Article

Categorizing Student Speech

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INTRODUCTION

One of the greatest complexities of free speech doctrine involves distinguishing between constitutionally protected communications and those that the Supreme Court considers outside the First Amendment's protective purview. This dichotomy is sharply pronounced in cases reviewing public school restrictions on student digital, verbal, and written statements. Courts jumble the precedents by sometimes treating students as civic participants and other times treating them as immature wards. Lack of consistency in this area of law has created circuit splits over when school administrators may constitutionally punish student speech that occurs inside or outside the school. This Article explains the contextual balance required to correct the internal conflicts between jurisprudence that recognizes students retain First Amendment rights at school and a different line of case law that deferentially affirms school censorship without subjecting it to exacting scrutiny.[1]

The Court has recently qualified core student speech precedents rather than overturning them outright. A student's right to express personal opinions, artistic acumen, or political insights remains sacrosanct, but as of late the Court has taken a decidedly less speech-protective analytical direction, and lower

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1. For earlier works on K–12 speech doctrine see, e.g., AMY GUTMANN, DEMOCRATIC EDUCATION (1987); CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS (2015); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008).

courts have followed its lead. A majority of justices have become increasingly deferential to school administrators' judgments to censor expressive content about matters such as drug policy and raunchy political school speeches. The judicial trend is to be categorical about the content of speech that school districts, principals, and teachers can prohibit and to be less rigorous of the evidence educators must provide courts to justify adverse actions against students.

The Supreme Court's increasing reliance on school officials' judgments has legitimized less rigorous review of cases challenging the suppression of student expression, rather than demanding that the officials rigorously hold to First Amendment principles. The Court has repeatedly demonstrated an unwillingness to closely scrutinize school boards' disciplinary measures imposed on students for the manner and substance of their expressions, emboldening state legislators to adopt harsh disciplinary laws against student speech.[2] Many of the statutes rely on ambiguous terms, including "boisterous conduct"[3] and "disturbance,"[4] granting school administrators broad, ad hoc discretionary powers, rather than limiting them to narrowly tailored restrictions on free speech. Lower court judges have also embraced the Court's increasingly lenient student speech doctrine, consigning to educators broad latitude to make policies about which pupil expressions are appropriate.[5]

Judicial reliance on rigid categories to identify protected student speech reflects a broader trend in First Amendment jurisprudence. The Roberts Court has spearheaded a categorical approach to free speech analysis.[6] Its stated methodology relies on a historical framework that is purportedly rooted in principles existing at the ratification of the Bill of Rights in 1791.[7] Upon

2. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2911 (2016); CAL. EDUC. CODE § 32210 (West 2014); N.D. CENT. CODE § 15.1-06-16 (2016).

3. N.D. CENT. CODE § 15.1-06-16 (2016) ("It is a class B misdemeanor for any person to . . . willfully interfere with or interrupt the proper order or management of a public school by . . . boisterous conduct.").

4. CAL. EDUC. CODE § 32210 (2014) (titled "willful disturbance of public school or meeting, offense"); N.D. CENT. CODE § 15.1-06-16 (2016) (titled "Disturbance of a public school-penalty").

5. *See infra* Part II.

6. United States v. Stevens, 559 U.S. 460, 472 (2010) (adopting a historical and traditional approach to identifying low level speech and denying to the legislature any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment").

7. *Id.* at 468.

closer examination, however, the evolution of free speech jurisprudence has been more nuanced and contextual than the listing of unprotected forms of communication.[8] Since 2010, the Court has articulated an absolutist-sounding free speech doctrine that prohibits judges from engaging in ad hoc balancing of social issues. In this context, the Court has identified a limited number of speech categories that it regards to be historically unprotected forms of communication.[9]

Student speech has never been among those categories the Court has included in its unprotected list. To the contrary, students have traditionally been found to retain their right of self-expression even during school hours.[10] They are young citizens, finding their individual voices, and contributing to public debates, if only in their academic niches. Consequently, the Court has historically been skeptical of censorship, except in those cases involving students who have substantially disrupted the educational environment or materially interfered with others' rights.[11] Increasingly, however, students' ability to express controversial opinions has been jeopardized by a pattern of judicial deference to school administrators. Some district and appellate courts afford minimal constitutional protections to students who use off-campus computers to post hyperbolic comments that are later read or viewed on campus through social media websites.[12]

8. *See* Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 506–14 (2015) (arguing that while the Court claims to be relying on history and tradition to identify low value speech, the actual categories the Court relies on are based on carefully balanced policy considerations).

9. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the 'historic and traditional categories [of expression] long familiar to the bar.'" (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

10. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

11. *Id.* at 513.

