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Democratic Values in a Digitized World: Regulating Internet Speech in Schools to Further the Educational Mission

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DEMOCRATIC VALUES IN A DIGITIZED WORLD: REGULATING INTERNET SPEECH IN SCHOOLS TO FURTHER THE EDUCATIONAL MISSION

The Internet is a remarkable tool—so remarkable that using the word “tool” to describe it is painfully inadequate. With a click of a mouse, a few strokes on a keyboard, or a swipe on a screen, the Internet allows instant communication and transaction at any time by anyone in the world. Young people, especially, have embraced the Internet as a means of communicating with peers and interacting with the world around them. In fact, the Internet may be thought of as a social context—similar to school, church, or home—where young people’s identities are influenced and shaped. As a result, what takes place online may have implications in the off-line world.

One of those offline places implicated by Internet expression is the public school system. Public elementary and high schools are unique institutions. They have long been recognized as playing a dominant role in maintaining our democratic society by inculcating in students certain values such as respect, honesty, citizenship, responsibility, and integrity. And, because public students enjoy less constitutional protections on school grounds and during school hours, public schools have been permitted to discourage expression and behavior that conflicts with those values. But there is a disagreement over whether public schools may discourage Internet expression that conflicts with those values. This Comment seeks to explain why permitting schools to limit certain Internet expression—regardless where or when the Internet expression occurred—promotes the educational mission of public schools.

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I. INTRODUCTION

Jane is an average teenager.¹ She is a sophomore at the public school where she has a 3.24 grade point average, goal tends for the junior varsity soccer team, and is a member of the Italian Club. Jane has a part-time job at the movie theater and sometimes babysits her younger sister when her mom works late. In addition to these regular activities, on a typical day Jane spends four hours and twenty-nine minutes watching television shows, two hours and thirty-one minutes listening to music, one hour and twenty-nine minutes using the computer for purposes other than school-related activities, one hour and thirteen minutes playing video games, and one hour and thirty minutes texting her friends.² In all, Jane spends an average of seven hours and thirty-eight minutes per day—seven days a week—exposed to some form of media technology.³

For schools, this excessive media-use phenomenon can be troubling, especially if Jane decides to create a fake profile, posing as one of her teachers, on a social networking site containing offensive content.⁴ Because of the connectivity of youth today, views of that profile will likely spread like wildfire among other students and community members.⁵ If this situation unfolds, the school faces a crossroads: the school can punish Jane and demand that she delete the profile—running the risk that this action will violate Jane's First Amendment rights—or the school can do nothing and tolerate student behavior that runs afoul of the school's educational mission.

1. Jane is a fictional person representing the average American teenager.

2. VICTORIA J. RIDEOUT ET AL., GENERATION M²: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2–3 (Jan. 2010), available at <http://www.kff.org/entmedia/upload/8010.pdf>.

3. *Id.* In the past five years, the number of hours an average eight- to eighteen-year-old spends connected to media has increased by one hour and seventeen minutes per day—the numbers add up to a total of fifty-three hours per week that young people are connected to some form of media. Bonnie Miller Rubin, *Teen, Tween Media Use Rising*, CHI. TRIB., Jan. 20, 2010, at 4 (reporting on the Kaiser Family Foundation findings).

4. See generally Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591 (2011) [hereinafter Waldman, *Badmouthing Authority*] (discussing the challenges that the Internet and digital communication pose to regulating student speech originating outside of schools).

5. See Douglas MacMillan, *Chasing Facebook's Next Billion Users*, BUS. WK., July 25, 2012, at 30–31; Somini Sengupta, *Facebook Revenue Edges Ahead of Expectations*, N.Y. TIMES, Oct. 24, 2012, at B1 (indicating that of the one billion Facebook users, 60% access the social networking website from their mobile phones).

Pointing out the dilemma created by student Internet expression is by no means a novel observation.⁶ Numerous cases have emerged involving students who were punished by schools for their Internet expressions.⁷ Many commentators have discussed the need for guidance from the Supreme Court and have proposed tests for how to deal with these types of cases.⁸ Some commentators advocate the position that student expression on the Internet can never be regulated by school authorities.⁹ Some propose that schools can curtail expression only if it targets students but never if it is directed at the school or its authorities.¹⁰ And others suggest that schools should be able to regulate student Internet speech only in extremely limited circumstances, such as when the speech could reasonably be interpreted as a serious threat to cause bodily injury¹¹ or when the Internet user allows public access to his or her expression.¹² Other suggestions for tests for student Internet

6. See, e.g., Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 140 (2003) (“Today, the threat of disruption from off-campus student speech has risen significantly because of the advent of the internet and continued efforts to integrate the medium into the classroom setting.”).

7. See *infra* Part III.

8. See Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1594–96 (2009) (suggesting a “control and supervision test to determine school jurisdiction over students’ online speech”); Sandy S. Li, Note, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 102 (2005) (suggesting that the *Tinker* standard be used because “it is both broad and flexible enough to balance the needs of a student’s right to self-expression and the school’s need to maintain an orderly and safe educational environment”).

9. See Frank D. LoMonte, *Shrinking Tinker: Students are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1325–26 (2009).

10. See Jacob Tabor, Note, *Students’ First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 591–93 (2009) (arguing that student speech can only be curtailed if it disrupts the classroom learning environment and that off-campus student speech aimed at teachers, the school, or the administration cannot reach that level).

11. See Adam Dauksas, Comment, *Doninger’s Wedge: Has Avery Doninger Bridged the Way for Internet Versions of Matthew Fraser?*, 43 J. MARSHALL L. REV. 439, 459 (2010) (“[T]he Supreme Court’s analysis should rest on whether a reasonable person in the student’s position would foresee that *any user* . . . would reasonably interpret the speech as a serious expression of intent to cause bodily harm.”).

12. See Kara D. Williams, Comment, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 726 (2008) (“[A] workable standard for determining whether students’ postings . . . are protected by the First Amendment must consider whether the students opted to set their profiles to private.”).

speech include a categorical approach,¹³ a factors test,¹⁴ and a reexamination of the *Tinker*¹⁵ standard.¹⁶ These are just a few examples of the proposed tests for school regulation of student Internet speech, but they are all testaments to the complexity of the problem faced by schools and the need for a uniform standard.

This Comment does not propose yet another workable standard for the Supreme Court to fashion when it ultimately hears a student Internet speech case. Rather, it discusses that the Supreme Court precedent, as well as state constitutions and statutes, already establish the authority of schools to limit student expression on the Internet that is directed at the school or school officials, even if the speech originates beyond the schoolyard. In doing so, this Comment explores both the Court's historical emphasis on the role of schools in educating students on how to be citizens in a democratic society,¹⁷ and the way the Internet is infiltrating our lives not only as a communication and information tool, but also as a social context.¹⁸ Because of this important role of schools and the pervasiveness of the Internet in society, the Court should decide that schools have the discretion to punish their students for speech that harasses teachers on the Internet.

Part II addresses how the goals of public education, particularly the cultivation of civic values, have shaped Supreme Court decisions on

13. See Caitlin May, Comment, "*Internet-Savvy Students*" and *Bewildered Educators: Student Internet Speech is Creating New Legal Issues for the Educational Community*, 58 CATH. U. L. REV. 1105, 1138–41 (2009) (proposing that off-campus student speech that "advocates violence within the school community" be exempt from First Amendment protection and that non-threatening speech remain "the traditional fact-based analysis articulated in *Tinker*").

14. See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 262–69 (2001) (outlining a five-factor test for student speech cases); David J. Fryman, Note, *When the Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 557, 589–91 (2009); Stephanie Klupinski, Note, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 647–50 (2010).

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

16. See Li, *supra* note 8, at 102–03 (proposing that only the substantial disruption test in *Tinker* can be used to determine whether schools unconstitutionally infringed on student Internet speech); Matthew I. Schiffhauer, Note, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J. LEGAL COMMENT. 731, 765 (2010) ("If the school claims that the expression [is] threatening, it should be analyzed under *Tinker*'s 'rights of others' prong.").

17. See *infra* Part II.A.

18. See *infra* Part IV.A.

student speech. Part II.A outlines the origin of public education in the United States and then examines the goals of public school education today. Part II.B discusses the Supreme Court precedent on student speech, focusing on the Court's interpretation of the school's role in relation to students' rights. Understanding the Supreme Court's characterization of the role of schools as inculcating democratic values is important to understanding the Court's rationale for previous decisions.¹⁹ The Court's underlying rationale provides a guideline for future decisions.

Part III analyzes several lower court decisions involving student speech expressed on the Internet. This Part compares those cases where the courts have ruled in favor of school limitation on student speech with those cases where the courts found school limitations to be unconstitutional. This Part seeks to examine the relationship between the lower courts' decisions and Supreme Court precedent.

Part IV.A examines how the Internet is changing rapidly and becoming a necessary tool in many peoples'—especially teenagers'—daily lives. Part IV.B discusses how harassing comments on the Internet can materially disrupt the school environment, and suggests that schools ought to have the discretion to regulate Internet expression that disrupts the educational mission.

II. THE EDUCATIONAL MISSION AND STUDENT SPEECH

Since 1969, the Supreme Court has heard and decided only four cases involving the public schools' authority to limit student speech in public schools.²⁰ However, none of these cases provides clear guidance for limiting off-campus speech, Internet speech, or speech directed at the school or school personnel.²¹ As a result, a debate exists concerning

19. See *infra* Part II.B.

20. See *infra* Part II.B. This number does not include cases involving the censorship or removal of books from a school's library, such as *Board of Education v. Pico*. See, e.g., 457 U.S. 853 (1982).

21. Rather, the cases involved political expression at school, lewd and vulgar speech at a school-sponsored event, student expression in a school-sponsored publication, and speech seen as promoting drug use. See *infra* Part II.B. Although the majority did not view it as such, *Morse v. Frederick* has been interpreted as involving suppression of off-campus student speech. See, e.g., Klupinski, *supra* note 14, at 615 (“[A]lthough the Court avoided the issue of whether schools can proscribe speech that originated off school property by deeming the banner ‘school speech,’ the *Morse* decision helps expand a school’s authority to discipline students for off-campus speech.”).

how the “tests” created by the Court in the four-student speech cases apply to student Internet expression.²² However, this Comment suggests that the four Supreme Court cases are not as limited to their specific facts as some suggest; rather, the Court’s underlying rationale for its holding in each case can similarly be applied to student Internet speech.²³ This Part addresses the origin of public education in the United States, and then identifies the current role of public schools. This Part then explains how the Court has carefully considered the purpose of public education when analyzing the authority of public schools to punish students for their speech.

A. *Origin of Public Education and the Current Role of Public Schools*

Education is not a fundamental right provided by the United States Constitution.²⁴ Nonetheless, the Supreme Court recognizes that it “is perhaps the most important function of state and local governments,”²⁵ playing “a fundamental role in maintaining the fabric of our society.”²⁶

22. See, e.g., Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1090 (2008) (arguing that the *Tinker* standard cannot be applied to student Internet speech “because it gives schools far too much authority to restrict juvenile speech rights”); Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 159 (2010) (“*Fraser* does not create school jurisdiction over online speech—regardless of whether it is created or accessed on or off campus—because there is no captive audience and no need for a school to disassociate itself from the speech.”); Hoder, *supra* note 8, at 1594–95 (suggesting a “control and supervision test to determine school jurisdiction over students’ online speech”); Klupinski, *supra* note 14, at 647 (explaining how courts should think of student speech effect and content as variables on a graph and analyze where these variables intersect to determine if discipline was appropriate); Tuneski, *supra* note 6, at 142 (advocating for a bright-line rule that eliminates Internet speech originating off-campus from school sanctions “unless the speaker took additional, purposeful steps to ensure that the expression was disseminated at school”).

