s decision in *Harper*, certainly would disagree.⁴¹³ Even if we could accept Judge Posner’s sweeping condemnation of student speech, depriving First Amendment protection to speech on the basis that it is low-value speech would be inconsistent with the Court’s free expression jurisprudence.⁴¹⁴

Finally, the role of the freedom of expression in promoting autonomy and self-fulfillment has even more resonance with respect to minors than with adults.⁴¹⁵ Adolescence is a time of tremendous growth, self-awareness, and personality development. Allowing students to express themselves in the digital media promotes the development of their individuality.⁴¹⁶ As discussed in Part II, teenagers use digital media to connect with friends, engage in autobiographical expression and cathartic storytelling that directly promotes self-realization and self-reflection.⁴¹⁷

409. Buss, *supra* note 402, at 380.

410. *Id.*

411. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL’Y REV. 343, 350–51 (1989).

412. *Nuxoll v. Indian Prairie Sch. Dist.* #204, 523 F.3d 668, 671 (7th Cir. 2008) (arguing that the anti-gay student speech at issue in the case is not essential to public debate).

413. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1197 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated*, 127 S. Ct. 1484 (2007) (noting that the acceptance of homosexuality is subject to “political disagreement and debate”).

414. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393–94 (1992) (holding unconstitutional a law that banned fighting words on the basis of race, gender, or religious preference). Judge Posner appears to recognize this inconsistency, but nevertheless concludes that restricting offensive student speech is permissible because students are especially sensitive to derogatory speech. See *Nuxoll*, 523 F.3d at 671.

415. Buss, *supra* note 402, at 380–81; see also Dienes & Connolly, *supra* note 411, at 352–53 (“For children, self-expression is the means of growing into autonomous adults capable of employing free speech to pursue self-government and to search for truth.”).

416. See Garvey, *supra* note 381, at 347 (arguing that permitting the students in *Tinker* to wear black armbands promoted the development of their individuality).

417. See *supra* Part II.

2. Differences Between Children and Adults

Another popular justification for curtailing the free speech rights of minors rests on the inherent cognitive and developmental differences between children and adults.⁴¹⁸ Everyone has had experience with children and, based on these experiences, has formed some intuitive ideas about the differences between children and adults.⁴¹⁹ Upon closer examination, however, the differences between children and adults are not entirely clear, particularly when the focus is on the differences between adolescents and adults.

As a descriptive matter, the Court has been wildly inconsistent in its consideration of the argument that differences between adults and minors warrant different treatment for juveniles.⁴²⁰ On the one hand, courts have upheld laws restricting the rights of minors to get married, buy alcohol or cigarettes, gamble, possess firearms, or to serve on juries or vote.⁴²¹ On the other hand, the Court held in *Planned Parenthood of Central Missouri v. Danforth*⁴²² that minors unable to obtain parental consent to have an abortion must be given an opportunity to prove they are mature enough for the procedure.⁴²³ In addition, although many laws distinguish between children and adults at age eighteen, sometimes the line is drawn at different ages. For example, in most states children can get a license to drive at age sixteen, be tried as an adult for certain offenses at age fourteen, and are prohibited from buying alcohol until age twenty-one.⁴²⁴

The Court's most detailed and recent analysis of the differences between juveniles and adults came in *Roper v. Simmons*,⁴²⁵ in which the Court held that the execution of minors under the age of eighteen at the

418. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 641–42 (1968) (concluding that it was “not irrational” for the New York legislature to conclude that indecent material was harmful to the ethical and moral development of young people, even though, as the Court recognized, such a conclusion was hardly a scientifically proven fact); *id.* at 649–50 (Stewart, J., concurring) (noting that censorship was warranted given that minors are “not possessed of that full capacity for individual choice”).

419. Moshman, *supra* note 397, at 30.

420. Donald L. Beschle, *Cognitive Dissonance Revisited: Roper v. Simmons and the Issue of Adolescent Decision-Making Competence*, 52 WAYNE L. REV. 1, 5 (2006) (remarking that political actors do not consistently view adolescents as responsible or irresponsible, but instead change their views depending on the context); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3–4 (1986) (noting the inconsistent treatment of minors in the law).

421. See Minow, *supra* note 420, at 3–4.

422. 428 U.S. 52 (1976).

423. *Id.* at 75.

424. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 286 (2006).

425. 543 U.S. 551 (2005).

time of their crimes was unconstitutional.⁴²⁶ The Court cited numerous scientific and sociological studies that appeared to confirm what “any parent knows”—that adolescents are immature, reckless, and irresponsible.⁴²⁷ In addition, the Court noted studies showing that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and that “the character of a juvenile is not as well formed as that of an adult.”⁴²⁸ Given these differences, the Court concluded that the conduct of juveniles is less morally reprehensible than the conduct of adults and therefore should not be subject to the death penalty.⁴²⁹ The Court recognized that drawing the line for the death penalty at age eighteen is in some ways arbitrary, given that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,” and that “some under 18 have already attained a level of maturity that some adults will never reach.”⁴³⁰ Nevertheless, the Court concluded that the age of eighteen was the appropriate place to draw the line because it “is the point where society draws the line for many purposes between childhood and adulthood.”⁴³¹

In dissent, Justice Scalia attacked the majority for relying on scientific and sociological studies that were never entered into evidence or challenged in an adversarial proceeding.⁴³² He contended that the majority was guilty of “look[ing] over the heads of the crowd and pick[ing] out its friends.”⁴³³ Justice Scalia pointed out that the American Psychological Association, which in this case had argued that persons under eighteen lack moral culpability, had submitted a brief in 1989 in a parental notification abortion case arguing just the opposite: that by middle adolescence (age fourteen to fifteen), the ability of young people to engage in reasoning about moral dilemmas and to understand social rules was comparable to that of adults.⁴³⁴ Justice Scalia added that even if the sociological studies the majority cited were reliable, none of them indicated that all teenagers are unable to comprehend that murder is wrong.⁴³⁵ He cited the Court’s reasoning in *Stanford v. Kentucky*,⁴³⁶ the prior case on the juvenile death penalty that *Roper* overruled:

426. *Id.* at 578.

427. *Id.* at 569.

428. *Id.* at 569–70.

429. *Id.* at 570, 578.

430. *Id.* at 574.

431. *Id.*

432. *Id.* at 617 (Scalia, J., dissenting).

433. *Id.*

434. *Id.* at 617–18.

435. *Id.* at 618.

436. 492 U.S. 361 (1989), overruled by *Roper*, 543 U.S. 551.