12. *Compare* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 398–400 (5th Cir. 2015) (holding that the school board's approved punishment for a threatening rap song recorded off campus but intimidating the targeted teacher at school did not violate the student's right of free speech), *and* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) (finding that a preliminary injunction was inappropriately granted to students who had created an off-campus racist website to be read by classmates, which school officials could have reasonably expected to impact school activities), *with* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932–33 (3d Cir. 2011) (holding that school officials cannot suspend a student for off-campus speech because a different student brought a copy of the communication to school).

This judicial trend has emboldened officials to police the content of student expressions without complying with heightened review of disciplinary decisions.[13]

Officials typically make disciplinary decisions based on legitimate desires to advance learning and the safety of students. However, without adequate judicial oversight to ensure that school restrictions do not compromise free speech values, courts leave too much room for restricting personal or political views to the sole discretion of teachers, principals, and school boards. Administrators' educational expertise certainly exceeds those of ordinary judges; however, the judiciary remains the foremost authority on constitutional interpretation. Final determination about the constitutionality of speech limitations should therefore remain the province of courts. Without heightened First Amendment scrutiny, student communications are left at the behest of subjective administrative judgments that broadly vary from school district to school district and from principal to principal.

Safeguarding students' abilities to openly explore controversial public subjects, to express themselves artistically, and to learn valuable information requires a fine-tuned standard of judicial review. This Article argues: (1) that any restriction on student political speech expressed outside a school sponsored event, class, or assembly, should be subject to strict scrutiny; and (2) where speech is within the auspices of schools, courts should apply a contextual form of intermediate scrutiny to review censorship decisions.

Part I provides doctrinal background for evaluating restrictions on student speech. It details the marked transformation of student speech doctrine from *Tinker v. Des Moines Independent Community School District*,[14] in which the Court scrutinized the administration's actions, to *Morse v. Frederick*,[15] in which the Court largely deferred to the administration. Part II turns to the categorical speech doctrine, explaining its roots in *United States v. Stevens*[16] and its progeny. These cases formalized free speech analysis outside the realm of student speech, narrowing the classes of expression beyond the pale of First Amendment protections. Although the Court did not list derisive student speech among the low-value categories, the Court's re-

13. *See infra* Part II.B.
14. 393 U.S. 503 (1969).
15. 551 U.S. 393 (2007).
16. 559 U.S. 460 (2010).

cent erosion of the *Tinker* doctrine has effectively rendered student communications among those few whose content can be suppressed without being subject to strict scrutiny review. After exploring Supreme Court precedents, Part II then turns to recent lower court opinions extending schools' discretionary authority to police contemporary technologies such as Facebook, Twitter, and email servers. The discussion deals with on-campus and off-campus communications of intimidation, incitement, threat, cyber-bullying, and hyperbole.

Part III develops a framework for adjudicating school regulations that impose substantial burdens on student communications. The proposed approach is significantly more nuanced and contextual than the current ad hoc test judges have relied on to evaluate educators' and administrators' decisions. It proffers a three-tiered approach. In discussions of ideas, self-assertion, and political speech, stated in the playground, near the school, by lockers, and other unstructured activities, courts should use strict scrutiny analysis. In circumstances, where limitations on students are created to advance certain content-neutral time, place, and manner concerns, the intermediate scrutiny standard is appropriate. Finally, officials should be granted the greatest discretion when dealing with speech that is neither political nor informational, such as obscenity, true threats, and plagiarism. This balanced method of review maintains the intellectual space for students to develop into thoughtful adults and to engage in social discourse while retaining sufficient discretion for pedagogical discipline. Balancing does not succumb to oversimplified categories; therefore, in some circumstances schools might identify other constitutional interests that outweigh student expression. Illustrative of the latter point are narrowly tailored rules against wearing confederate symbols in schools to administer the Thirteenth Amendment's injunction against the badges of slavery. In any case, student First Amendment rights can be better secured through contextual analysis rather than by categorical framing.

I. SCHOOL SPEECH DOCTRINE

Recognizing that constitutional protection of free speech applies equally to youths as it does to adults, early Supreme Court precedents on student speech robustly protected students who wished to express controversial viewpoints at schools. Youths communicate about matters at the core of the First Amendment, including topics on deliberative democracy, personal development, and informative facts. However, the school speech doctrine

has gradually eroded to diminish student autonomy and to expand educators' prerogatives over administrative suppression of statements and opinions. This Part discusses the most important Supreme Court precedents establishing the student speech doctrine. Initially, in *Tinker*, the Court set a clearly defined test, prohibiting schools from restricting student speech unless it caused a substantial disruption.[17] However, the more recent opinions of *Fraser* and *Morse* rely on ad hoc tests of vulgarity and illegality, without requiring proof of disruption.[18] The later cases augmented school administrators' authority to censor unconventional student views, while stifling student opposition to school policies or to existing law. The *Morse* majority went so far as to sanction a principal's exercise of disciplinary authority against students who displayed a sign on the sidewalk across the street from the school.[19]