23. See Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 689 [hereinafter Hafen, *First Amendment Institutions*] (“These cases reason not from the premise that a school is a public forum for rational adults, but from the opposite premise that young students must have unusual protection against coercive influence on their beliefs precisely because they lack the rational capacity of adults.”).

24. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

25. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

26. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

As this section addresses, public schools are valued by society because they teach not only fundamental academic skills that prepare students for future careers and higher education, but also instill in students a common set of core principles and values, such as respect, honesty, citizenship, responsibility, and integrity, which are necessary for our democratic nation to function.²⁷

After the American Revolution, education was perceived as a necessary function to maintain and strengthen the country's newly formed system of self-government.²⁸ Leaders recognized that a democratic society could be preserved only if its citizens were educated to understand the principles and practices of self-governance.²⁹ As a result, public schools were established to teach students how to exercise their democratic rights as citizens and cultivate a sense of nationalism.³⁰

27. See Michael A. Resnick, *Public Education—An American Imperative: Why Public Schools Are Vital to the Well-Being of Our Nation*, POL'Y RES. BRIEF, Spring/Summer 2004, at 3.

A democratic and free nation requires a people who value and practice certain principles in their society. These principles include equality and freedom for all, social mobility and meritocracy, equal opportunity and self-governance, and respect for civil law and civic responsibility. Despite our nation's size and diversity, the American people have developed a shared vision and a common set of expectations about what living in a democratic and free society means.

Id.

28. Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 774 (1995). "[T]he attitude toward education after the American Revolution was that education was necessary to 'build nationalism, to shape the good citizen, and to reform society.'" ROBERT M. HARDAWAY, *AMERICA GOES TO SCHOOL: LAW, REFORM, AND CRISIS IN PUBLIC EDUCATION* 70 (1995) (quoting JOEL SPRING, *THE AMERICAN SCHOOL 1642–1990*, at 30 (2d ed. 1990)).

29. Bitensky, *supra* note 28, at 774–75; see GERALD L. GUTEK, *EDUCATION IN THE UNITED STATES: AN HISTORICAL PERSPECTIVE* 41–42 (1991) (explaining Thomas Jefferson's belief that the country would "degenerate into mob rule" unless a majority of people received an education that emphasized civic virtues and responsibility); see also Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 675 (1987) [hereinafter Hafen, *Developing Student Expression*] ("[E]ducation would create a needed sense of national unity, not only as a matter of patriotic loyalty, but as a matter of common understanding and language, forged in the egalitarian community of a public school inhabited by children of all classes and origins.").

30. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and

Today, our nation's schools are much more diverse than in the post-revolutionary days.³¹ The increased diversity in student bodies has led to conflicts between morality-based curriculum aimed at unifying the nation and rights-based individualism, which naturally springs from the multitude of racial, ethnic, and cultural backgrounds.³² Because of increased diversity, public schools have almost entirely eliminated morality-based curriculum.³³ Modern public schools instead focus predominately on preparing students for higher education and the workforce;³⁴ schools therefore emphasize skills acquisition in core subjects such as literacy and mathematics, foster creative and analytical thinking, and reinforce appropriate socialization skills.³⁵ Nevertheless, the public school is still regarded as a unique place where students are

acquisition of knowledge as matters of supreme importance which should be diligently promoted.”); Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU EDUC. & L.J. 1, 23–24 (discussing Thomas Jefferson’s vision for education as a necessity to sustain self-government). In order to foster democratic ideals through education, public school curriculum originally was aimed at teaching moral, work, and political values. Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL’Y REV. 275, 280 (1989). Moral values included honesty, generosity, charity, individualism, and self-reliance; work values included discipline, self-control, industriousness, and obedience; and political values included patriotism, democracy, and civic responsibility. *Id.*

31. See Rebell, *supra* note 30, at 283–84 (explaining that legal developments over the past one hundred twenty years—such as compulsory education statutes and school desegregation decrees—have diversified schools).

32. Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99, 108 (1996).

33. *Id.* at 108 (explaining that a major hurdle for achieving meaningful education reform is the disintegration of the values consensus forged during the nineteenth century); see Rebell, *supra* note 30, at 283–84 (discussing the dangers of inculcating a basic set of values in contemporary schools that have changed drastically due to modern trends such as urbanization, centralization, and individual rights assertion). The inculcative model of public schools that dominated educational origins is opposed by critics who believe schools should serve as a “marketplace of ideas” that allow student free expression and thought. See Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in American’s Public Schools*, 50 UCLA L. REV. 959, 966 (2003). A comprehensive discussion on the two opposing educational theories is beyond the scope of this comment but is important to note.

34. Resnick, *supra* note 27, at 4–5 (noting that the goal of public schools shifted in the 1950s from “Americanizing a nation of immigrants and preparing an industrial workforce” to preparing students for higher education).

35. VICTORIA J. DODD, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* 6–7 (2d ed. 2010).

able to learn the principles and practices of a democratic society.³⁶

Although commentators disagree about the methods schools should use to teach students, they generally agree that schools ought to teach students certain values.³⁷ A school environment is ideal for this purpose because “[t]he hidden curriculum of the school has the potential to teach important lessons about authority, responsibility, caring, and respect.”³⁸ In fact, “some inculcation of values in schools is inevitable.”³⁹ One critic of values inculcation in schools admits that “[i]t would be both practically and theoretically impossible to completely prevent the governmental values inculcation that occurs in the educational process; in certain instances, values inculcation is an inherent by-product of the educational process, and it would be absurd to hypothesize a vibrant democratic society absent such a process.”⁴⁰ Thus, even though the methods may have changed, schools serve an important function in teaching students “the civic knowledge, skills, and dispositions necessary

36. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 318–24 (1991) (describing three concepts of public education: civic education, democratic education, and critical education).

37. See, e.g., Bentley, *supra* note 30, at 4 (arguing that schools should “inculcat[e] in young students . . . the essential democratic values of nonrepression and nondiscrimination”); Rebell, *supra* note 30, at 289–92 (suggesting that values inculcation should be based on values important in a pluralistic society, which are discovered through participating in community dialogues and looking to the courts when there are conflicts); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today?: Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 69–72 (2002) (advocating that values education should be based on an anti-indoctrination model, which conveys only those values that are related to the educational process); Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1292 (1991) (claiming that schools’ role in assisting students in development values should be based on a conceptual-development model, rather than values inculcation model, to better develop thinking skills).

38. Nat’l Council for the Soc. Studies, *Fostering Civic Virtue: Character Education in the Social Studies*, 61 SOC. EDUC. 225, 226 (1997), available at <http://www.socialstudies.org/positions/character> (“Teaching academic subjects and teaching character can be mutually reinforcing tasks. Intellectual virtues such as patience, diligence, responsibility, reflectiveness, and honesty are critical to the development of each student’s academic potential. Thus, the teaching of personal virtue is often a contribution to the development of civic virtue.”).

39. AMY GUTMANN, *DEMOCRATIC EDUCATION* 53 (1987) (“Even if schools avoid all courses that deal explicitly with morality or civic education, they still engage in moral education by virtue of their . . . noncurricular practices that serve to develop moral attitudes and character in students.”); Welner, *supra* note 33, at 967.

40. Redish & Finnerty, *supra* note 37, at 69; see Nat’l Council for the Soc. Studies, *supra* note 38, at 226.

to participate in, preserve, and strengthen our republic.”⁴¹

Education has changed a lot since the post-Revolutionary era, but it is still viewed as an important vehicle through which young people learn the values required to be responsible citizens.⁴² Even though the United States Constitution does not refer to education, explicitly or implicitly,⁴³ each state acknowledges the fundamental role of education in its state constitution.⁴⁴ For example, several state constitutions describe education as necessary or essential to preserve the rights and liberties of the people and the free government.⁴⁵ In other states, the statutory provisions that provide for free public education identify that the purpose of education is, in part, to prepare individuals to be responsible,

41. GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS 8 (Jonathan Gould ed., 2011) [hereinafter GUARDIAN OF DEMOCRACY], available at <http://www.servicelearning.org/library/resource/9617> (discussing the importance of civic education and proposing six proven practices in civic learning).

42. See *id.* at 15–23 (explaining various benefits of civic learning); U.S. DEP’T OF EDUC., ADVANCING CIVIC LEARNING AND ENGAGEMENT IN DEMOCRACY: A ROAD MAP AND CALL TO ACTION 2 (2012), available at <http://www.ed.gov/sites/default/files/road-map-call-to-action.pdf> (calling for an “infus[ion] and enhance[ment] [of] civic learning and democratic engagement for all students throughout the American education system”).

43. See *supra* note 24 and accompanying text.

44. See, e.g., FLA. CONST. art. IX, § 1, cl. a (“The education of children is a fundamental value of the people of the State of Florida.”); IDAHO CONST. art. IX, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people . . .”); VA. CONST. art. I, § 15 (“[F]ree government rests, as does all progress, upon the broadest possible diffusion of knowledge . . .”).

45. See, e.g., ARK. CONST. art. 14, § 1 (“Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government . . .”); IND. CONST. art. 8, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government . . .”); ME. CONST. art. VIII, pt. 1, § 1 (“A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people . . .”); MASS. CONST. pt. II, ch. V, § 2 (“Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties . . .”); MO. CONST. art. IX, § 1(a) (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people . . .”); N.H. CONST. pt. 2, art. 83 (“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government . . .”); N.D. CONST. art. VIII, § 1 (“A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people . . .”); R.I. CONST. art. XII, § 1 (“The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties . . .”); TEX. CONST. art. VII, § 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people . . .”).

active citizens by promoting both civic values and good character.⁴⁶

Indeed, states recognize the important goal of teaching their youth the skills necessary to prepare students for college and careers,⁴⁷ but they also give public schools the responsibility of instilling in its students the values of good character.⁴⁸ To obtain these goals, school districts recognize that the school environment plays a critical role in ensuring that proper teaching and learning take place.⁴⁹ Therefore, in their student handbooks and codes of conduct, several school districts have identified student behaviors that are punishable, but they also focus on promoting values that are required of responsible citizens.⁵⁰ For example, in its Bill of Student Rights and Responsibilities, the New York City Department of Education “promotes responsible student behavior and an atmosphere of dignity and respect by establishing

46. See, e.g., ALASKA STAT. § 14.03.015 (2010) (“It is the policy of this state that the purpose of education is to help ensure that all students will succeed in their education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them.”); OR. REV. STAT. § 329.015 (2011) (focusing on education as “a major civilizing influence on the development of a humane, responsible and informed citizenry . . .”); TEX. EDUC. CODE ANN. § 4.001 (West 2006) (explaining that the mission of the public education system is “grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens” with a goal to “prepare students to be thoughtful, active citizens who have an appreciation for the basic values of our state and national heritage and who can understand and productively function in a free enterprise society”); VT. STAT. ANN. tit. 16, § 1 (2004) (declaring that education is necessary to maintain the state’s “constitutional form of government and its guarantees of political and civil rights” as well as to “keep Vermont’s democracy competitive and thriving”); WIS. STAT. § 118.01 (2009–2010) (requiring schools to teach students “[a]n understanding of the basic workings of all levels of government, including the duties and responsibilities of citizenship”).