[I]t is ‘absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards.’⁴³⁷

At first blush, the assertion that there are important differences between children and adults that could justify the restriction of children’s speech rights seems noncontroversial. Certainly if by “children” we mean persons from birth to age eighteen, claims that children are emotionally and mentally less mature and more vulnerable than adults are obvious.⁴³⁸ Most of the students asserting their free speech rights, however, are not pre-school or elementary school students. Instead, almost all plaintiffs in student speech cases are at least twelve years old, and the vast majority are in high school.⁴³⁹ Thus, when considering the free speech rights of students, in practical terms the discussion is about the free speech rights of adolescent students.⁴⁴⁰ The emotional, developmental, and cognitive differences between high school students—who are minors and given fewer rights—and recent high school graduates—who are typically eighteen or older and enjoy full constitutional rights—is not so obvious.

But even assuming that there are real differences between teenagers and young adults, the deficits arguably common in adolescent thinking suggest that students would benefit from robust First Amendment rights in most circumstances. Adolescence is the primary time of identity formation.⁴⁴¹ This observation does not suggest that people are not engaged with identity formation throughout their lives, from infancy to old age, but adolescence is the time when the quest to determine “‘Who am

437. *Roper*, 543 U.S. at 619 (Scalia, J., dissenting) (citing *Stanford*, 492 U.S. at 374).

438. Garfield, *supra* note 15, at 603; Garvey, *supra* note 381, at 323 (“We are accustomed to thinking that the physical, mental, and emotional immaturity of children in some way makes them ineligible to possess rights.”).

439. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (involving a high school student’s free speech rights at a school-sponsored event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988) (concerning editorial control over a high school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986) (ruling on a high school student’s free speech rights at a school assembly); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (involving the rights of three students, aged thirteen, fifteen, and sixteen to wear a black armband to school); *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 669 (7th Cir. 2008) (concerning a high school student’s right to make negative comments about homosexuality at school).

440. Adolescence is considered the bridge between childhood and adulthood and is commonly considered to begin at age ten or eleven and continue to age eighteen or nineteen. See Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 476 (2000).

441. Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 329 (2007).

I?” takes center stage.⁴⁴² Since adolescents lack a fixed sense of character or personal identity, granting them relatively unrestricted speech rights may encourage the formation and permanence of character traits that are essential to democratic self-governance, such as an interest in public affairs and toleration for unpopular viewpoints.⁴⁴³ In addition, it is preferable to encourage adolescents who feel compelled to explore the boundaries of socially acceptable conduct or to seek novel sensations to do so through relatively harmless mechanisms, such as speech, rather than through reckless activity. Furthermore, since adolescents tend to underestimate risk, discount unpleasant consequences, and succumb to peer pressure when making decisions, perhaps permitting unrestricted discussion of outcomes and alternatives will improve the adolescent’s understanding of likely consequences and thereby improve the overall quality of adolescent judgment.

3. Protecting Parents’ Choices

Some scholars have suggested that the custodial relationship between parents and their children justifies some restrictions on the rights of minors.⁴⁴⁴ Until children reach the age of majority, they are subject to extensive parental control. The government frequently argues that laws restricting the free speech rights of minors are necessary to support the ability of parents to raise their children as they wish.⁴⁴⁵

Parental freedom has played an important role in the Court’s jurisprudence. In *Pierce v. Society of Sisters*,⁴⁴⁶ the Court held that parents have a constitutional right to send their children to private rather than public schools,⁴⁴⁷ and in *Wisconsin v. Yoder*,⁴⁴⁸ the Court upheld the right of an Amish family to withdraw the children from school entirely after the eighth grade.⁴⁴⁹

Although the Court has occasionally cited the need to support parents in upholding speech restrictions aimed at children,⁴⁵⁰ the government’s

442. *Id.* at 329–30.

443. *See* Garfield, *supra* note 15, at 580–81.

444. Garvey, *supra* note 381, at 323 (“[T]he complex of moral rights and obligations that characterize the parent-child relationship plays a part in shaping whatever fundamental rights children have.”).

445. *See* Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 473–83 (2000) (pointing out, in the context of regulation of speech aimed at children, that governmental bans on speech in fact undermine parental preferences and parental authority).

446. 268 U.S. 510 (1925).

447. *Id.* at 534–35.

448. 406 U.S. 205 (1972).

449. *Id.* at 234.

450. The Court’s decisions in *Pacifica* and *Ginsberg* upheld censorship laws with the stated purpose of helping parents protect their children from the undesirable influence of lewd and indecent expression. *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978); *Ginsberg v. New York*,

reliance on this justification has met with mixed results and rests on shaky ground.⁴⁵¹ Permitting the government to suppress student speech on the theory of supporting parents would give the government almost limitless control over juvenile speech rights.⁴⁵² It is also not even clear such government support is necessary given that parents maintain extensive authority to control the cultural exposure of their children, particularly in their pre-teen years.⁴⁵³ Furthermore, government speech restrictions can more often than not actually interfere with the choices some parents have made regarding their children's upbringing.⁴⁵⁴ Not all parents want this sort of government assistance.⁴⁵⁵ As Justice Brennan noted in his *Pacifica* dissent, "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."⁴⁵⁶ Permitting schools to act in the name of supporting parental rights is a false legal fiction that simply grants school officials broad authority to engage in censorship of speech that they do not like.⁴⁵⁷

Certainly the right of parents to force schools to alter their curriculum, textbooks, and extracurricular activities is limited. For example, arguments that schools should not be permitted to engage in sex education or distribute condoms have largely been unsuccessful.⁴⁵⁸ But granting schools authority to restrict the expression of children in digital media is a much greater intrusion on parental rights because it limits the ability of parents to direct their children's upbringing even when they are at home.

4. The in loco parentis Doctrine

In some decisions, especially in the Fourth Amendment context, the Court has suggested that students have diminished or even nonexistent constitutional rights when they are in school because school officials act

390 U.S. 629, 639 (1968).

451. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 669–70 (2004) (affirming grant of preliminary injunction against the enforcement of the Child Online Protection Act on grounds that voluntarily installed filters may be a more effective method of protecting children; the Court noted that Congress must assume that parents lack the ability, not the will, to protect their children, and filters could give them the ability they desire).

452. Leon Letwin, *Regulation of Underground Newspapers on Public School Campuses*, 22 UCLA L. REV. 141, 203 (1974).

453. Garfield, *supra* note 15, at 616–17.

454. *Id.* at 618.

455. *Id.*

456. *FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) (Brennan, J., dissenting).

457. See Letwin, *supra* note 452, at 203 ("[S]ince school authorities, not parents, would make the actual decisions, this rationale would merely end up expanding the effective power of school authorities by patent fiction.").