The seminal case on the constitutional status of student speech, *Tinker v. Des Moines Independent Community School District*, arose from complaints filed against school officials who had attempted to ban political speech on campuses.[20] In 1965, as the United States was building up military forces in Vietnam,[21] several adults and children met in Des Moines, Iowa and agreed to wear black armbands in civil protest of the expanded U.S. involvement in that armed conflict. Among them were two high school students and one elementary school student.[22]

Determined to stop the children from protesting at school, principals throughout the city committed to a joint policy of preventing students from wearing armbands.[23] As a result, officials suspended the three students for refusing demands to remove the insignia at school.[24] All of them testified at trial that wearing the armbands signaled sorrow at the loss of life and support for

17. *Tinker*, 393 U.S. at 514.

18. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986); Morse v. Frederick, 551 U.S. 393, 408–10 (2007).

19. *Morse*, 551 U.S. at 408–10.

20. *Tinker*, 393 U.S. at 504.

21. JONATHAN COLMAN, THE FOREIGN POLICY OF LYNDON B. JOHNSON 52–53 (2010) (discussing the rapid expansion of the number of U.S. troops in Vietnam between 1965 and 1966); YAACOV VERTZBERGER, RISK TAKING AND DECISIONMAKING 265 (1998) ("In a television broadcast on July 28, 1965, Johnson announced that additional U.S. troops would be sent to fight in South Vietnam.").

22. *Id.*

23. *Id.*

24. *Id.*

a truce in Vietnam.[25] The prohibition prevented students from expressing their ideas on a significant public debate.

The Supreme Court majority in *Tinker* held that the suspension violated the students' constitutional rights to free speech.[26] In one of the most insightful and influential statements, Justice Abe Fortas wrote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[27] The students wore armbands both as a personal protest against U.S. engagement in the Vietnam conflict and to influence others' thinking on the matter: these were self-assertive acts protected by the Free Speech Clause.[28] As a rule, school authorities can only rely on neutral criteria—such as time, place, and manner,[29] or limited public-forum restrictions[30]—to punish students for demonstrative expressions. In the key portion of the case, the Court ruled that school administrators can order students to desist from expressive behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[31] For half a century, that has been the abiding law of free speech at public schools; although, subsequent case law has narrowed its initial breadth of protection for K–12 students' free speech.[32]

Given the importance of obtaining instruction and expressing personal views, school suppression of speech can only be undertaken upon the school's proof that the student "substantially interfere[d] with the work of the school or impinge[d] upon the rights of other students."[33] Merely creating audience "discomfort or unpleasantness"[34] by expressing unpopular views is not

25. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966), *rev'd*, 393 U.S. 503 (1969).

26. *Tinker*, 393 U.S. at 513–14.

27. *Id.* at 506.

28. *Id.* at 514.

29. *See* Grayned v. City of Rockford, 408 U.S. 104, 116–19 (1972) (upholding, under the First Amendment, an anti-noise regulation, tailored for the particular needs of an educational institution, creating neutral restrictions for protests conducted on sidewalks adjacent to a school).

30. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001) (holding "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint").

31. *Tinker*, 393 U.S. at 513.

32. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

33. *Tinker*, 393 U.S. at 509.

34. *Id.* at 509.

enough for school authorities to interfere with a fundamental liberty.[35] In *Tinker*, the school failed to demonstrate that by wearing armbands the students had materially and substantially disrupted school activities.[36] Justice Fortas made clear that school officials do not have unbridled authority to determine whether there has been substantial disruption; rather, courts must rely on independent judgment to evaluate whether the evidence sufficiently justifies the suppression of student expression.[37] In *Tinker*, the Court evaluated the record, finding no "evidence that the school authorities had reason to anticipate"[38] that by wearing armbands, students would substantially interfere with learning.[39] This was not merely a rational basis of review, but a close scrutiny of the school's decision to interfere with students' right of free speech by setting content or viewpoint restrictions on expression.

Tinker contributed a variety of insights into the school speech area. For example, students retain constitutional rights even when they express messages contrary to those favored by school authorities.[40] Public school officials fall under the Fourteenth Amendment definition of state actors.[41] They cannot conduct themselves outside the parameters of constitutional guarantees, without regard to students' maturity and inexperience. Justice Fortas further wrote for the majority that totalitarian authority over students has no place in public schools.[42] The state must respect the fundamental right of free speech; students are not merely the recipients of communications but are at

35. *Id.*

36. *Id.* at 514.

37. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 533–34 (2000) ("[I]t is not for a court to accept the claims of school officials about the need to stop the speech; the court must independently review the facts and determine whether there is sufficient evidence of significant disruptive effect to justify punishing expression."); C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 359 (1989) ("[T]he Court demands substantial governmental justification for the burdens that school officials impose on student speech.").

38. *Tinker*, 393 U.S. at 509.