47. See, e.g., L.A. UNIFIED SCH. DIST., 2012–2015 STRATEGIC PLAN 3 [hereinafter STRATEGIC PLAN], available at http://home.lausd.net/apps/pages/index.jsp?uREC_ID=178744&type=d&pREC_ID=407679 (stating that the school district’s vision includes having its students “college-prepared and career-ready”).

48. See DODD, *supra* note 35, at 6–7; GUARDIAN OF DEMOCRACY, *supra* note 41, at 15–23.

49. See PATRICIA ANNE DUNCAN PARRISH, A WAKE UP CALL FOR SCHOOLS: A NEW ORDER IN PUBLIC EDUCATION 39 (2010) (“Positive climate is the foundation for every effective school.”); see, e.g., STRATEGIC PLAN, *supra* note 47, at 3 (“Our job is to create conditions and environments for students to flourish and to build a culture of curiosity and a community of life-long learners. Our vision is that every student will receive a quality education in a safe, caring environment, and will be college-prepared and career-ready.”).

50. See, e.g., N.Y.C. DEP’T OF EDUC., CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES 1 (2012) [hereinafter N.Y.C. DEP’T OF EDUC.].

guidelines to help students as they strive to become productive citizens in a diverse society.”⁵¹ As another example, Miami-Dade County Public Schools established a set of core values as essential to its commitment to helping students learn how “to participate as caring, responsible citizens in our nation’s democracy.”⁵²

From the beginning, education has been vital to preserving our nation.⁵³ Because the principles associated with democracy—such as respect, honesty, citizenship, responsibility, and integrity—are not inherent, public schools are given the responsibility of promoting them.⁵⁴ All levels of government recognize this important responsibility.⁵⁵ As the next section explains, the Supreme Court also recognizes this goal of public schools.

B. Supreme Court Promotes the Educational Mission Through Student Speech Cases

The Supreme Court has consistently recognized that the public school plays a dominant role in maintaining our democratic society. For example, in *Brown v. Board of Education*, the Court described education as “the very foundation of good citizenship . . . [and] a principle instrument in awakening the child to cultural values[.]”⁵⁶ Similarly, the Court declared in *Ambach v. Norwick* that an imperative function of public schools is to prepare persons for citizenship and to preserve values.⁵⁷ Since 1969, the Supreme Court has addressed four cases concerning students’ right to free speech within a public school.⁵⁸ In these cases, the Court identified the scope of the constitutional

51. *Id.*

52. MIAMI-DADE CNTY. PUB. SCH., CODE OF STUDENT CONDUCT: SECONDARY 4 (2007–2008). The values include citizenship, cooperation, fairness, honesty, integrity, kindness, pursuit of excellence, respect, and responsibility. *Id.*

53. See *supra* notes 28–30 and accompanying text.

54. See *supra* notes 45–50 and accompanying text. See generally Resnick, *supra* note 27.

55. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); see *supra* notes 42, 44–45 and accompanying text; see, e.g., N.Y.C. DEP’T OF EDUC., *supra* note 50, at 1.

56. *Brown*, 347 U.S. at 493.

57. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.”).

58. See *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

protection for student speech in light of the school's role.

The first case the Supreme Court heard concerning student speech was *Tinker v. Des Moines Independent Community School District*.⁵⁹ In that case, three students wore black armbands to school to represent their objections to the Vietnam War.⁶⁰ The students were sent home from school after refusing to remove the armbands and suspended until they agreed to return without them.⁶¹ Proclaiming that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁶² the Court held that the silent protest of the students was protected speech, and the actions taken by the school violated the Constitution.⁶³

In coming to its decision, the Court identified two colliding interests: the free exercise of students' First Amendment rights and the authority of the schools to control conduct within the school.⁶⁴ The Court quoted Justice Jackson, who explained: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁶⁵ Yet, the Court identified the "special characteristics of the school environment"⁶⁶ and the school's authority to control student conduct.⁶⁷

To ensure that students are allowed to express their opinions at school, while reaffirming the school's ability to control conduct, the Court explained that a student's right to speech and expression may not be regulated unless there is a showing that the speech or expression "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"⁶⁸ Read broadly, *Tinker* established

59. *Tinker*, 393 U.S. 503.

60. *Id.* at 504.

61. *Id.*

62. *Id.* at 506.

63. *Id.* at 514. The Court noted that suspending the students for armbands implicated "direct, primary First Amendment rights akin to 'pure speech.'" *Id.* at 508.

64. *Id.* at 507.

65. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

66. *Id.* at 506.

67. *See id.* at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

68. *Id.* at 513.

a presumption that student speech or expression in school is constitutionally protected unless the school can reasonably show that the speech or expression caused—or will cause—a material disruption or invasion of rights.⁶⁹

The Supreme Court heard its second student speech case—*Bethel School District No. 403 v. Fraser*—seventeen years after *Tinker*.⁷⁰ Matthew Fraser, a high school student, was suspended from school for three days and his name was removed from a list of candidates to speak at commencement because he gave a “lewd” speech at a school-sponsored assembly.⁷¹ The speech elicited a response from several students but did not cause any delays to the assembly program nor did it cause any other disruptions at school.⁷² Nevertheless, the school district maintained—and the Supreme Court agreed—that the school could punish Fraser because the school had an interest in protecting its students from lewd and offensive speech.⁷³

The Court, in reversing the decision of the district court and the Ninth Circuit Court of Appeals, noted the distinction between the political expression in *Tinker*—the “nondisruptive, passive expression of a political viewpoint”—and the lewd, sexual content of the speech in *Fraser*.⁷⁴ The Court explained that an important objective of public

69. Hafen, *First Amendment Institutions*, *supra* note 23, at 689. *But see* Bentley, *supra* note 30, at 7–8 (providing examples of narrow interpretations of *Tinker*); Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1072 n.149 (2009) (discussing the different interpretations of the *Tinker* rule).

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

71. *Id.* at 677–78. The lewd speech was a nomination of a fellow student for student office in which Matthew Fraser referred to the candidate in terms of a sexual metaphor:

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

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

72. *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1360 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

73. *Fraser*, 478 U.S. at 680; *see* ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 43 (2009).

74. *Fraser*, 478 U.S. at 680. The Ninth Circuit Court of Appeals, applying the *Tinker* standard, found that the speech was protected because it did not disrupt school activities. *Fraser*, 755 F.2d at 1360 (“In our view, a noisy response to the speech and sexually suggestive

school education is the teaching of “habits and manners of civility,” including tolerance of speech that expresses opposing or controversial ideas.⁷⁵ However, a school need not tolerate speech that “undermine[s] the school’s basic educational mission,”⁷⁶ such as speech that is lewd and vulgar.⁷⁷

The Court’s holding in *Fraser* did not overrule *Tinker*; rather, it “established that [*Tinker*’s] mode of analysis . . . is not absolute.”⁷⁸ The decision demonstrates that public school students do not have the same First Amendment protections as adults in other settings.⁷⁹ Moreover, the decision reflects the Court’s faith in public schools to decide how to teach students to “demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.”⁸⁰ As such, the Court established a balancing test: weighing the students’ freedom to express unpopular opinions against society’s interest of ensuring that students learn appropriate behaviors.⁸¹ As one commentator observed, the Court “believed that high school students could only learn about democratic values in a more disciplined atmosphere. If they are able to learn these values while they are in

movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser’s First Amendment right to express himself freely.”).

75. *Fraser*, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS’ NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

76. *Id.* at 685.

77. *Id.* at 685–86.

78. *Morse v. Frederick*, 551 U.S. 393, 405 (2007); see DUPRE, *supra* note 73, at 49; Hafen, *First Amendment Institutions*, *supra* note 23, at 690–91 (describing the *Fraser* decision as a “significant departure” from the material or substantial disruption test articulated in *Tinker*).

79. *Fraser*, 478 U.S. at 682 (citation omitted). In his concurring opinion, Justice Brennan noted:

It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school’s educational mission. Respondent’s speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty.

Id. at 688–98 (Brennan, J., concurring).

80. *Id.* at 683 (majority opinion).

81. *Id.* at 681.

school, they will be better able to understand their importance to the self-preservation of the nation when they become adults.”⁸²

The Court’s holding in *Fraser* has caused significant confusion among courts and commentators alike.⁸³ Read narrowly and literally, *Fraser* stands for an exception to *Tinker*’s material disruption analysis: a school may regulate speech in classrooms or at school-sponsored events if it is lewd, vulgar, or obscene—no disruption is needed.⁸⁴ However, *Fraser* has also been interpreted more broadly as recognizing that it is within the school’s discretion to regulate student speech if the school finds that the speech is “inconsistent with its ‘basic educational mission.’”⁸⁵

Two years after *Fraser*, the Supreme Court formulated another “test” in its third student speech case, *Hazelwood School District v. Kuhlmeier*.⁸⁶ In this case, the school principal omitted two articles written by student-staff members of the school newspaper.⁸⁷ One article, featuring three students’ experiences with pregnancy, was removed because the principal was concerned that the identities of the girls in the article would become known.⁸⁸ The principal also believed that “the

82. DUPRE, *supra* note 73, at 49.

83. See Davis & Rosenberg, *supra* note 69, at 1074–75 & n.161 (explaining that *Fraser* confused *Tinker*’s already ambiguous holding and has left many questions unanswered); Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 839 (2008) (“*Fraser* did not, however, explicitly hold that it was altering or adding to *Tinker*’s inquiry.”); see also Bitensky, *supra* note 28, at 814 (noting that the *Fraser* decision answers whether schools may regulate speech to instill nonpolitical values but it also created ambiguity and left many questions unanswered). An analysis of the extent of confusion is beyond the scope of this comment. For purposes of this comment, it is sufficient to understand the two dominant approaches to *Fraser*.

84. See Tomain, *supra* note 22, at 104 (“*Fraser* holds that three factors are important for schools to assert jurisdiction over student speech: (1) there must be a captive audience; (2) the speech must involve lewd or indecent sexual content; and (3) the school must have a need to disassociate itself from the speech.”).

85. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Fraser*, 478 U.S. at 685); see Bentley, *supra* note 30, at 9 (noting that, despite ultimately being decided based on the speech’s vulgarity, “the opinion contained numerous statements by the Court regarding the appropriateness of deferring to educational authorities in matters relating to the educational mission of schools”); Hafen, *First Amendment Institutions*, *supra* note 23, at 691 (“*Fraser* rested on a more substantial foundation than the vulgarity of the student speaker’s language . . .”).

86. See *Hazelwood*, 484 U.S. at 272–73.

87. *Id.* at 263.