458. Lau, *supra* note 441, at 344.

in loco parentis. Blackstone's *Commentaries* are often cited in support of this doctrine:

[The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁴⁵⁹

Of course when Blackstone was writing, there were no public schools; he was writing about the relationship among parents, students, and their private tutors. At that time, parents had greater rights than they have today to control how schoolmasters disciplined children; nowadays, if a parent objects to the way a school official treats his child, it is "of little constitutional moment."⁴⁶⁰ In addition, even Blackstone limited the delegation of authority from parent to tutor to that which "may be necessary to answer the purposes for which he is employed."⁴⁶¹ At the same time, courts were unclear whether the doctrine created a strict in-school versus out-of-school dichotomy concerning the scope of a tutor's authority. Some courts held that a tutor had no power to control the conduct of his pupils once the pupils leave classes,⁴⁶² while others were willing to permit a tutor to punish a student for conduct outside the classroom that had a "direct and immediate tendency" to undermine the authority of the teacher.⁴⁶³

In most decisions, the Supreme Court seems to understand that compulsory attendance laws make it difficult to swallow the argument that school officials are simply acting in loco parentis and therefore outside the Constitution.⁴⁶⁴ After all, given that parents have no real choice but to send

459. 1 WILLIAM BLACKSTONE, COMMENTARIES 441.

460. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 n.1 (1995) (O'Connor, J., dissenting).

461. BLACKSTONE, *supra* note 459, at 441. Thus, for example, one court held in 1942 that a teacher who harms a student by negligently treating his wounded finger cannot use the doctrine of in loco parentis to escape liability. *Guerrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. Ct. 1942). For a comprehensive discussion of the limits of Blackstone's conception of the doctrine of in loco parentis, see Stephen Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U.P.A.L. REV. 373, 377-84 (1969).

462. See, e.g., *Hobbs v. Germany*, 49 So. 515, 517 (Miss. 1909) ("When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins," but "[w]hen sent to his home, the authority of the teacher ends, and that of the parent is resumed.").

463. See, e.g., *Lander v. Seaver*, 32 Vt. 114, 120 (1859); see also Goldstein, *supra* note 461, at 383-84.

464. *Morse v. Frederick*, 127 S. Ct. 2619, 2637-38 (2007) (Alito, J., concurring); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) ("[P]ublic school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."); *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)

their children to public schools, it would add insult to injury to assume that they have willingly given schools full authority to act in their stead. In addition, as commentators have pointed out, assuming that school officials are acting like parents does not square with reality. When a school threatens to use its power against a student, it is typically not acting with “genuine parental protective concern” but rather as a form of law enforcement seeking to protect the general student body from the harms of conduct regarded as antisocial.⁴⁶⁵ Furthermore, allowing schools to discipline children on the basis that they are acting in the place of their parents would give school officials virtually unbridled authority to restrict student speech in any way they wished.⁴⁶⁶

5. The “Special Characteristics” of the School Environment

Rather than rely on a problematic *in loco parentis* theory, the Court has instead tended to rest its student-speech decisions on the so-called “special characteristics” of the elementary and secondary school environment.⁴⁶⁷ Although the Supreme Court has largely applied strict scrutiny to content-based speech restrictions, the Court has relaxed the applicable standard of review in four specific settings: the military,⁴⁶⁸ prisons,⁴⁶⁹ public employment,⁴⁷⁰ and schools. In each context, the Court has stated that the

(“Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may [act] . . . as is reasonably necessary ‘for the proper education of the child and for the maintenance of group discipline.’” (quoting 1 HARPER & JAMES, LAW OF TORTS § 3.20 (1956) (footnote omitted)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637–38 (1943) (noting that West Virginia State Board of Education is a government actor that must abide by the limitations of the Bill of Rights). *But see Morse*, 127 S. Ct. at 2631–36 (Thomas, J., concurring) (arguing for a revival of the *in loco parentis* doctrine because parents choose to send their children to public school, rather than to private or parochial schools).

465. See William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974).

466. Indeed, when the doctrine of *in loco parentis* held sway in court, school disciplinary decisions were frequently upheld after only minimal scrutiny for reasonableness. See Project, *supra* note 408, at 1456 n.470 (citing cases).

467. *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.”).

468. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . [T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”).

469. See, e.g., *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (concluding that it is appropriate for the judiciary to defer to the decisions of prison administrators “[b]ecause the realities of running a penal institution are complex and difficult” and “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform” (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974))).

470. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“Government employers, like private

special circumstances of these institutions warrant broad deference to the decision to restrict speech.

The Court has not been entirely clear about what special circumstances justify treating speech restrictions in public secondary schools so differently from speech restrictions in most other contexts. The claim that the special circumstances of schools warrant deference seems to embrace many of the justifications already discussed—and rejected—above, including the age of the students, a purportedly voluntary waiver of their free speech rights, and the low value of their speech. Allowing public schools to restrict the expression of their students due to their age would seem to justify broader government restrictions on adolescent speech rights generally, but it seems clear that adolescents outside school are entitled to the same free speech rights as adults.⁴⁷¹ The waiver argument might make a modicum of sense in the context of prisons, the military, or even public employment, but it makes no sense in the context of public schools, where—Justice Thomas’s assertion in *Morse* to the contrary notwithstanding⁴⁷²—most students have no choice but to attend. Declaring adolescent speech to be low-value expression entitled to less protection is a highly questionable justification. As a factual matter, it is not always true—take the student speech at issue in *Tinker* as just one example.⁴⁷³ And even if not all student expression is core political speech, the Court appears to be extremely reluctant to withhold First Amendment protection from speech on the grounds that it is “low value.”

The strongest justification for allowing public schools to restrict their students’ free speech rights is not based on their age, a notion of waiver, or the content of their speech, but rather on the particular needs of the institution.⁴⁷⁴ Frequently the Court refers to its lack of competence to second-guess the need for speech restrictions at “authoritarian institutions”⁴⁷⁵—prisons, armed forces, and schools. Although these institutions are different in many ways, they share several key

employers, need a significant degree of control over their employees’ words and actions . . .”).

471. See *supra* Part V.A. This claim is certainly true with respect to the right to speak; the Court has affirmed restrictions only on the indecent speech minors might receive.

472. *Morse v. Frederick*, 127 S. Ct. 2618, 2634–36 (Thomas, J., concurring).

473. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (addressing speech protections for three students who wore black armbands to school as a protest against the Vietnam hostilities).

474. Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 50 (2008). See generally Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (discussing an approach to First Amendment theory based on institutional demarcations).