39. *Id.*

40. *Id.* at 506 ("In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

41. *Id.*

42. *Id.* at 511.

liberty to express their sentiments without first receiving official approval.[43] Judge Fortas' statement that the marketplace of ideas requires "vigilant protection . . . in the community of American schools"[44] is tied to the democratic model of education.[45] This view of public education elaborated the same principles that informed the *Brown v. Board of Education* opinion, where Chief Justice Warren stressed that public schools awaken "the child to cultural values."[46] To this point, *Tinker* adds that students contribute to culture and education.[47] Education, therefore, benefits democratic learning and democratic engagement.

Following the creation of this integrative conception of student speech as an instrument essential to education and childhood development, the Court gradually beveled away at the moorings of *Tinker*, becoming increasingly deferential to school authorities. Beginning with *Bethel School District No. 403 v. Fraser*,[48] the Court regularly created categories of presumed lower value student speech and did not apply the *Tinker* standard to them. With changes to Court membership having shifted the institution in a more conservative direction, the *Fraser* majority accepted a school's imposition of punishment for verbal communication.[49] The high school student had been disciplined for a nominating speech on behalf of a fellow student that was delivered at a high school assembly, attended by students as young as fourteen years of age.[50] It contained "an elaborate,

43. *Id.*

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

45. *Id.* Among the purposes of democratic education is the development of good character, the imparting of moral reasoning, the engagement with deliberative participation. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 50–52 (1987).

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

47. That flexible protection of liberties, among which speech is only one, has a broad range of implications about other constitutional limits on school officials on matters like school searches; although, the Supreme Court has been quite deferential to their uses of authority. While *Tinker* heralded an expansion of constitutional protections for student free speech, this expansion did not translate into other areas such as school search and seizure nor into administration of corporal punishments. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (finding that in a school setting, reasonableness, rather than probable cause, suffices for a school purse search); Ingraham v. Wright, 430 U.S. 651, 683 (1977) (holding that the Cruel and Unusual Punishments Clause does not apply to school settings and common law state protections safeguard students' due process interests).

48. 478 U.S. 675 (1986).

49. *Id.* at 685.

50. *Id.* at 677.

graphic, and explicit sexual metaphor,"[51] which teachers had warned the speaker were inappropriate and might subject him to disciplinary censure.[52] Writing for the majority, Chief Justice Burger acknowledged the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms," but stressed that value "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[53] Justice Burger gave wide latitude to schools, adopting the perspective of historians who had argued that public education inculcates "habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[54]

Justice Burger differentiated the case from *Tinker*, where the ability to express political views had been at stake.[55] On the other hand, in *Fraser*, the public school undertook "to prohibit the use of vulgar and offensive terms in public discourse."[56] By this explanation, the Court acceded to school officials' content-based censorship. The holding is understandable, in large part because the speech sparked a reaction from the use of vulgar gestures during a speech presented at a school function. Even the high value of free speech, Justice Burger found, did not require educators to abandon their responsibility for students' character developed in the face public misbehavior.[57] Such an

51. *Id.*

52. *Id.* at 677–78.

53. *Id.* at 681.

54. *Id.* (quoting CHARLES BEARD, MARY BEARD & WILLIAM BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1960)). The connection between education and good habits is in fact ancient in Anglo-American culture. *See, e.g.*, Etna, 8 F. Cas. 803, 804 (D. Me. 1838) ("The community has a deep interest in preserving the rectitude of the young, and in imparting to them such an education and training them to such habits as will render them in manhood useful and not pernicious members of society."); 1 MARIA EDGEWORTH & R. L. EDGEWORTH, PRACTICAL EDUCATION 334 (2d ed. 1801) ("As the understanding unfolds we should fortify all our pupils' good habits, and virtuous enthusiasm, by the conviction of their utility, of their being essential to the happiness of society in general, and conducive immediately to the happiness of every individual."); T.C. FOSTER, A VERBATIM REPORT OF THE GREAT DIOCESAN MEETING AT WARRINGTON 44 (1839) (asserting that it is the duty of school masters to instill "good dispositions, good habits, good principles, good conduct, founded on religious motives").

55. *Fraser*, 478 U.S. at 685.

56. *Id. at* 676.

57. *Id.* at 685–86.

approach empowers school officials to maintain an orderly learning environment at school sponsored events without substantial disruption. These conclusions are in line with *Tinker*. However, there is reason to question the Court's perfunctory acceptance of the Bethel School Board's characterization of events.