88. *Id.* The story used false names, but the principal was concerned that they may nonetheless be identified from the text. *Id.*

article's references to sexual activity and birth control were inappropriate for some of the younger students."⁸⁹ The other article removed from the newspaper discussed students' experiences with parental divorce.⁹⁰ The principal removed that article because he thought the parents identified in the article should have been given an opportunity to respond to the remarks about them or to consent to publication.⁹¹ The students contended that by omitting two articles from the school newspaper, the school violated their First Amendment rights.⁹²

Like *Tinker* and *Fraser*, the decision in *Hazelwood* was based upon balancing the First Amendment rights of students against the educational mission of the public school. The Court accepted that the principal's decision to delete the articles was a reasonable one, and therefore it found no violation of the students' First Amendment rights.⁹³ In doing so, the Court rejected the idea that a school-sponsored newspaper was a public forum open to "indiscriminate use" by the students because the newspaper was intended to be a learning experience.⁹⁴ More importantly, the Court differentiated students' personal expression from expression that the "public might reasonably perceive to bear the imprimatur of the school."⁹⁵

Focusing again on the role of educators as imparting knowledge about cultural values as well as traditional academia,⁹⁶ the Court in

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 264.

93. *Id.* at 276.

94. *Id.* at 270 (citation omitted).

95. *Id.* at 271 ("Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."). As one commentator observed,

[The majority opinion] pointed out that in *Tinker* the Court addressed whether a school was required to *tolerate* student speech—a matter of the student's personal expression. In *Hazelwood*, the question was whether the school was required affirmatively to *promote* particular student speech that occurred in activities the school sponsored, like newspaper publications, theater productions, and other expressive activities.

DUPRE, *supra* note 73, at 89.

96. See *Hazelwood*, 484 U.S. at 272 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493

Hazelwood concluded that schools may censor student publications that are reasonably related to “legitimate pedagogical concerns.”⁹⁷ The court suggested that if schools were unable to disassociate themselves from certain student speech, they “would be unduly constrained from fulfilling their role as ‘principal instrument[s] in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”⁹⁸

Like *Tinker* and *Fraser*, *Hazelwood* has been interpreted in several ways.⁹⁹ However, the standard most often attributed to the *Hazelwood* decision is that schools have discretion in regulating school-sponsored speech that takes place in a school-sponsored forum if the regulation reasonably relates to the school’s educational mission.¹⁰⁰

The final student speech case heard by the Supreme Court was *Morse v. Frederick*.¹⁰¹ In *Morse*, the school permitted its students to observe the Olympic Torch Relay, which passed through the town along a street in front of the school.¹⁰² Students viewed the relay from either side of the street, off school grounds.¹⁰³ Joseph Frederick, who had been late to school that day, joined his friends on the street across from the school and unfolded a banner bearing the phrase “BONG HiTS 4 JESUS” as the torch bearers and camera crews passed by.¹⁰⁴ Frederick refused to take down the banner until the principal confiscated it, and he was suspended from school for ten days.¹⁰⁵ The Court declared that

(1954)).

97. *Id.* at 272–73.

98. *Id.* at 272 (quoting *Brown*, 347 U.S. at 493 (1954)); see Hafen, *First Amendment Institutions*, *supra* note 23, at 685 (suggesting that *Hazelwood* actually strengthens rather than weakens students’ First Amendment protections because it recognizes schools as tools to help students “develop their own educated capacity for self-expression”).

99. See Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90 (2008) (identifying that different circuit courts are reaching different conclusions about the boundaries of *Hazelwood* in relation to viewpoint related restrictions and the rationales used when applying the case to decide student-speech issues).

100. See, e.g., Hafen, *First Amendment Institutions*, *supra* note 23, at 693–94; Adam K. Nalley, Note, *Did Student Speech Get Thrown Out with the Banner? Reading “Bong Hits 4 Jesus” Narrowly to Uphold Important Constitutional Protections for Students*, 46 HOUS. L. REV. 615, 640 (2009).

101. *Morse v. Frederick*, 551 U.S. 393 (2007).

102. *Id.* at 397.

103. *Id.*

104. *Id.*

105. *Id.* at 398.

the “special circumstances of the school environment”¹⁰⁶ combined with the governmental interests to prevent drug abuse gives schools discretion to regulate speech that promotes drug use.¹⁰⁷ Thus, the Court concluded that Frederick’s expression was not protected speech because it could reasonably be viewed as promoting illegal drug use during a school-sponsored event.¹⁰⁸

The Court’s decision in *Morse* has been viewed by commentators as a constitutional dead end—that it applies only when schools censor speech that can be “reasonably viewed as promoting illegal drug use.”¹⁰⁹ However, lower courts have construed the opinion to be about the schools’ concerns for the health and safety of its students.¹¹⁰ The case has also been viewed as expanding a school’s authority to discipline student speech that occurs off-campus.¹¹¹

The Supreme Court’s decisions in each of the four student speech cases appear to impart a rather narrow test specific to the particular facts. Nonetheless, the Court’s underlying analysis, which considers the school’s educational mission, has remained consistent when determining the constitutionality of student speech regulation. Critics of the Court’s decisions argue that limiting student speech in schools—when it could not be limited if otherwise not in a school setting—is wholly contrary to the school’s democratic mission and our country’s commitment to the exercise of the First Amendment.¹¹²

106. *Id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

107. *Id.*

108. *Id.* at 410.

109. *Id.* at 403; see Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court’s Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 1–3 (2008) (discussing why the Court’s holding “was perceived as being constricted and limited by both its quirky, if not unique, set of facts about the display of a banner conveying the message ‘Bong Hits 4 Jesus’”).

110. See Calvert, *supra* note 109, at 12–21 (analyzing how *Morse* has been applied by lower courts to support suppression of violent and homophobic speech in schools).

111. See, e.g., Klupinski, *supra* note 14, at 615 (“[A]lthough the Court avoided the issue of whether schools can proscribe speech that originated off school property by deeming the banner ‘school speech,’ the *Morse* decision helps expand a school’s authority to discipline students for off-campus speech.”)

112. See DUPRE, *supra* note 73, at 2 (illustrating the “paradox” of school speech); see also *Morse*, 551 U.S. at 423 (Alito, J., concurring) (“The ‘educational mission’ argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.”).

However, other commentators and the Court have attempted to dispel this argument by discussing the “special characteristics of the school environment.”¹¹³ For instance, the Court acknowledged that even though students do not lose their constitutional rights while they are at school,¹¹⁴ their rights while at school “are not automatically coextensive with the rights of adults in other settings.”¹¹⁵ The Court cited reasons for this unique treatment of public school children such as the maturity levels of the students¹¹⁶ and the necessity of teachers to be able to control the conduct of their students in order to effectively impart knowledge.¹¹⁷

Furthermore, limiting student expression in schools may actually assist students in understanding their democratic rights more than if children in schools were free to express whatever they desired.¹¹⁸ As one commentator has observed, because children have a diminished capacity to make meaningful decisions—a fact that has been implicated in decisions such as the establishment of a minimum voting age of eighteen and prohibition of prayer in public schools—they do not have the capacity to meaningfully express themselves.¹¹⁹ Until they develop this capacity, any restraint on their expression is limited in value.¹²⁰ Thus, appropriate restraint on student speech can effectively promote rather than contradict important democratic values that are necessary to prepare students to become effective citizens in society.

However, the Supreme Court’s decisions regarding student speech arguably have caused more confusion than guidance for schools dealing with student speech issues. Lower courts have attempted to apply the four principles generated from the decisions to student speech cases

113. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506. (1969).

114. *Id.*

115. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (citation omitted).

116. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Fraser*, 478 U.S. at 683.

117. *See Tinker*, 393 U.S. at 507.

118. *See* Hafen, *First Amendment Institutions*, *supra* note 23, at 699–700 (arguing that the long held belief of minimal intervention in student expression does not enhance children’s “most fundamental interest in first amendment values”).

119. *See id.* (“Until children have developed this freedom ‘for expression,’ their freedom ‘from restraints on expression’ has only limited value.” (quoting Hafen, *Developing Student Expression*, *supra* note 29, at 666)).

120. *Id.* at 700; *see also* Bentley, *supra* note 30, at 31 (suggesting that when children are simply left without guidance and hierarchical instruction, they are unable to choose the fundamental democratic values because they lack adequate moral reasoning).

with significantly different fact scenarios.¹²¹ The result has been an aggregate of differing interpretations.¹²² One of the more difficult student speech scenarios the lower courts have grappled with is student speech on the Internet that originated off-campus and involves the school or school personnel.¹²³ The Supreme Court cases have not examined student speech that occurs off-campus, speech that exists on the Internet, or speech that is directed at the school or school officials. The next Part examines these lower court decisions more in depth.

III. LOWER COURTS' APPLICATION OF PRECEDENT TO ONLINE SPEECH

Student speech cases seem to involve a sort of balancing approach: balancing a school's interests in maintaining order and fulfilling its role as an educational institution with the student's right to freedom of expression.¹²⁴ Even before the use of the Internet, lower courts struggled with determining where the balance tipped when schools disciplined students for off-campus expression directed at school and school authorities.¹²⁵ Although the location of the speech as either off-campus or on-campus was relatively easy to determine—a decision based on the geographic location of where the student created the expression—courts were left unguided when off-campus expression was brought on school grounds.¹²⁶ The use of the Internet for student expression has only muddled the issue further, as shown by the inconsistencies in lower court decisions. Below are examples of lower court decisions where students created expression on the Internet and the various standards the lower courts have applied to decide them.

121. See discussion *infra* Part III.

122. See discussion *infra* Part III.

123. See, e.g., *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

124. See *supra* note 81 and accompanying text.

125. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (Snyder II)*, 650 F.3d 915, 937 (3rd Cir. 2011) (en banc) (Smith, J., concurring) ("Lower courts . . . are divided on whether *Tinker's* substantial-disruption test governs students' off-campus expression."); *supra* note 81 and accompanying text.

126. Compare, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044–45 (2d Cir. 1979) (holding that the school exceeded its authority by disciplining students for distributing satirical newsletter created off-campus), with *Boucher v. Sch. Bd.*, 134 F.3d 821, 829 (7th Cir. 1998) (upholding school's authority to punish a student who published an underground newsletter describing how to hack into the school's computers).

A. Internet Speech Originating Off-Campus: Cases Favorable for the School

Without a Supreme Court ruling on how to handle student expression on the Internet, some courts have underscored the Court's emphasis on the educational mission of the schools to determine the constitutionality of disciplining student Internet speech.¹²⁷ For example, in *J.S. ex rel. H.S. v. Bethlehem Area School District*, an eighth-grader created a website on his home computer entitled "Teacher Sux."¹²⁸ The website contained several web pages of offensive comments and images about the principal and some of the teachers at the student's school.¹²⁹

Other students at school viewed the website, and eventually a teacher at the middle school learned of the website and reported it to the principal.¹³⁰ Interpreting the website as containing a serious threat to the school, the principal contacted the local police and the Federal Bureau of Investigation to identify the creator of the website.¹³¹ Mrs. Fulmer developed numerous psychological symptoms as a result of feeling threatened and was granted a medical leave of absence, which required the school to hire three substitute teachers.¹³² The website even caused a "demoralizing impact on the school community," which the court described as comparable to the death of a student or staff member.¹³³

After the School Board voted to expel J.S. for statements he made on the website, J.S. argued that his First Amendment rights were violated by the School District.¹³⁴ The Supreme Court of Pennsylvania

127. *Bethlehem Area Sch. Dist.*, 807 A.2d 847.

128. *Id.* at 850–51.