475. See Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441 (1999) (“[T]he Court has consistently refused to follow usual constitutional principles and protect individual rights in what I will term ‘authoritarian institutions’: prisons, military, and schools.”).

characteristics: the individuals are usually not voluntarily present, the institutions are not democratically operated, a “rigid hierarchy of authority” prevails, and in each the Court has declared itself incompetent to second-guess the decisions of the governing authority.⁴⁷⁶

Granting school administrators some deference to determine what speech is materially disruptive makes sense with respect to speech occurring during school hours. The educational process requires quiet and order, and school officials do have expertise regarding the conduct of a classroom. They generally have to make quick decisions about what to tolerate and what to condemn. In addition, while students are in school, their teachers and school administrators are exercising a form of custody over them. In classrooms and at other school events students are required to attend, they might be properly considered a ‘captive audience,’ which might warrant some limitations on their classmates’ expressive rights that would otherwise not be tolerated. When it comes to digital media, however, it becomes much more difficult to conclude that students are forced—aside from perhaps peer pressure—to view their classmates’ speech.

Some have argued it would undermine the mission of public education to permit students to have unbridled free speech rights on school grounds. Indeed, the trend in the Court’s jurisprudence granting schools more authority to regulate student speech indicates that the Court feels that certain kinds of speech—although fully protected outside the school environment—are entitled to no protection in the school environment. As many commentators have noted, it is virtually impossible for schools to avoid some viewpoint discrimination in their curriculum decisions and perhaps also in the student speech they tolerate on campus.⁴⁷⁷ Thus, schools should not have to tolerate lewd speech in the classroom or harassing and demeaning speech that interferes with another student’s ability to learn. In *Morse*, Justice Alito’s concurrence explicitly disavowed any reliance on the educational mission theory, most likely because the more conservative members of the Court feared that schools would then be given license to censor any speech that they felt inconsistent with the school’s mission⁴⁷⁸ (including anti-gay speech, like that at issue in *Harper*).⁴⁷⁹ But to the extent the Court’s school speech jurisprudence is

476. *Id.* at 442.

477. *See, e.g.,* Dienes & Connolly, *supra* note 411, at 381 (noting that “[v]alue neutral education is simply not possible” because “school officials inevitably make choices that lend government support to particular viewpoints or ideas”); Garnett, *supra* note 474, at 59 (“[W]e all do well to remain skeptical about the compatibility of government-run education with the freedom of speech.”); Taylor, *supra* note 123, at 18 & n.78.

478. *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

479. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1170–72 (9th Cir. 2006), *vacated*, 127 S. Ct. 1484 (2007) (finding that student who was disciplined for wearing T-shirt with an anti-gay message was not likely to succeed on the merits in his First Amendment claim against the

based on the “special circumstances” of the school environment—and not on the age of their students—it must at bottom rest on the sense that schools have a mission, and that offering students full speech rights would interfere with that mission.

As Justice Alito recognized in his *Morse* concurrence, however, giving schools broad authority to suppress speech in the name of promoting their educational mission is dangerous. Given that public students already face compulsory attendance laws, the risk of improper governmental indoctrination is high.⁴⁸⁰ Granting schools broad authority to censor the digital speech of their students would unnecessarily exacerbate this risk and prove a grave threat to the speech rights of adolescents generally. Allowing schools to invoke their educational mission as a basis for restricting their students’ speech wherever it occurs would permit public schools to exercise unbridled censorship authority over youth expression. Nothing about the special characteristics of the school environment warrants such broad and unchecked power.

VI. RETHINKING STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

Allowing school officials to have the authority to punish students for expression that they create on digital media, typically when they are away from school, begs the question what sort of free speech rights juveniles in our society enjoy generally. Although minors are plainly subject to the control of their parents, it does not necessarily follow that they should also be subject to the control of their schoolmasters. Certainly, as discussed above, one cannot simply declare that school officials serve in loco parentis and leave it at that.

Determining whether school officials have the authority to punish digital student expression would not be so difficult if we decided that minors simply do not enjoy full speech rights outside the schoolhouse gates; however, the Court has never taken this position and it lacks a sound basis in constitutional law.⁴⁸¹ Although the Court has tolerated some speech restrictions that serve to protect students from certain kinds of speech—typically indecent or sexually explicit speech—it has never sanctioned restrictions on juvenile expression itself. Indeed, in most student speech cases, members of the Court have pointedly noted that the expression at issue would be plainly protected had it occurred in the fabled town square. In the absence of any sort of captive audience that might justify the restriction of juvenile speech—or anyone’s speech, for that matter—restrictions on student speech rights cannot stand on the premise that juveniles simply do not enjoy full First Amendment protection.

school).

480. Dienes & Connolly, *supra* note 411, at 383.

481. *See supra* Part V.B.I.

In student speech cases involving the digital media, courts have typically focused on whether the speech at issue could be considered on-campus speech, or they have simply applied *Tinker*'s material-and-substantial disruption test. Because digital speech is generally nowhere and everywhere at the same time, permitting school officials to restrict such speech simply because it is accessed on school grounds, because it is somehow directed to the school grounds, or because it was reasonably foreseeable that it would come to the attention of school officials gives schools far too much authority to restrict the speech of juveniles generally. Applying the *Tinker* test to all speech, whether digital or not, has some intuitive appeal, but this approach is likewise unsatisfying because it gives schools far too much authority to restrict juvenile speech rights.

This Article concludes that schools have very little authority to punish students for their speech in the digital media. At the same time, however, it urges schools to educate their students about the use of digital media, both before and after any offensive digital speech comes to their attention.

A. *Criticism of Territorial Approaches*

As discussed in Part IV.B, many courts facing a student speech case ask as a threshold matter whether the speech can be considered on-campus or off-campus expression. In making this determination, some courts consider whether the digital speech was accessed on campus, whether the speech was directed to campus, or whether it was reasonably foreseeable that the speech would come to the attention of school authorities. All three approaches give schools too much authority to restrict juvenile speech rights generally.

It makes sense to declare that schools lack authority to restrict student speech that is plainly off-campus. All the Supreme Court's student speech cases to date involve expression that takes place on school grounds or during school-sanctioned activities. As a bright-line rule, courts should continue to declare that speech that lacks any sort of physical connection to the school should fall outside the school's jurisdiction.

Most commentators concerned about student speech rights concede, however, that schools should have authority to regulate digital expression that is somehow physically present on campus. For example, one leading article concedes that if a student uses school computers to create, view, or print digital expression, then the school may exercise its authority to restrict that expression.⁴⁸² This approach concedes too much. Taking a strict territorial approach like this one is troubling because digital speech, unlike traditional media, is uniquely pervasive.⁴⁸³ The mere incidental

482. Calvert, *supra* note 221, at 264–67.

483. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (“Cyberspace radically undermines the relationship between

usage of school computer facilities, or the use of a personal electronic device on campus, should be insufficient to trigger school censorship authority.⁴⁸⁴ Under an incidental-use analysis, a school should not have authority to regulate student expression on the Internet merely because the student accesses his website from a school computer.⁴⁸⁵ The mere fact that a student can retrieve his expression on campus, without more, should not grant school authorities the power to control his off-campus expressive activities. If schools are concerned about the mere use of digital media while students are in school, they can restrict access to the school computers or ban the use of cell phones and other electronic devices during school hours without running afoul of the First Amendment.⁴⁸⁶ In contrast, if a student sends an e-mail to other students on school computers, texts other students using his cell phone during school time, or posts offensive content on a school-sponsored website, a school should have authority to restrict that expression.