While the indecency may have been clear to the *Fraser* majority, the evidence does not seem to have been at all so conclusive. The court of appeals, to the contrary, found that only three students of an assembly of six hundred students were boisterous and that the education process was not at all disrupted.[58] At trial, a school counselor testified that the level of student response was not out of the ordinary in these sorts of assemblies.[59] The district court, "applying the variable test for obscenity as to high school students,"[60] had found that the speech was "not obscene" for the high school audience.[61]

Ordinarily speakers may purposefully resort to expletives and perhaps even vulgarities to make a public point about anything from a presidential election to a military policy. Given the potential for officials to suppress students' core speech rights, judicial oversight remains essential to safeguard constitutional values. Judges should deal with specific counterclaims of expression and disruption rather than dismissing out of hand factual findings of the trial court. The Court's understandable skittishness against acting as a super-school board does not gainsay the judiciary's constitutional obligation to demand a school to furnish rigorous proof of disruption in a matter implicating political speech. To provide more guidance to schools and lower court judges, the *Fraser* Court might have more clearly limited the holding to vulgar statements at public assemblies or at school functions with young children present, thereby recognizing that not all sexual innuendo used by students is actionable by high schools.[62]

58. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1360 (9th Cir. 1985).

59. *Id.* at 1359.

60. Brief for Respondents, E.L. Fraser at 12, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (No. 84-1667), 1985 WL 670006 *29.

61. *Id.*

62. There is some indication that the Court means its holding to be limited: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Fraser*, 478 U.S. at 685. However, the Court also uses broader discretionary language that would indicate broader school official powers: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.*

Following *Fraser*, the Court doubled down on its deference to school administrators in *Hazelwood School District v. Kuhlmeier*,[63] approving administrative censorship of students who sought to publish articles about social issues in a school newspaper.[64] *Hazelwood* arose after a high school principal refused to permit the publication of two stories.[65] One story dealt with teenage pregnancy and the other with the developmental adjustment of children after parental divorce.[66] Any state prohibition against publishing such content in an ordinary newspaper would have certainly violated free speech doctrine against prior restraints of the press.[67]

The principal openly admitted that the decision to deny publication was content based.[68] Arguably at least, the topic of pregnancy may have been inappropriate for some younger students. The Court found the principal might have "reasonably been concerned" that parents and boyfriends discussed in the article had not been given the opportunity to respond to sensitive charges.[69] Although the pregnant students who were discussed in the story were pseudonymous, the principal was concerned members of the school community might recognize their real identities.[70] Nevertheless, the Court's rationale contained phrasing that cut into students' expressive interests.

While the *Hazelwood* Court continued to quote the *Tinker* statement that students did not give up all their free speech rights at school, the majority found that public school students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings."[71] The *Hazelwood* majority deferred to educators, treating student speech on subjects of in-

63. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

64. *Id.* at 276.

65. *Id.* at 263.

66. *Id.*

67. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (asserting that prior restraint is "the most serious and the least tolerable infringement on First Amendment rights"); New York Times v. United States, 403 U.S. 713, 714 (1971) (per curiam) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

68. *Hazelwood*, 484 U.S. at 263 (stating the various content-based reasons the principal denied publication of the two articles).

69. *Id.*

70. *Id.* at 263.

71. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

terest to student journalists and readers as being low-value communications, asserting "what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[72] This pithy statement signaled a remarkable assignment of judicial power to interpret the Constitution to educators. School officials, the majority found, are entitled to regulate the newspaper content without even being subject to the rigors of intermediate, much less, strict scrutiny.[73] The Court sought to distinguish school-sponsored newspaper stories from the armband protest of *Tinker*,[74] even though both were about controversial subjects disapproved of by school officials. The reasoning in *Hazelwood* nevertheless expanded school officials' powers to discriminate on the basis of content and viewpoint low-value speech by a mere showing of reasonableness.[75] The majority made clear that it regarded student speech in school-created fora to be a separate category of First Amendment doctrine.[76]

The *Hazelwood* reliance on rational scrutiny demonstrated the Supreme Court's increased willingness to defer to public officials' discretion over student expressions, even when strictures overtly suppress contents and viewpoints. The succeeding case was even more deferential to school authorities. *Morse v. Frederick*, which the Court decided in 2007, did not involve speech at school, nor a column in a school newspaper.[77] The school suspended Joseph Frederick for displaying a large banner with, "BONG HiTS 4 JESUS," and refusing the school principal's request to furl it.[78] The offending students planned the protest to coincide with the Olympic torch passing by the school and hoped their stunt would thereby garner press coverage.[79] Frederick displayed the messages on the sidewalk across from the school.[80] At no point during the display did he enter school grounds.[81] Finding herself rebuffed by Frederick's recalcitrance, the principal walked off the school grounds, across the street, grabbed the

72. *Id.* at 267 (quoting *Fraser*, 478 U.S. at 683).

73. *Id.* at 276.

74. *Id.* at 270–71.

75. *Id.* at 274.

76. *Id.* at 273 ("This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

77. Morse v. Frederick, 551 U.S. 393, 396 (2007).

78. *Id.* at 397–98.