129. *Id.* at 851. The website was particularly aimed at J.S.'s algebra teacher, Mrs. Fulmer. *Id.* For example, the site contained a web page titled "Why Should [Mrs. Fulmer] Die?" and elicited \$20 from readers to help pay for a hitman. *Id.* On his site, J.S. depicted Mrs. Fulmer as Adolf Hitler, included a drawing of Mrs. Fulmer's head severed from her body, and repeated 136 times "F____ You Mrs. Fulmer. You are a B____. You Are A Stupid B____." *Id.* Additionally, the website expressed that the school's principal was having sexual relations with a principal from another school. *Id.*

130. *Id.* at 851–52. Even though there was a disclaimer on the website stating that by clicking on it and entering the website the visitor agrees that he is not employed by the school district and will not tell any school district employees about the website, anyone was able to access the website. *Id.* at 851.

131. *Id.* at 852.

132. *Id.*

133. *Id.*

134. *Id.* at 853.

affirmed both the trial court's and the Commonwealth Court's decisions to uphold the Board's decision to expel him.¹³⁵ Deciding first whether the speech was considered to be on or off-campus speech, the court found that a sufficient nexus existed between the website and the school campus to characterize the speech as an on-campus expression.¹³⁶ The court acknowledged that the website was created off-campus, but held that it was on-campus speech because it was aimed at the school and school personnel and was accessed at school by J.S.¹³⁷

After determining that the speech was indeed on-campus, the court recognized that the facts of the case made applying any of the Supreme Court precedents for analyzing student speech difficult.¹³⁸ The court, however, in focusing on "the unique needs of the school setting and concern for the school's education mission,"¹³⁹ applied a combination of *Tinker* and *Fraser*.¹⁴⁰ Because the language on the website was "lewd, vulgar, and plainly offensive,"¹⁴¹ it undermined the school's basic educational mission.¹⁴² Further, because schools must control conduct within the school environment, the disruption that the website caused within the school was substantial enough for the school to discipline J.S. for the content of the website.¹⁴³

Courts have also determined the constitutionality of disciplining Internet speech by examining the likelihood that the speech would reach campus and cause a material or substantial disruption in the learning environment. In *Wisniewski v. Board of Education*,¹⁴⁴ an eighth-grade student created an instant messaging icon on his parents' computer that identified him when he messaged his "buddies" on AOL.¹⁴⁵ The icon

135. *Id.* at 869.

136. *Id.* at 865.

137. *Id.* "We hold that 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, the speech will be considered on-campus speech." *Id.*

138. *See id.* at 865–66 (explaining why *Tinker*, *Fraser*, and *Hazelwood* do not provide adequate guidelines to determine whether J.S.'s speech is protected).

139. *Id.* at 868.

140. *Id.* at 866 ("In essence, the type of speech at issue in this case straddles the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*.").

141. *Id.* at 868.

142. *Id.*

143. *Id.* at 868–69.

144. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007).

145. *Id.* at 35.

was a depiction of a person's head being shot by a pistol, with the words "Kill Mr. VanderMolen" beneath it.¹⁴⁶ A classmate of Wisniewski informed Mr. VanderMolen of the depiction and brought a copy of the icon to school to show him.¹⁴⁸ Wisniewski was originally suspended for five days,¹⁴⁹ but after a superintendent's meeting, his suspension was increased to the entire first semester of the school year.¹⁵⁰

The court declined to analyze the facts of the case under a "true threat" analysis.¹⁵¹ Rather, applying *Tinker*, the court held that the speech was not protected because the school reasonably predicted that the icon would create a risk of material or substantial disruption.¹⁵² Even though Wisniewski created the icon on his home computer and did not intend for the icon to come to the attention of the school, the threatening nature of the icon and the distribution of it to at least fifteen classmates created a foreseeable risk that the icon would be made known to the school and would cause a disruption therein.¹⁵³ The court emphasized its view that conduct that reasonably causes a foreseeable risk of disruption within the school—regardless of intent or origin—can be disciplined by the school.¹⁵⁴

Courts have also upheld schools' decisions to punish students for speech causing disruption to the activities of school administrators. For example, in *Doninger v. Niehoff*, the Second Circuit upheld a school's decision to discipline a student for her speech on the Internet.¹⁵⁵ Avery Doninger, a high school junior, was a member of Student Council and

146. Mr. VanderMolen was Wisniewski's teacher at the time. *Id.* at 36.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 37.

151. *Id.* at 37–38. A true threat analysis requires a court to determine "whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm." *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002). See generally *Watts v. United States*, 394 U.S. 705 (1969) (recognizing that threats of violence are not protected by the First Amendment). The *Wisniewski* Court noted that despite the practice of other courts to assess a student's statements concerning killing school officials against the "true 'threat'" standard, it believed that the school had "broader authority to sanction student speech" than allowed under a true threat analysis. *Wisniewski*, 494 F.3d at 38.

152. *Wisniewski*, 494 F.3d at 38–39.

153. *Id.* at 39–40.

154. *Id.* at 40.

155. *Doninger v. Niehoff*, 527 F.3d 41, 43–44 (2d Cir. 2008).

served as the Junior Class Secretary.¹⁵⁶ While attempting to finalize the scheduling of an annual event—Jamfest—Doninger and other members of the student council sent out an email to the broader community asking for help to persuade the district superintendent to hold Jamfest on the date and at the location they wanted.¹⁵⁷ The superintendent and the school's principal received “an influx of telephone calls and emails” from the email recipients who were concerned about the scheduling of the event.¹⁵⁸ The principal expressed her disappointment in Doninger, and—according to Doninger—told her that Jamfest was going to be cancelled altogether.¹⁵⁹

Later that evening, Doninger published her frustrations on her public blog on livejournal.com:¹⁶⁰

[J]amfest is cancelled due to douchebags in central office. [H]ere is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. [B]asically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. [W]e have so much support and we really appreciate [sic] it. [H]owever, she got pissed off and decided to just cancel the whole thing all together. [A]ndddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on [M]ay 18th. [A]ndd [sic] here is the letter we sent out to parents.

....

And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. [I'm] down.¹⁶¹

The principal and superintendent each received more phone calls

156. *Id.* at 44.

157. *Id.*

158. *Id.*

159. *Id.* at 44–45. Doninger claimed that the school's principal told her the event was cancelled; however, the district court gave credit to the principal's testimony, claiming she never told Doninger that the event was cancelled. *Id.*

160. *Id.* at 45. Livejournal.com is a “community publishing platform” where users are able to blog as well as network with one another. *See Our Company*, LIVEJOURNAL, <http://www.livejournalinc.com/aboutus.php> (last visited Nov. 16, 2012).

161. *Doninger*, 527 F.3d at 45. The post also contained copies of the email that the Student Council members sent earlier that day as well as a copy of the email Doninger's mother had wrote to the superintendent concerning the conflict. *Id.*

and emails concerning Jamfest the next day at school.¹⁶² The school's principal decided that Doninger's conduct was inconsistent with the "civility and good citizenship expected of class officers," and she prohibited Doninger from running for Senior Class Secretary.¹⁶³

The Second Circuit Court applied the *Tinker* standard¹⁶⁴—rejecting the *Fraser* exception because the blog was written off school grounds¹⁶⁵—and concluded that the school did not violate Doninger's First Amendment rights by disqualifying her from running for Senior Class Secretary.¹⁶⁶ The court used the framework developed in its decision in *Wisniewski*¹⁶⁷ to conclude that although she created the blog post off-campus, Doninger meant for it to reach school grounds.¹⁶⁸ Further, the court found that the post created a reasonably foreseeable risk of substantial disruption in the school.¹⁶⁹ Three factors the court focused on in coming to its conclusion were (1) the language Doninger used in her post requesting her readers to call the principal and superintendant was "disruptive of efforts to resolve the ongoing controversy,"¹⁷⁰ (2) the misleading—if not false—information Doninger used claiming that Jamfest had been cancelled altogether caused frustration in the school community and was likely to cause more disruption to the school administrators and teachers,¹⁷¹ and (3) the discipline was appropriate since it related to Doninger's role as a member of student council.¹⁷²

Finally, at least one court has analyzed a student speech case without referring to any of the Supreme Court precedents. In *Barnett ex rel.*

162. *Id.* at 46.

163. *Id.* Doninger was not permitted to be on the ballot or to campaign for Senior Class Secretary, yet she received a plurality of the votes as a write-in candidate. *Id.* However, she was not permitted to accept the nomination for office. *Id.*

164. *Id.* at 50.

165. *See id.* at 49 ("To be clear, *Fraser* does not justify restricting a student's speech merely because it is inconsistent with an educator's sensibilities [H]ad it occurred in the classroom, [Doninger's speech] would have fallen within *Fraser* and its recognition that nothing in the First Amendment prohibits school authorities from discouraging inappropriate language in the school environment.").

166. *Id.* at 53.

167. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007).

168. *Doninger*, 527 F.3d at 50.

169. *Id.*

170. *Id.* at 50–51.

171. *Id.* at 51.

172. *Id.* at 52.

Barnett v. Tipton County Board of Education,¹⁷³ two high school students were disciplined for creating fake MySpace profiles of the assistant principal and a coach of the high school.¹⁷⁴ The profile of the assistant principal, which contained sexually suggestive comments directed towards female students, was brought to the school's attention by a concerned parent and a local reporter who both believed the profile to be authentic.¹⁷⁵ In holding that the school did not violate the students' First Amendment rights, the court did not analyze the case under *Tinker* or any of the other Supreme Court cases;¹⁷⁶ rather, the court held that the speech in the profiles was not protected by the First Amendment because the profiles were not parodies.¹⁷⁷ The court further denied allegations that the school violated the students' due process rights under the Fourteenth Amendment.¹⁷⁸ Thus, similar to *Wisniewski*, *Doninger*, and *J.S.*, the *Barnett* court affirmed the state's interest in deterring speech that poses a risk for substantial disruption in favor of the school's interest in furthering its educational mission.

B. Internet Speech Originating Off-Campus: Cases Favorable for the Students

Conversely, some courts have held in favor of protecting student speech. Often, when a court holds that a school violated a student's free expression rights by punishing the student for content on the Internet, the court will find that the Internet expression—unless constituting a threat—did not create a reasonably foreseeable risk of substantial disruption within a school.¹⁷⁹ In *Beussink ex rel. Beussink v. Woodland R-IV School District*,¹⁸⁰ for example, Brandon Beussink was disciplined

173. *Barnett ex rel. Barnett v. Tipton Cnty. Bd. of Educ.*, 601 F. Supp. 2d 980 (W.D. Tenn. 2009).

174. *Id.* at 982–83.

175. *Id.*

176. *Id.* at 984.

177. *Id.* Parodies are protected by the First Amendment if they “involve speech that cannot ‘reasonably be understood as describing actual facts about [the subject of the parody].’” *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988)).

178. *Barnett*, 601 F. Supp. 2d at 985.

179. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216, 219 (3d Cir. 2011) (en banc), cert. denied, 132 S. Ct. 1097 (2012); *Snyder II*, 650 F.3d 915, 930–31 (3d Cir. 2011) (en banc); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998).