Although permitting schools to restrict digital student speech whenever it has some sort of physical connection to campus is troubling, far more disconcerting are the expansive territorial approaches that permit schools to punish student speech whenever it is directed to campus, or when it is reasonably foreseeable that it will come to the attention of school authorities.⁴⁸⁷ These approaches grant schools virtually unbridled discretion to restrict juvenile speech generally. Students' speech frequently concerns topics related to their school and classmates. Given this reality, it is hard to imagine when it would not be directed to campus, or when it

legally significant (online) phenomena and physical location.”).

484. See *supra* Part IV.B.1.

485. Recognizing that a school has no authority to punish student speech that makes incidental use of school property is consistent with the decision in *Thomas v. Board of Education*, a pre-digital age decision where the appellate court held that a school lacked the power to punish students for an underground newspaper that had been stored on school grounds because “all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate.” *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979). There, the student-authors of the newspaper had used a classroom after school hours to edit their articles and to store extra copies of their publication. *Id.* at 1045.

486. Banning cell phones or restricting access to personal websites during the school day would not run afoul of the First Amendment because such measures would be permissible content-neutral time, place, and manner regulations. Under First Amendment jurisprudence,

[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted).

487. See *supra* Part IV.B.2.

would not be reasonably foreseeable that students' digital expression would come to the school's attention. For example, in *Wisniewski*, the Second Circuit held that it was reasonably foreseeable that an instant message icon Aaron Wisniewski sent to fifteen classmates would come to the attention of school officials.⁴⁸⁸ Because Wisniewski did not send the message to any school officials or even make his icon generally available on the Internet, it is hard to imagine why it should have been reasonably foreseeable to Wisniewski that his school would find out about it. Indeed, the school learned about the icon only after one of Wisniewski's schoolmates tattled on him.⁴⁸⁹ Accordingly, it appears that under the *Wisniewski* test, schools are given authority to punish student expression whenever the speech concerns the school in some way. Indeed, a federal district court applied the test in this way when it concluded that it was reasonably foreseeable that a blog would come to the attention of school authorities because "the content of the blog itself indicated that [the student] knew other [school] community members were likely to read it."⁴⁹⁰

The unbridled, unduly expansive nature of the Second Circuit's approach becomes clear when one attempts to apply it to non-digital expression. Permitting school officials broad authority to punish student speech whenever it comes to their attention would grant them the power to punish students who engage in a political protest in the town square, write a letter to the editor in the local newspaper, or simply speak to their friends while walking around the mall. It is hard to understand why schools should be given more authority to restrict digital speech than they would have to punish non-digital expression.

B. *Application of Tinker is Inappropriate*

The application of *Tinker*'s materially and substantially disruptive standard to all digital speech is also a tempting but ultimately unsatisfying approach. As a threshold matter, lower courts applying the *Tinker* standard have tended to give substantial deference to a school's determination that the challenged expressive activity was in fact substantially and materially disruptive. As a result of this deference, schools are engaging in the sort of standardless discretion that is anathema to the First Amendment.⁴⁹¹ But

488. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

489. *Id.* at 36.

490. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 217 (D. Conn. 2007).

491. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (striking down parade and assembly ordinance because it permitted too much discretion); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (noting that unfettered discretion permits government officials "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in

even if courts rigorously applied *Tinker*'s materially disruptive standard, a fundamental problem would remain: the *Tinker* approach to student speech is ill-suited to deal with off-campus expression.

The *Tinker* standard came about in the context of speech occurring during school hours in a manner visible to all students and the teacher. In that context, it makes sense to consider whether that very public speech disrupts the classroom, a school assembly, or other school event. Clearly, a teacher leading a physics lesson may restrict the students' discussion of the political issues of the day. In this way, permitting schools to sanction speech that disrupts their work closely resembles the ability of, say, courtroom deputies to enforce rules of conduct while the court is in session. For the most part, however, digital communications do not intrude into the public space, and therefore by their very nature cannot cause an immediate disruption to the work of the school.

More fundamentally, applying *Tinker*'s disruption standard to digital speech permits school officials to exercise too much control over juvenile expression generally. Lots of off-campus speech and conduct can distract students from their schoolwork.⁴⁹² Students may be just as distracted by the new Harry Potter book or X-Man movie or an episode of *Gossip Girl* or a new video game or a new website as they will be by the message someone has posted on their social networking site. These other cultural influences could also have a much more profound educational effect on the students than someone's e-mail icon or website. It would be unthinkable to permit school officials to control their students' access to television shows, movies, public libraries, and other materials on the Internet.

School officials frequently assert that all student speech falls within their control because it has the capacity and the potential to affect the school. Most courts have accepted this argument, and by doing so, they have extended beyond recognition the rationale for school control over student speech. Students use electronic technology to express themselves. Allowing schools to restrict speech there is akin to allowing schools to restrict speech anywhere. Communicating through digital media is the way students deal with their lives and how they deal with authority. Students are going to be talking about their teachers and their classmates anyway; now they are simply using digital media to do it. Most student speech does not involve unprotected speech but rather unpleasant speech that offends school officials or makes them uncomfortable.⁴⁹³

In addition, as the Court in *Tinker* recognized, school administrators often seek to repress student speech in order to avoid controversy and

question on the 'welfare,' 'decency,' or 'morals' of the community").

492. Caplan, *supra* note 51, at 163.

493. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 542–44 (2000) (listing lower federal court cases addressing student speech).

protect the reputation of the school.⁴⁹⁴ In *Tinker*, the Court noted that the school officials tried to prevent students from wearing black armbands not because they caused any real disruption to the school, but rather because they had “an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation’s part in the conflagration in Vietnam.”⁴⁹⁵ Not surprisingly, schools are now punishing students for parodies that poke fun at teachers and school administrators on the grounds that they are disruptive to the work of the school.⁴⁹⁶ In *Thomas v. Board of Education*, the Second Circuit noted the inherent conflict of interest that arises when school officials are given broad authority to act as “both prosecutor and judge” with respect to student speech rights.⁴⁹⁷

As of this writing, no court has invoked *Tinker*’s rights-of-others prong as the sole basis for upholding restriction on student speech in the digital media.⁴⁹⁸ As discussed above, it is unclear whether this relatively obscure aspect of *Tinker* should play a role in any student speech cases, digital or not, given how amorphous and ill-defined it is.⁴⁹⁹ Certainly, permitting schools to invoke the Ninth Circuit’s broad and rather standardless approach to *Tinker*’s rights-of-others prong in digital media cases would obviously pose an even greater threat to juvenile speech rights than *Tinker*’s materially disruptive standard.