79. Frederick v. Morse, 439 F.3d 1114, 1115–16 (9th Cir. 2006).

80. *Id.* at 1115.

81. *Id.*

sign, and then suspended him from school for advocating illegal drug use.[82] Her administrative action was an undeniable form of subject and viewpoint discrimination, which under ordinary circumstances would have warranted strict scrutiny review.

The principal read into Frederick's message. At oral argument, Justice Souter suggested that the student might have been making a political statement, calling for the legalization of marijuana, but not for its use by students.[83] On the other hand, the statement might have been a parody[84] or public commentary,[85] both of which *Tinker* indicates are protected at school and, even more so, outside of it. In his dissent, Justice Stevens also recognized this point, asserting that allowing a principal to suspend the student for an "obtuse reference to marijuana," the advocacy of which "was at best subtle and ambiguous," overbroad, with "no stopping point" to prevent the school from further encroaching on speech.[86]

Despite the inherent ambiguity of Frederick's four-word message, the speculation as to its meaning, the parody of it, and the political debate it might have engendered, Chief Justice Roberts, writing for the majority in *Morse*, did not engage in heightened scrutiny. Instead, he accepted the principal's assessment without adequately balancing Frederick's claim to free expression.[87] The Court's rational basis approach might have made sense had Frederick caused a substantial disruption of school, but nothing of the type appears from the record. Rather than demanding the principal to provide compelling or substantial reasons for punishing a student for speech in a traditional public forum, a locus where the Court has long recognized the need for

82. *Id.*

83. Transcript of Oral Argument at 6–7, Frederick v. Morse, 551 U.S. 393 (2007) (No. 06-278), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf.

84. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (finding the First Amendment protects parody).

85. Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (asserting that "[t]he policy of the First Amendment favors dissemination of information and opinion" on public matters).

86. *Morse*, 551 U.S. at 444 (Stevens, J., dissenting).

87. See *id.* at 408–10 (noting that the principal's actions were justified because of the dangers of drug use); *cf.* United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) ("Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person.").

strict scrutiny review,[88] the holding in *Morse* relies on the principal's sensibilities of student propriety.[89] And she made a decision, not about some acting out at school, but an adolescent's behavior on the public sidewalk. By requiring no empirical proof and taking the principal's word as to both the sign's meaning and the foreseeable possibility of discipline breaking down because of the pro-drug message, the majority treated student off-campus speech as a low value category, one that requires neither strict nor intermediate scrutiny. Although it did not overrule *Tinker*, *Morse* sharply curtailed the constitutional protection of student expression and enabled school officials to undercut student engagement in the marketplace of ideas. Now, school officials only need to make a reasonable inference about the consequences of student speech, without proving it to have been disruptive.[90] Of even greater consequence, the Court countenanced the school's censorship of contrarian speech with an arguably political message.

Frederick expressed himself off school grounds and did not make his statement on a thoroughfare connected to school. He and other students sought to garner attention by gathering near school when journalists were present. The record contained no indication that Frederick's conduct met the *Tinker* heightened scrutiny test for justifiable school restraint on student expression: he had not materially and substantially disrupted schoolwork or school functions. In fact, the principal instigated the altercation. Moreover, the Court should have distinguished *Morse* from *Hazelwood* because Frederick had not sought to publish the message on a school platform. Furthermore, he displayed the sign away from the official school event, albeit within ready view of school officials. The *Morse* majority relied on rational basis review, as if student speech that could be interpreted to advocate illegal conduct were a category unprotected by First Amendment

88. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumstantial.").

89. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (asserting that rational basis review allows for "a legislative choice" that "is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data").

90. *Morse*, 551 U.S. at 397 ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

norms, history, and tradition.[91] This conclusion has had far-reaching implications about students' abilities to advocate against existing legal rules.

II. THE CATEGORICAL FREE SPEECH DOCTRINE AND MODERN SCHOOL DILEMMAS

By increasingly deferring to school officials' pedagogical judgments, the Court has created a de facto, albeit inchoate, category of lower level speech that had not previously been defined in judicial or scholarly literature.[92] The plasticity of the rational basis test threatens student political and self-expressive speech. The new direction in student speech has significantly shifted from the *Tinker* standard for the protection of students' abilities to express controversial views on heated subjects. Even when a school suppressed speech because of its content—such as when the school newspaper sought to publish articles on subjects disapproved by the school principal or students used impropriety at school events—the Court refused to engage in heightened review.[93] Much student speech is now treated as low value communication that is unprotected by the First Amendment.