180. *Beussink*, 30 F. Supp. 2d 1175.

for creating a webpage that criticized the school, the principals, and the teachers.¹⁸¹ The webpage contained “vulgar language” used to criticize the school and invited readers to contact the school to voice their concerns—though there is no evidence that anyone actually contacted the school.¹⁸²

The court used *Tinker*’s material and substantial disruption test to decide whether the school was justified in limiting the student’s speech.¹⁸³ It balanced the harm to Beussink if his discipline was upheld against the harm to the school if the discipline was found to be in violation of Beussink’s rights.¹⁸⁴ The court found that the school violated Beussink’s free speech rights because the website caused no actual or reasonable fear of substantial disruption to the school.¹⁸⁵ Additionally, the court defined the speech as an unpopular opinion and identified it as the type of speech that the First Amendment was designed to protect.¹⁸⁶

Similar to the analysis in *Beussink* was the court’s analysis in *Evans v. Bayer*.¹⁸⁷ In this case, Katherine Evans was a high school senior who created a group on Facebook entitled, “Ms. Sarah Phelps is the worst teacher I’ve ever met,” as a place for her and other students to “express [their] feelings of hatred” for the teacher.¹⁸⁸ Evans created the group page on her home computer and removed it after two days, but she was nevertheless disciplined by the school principal after he became aware of the page.¹⁸⁹

In holding that the school violated Evans’ First Amendment rights,¹⁹⁰ the court first recognized that off-campus speech could “raise[] on-

181. *Id.* at 1177–78.

182. *Id.* at 1177.

183. *Id.* at 1180; *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

184. *Beussink*, 30 F. Supp. 2d at 1181.

185. *Id.*

186. *Id.* at 1182. The court explained that the school principal disciplined Beussink because the content of the webpage upset him, rather than for fear that the speech would cause a disturbance to the school environment. *Id.* at 1180.

187. *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

188. *Id.* at 1367. The webpage contained Phelps’ picture, and only three postings, all in support of Phelps, appeared on the page from other students. *Id.* Phelps never saw the webpage. *Id.*

189. *Id.*

190. *Id.* at 1376–77.

campus concerns.”¹⁹¹ Although the off-campus speech in this instance was aimed at the school, the court held that the direction of the speech was not, by itself, sufficient to define the speech as on-campus.¹⁹² Further, the court explained that the speech was protected because “[i]t was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior.”¹⁹³ As a result, absent a showing of a foreseeable threat of disruption, the court refused to allow regulation of student Internet speech simply because the target audience was in whole or in part on-campus.

Recently, the Third Circuit decided two similar cases *en banc*. In *J.S. ex rel. Snyder v. Blue Mountain School District*,¹⁹⁴ eighth-graders J.S. and her friend, K.L., created a fake MySpace profile of their principal, Mr. McGonigle, using J.S.’s home computer.¹⁹⁵ The profile did not include McGonigle’s real name, school, or location, but instead characterized him as a bi-sexual forty-year-old middle school principal named “m-hoe=]” who lived in Alabama with his wife and child.¹⁹⁶ The profile did feature his photograph, which was copied and pasted from the school district’s website.¹⁹⁷ In the “Interests” section of the webpage, the girls included things such as “being a tight ass,”¹⁹⁸ “riding the frainttrain [sic],”¹⁹⁹ and “hitting on students and their parents.”²⁰⁰ Additionally, the “About Me” section of the webpage read:

HELLO CHILDREN[.] yes. [I]t’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to [MySpace] so I can pervert

191. *Id.* at 1370.

192. *See id.* at 1371.

193. *Id.* at 1374.

194. *Snyder II*, 650 F.3d 915 (3rd Cir. 2011) (*en banc*).

195. *Id.* at 920. The profile’s URL was <http://www.myspace.com/kidsrockmybed>. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (Snyder I)*, 593 F.3d 286, 291 (3rd Cir. 2010), *vacated, reh’g granted en banc*, 650 F.3d 915 (3rd Cir. 2011).

196. *Snyder I*, 593 F.3d at 291 (internal quotation marks omitted).

197. *Id.*

198. *Id.* (quoting 2 Appendix on Behalf of Appellants at A38, *Snyder I*, 593 F.3d. 286 (3rd Cir. 2010) (No. 08-4138)) (internal quotation marks omitted).

199. *Id.* (quoting 2 Appendix on Behalf of Appellants, *supra* note 198, at A38) (internal quotation marks omitted). Debra Frain is Mr. McGonigle’s wife and one of the school’s guidance counselors. *Id.* at 291 n.2.

200. *Id.* at 291 (quoting 2 Appendix on Behalf of Appellants, *supra* note 198, at A38) (internal quotation marks omitted).

the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to [MySpace] is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[.] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN[.] [S]o please, feel free to add me, message me whatever[.]²⁰¹

Originally appearing as a “public” profile, “M-hoe’s” profile page was made “private” by J.S. after several students approached her at school on the day after the page was created.²⁰² No students viewed the profile while at school—Blue Mountain School District blocked computer access to MySpace—but access was granted to about twenty-two students who attended school in the district after requesting “friend” status.²⁰³ When Mr. McGonigle learned about the profile page and its creator,²⁰⁴ he showed it to the school district’s superintendent and the Director of Technology, as well as two guidance counselors.²⁰⁵ He eventually punished J.S. and K.L. with ten days out-of-school suspension.²⁰⁶ Further, Mr. McGonigle contacted MySpace, Inc., to have the profile removed, and he called the local police station to inquire about whether he could take personal legal action.²⁰⁷

The U.S. Court of Appeals for the Third Circuit found that the school violated J.S.’s First Amendment free speech rights by punishing her for creating the profile of Mr. McGonigle.²⁰⁸ Rejecting the applicability of *Fraser* to the case,²⁰⁹ the court applied the *Tinker* analysis

201. *Snyder II*, 650 F.3d 915, 921 (3rd. Cir. 2011) (en banc) (alterations in original) (quoting 2 Appendix on Behalf of Appellants at A38, *Snyder II*, 650 F.3d. 915 (3rd Cir. 2011) (No. 08-4138)).

202. *Id.*

203. *Id.*

204. *Id.* (explaining that Mr. McGonigle learned about the profile from another student and asked the student to bring him a printout of the profile page).

205. *Id.*

206. *Id.* at 922.

207. *Snyder I*, 593 F.3d 286, 293 (3rd Cir. 2010), *vacated, reh’g granted en banc*, 650 F.3d 915 (3rd Cir. 2011).

208. *Snyder II*, 650 F.3d at 931.

209. *See id.* at 932 (“*Fraser*’s ‘lewdness’ standard cannot be extended to justify a school’s punishment of J.S. for use of profane language outside the school, during non-school hours.”).

when deciding that the “School District could [not] have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.’s profile.”²¹⁰ The court explained that the profile could not be seen as potentially causing a substantial or material disruption because it was created as a joke and “was so outrageous that no one could have taken it seriously, and no one did.”²¹¹ Although the profile contained vulgar language, the court characterized the content as so “juvenile” that no one in the school community who might see the profile would suspect that Mr. McGonigle actually possessed the type of character described in the profile.²¹² Furthermore, the court also considered in its decision the fact that J.S. made the profile “private,” inferring that she never intended for the page to reach school grounds.²¹³

The second of the two *en banc* rulings issued by the Third Circuit on the same day was *Layshock ex rel. Layshock v. Hermitage School District*.²¹⁴ Justin Layshock, a senior at Hickory High School, created a fake profile of his principal, Mr. Trosch, on MySpace.²¹⁵ Similar to J.S., Layshock created the profile during non-school hours and on a home computer.²¹⁶ Also like J.S., Layshock posted a picture of Mr. Trosch on the profile, which he copied and pasted from the school district’s website.²¹⁷ In a section titled “[T]ell me about yourself,” the profile featured fictitious answers to a set of survey questions:

Birthday: too drunk to remember
Are you a health freak: big steroid freak
In the past month have you smoked: big blunt
In the past month have you been on pills: big pills
In the past month have you gone Skinny Dipping: big lake, not
big dick
In the past month have you Stolen Anything: big keg
Ever been drunk: big number of times
Ever been called a Tease: big whore

210. *Id.* at 931.

211. *Id.* at 930.

212. *Id.* at 929–30.

213. *Id.* at 930 (internal quotation marks omitted).

214. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 1097 (2012).

215. *Id.* at 207–08.

216. *Id.* at 207 (explaining that Layshock created the profile page using his grandmother’s computer).

217. *Id.* at 207–08.

Ever been Beaten up: big fag
Ever Shoplifted: big bag of kmart [sic]
Number of Drugs I have taken: big²¹⁸

Further, he listed “Transgender, Appreciators of Alcoholic Beverages” as “Interests” of Mr. Trosch, and “Steroids International” was included as an organization to which Mr. Trosch was a member.²¹⁹ The profile was viewed by other students whom Layshock listed as “friends,” who included “most, if not all,” of the students that attended Hickory High School.²²⁰ Not long after Justin created the fake profile, three other students created bogus profiles of Mr. Trosch and posted them to MySpace, all of which were more vulgar and offensive than Justin’s profile.²²¹ The profiles were viewed during school hours, although the school was unable to determine how many students actually accessed them.²²²

When Mr. Trosch learned of the fake profiles—which he believed to be “‘degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking,’”²²³—and that Layshock created the original profile,²²⁴ he punished Layshock with a ten-day, out-of-school suspension.²²⁵ Additionally, Layshock was placed in the Alternative Education Program for the remainder of the school year, was banned from all extracurricular activities, and was not allowed to participate in his high school graduation ceremony.²²⁶

The Third Circuit ruled that the school district violated Layshock’s First Amendment free speech rights by punishing his expressive conduct.²²⁷ The issue the court focused on was whether Layshock’s use of Mr. Trosch’s picture, obtained from the School District’s website, was considered entering the school.²²⁸ The court struck down the School

218. *Id.* at 208.

219. *Id.* (internal quotation marks omitted).

220. *Id.* (internal quotation marks omitted).

221. *Id.*

222. *Id.* at 209.

223. *Id.*

224. Mr. Trosch’s daughter who was in eleventh grade informed Mr. Trosch about the profiles. *Id.* at 208. He discovered all three profiles and learned that Layshock was responsible for creating the first about six days later. *Id.* at 208–09.

225. *Id.* at 210.

226. *Id.* at 210.

227. *Id.* at 216.

228. *Id.* at 214–15, 219. The District Court found no substantial disruption occurred by using the website, nor could one reasonably conclude that the profile would cause substantial

District's argument that using the district's website to obtain a photograph "forge[d] a nexus between the School and [Layshock's] profile."²²⁹ Because Layshock's "expression" was considered outside the schoolhouse gate, the court refused to apply *Fraser*,²³⁰ and ultimately concluded that the school was not allowed to discipline Layshock for his expressive conduct.²³¹

The cases above illustrate several courts' attempts to protect student expression that occurs on the Internet. The courts in *Beussink* and *Evans* seemed to focus on the content of the speech when determining that the speech deserved protection.²³² The courts were unwilling to limit speech that expressed a negative opinion of the school and school authorities but did nothing more.²³³ The Third Circuit decisions, however, displayed a hesitancy to reach beyond the school yard, even though the content of the student speech was arguably offensive to some viewers.²³⁴

Trying to unify and make sense of the lower courts' holdings in student Internet speech cases is frustrating. The inconsistencies in the lower courts' holdings leave schools at a troubling position when deciding whether they have the ability to discipline a student for offensive speech aimed at the school or school authorities. Comparing these cases with those in Part III.A exemplifies the necessity of a Supreme Court ruling.

IV. *TINKER* IN THE INTERNET AGE

The Internet—"an international network of interconnected

disruption in the future. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600–01 (W.D. Pa. 2007) ("The actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."); *vacated, reh'g granted en banc*, 650 F.3d 205 (3rd. Cir. 2011).