C. The Problem of Harassing Speech

Harassing speech poses perhaps the most difficult challenge to any argument limiting the power of schools to punish student expression. Peer-to-peer harassment is hardly new behavior, but many students engage in such speech through the digital media. As with more traditional harassment and bullying, cyber-harassment can cause serious psychological damage to students, severely undermine their ability to learn and succeed at school, and at times lead to truancy, violence, and suicide.⁵⁰⁰ Although it is tempting to permit schools to punish students for

494. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509–10 (1969).

495. *Id.* at 510.

496. See *supra* note 324 and accompanying text.

497. *Thomas*, 607 F.2d at 1051. See also text accompanying footnotes 243–53 (discussion of *Thomas*).

498. In *Snyder v. Blue Mountain School District*, a federal district invoked *Tinker*’s right-of-others prong in a footnote as an apparent alternative basis for its holding that a student did not have a First Amendment right to post a parody profile of his school principal on MySpace.com. No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008). The court explained that the profile “affected [the principal]’s rights” because “[a]s principal of a school, it could be very damaging to have a profile on the internet indicating that he engages in inappropriate sexual behaviors.” *Id.*

499. See *supra* notes 112–37 and accompanying text.

500. See *Servance*, *supra* note 64, at 1216–17.

any digital expression that harasses or bullies another student, granting schools this authority is not necessary and would pose a grave threat to juvenile speech rights.

Some have suggested that schools must be given authority to punish cyber-harassment because they could be held liable for civil damages under Title IX if they fail to do so. Among other things, Title IX prohibits any school that receives federal funds from subjecting a student to discrimination on the basis of sex.⁵⁰¹ Although no court has addressed whether a school could be liable for Title IX harassment in a case involving the digital media, a closer examination of the requirements for liability indicate that they could not be.

In *Davis v. Monroe County Board of Education*,⁵⁰² a sharply divided Supreme Court held that a school could be held liable for a classmate's sexual harassment of a student that occurred on school grounds.⁵⁰³ In that case, one of LaShonda Davis's classmates subjected her to repetitive harassing comments and gestures during school hours and on school grounds.⁵⁰⁴ His conduct included comments like "I want to feel your boobs" as well as attempts to touch LaShonda's breast and genitals.⁵⁰⁵ LaShonda claimed that as a result of this harassment, her grades dropped and she was unable to concentrate on her studies.⁵⁰⁶ Although her classmate was ultimately charged with, and pled guilty, to sexual misconduct, LaShonda also sought to hold the school liable under Title IX for failing to take disciplinary action against her harasser.⁵⁰⁷

The Court made clear that the school could be held liable only in the most extreme circumstances.⁵⁰⁸ The Court declared that in order to hold a school liable for peer-to-peer harassment, the school must (1) have had adequate notice that it could be held liable for the conduct at issue; (2) have acted with deliberate indifference to known acts of harassment; (3) exercise substantial control over the harasser and the context where the known harassment occurs; and (4) moreover, the reviewing court must find that the harassment is so "severe, pervasive, and objectively offensive" that it effectively bars the victim's access to an educational opportunity or benefit.⁵⁰⁹ In *Davis*, the Court concluded that the plaintiff's

501. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (2006).

502. 526 U.S. 629 (1999).

503. *Id.* at 633.

504. *Id.*

505. *Id.*

506. *Id.* at 634.

507. *Id.* at 634–36.

508. *Id.* at 642.

509. *Id.* at 644–50.

case against her school under Title IX could go forward because she could conceivably prove facts sufficient to entitle her to relief.⁵¹⁰

In most cyber-harassment cases, however, it is highly unlikely that a plaintiff could adequately allege all the necessary elements for a Title IX claim.⁵¹¹ Specifically, a plaintiff would have great difficulty satisfying the requirement that the school has “substantial control over both the harasser and the context in which the known harassment occurs.” This requirement will generally not be met in cases involving digital speech, unless the digital expression has more than an incidental connection with the school grounds.⁵¹² When the harassing speech occurs at school, school officials have “significant control over the harasser” in light of their custodial role, as well as significant control over the context of the expression.⁵¹³ Students engaging in digital expression away from school, however, are not within the control of the school, but rather in the control of their parents. Similarly, schools do not typically have control over the context of digital speech. In *Davis*, the Court made clear that liability was possible because schools have control over the context of harassment that occurs “during school hours, and on school grounds.”⁵¹⁴ Cyber-harassment frequently occurs outside school hours and off school grounds.⁵¹⁵ Schools might be liable for harassing digital speech that occurs during school hours and on school grounds, but in such cases the use of digital media would be more than incidentally on campus and fall within the school’s regulatory authority.

Of course it is one thing to say that schools cannot be held liable for harassment if they fail to intervene to stop it; it is quite another to say that they are not *permitted* to intervene if they wish.⁵¹⁶ Courts and commentators disagree when schools should have authority to restrict harassing, intimidating, or otherwise hurtful speech even when it plainly occurs on school grounds. One reason for this lack of consensus is that the First Amendment does not categorically exclude harassing or intimidating

510. *Id.* at 654.

511. For a brief discussion about the potential difficulties of holding schools liable for cyber-harassment under Title IX, see Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 919–25 (2001).

512. Under the approach this Article advocates, schools would have authority to punish digital student speech that has more than an incidental connection to the school grounds. See *supra* Part VI.A.

513. *Davis*, 526 U.S. at 646.

514. *Id.*

515. See, e.g., Servance, *supra* note 64, at 1218 (“In this cyber-age, Internet websites, chat rooms, anonymous electronic bulletin boards, instant messaging, and other web devices quickly and widely disseminate harassing content.”).