The Roberts Court has repeatedly asserted that regulations of certain categories of adult speech—including obscene and fraudulent speech—likewise raise no First Amendment concerns. The latitude the Supreme Court showed school officials in *Fraser*, *Hazelwood*, and *Morse* has created a similar low status for various forms of students' expressions, asserted on and off campuses, and diminished the judicial role of protecting a core constitutional liberty. Lower court opinions that were rendered after *Morse* are a patchwork of ad hoc conclusions about the school officials' latitude to suppress artistic and political statements. Courts often treat student communications as if they

91. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 406 (1992) (relying on rational standard of review in the context of "categories of unprotected speech"); *see also* Ginsberg v. New York, 390 U.S. 629, 640–41 (1968) (providing an example of a category of speech requiring only rational basis review).

92. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 94 (2015) (recognizing the Supreme Court's "taxonomy of censorship for student speech" and how the chosen category "determines the level of constitutional protection the speech receives").

93. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (holding that content-based regulations must be reviewed on the basis of the strict scrutiny analysis).

were part of a low-value category along the lines asserted in *Stevens*, *Entertainment Merchants*, and *Alvarez*.[94]

Such treatment endangers free speech rights, especially when it results in deference to school officials who often seem prone to favor discipline over free speech. Some examples will help illustrate the point: A high senior, Jakob, in the Clear Fork High School in Ohio was suspended for retweeting a message in favor of an individual who was suing the district to decriminalize marijuana.[95] The suspension was significant blow to Jakob's life prospects.[96] He had nearly a straight A grade point average and was the second highest scorer on his soccer team.[97] Prior to the suspension he had been an attractive candidate to college recruiters.[98] The blot on Jakob's transcript diminished his available options for a college scholarship.[99] In a different case, a high school in Staten Island, New York suspended a student for tweeting a photograph with an image of a teacher's automobile parked next to a "No Parking" traffic sign and adding that he hoped the van would soon be towed.[100] So too an eighth grader who wore a patriotic t-shirt in support of fallen soldiers was suspended by a rigid rule against shirt designs with "violence related reference."[101] His shirt had images of boots, helmet, and gun, along with the words, "Standing for those who stood for us," and was clearly a political statement.[102] But the Supreme Court's deference to educators' decisions, in preference to *Tinker*'s more rigorous protections of student speech, left even patriotic statements at the ad hoc discretion of teachers. At a high school, journalists were suspended for refusing to follow

94. *See infra* text accompanying notes 86–106.

95. Linda Martz, *Senior Athlete Suspended for Weed-Related Retweet Sues District*, MANSFIELD NEWS J. (Apr. 10, 2014), http://www.mansfieldnewsjounal.com/story/news/2014/04/10/clear-fork-senior-suspended-for-weed-related-retweet-sues-district/7566503.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Daniel Leddy, *Advance Legal Columnist: The Issue of Students' Free-Speech Rights is a Murky Area*, STATEN ISLAND ADVANCE (Feb. 26, 2013), http://www.silive.com/opinion/danielleddy/index.ssf/2013/02/advance_legal_columnist_the_is.html.

101. Eugene Volokh, *Eighth-Grader Suspended for Not Removing Patriotic T-Shirt Depicting a Fallen Soldier's Rifle*, WASH. POST: VOLOKH CONSPIRACY (Oct. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/12/eighth-grader-suspended-for-not-removing-patriotic-t-shirt-depicting-a-fallen-soldiers-rifle.

102. *Id.*

their principal's mandate to use the Redskins team name because they regarded it to be offensive.[103] Examples of this type could be multiplied, but these should suffice to illustrate the gravity of censorship associated with unbridled administrative restrictions of free speech rights at the high school and grade school levels.

This Part of the Article demonstrates that the Supreme Court's newly loosened approach to student speech is part of a broader categorical analysis that derides the balancing of interests. Lower courts increasingly review controversial student statements by the extent to which school censorship is analogous to one of the categories the Supreme Court has found to be of low value: vulgar, school-sponsored, or advocating illegality.[104] This categorical doctrine has resulted in a chilling of students who wish to express themselves freely about matters of social, communal, and personal importance. In Section A, I describe the formalistic doctrine that enumerates categories of unprotected speech but requires strict scrutiny analysis for other content restrictions. In Section B, I demonstrate that various lower courts have understood recent Supreme Court developments to relegate on and off-campus student speech to a low-value category, subject only to rational basis review.

A. CATEGORICAL FREE SPEECH DOCTRINE

Outside the student speech cases, the Court has become more formalistic in its approach to free speech cases. In *Stevens*, *Entertainment Merchants*, and *Alvarez*, a majority of Justices derided judicial balancing of free speech against other values. While the Justices have never asserted that student speech is outside the purview of the First Amendment—thus *Tinker* technically remains intact—the recent turn in favor of school administrators effectively (although not explicitly) treats student speech within a set of expressions that only receives the lowest level of adjudicative scrutiny.

The Court first articulated the existence of low value speech in a seminal 1942 decision, *Chaplinsky v. New Hampshire*,[105]

103. *When Educators Become Censors, Students Are Marginalized: Editorial*, NJ.COM (Oct. 12. 2014), http://www.nj.com/opinion/index.ssf/2014/10/when_teachers_become_censors_the_students_suffer_editorial.html.