229. *Layshock*, 650 F.3d at 214–15.

230. *Id.* at 216 ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.").

231. *Id.* at 219.

232. *See supra* text accompanying notes 187, 194.

233. *See Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (noting that the student's language "was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior"); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (noting that "no significant disruption to school discipline occurred").

234. *See supra* text accompanying notes 194–231.

computers”²³⁵ that enables “millions of people to communicate with one another and to access vast amounts of information from around the world”²³⁶—is now an essential tool in many peoples’ daily lives.²³⁷ Because of the Internet’s increasingly important role in society, eventually the Supreme Court will have to rule on the constitutionality of schools disciplining student expression on the Internet.²³⁸ Taking into account the Court’s history of emphasizing the role of schools in instilling democratic values²³⁹ and the role the Internet plays in adolescent’s daily lives,²⁴⁰ our nation’s high court will likely decide that schools do have some discretion to control student Internet expression to preserve the school’s educational mission. Part IV.A will examine the characteristics of the evolving Internet and the implications for student expression. Part IV.B will then discuss how Internet speech disrupts the school environment and why schools should be given discretion to regulate this type of student speech.

A. *The Internet as a Social Context*

For today’s young people, a time when the Internet was not immediately accessible is virtually unfathomable. Given labels such as “Net natives,”²⁴¹ “the Internet generation,” “cyberkids,” and “the digital

235. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

236. *Id.* at 850.

237. See AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 5 (2010), available at <http://www.pewInternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx> (discussing the rising Internet use among teens and young adults).

238. The Supreme Court denied Blue Mountain School District’s petition for certiorari on January 17, 2012. Lyle Denniston, *Students, MySpace and the First Amendment*, HUFFINGTON POST, Jan. 19, 2012, http://www.huffingtonpost.com/lyle-denniston/students-myspace-and-the-_b_1214709.html. The general counsel for the National School Boards Association was disappointed by the Court’s decision to deny certiorari:

We’ve missed an opportunity to really clarify for school districts what their responsibility and authority is at a time when kids are using electronic media instantaneously, and especially when those messages are so impactful and immediate on the school setting This is one of those cases where the law is simply lagging behind the times.

Maryclaire Dale, *Supreme Court Rejects Appeal by Blue Mountain School District*, REPUBLICANHERALD.COM, Jan. 18, 2012, <http://republicanherald.com/news/supreme-court-rejects-appeal-by-blue-mountain-school-district-1.1259142> (internal quotation marks omitted).

239. See discussion *supra* Part II.A.

240. See generally LENHART ET AL., *supra* note 237.

241. Kathryn C. Montgomery, *Youth and Digital Democracy: Intersections of Practice*,

generation,”²⁴² today’s young people have incorporated the Internet into their daily lives much quicker than any other age group.²⁴³ A study from September 2009 showed that 93% of teenagers between age twelve and seventeen use the Internet—compared to 74% of adults age eighteen and older.²⁴⁴ Approximately two-thirds of those teenagers use the Internet every day, with at least a little over one-third of them going online several times a day.²⁴⁵ Further, access to the Internet is no longer limited to sitting in front of a desktop, clicking a mouse, and typing on a keyboard. Although desktop and laptop computers remain the most popular machines used to go online, young people are increasingly using portable devices such as cell phones, tablets, and handheld gaming devices to wirelessly access the Internet from any location.²⁴⁶

Early conceptualizations of the Internet in relation to society equated the Internet with a separate, physical place.²⁴⁷ Likewise, the theories on the relationship between the Internet and society suggested that Internet users could separate their online selves from their off-line selves.²⁴⁸ These theories suggested that a clear distinction existed between the online world and off-line world. By separating their online lives from their off-line lives, Internet users remained anonymous and explored social worlds unconnected to their real-world lives,²⁴⁹ perhaps taking advantage of a way to play and experiment with their identities.²⁵⁰ With this understanding of the Internet, making a distinction between Internet postings of a student off school grounds and those made by a student while at school made sense.

Policy, and the Marketplace, in CIVIC LIFE ONLINE: LEARNING HOW DIGITAL MEDIA CAN ENGAGE YOUTH 25, 25 (W. Lance Bennett ed., 2008).

242. SONIA LIVINGSTONE, *CHILDREN AND THE INTERNET* 21 (2009) (citations omitted).

243. Montgomery, *supra* note 241, at 25.

244. LENHART ET AL., *supra* note 237, at 5.

245. *Id.* at 7 (demonstrating that 63% of teens go online every day while 36% go online several times a day).

246. *Id.* at 14.

247. See generally Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003). We even speak of the Internet in spatial terms. See *id.* at 453–54 (highlighting various examples).

248. See GUSTAVO S. MESCH & ILAN TALMUD, *WIRED YOUTH: THE SOCIAL WORLD OF ADOLESCENCE IN THE INFORMATION AGE* 5 (2010).

249. *Id.* at 5–6.

250. See KAVERI SUBRAHMANYAM & DAVID ŠMAHEL, *DIGITAL YOUTH: THE ROLE OF MEDIA IN DEVELOPMENT* 35 (2011).

As the Internet—and our understanding of it—evolved, the metaphor of the Internet as a place has diminished.²⁵¹ Moreover, the expansion of the Internet has resulted in its evolution from merely an information and communication tool to a social context.²⁵² People use the Internet to interact with friends, meet new people, participate in groups, and engage communities.²⁵³ A modern theory of the relationship between the Internet and society views the Internet as a cultural tool reflecting real-life social conditions.²⁵⁴ The rapid expansion of the Internet and the use of tools such as smart phones and social networking sites have changed the online environment from a place where a user can be someone else to a medium that is intertwined with the user's off-line life.²⁵⁵ Social networking sites, especially, serve as platforms where users' "online dialogue mirrors the exchange of ideas and opinions that happens throughout people's lives off-line, in conversations at home, at work, in cafes, and in classrooms."²⁵⁶

As a result, the line between online and off-line is blurred, and young people in particular "are bringing the people and issues from their off-line lives into their online worlds and interactions."²⁵⁷ Researchers have consequently characterized the Internet as a social

251. See generally Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003).

252. SUBRAHMANYAM & ŠMAHEL, *supra* note 250, at 103.

253. *Id.*

254. MESCH & TALMUD, *supra* note 248, at 8; see SUBRAHMANYAM & ŠMAHEL, *supra* note 250, at 34.

255. See SUBRAHMANYAM & ŠMAHEL, *supra* note 250, at 35.

256. *Facebook Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Feb. 7, 2012). Recognizing the interplay of online and off-line social interactions, Facebook established standards for online behavior, one of which states that "claiming to be another person" is in violation of their terms and undermines the trust of the users on the Facebook community. *Id.* The quoted language is no longer part of Facebook's Community Standards. It was replaced with:

Facebook gives people around the world the power to publish their own stories, see the world through the eyes of many other people, and connect and share wherever they go. The conversation that happens on Facebook—and the opinions expressed here—mirror the diversity of the people using Facebook.

Facebook Community Standards, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Nov. 17, 2012); see also *Parody, Commentary, and Fan Accounts Policy*, TWITTER, <https://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/106373-parody-commentary-and-fan-accounts-policy> (last visited Nov. 17, 2012) (allowing users to create parody and fan accounts as long as the user clearly indicates that the profile is fake).

257. SUBRAHMANYAM & ŠMAHEL, *supra* note 250, at 36.

context for adolescent development, on par with other contexts like church, home, school, and work.²⁵⁸ “Children and young people’s [online] activities are primarily exploratory, seeking freedoms online that may be constrained off-line, negotiating the social expressions of identity, developing new forms of valued expertise, taking risks with social norms and personal experiences and, ultimately, integrating online and off-line in developing [the self].”²⁵⁹ Thus, the Internet has become more than just a medium for information and mass communication; rather, it is a dynamic entity that penetrates all spheres of life and has the capacity to influence adolescents’ social relationships, leisure activities, cultural values, and beliefs.²⁶⁰

Not only are Internet users’ online activities intertwined with their off-line lives, but the nature of the Internet allows users to reach the masses.²⁶¹ As the Supreme Court stated in *Reno v. American Civil Liberties Union*, “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”²⁶² Significantly, an Internet user’s “voice”—especially an adolescent Internet user—often resonates with a harsher, less inhibited tone than it would off-line.²⁶³

These characteristics of the Internet and its users have important implications for student expression. Essentially, the Internet is

258. *Id.* at 34, 137.

259. LIVINGSTONE, *supra* note 242, at 31.

260. See SUBRAHMANYAM & ŠMAHEL, *supra* note 250, at 32; see also Charlie Stross, *LOGIN 2009 Keynote: Gaming in the World of 2030*, ANTIPOPE.ORG (May, 13, 2009, 10:12 PM), <http://www.antipope.org/charlie/blog-static/2009/05/login-2009-keynote-gaming-in-t.html> (“Welcome to a world where the Internet has turned inside-out; instead of being something you visit inside a box with a coloured screen, it’s draped all over the landscape around you, invisible until you put on a pair of glasses or pick up your always-on mobile phone. A phone which is to today’s iPhone as a modern laptop is to an original Apple II; a device which always knows where you are, where your possessions are, and without which you are—literally—lost and forgetful.”).

261. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 33–34 (2004) (identifying five ways the Internet makes speech more salient).

262. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

263. See Waldman, *Badmouthing Authority*, *supra* note 4, at 647–49 (examining why the characteristics of the Internet coupled with adolescence has led to hostile Internet speech about school officials).

everywhere; it has no physical, social, or cultural boundaries.²⁶⁴ Because of its pervasiveness, any on-campus/off-campus distinction about Internet expression makes little sense and should therefore be abandoned.²⁶⁵ What is the difference, for example, between a student who uses a school computer to post a vulgar comment about a school official that is read by his classmates, and a student who stands on a public sidewalk facing the school using his iPhone to post the same comment?²⁶⁶

With the rise in the use of handheld Internet-capable devices such as tablets and smart phones,²⁶⁷ it is even difficult to differentiate the student who stands on a podium in the school assembly hall and calls her teacher a “douchebag” from the student who types a similar sentiment on her Facebook Timeline (which is instantaneously available for her classmates to view).²⁶⁸ Because the Internet is not static but rather an

264. See Kathryn Gregory, *How Have Facebook & Other Forms of Social Media Changed the Way We Interact? Both Sides of the Story: High School Students, Leaders Differ on Impact*, CHARLESTON GAZETTE, Feb. 5, 2012, at 1F, available at <http://sundaygazette.com/News/201202030259> (interviewing a high school principal who suggests that students are addicted to their cell phones and worries that “[i]t’s very hard for them to pay attention on what is going on in the classroom when they are focused on what is going on on that phone”).

265. See, e.g., Li, *supra* note 8, at 92–93 (suggesting that courts abandon the on-campus/off-campus distinction when analyzing student Internet speech).

266. See Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) (suggesting that punishing a student for content on a website created outside of school “would be an unseemly and dangerous precedent”), *cert. denied*, 132 S. Ct. 1097 (2012).

267. According to a PEW survey conducted in 2011, 77% of teens have a cell phone, and about one in four of those teens has a smart phone. AMANDA LENHART, PEW RESEARCH CENTER, *TEENS, SMARTPHONES, & TEXTING* 6–7 (2012), available at <http://pewInternet.org/Reports/2012/Teens-and-smartphones.aspx>. Moreover, teens communicate via their phones more than they have face-to-face conversations. *Id.* at 16–18 (showing that on a daily basis, 63% of the teens surveyed communicated through text message and 29% communicated through social networking sites, while only 25% communicated face-to-face with their friends outside of school).