516. See Waldman, *supra* note 112, at 500 (“[T]he notion that schools can prohibit only the speech that they *must* prohibit, and that there is no room for educational discretion below that line, is inappropriately cabined.”).

speech from its protections. Indeed, the Court has made clear that individuals must tolerate speech that denigrates their racial or ethnic background or religious beliefs if the expression falls short of incitement or fighting words.⁵¹⁷ Anti-discrimination laws applicable to the workplace, such as Title VII, already exist in some tension with the First Amendment because they are plainly content- and viewpoint-based.⁵¹⁸ In the public secondary school setting, courts have disagreed about whether schools can prohibit speech that would not be covered by federal anti-discrimination law. For example, the Ninth Circuit held in *Harper* that a school could restrict anti-gay speech even if it is non-disruptive and not directed specifically at another student.⁵¹⁹ On the other hand, the Third Circuit has struck down a similar anti-harassment policy as unconstitutionally overbroad, holding instead that schools can restrict harassing speech only when it satisfies *Tinker*'s substantial disruption standard.⁵²⁰ For all the reasons Judge Kozinski gave in his *Harper* dissent, the Ninth Circuit's approach seems highly questionable even with respect to speech on school grounds.⁵²¹ It would be intolerable to extend that approach to student speech in the digital media.

Any authority schools might be afforded to intervene in cases of cyber-harassment must be carefully and narrowly restricted to avoid giving schools license to restrict too much speech. As the dissent in *Davis* noted, "schools that are the primary locus of most children's social development are rife with inappropriate behavior by children who are just learning to interact with their peers."⁵²² Name calling, teasing, and the use of vulgarities are commonplace in juvenile expression.⁵²³ Holding schools liable for cyber-harassment would pose a tremendous risk that school officials would punish speech that might be offensive and irritating but hardly so severe and pervasive so as to deprive a student access to an educational benefit or opportunity.

Limiting the ability of schools to punish harassing speech except in extreme circumstances does not mean that schools are powerless to act. Some schools have been experimenting with anti-bias and anti-bullying programs intended to reduce harassment, defamation, racism, homophobia,

517. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (finding that advocacy of controversial views is not proscribable unless it is directed at inciting illegal action and is in fact likely to result in such action); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (noting that no assault, threat of bodily harm or person occurred).

518. For a lengthier discussion of this tension, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1799–807 (1992).

519. See *supra* notes 113–22 and accompanying text.

520. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

521. See *supra* notes 123–34 and accompanying text.

522. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting).

523. *Id.* at 673.

and other offensive speech before it occurs.⁵²⁴ When harassment does occur, schools can always attempt to counsel the students involved about the harm their speech is causing and seek assistance from law enforcement officials when appropriate.

D. *Nonpunitive Methods for Responding to Digital Speech Issues*

The conclusion that schools have little authority under the First Amendment to punish digital student speech does not mean that schools are helpless to act. This Article argues, however, that the primary approach that schools should take to most digital speech is not to punish their students, but to educate their students about how to use digital media responsibly.

In many of the recent cases involving digital speech, students were suspended, expelled, or barred from certain school activities for writing rather trivial and innocuous things on the Internet. Many of the students embroiled in school speech cases—at least the ones that make their way into the court system—are top students angling for good grades and college admission. Although courts like to characterize students on the Internet as problem students, often the students who become embroiled in free speech disputes are quite outstanding. For example, although Chief Justice Burger characterized Matthew Fraser (the plaintiff in *Fraser*) as a “confused boy,”⁵²⁵ Justice Stevens, in dissent, pointed out that in fact Fraser “was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school’s commencement exercises demonstrates that he was respected by his peers.”⁵²⁶ In *Emmett v. Kent School District No. 415*,⁵²⁷ the student who created a website with fake obituaries had a grade-point-average of 3.95, served as co-captain of the school’s basketball team, and had a clean disciplinary record.⁵²⁸ Such an approach is much more beneficial than simply punishing students the moment they engage in controversial speech.

Schools should first begin to address perceived problems with student speech in the digital age by educating their students about safety and civility on the Internet and in digital media generally even before problems begin. Such an approach could begin with some education about the First Amendment generally, but then continue to a broader discussion about safety and responsible use of digital media. For example, students could

524. See, e.g., Gerri Hirshey, *Pushing Back at Bullying*, N.Y. TIMES, Jan. 28, 2007, § 14 at 1 (describing anti-bullying programs and noting that twenty-nine states have adopted anti-bullying or anti-harassment statutes).

525. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

526. *Id.* at 692 (Stevens, J., dissenting).

527. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

528. *Id.* at 1089.

be taught about how to guard against predators on the Internet, particularly on social networking websites. In addition, schools might want to discuss the problems of anonymous speech and the real harms that offensive speech can cause. Sometimes these lessons could take the form of practical exercises. To take one example, Kevin Metcalf, a government teacher in upstate New York, does an experiment with his students to show how damaging and misleading a single still picture taken on a cell phone can be.⁵²⁹ He asks the students to take out their cell phones while he puts his head down on his desk.⁵³⁰ He then asks the students what people would think of him as a teacher if they had taken a picture of him with their phones and posted it on YouTube.⁵³¹ Inevitably, the students say that he would be regarded as ““lazy”” and as a teacher who ““doesn’t care”” about his students.⁵³² He says that this lesson helps drive home the message of how pictures on cell phones can misrepresent the truth and have serious consequences.⁵³³

When students engage in digital speech that concerns school officials, the officials should resist their impulse to punish such speech and instead use the incident as an opportunity to teach important lessons about digital speech. For example, Joseph Frederick, the plaintiff in *Morse v. Frederick*, offered to settle his case if the school agreed to invite the ACLU and school board members to give an assembly at which student speech rights would be discussed.⁵³⁴ The school refused and missed out on a golden opportunity to teach students about the breadth—and limits—of their free speech rights.⁵³⁵

This proposal does not suggest that some monitoring of teenagers’ speech is inappropriate. School officials can and should alert the police if they come across violent speech that they believe poses a threat to the safety of its students.⁵³⁶ Indeed, law enforcement officials report that they are already searching social networking sites as well as other websites as part of their efforts to investigate criminal activity.⁵³⁷ A police officer in Illinois revealed, “We patrol the Internet like we patrol the streets. . . .

529. Vaishali Honawar, *Cellphone Taping a Classroom Threat*, TCHR. MAG., Nov. 7, 2007, http://www.teachermagazine.org/tm/articles/2007/11/07/ew_videotape_web.h19.html.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. Nat Hentoff, *Joe Frederick, First Amendment Idol*, VILLAGE VOICE, Mar. 27, 2007, <http://www.villagevoice.com/2007-03-27/news/joe-frederick-first-amendment-idol/> (citing report from Nina Totenberg).

535. *Id.*

536. See Calvert, *supra* note 221, at 268.

537. See Wendy Davis, *Teens’ Online Postings are New Tool for Police*, BOSTON GLOBE, May 15, 2006, at A1 (reporting that social networking sites “are fast becoming a crucial source of evidence in crimes involving young people ranging from pornography to drugs to terrorist threats”).