268. See Deb Nicklay, *Social Media Presents New Challenges to Educators*, GLOBEGAZETTE.COM, Feb. 4, 2012, http://globegazette.com/news/local/social-media-presents-new-challenges-to-educators/article_fde0fd7a-4fbc-11e1-85e6-0019bb2963f4.html (quoting the legal services director School Administrators of Iowa: “Fifteen years ago you might have something said about you at a lunchroom table in front of 15 to 20 kids On Facebook some kids have 2,000 to 3,000 ‘friends’—and once something is posted it goes to that many people immediately.”). A Timeline is a Facebook user’s “collection of the photos, stories, and experiences that tell [the user’s] story.” *Glossary of Terms*, FACEBOOK, <https://www.facebook.com/help/glossary> (last visited Nov. 17, 2012).

interactive and dynamic communicative tool, any expression that targets school or school officials will almost inevitably reach the school. If the Internet really was a separate place, distinct and isolated from our “real world” lives, then prohibiting schools from regulating student Internet speech would make sense. However, that is not the case. The limitless and pervasive nature of the Internet allows an expression typed by a student on his laptop at home to ring loud and clear through the halls at school. In order to uphold its educational mission, a school needs to be able to use its discretion to limit speech that is damaging to that objective.

B. Disruption to the Educational Process

A disparaging comment about a teacher or school administrator on a social networking website is not merely a student expressing himself; rather, that comment may have an effect on the educational process if it reaches the school. In order to effectively teach students about how to be responsible and knowledgeable citizens in a democratic society, teachers need to be able to establish a teacher–pupil relationship that is based on respect and influence.²⁶⁹ The Court has addressed the important roles of teachers in *Ambach v. Norwick*:

Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers . . . are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values This influence is crucial to the continued good health of a democracy.²⁷⁰

An Internet posting about a school official may not cause a “substantial disruption” in the literal sense that it “disrupt[s] immediate

269. See *supra* notes 34–50 and accompanying text.

270. *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979).

classroom activity or school discipline.”²⁷¹ Nevertheless, an Internet posting about a teacher may certainly cause a substantial disruption to the educational process in several other ways. For instance, as one commentator points out, “verbal aggression towards teachers can be a source of significant stress for teachers.”²⁷² As a result, teachers may become disengaged from their classrooms or even decide to leave the profession entirely.²⁷³ Additionally, if student Internet speech has the overall effect of damaging that teacher’s reputation or distorting her students’ perceptions about her ability to effectively teach, the teacher

271. Tabor, *supra* note 10, at 593 (citation omitted).

272. Waldman, *Badmouthing Authority*, *supra* note 4, at 644. Elona Hartjes discussed teachers’ reactions to being bullied by students in her blog. Elona Hartjes, *Some Students Bully Teachers Too*, TEACHERS AT RISK (May 7, 2007), <http://www.teachersatrisk.com/2007/05/07/some-students-bully-teachers-too/>. Some teachers provided stories for how they have been harassed by students and the effect of the harassment on their ability to teach:

I’ve had almost all I can handle I have a class of kids who is absolutely disrespectful—one has gone so far as to yell at me, call me names, using her cell phone (even though there [are] rules about it), tell me not only am I stupid but so is anything that I do or have the class do. I have tried talking to her only to have her tell me that she’s not going to put up with this I cried today. [F]or the first time in front of students, I cried. I couldn’t help it This girl does her work. It’s the nasty comments she makes about it. It’s constant Although some students are wonderful, I keep telling myself that it’s one kid—but that only goes so far because she is making me miserable and [I]’m finding it really difficult to do my job.

Valerie, Comment to *Some Students Bully Teachers Too*, TEACHERS AT RISK (Apr. 23, 2008, 9:07 PM), <http://www.teachersatrisk.com/2007/05/07/some-students-bully-teachers-too/>.

I’m a teacher [and] I have already figured out which students have written slanderous comments about me I am ready to quit teaching. I try as hard as I can to do my best to teach students but they have very little respect these days and their parents have no idea what their children are doing [online]. I’ve already invested 22 years in my career and I hoping I can stick it out another 8 more years – then I will happily retire and move on.

Angela, Comment to *Some Students Bully Teachers Too*, TEACHERS AT RISK (Oct. 14, 2009, 1:42 AM), <http://www.teachersatrisk.com/2007/05/07/some-students-bully-teachers-too/>.

For me[] years of false accusations [about] hitting kids, yelling, slamming heads into walls, gradually turned into accusations of sexual predation. The final straw was being accused by some of the most disruptive kids in the class of trying to film their chests when I attempted to film them working on year end projects. I used to live in Paraguay, one of the most corrupt countries on earth. Nothing I can think of from that experience comes close to the treatment I received in my own country.

Karl Liebhardt, Comment to *Some Students Bully Teachers Too*, TEACHERS AT RISK (Nov. 26, 2011, 4:06 AM), <http://www.teachersatrisk.com/2007/05/07/some-students-bully-teachers-too/>.

273. Waldman, *Badmouthing Authority*, *supra* note 4, at 644–46.

may not be viewed as a role model, perhaps losing that influence which is crucial to her role as an educator.²⁷⁴ These are instances when the educational process may certainly be disrupted.²⁷⁵

To be clear, many students use the Internet as an outlet to vent their frustrations about school.²⁷⁶ Most of these expressions would likely be protected speech because they are generally anonymous and have no connection to the students' schools. It is when a student goes as far as creating a false profile or humiliate a teacher online—similar to J.S. and K.L.²⁷⁷ or Justin Layshock²⁷⁸—where that speech should no longer be considered protected.²⁷⁹ To be sure, sometimes an Internet posting or fictitious profile may be so “outrageous” that a student should be able to disassociate the “fake” ideas expressed online from the “real” teacher instructing them at the front of the classroom.²⁸⁰ However, in today's digital society where the line between the online and off-line world is blurring,²⁸¹ students may actually have a more difficult time differentiating the outrageous from the genuine. Therefore, to ensure that schools can effectively fulfill their educational mission of instilling democratic values, the schools must be able to regulate certain Internet expression that has an impact on the school environment.

274. *Supra* note 272 and accompanying text.

275. *See supra* note 273.

276. The author of this comment attempted several Internet searches, including “I hate my teacher,” “I hate my school,” and “my teacher sucks.” The result was thousands of sites, including forums, YouTube videos, Facebook pages, and blogs where students vented about their teachers and schools.

277. *See supra* text accompanying notes 194–203.

278. *See supra* text accompanying notes 215–19.

279. *See, e.g.,* Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) (“School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children With its captive audience of children, many of whom, along with their parents, legitimately expect reasonable regulation, a school need not capitulate to a student's preference for vulgar expression. A school's authority to condemn indecent language is not inconsistent with a student's right to express his views.”).

280. *See Snyder II*, 650 F.3d 915, 930 (3d Cir. 2011) (en banc).

281. *See supra* text accompanying notes 258–68.

V. CONCLUSION

The Supreme Court seems hesitant to decide whether schools may regulate student Internet speech.²⁸² Perhaps the Court is hesitant to develop a standard for speech involving rapidly-changing technology until it more fully understands the impact of the Internet in the school setting.²⁸³ Nevertheless, in each of the four student speech cases, the Court indicated that a school provides a unique context for student rights, and, in light of that unique context, the Court balanced the school's interests with the student's rights.²⁸⁴ Because the Internet has no boundaries, speech that implicates the school or school personnel should be analyzed under *Tinker's* substantial disruption test as if it were spoken within the bricks and mortar of the building.

Because of the Supreme Court's silence, state and local legislatures need to step in and address the issue.²⁸⁵ As discussed above, many state constitutions and statutes include educational objectives that identify schools as places where students learn respect and prepare for citizenship.²⁸⁶ Student Internet speech that harasses or impersonates a school authority figure is contrary to these educational objectives and, therefore, should be punishable under this standard if it causes the sort of disruption mentioned above²⁸⁷ or invades a teacher's rights.²⁸⁸ As stated by the Supreme Court, "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive

282. See *supra* note 243.

283. See *Brown v. Entm't Merchs. Ass'n.*, 131 S. Ct. 2729, 2733 (2011) (identifying the "challenges of applying the Constitution to ever-advancing technology").

284. See discussion *supra* Part III.

285. See *Morse v. Frederick*, 551 U.S. 393, 421 (2007) (Thomas, J., concurring) ("Local school boards, not the courts, should determine what pedagogical interests are 'legitimate' and what rules 'reasonably relat[e]' to those interests." (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988))). For example, North Carolina has already taken action against Internet postings that disparage teachers by making it a crime to "intimidate or torment" teachers online. Steve Eder, *Teachers Fight Online Slams: Amid Free-Speech Concerns, Law Targets Comments that 'Torment' Faculty*, WALL ST. J., Sept. 18, 2012, at A3; see 2012 N.C. Sess. Laws 149 §14-458.2 (outlining a cyber-bullying provision that prohibits such activities as creating fake profiles or Web sites, or posting real or doctored images of school employees on the Internet).

286. See *supra* notes 44–46 and accompanying text.

287. See *supra* notes 271–75 and accompanying text.

288. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1986).

speech and conduct”²⁸⁹ Indeed, “schools may not be enclaves of totalitarianism,”²⁹⁰ but a school cannot function as an educational institution if its students are allowed to bypass this educational objective.

Admittedly, determining what type of Internet expression should and should not be punishable is difficult to decide and depends on the individual facts and the type of speech. But schools are given broad discretion to manage their day-to-day affairs.²⁹¹ Most schools have student handbooks or codes of conduct that provide notice to students concerning what types of behaviors are punishable.²⁹² Perhaps school districts could simply include a clause in these manuals indicating that the student code of conduct applies to inappropriate expression on the Internet that disrupts or may disrupt the educational process at the school, notwithstanding where the expression originated. A broad statement such as that would provide a student with sufficient notice that Internet activity is punishable; yet it allows the school discretion in determining whether a specific activity is actually disruptive to the educational process.

The Internet is evolving.²⁹³ Even over a few short years, it has drastically become increasingly intertwined with our daily functions.²⁹⁴ Once the Internet is more commonly understood as something greater than an information and communication tool, society may come to appreciate the significant impact that it has on individuals, even in the “off-line” world.²⁹⁵ Likewise, student expressions on the Internet have a great impact on the school environment, especially if the expressions are directed at a teacher or school authority.²⁹⁶ What one student writes online about a teacher may influence how another student views that teacher, and could result in a loss of respect for the teacher and lack of subordination necessary in a teacher-pupil relationship.²⁹⁷ Therefore, it is necessary that the Supreme Court steps in to clarify the authority

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

290. *Tinker*, 393 U.S. at 511.

291. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 863–64 (1982) (citations omitted).

292. *See supra* text accompanying notes 50–52.

293. *See discussion supra* Part IV.A.

294. *See supra* text accompanying notes 250–63.

295. *See supra* notes 251–55 and accompanying text.

296. *See discussion supra* Part IV.B.

297. *See supra* notes 269–74 and accompanying text.

schools have over student Internet speech in light of the educational mission of the school and the students' First Amendment rights.

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