We'll go in on a MySpace or a Xanga, we'll pick out our area and we'll just start surfing it, checking it, seeing what's going on."⁵³⁸ Although much of the content of social networking sites is innocuous, the officer said that from time to time they have found pictures of people standing proudly by graffiti they have just created or with the drugs that they are dealing.⁵³⁹ As the cases demonstrate, law enforcement is much better at assessing the likelihood that violent expression poses a real danger to the safety of the school.

Although it is understandable that school authorities want at all costs to avoid another Columbine massacre, punishing students for speech with any violent or threatening elements is an inappropriate—and unconstitutional—overreaction. That teenagers would use violent themes and images in their expression is unremarkable. As discussed above, schools have shown little tolerance for student speech that contains even the slightest reference to or depiction of violence, even when law enforcement has declared it innocuous.⁵⁴⁰ Permitting schools to punish violent digital speech would expand school authority over juvenile speech exponentially. When there is a concern that a student might be troubled or likely to act out his violent fantasies, it would be far more productive to counsel the student, contact his parents, and, when appropriate, call in the police for assistance.

Restricting the authority of schools to punish online speech does not mean that the student speech goes unpunished; instead, students still would face possible criminal prosecution and civil liability. School officials should continue to report threatening or otherwise disturbing speech to law enforcement authorities who could in turn take appropriate action. For example, school officials in Allentown, Pennsylvania, contacted law enforcement when it came to their attention that pornographic images of two female students had been disseminated via cell phones to at least forty of their classmates.⁵⁴¹ The District Attorney's Office intervened and required those students who received the images to show their phones to the police to make sure that the images, which constituted child pornography, were removed.⁵⁴² Likewise, if the speech contains actionable

538. Koppelman, *supra* note 29 (quoting officer James McNamee, a member of the Barrington, Ill., police department's Special Crimes Unit).

539. *Id.* The officer noted, however, that when police officers came across a website that declared "'We Hate Barrington Police Department,' they simply had a good laugh and let the posters vent." *Id.*

540. *See supra* Part IV.B.4.

541. Michael Rubinkam, *Cell Phone Porn Scandal Hits U.S. School*, MSNBC.COM, Jan. 25, 2008, <http://www.msnbc.msn.com/id/22840727/print/1/displaymodel/1098/>.

542. *Id.*

defamatory statements or otherwise violates the law, the offended party can seek redress in the judicial system.⁵⁴³

Finally, it is worth mentioning that parents continue to play an important role in policing the activities of their children. A recent study reported that Internet use is the subject of household rules in the majority of homes.⁵⁴⁴ Commonly, parents limit the amount of time their children can spend online and also restrict the websites they can visit. Sixty-five percent of parents report checking what websites their children view after they get offline, and seventy-four percent know whether their children have a profile on a social networking site.⁵⁴⁵ Schools should make their best efforts to educate their students' parents about the harms and benefits of digital media and encourage them to be more proactive in the supervision of their children's digital speech activities.

VII. CONCLUSION

The rise of student speech in the digital media provides a perfect opportunity to reconsider the free speech rights of minors and the authority of school officials to restrict their expression. The three primary justifications given for the protection of the freedom of speech—the promotion of democratic self-government, the search for truth in the marketplace of ideas, and the fostering of autonomy and self-fulfillment—all point in the direction of protecting adolescent speech on and off school grounds.

The common justifications for allowing schools to restrict student speech do not hold water. The developmental differences between adults and adolescents are simply not clear enough to warrant stripping young people of their free speech rights. The notion that school officials are free to restrict student speech rights because they operate in loco parentis makes little sense given the compulsory education laws requiring parents to place their children in the hands of public officials. In addition, allowing school officials to restrict students' expression in the digital media—which largely takes place off school grounds—would significantly undermine the

543. For example, in one case where a student created a website at home called "Teacher Sux," the teacher who was the subject of the website sued its student-creator for defamation, interference with contractual relations, invasion of privacy, and loss of consortium. Kathleen Parrish, *Teacher Sues Over Derogatory Web Site*, ALLENTOWN MORNING CALL, Nov. 6, 1998, at B1. The student, who was expelled from school, took his case against the school authorities all the way to the Pennsylvania Supreme Court, which found no violation of the First Amendment. *J.S. ex rel/H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 852–53, 869 (Pa. 2002); see also *supra* notes 255–59 and accompanying text.

544. ALEXANDRA RANKIN MACGILL, PEW INTERNET & AMERICAN LIFE PROJECT, PARENT AND TEENAGER INTERNET USE 2 (2007), http://www.pewinternet.org/pdfs/PIP_Teen_Parents_data_memo_Oct2007.pdf.

545. *Id.* at 5.

authority of parents to direct the upbringing of their children. Finally, reliance on the “special circumstances” of the schoolhouse setting may make some sense when a student disrupts a class or a school assembly, but it is much less persuasive when digital speech is at issue.

Having concluded that minors are entitled to robust speech rights, this Article argues that schools should have very little authority to restrict student speech in the digital media. Most courts confronting a student speech case ask as a threshold question whether the speech at issue can be considered “on-campus” speech. Some courts apply a territoriality test that asks whether the speech literally appeared on school grounds. Although such an approach has the benefit of forbidding a school to restrict the bulk of student speech in the digital media, its rigidity has led some courts to reject it. Instead, recently some courts have held that student speech can be considered on-campus speech whenever it is reasonably foreseeable that it will come to the attention of school officials. This approach threatens to grant schools virtually unlimited authority to restrict student expression because it is arguably foreseeable that virtually any speech that concerns the school, its personnel, or its students will come to the attention of school officials.

The application of *Tinker*’s materially disruptive standard—regardless of whether it is preceded with an inquiry into whether the speech is properly labeled “on-campus” or “off-campus” speech—provides little protection to students’ expressive rights. First, many courts are far too deferential to schools’ assertions that the challenged expressive activity was substantially and materially disruptive to schoolwork or discipline. Second, and more importantly, the *Tinker* test is ill-suited to speech in the digital media. Many off-campus events and activities can distract students from their work, but it would make no sense to permit schools to serve as a cultural censor. Schools plainly lack authority to prevent their students from watching the latest television show or playing the newest video game; schools should likewise have no authority to restrict the distracting expression their students create.

Computers, mobile phones, and cameras play an integral role in the way young people communicate with each other and the world at large. Students have always made fun of their teachers and harassed their classmates, but school officials generally did not learn about it. Now school officials frequently find this material simply by logging onto the Internet. Speech that in another time would escape the school’s notice now has become the basis for suspensions, expulsions, and other significant punishment. Rather than punish their students, schools must instead become more tolerant of speech that they do not like and focus more on educating their students to use digital media responsibly.