104. *See supra* Part I.

105. 315 U.S. 568 (1942).

which upheld a state statute that criminalized the use of "offensive, derisive, or annoying words" in public place.[106] The majority read the statute narrowly, under a newly created fighting words doctrine: the First Amendment does not prohibit government from criminalizing speech whose very utterance inflicts injury or tends to incite an immediate breach of the peace.[107] Fighting words are among a "class of speech" government can censure without running afoul of the First Amendment.[108] The majority also defined other classes of speech, including "the lewd and obscene, the profane, [and] the libelous," whose prevention and punishment did not raise First Amendment concerns.[109] In *Chaplinsky*, the Court nowhere indicated that these categories are rigid, exhaustive, or historical. To the contrary, the majority explained that those types of expressions were outside the scope of the Free Speech Clause because their "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[110] The Court, therefore, regarded social valuations of some expressions to be legitimate because of its potential to generate disorders, such as immediate breaches of the peace. While the Court listed only a limited group of unprotected expressions, based on later jurisprudence, to this list should be added misleading and illegal advertisement,[111] workplace sexual harassment,[112] and conspiracy to commit crimes.[113]

For decades, academics and courts regarded *Chaplinsky* to have established a balancing test, requiring judges to identify and weigh the relevant demands of free expression and of public regulation.[114] History and precedent certainly played a role, but

106. *Id.* at 568.
107. *Id.* at 572.
108. *Id.* at 571–72.
109. *Id.* at 572.
110. *Id.*
111. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976).
112. R.A.V. v. City of St. Paul, 505 U.S. 377, 410 (1992) (White, J., concurring).
113. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).
114. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (citing *Chaplinsky* to determine the appropriate way to identify "a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"); Iannarelli v. Morton, 327 F. Supp. 873, 880 (E.D. Pa. 1971) (discussing *Chaplinsky* balancing);

judges identified unprotected categories of speech by their inclusion or exclusion from core free speech values of self-expression, political participation, or informative content.

More recent decisions of the Roberts Court have used formalistic and categorical language. Rather than following the *Chaplinsky* balancing formula, in 2009, with *United States v. Stevens*,[115] the Court began relying on a presumption of calcified categories, whose existence it supposed to be fixed at the year the Bill of Rights were ratified.[116] Chief Justice Roberts, who wrote the majority opinion in *Stevens*, explained away the *Chaplinsky* recognition of balancing in First Amendment cases, as a "descriptive statement" about rigid categories.[117] This perspective discounts the use of rigorous balancing criteria for rendering judgment.[118] As I have shown elsewhere, it also overlooks judicial creation of low value speech categories—such as child pornography, obscenity, and fighting words—in twentieth century decisions rather than in 1791.[119]

Marc Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 127 n.90 (1963) (relying on *Chaplinsky* style balancing); Henry H. Foster, Jr., *The Relation and Correlation of Freedom and Security*, 58 W. VA. L. REV. 325, 349 n.73 (1956) (listing *Chaplinsky* among cases deploying balancing analysis); Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009 CATO SUP. CT. REV. 67, 81 (arguing that the last sentence of *Chaplinsky* invites judges to engage in open-ended balancing).

115. 559 U.S. 460 (2010).

116. This originalist conception appeared in Justice Scalia's majority opinion in *R.A.V.*:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations.

505 U.S. at 382–83 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

117. *Stevens*, 559 U.S. at 471 (2010).

118. I've developed a rigorous balancing test consisting of: (1) whether the expression at issue is likely to implicate specific constitutional, statutory, or common law harms; (2) whether the restriction on speech is based on a historical or traditional doctrine; (3) whether any government policies benefitting the general welfare weigh in favor of the regulation; (4) whether the regulation on speech closely fits the public ends that is sought; and (5) whether there are any less restrictive alternatives to achieving them. Alexander Tsesis, *Multifactoral Free Speech*, 110 NW. U. L. REV. 1017, 1036 (2016).

119. *See generally* Tsesis, *supra* note 8 (explaining the ways in which low value speech categories are overlooked).

In *Stevens*, Chief Justice Roberts, writing for the majority, held the Animal Crush Videos Act to be facially unconstitutional.[120] The statute had criminalized the creation, distribution, or possession of crush videos depicting actual suffocation, drowning, and infliction of injuries on non-human animals.[121] The case specifically addressed the federal limitation on visual depictions and distributions of videos containing images of the brutal crushing of animals, conduct which all fifty states punish through anti-cruelty statutes.[122] Ultimately, the Court determined the statute was substantially overbroad, censoring even protected expressions, such as hunting videos.[123] More importantly for our discussion on the current status of school speech, the Court assayed against "ad hoc balancing of relative social costs and benefits," determined to prevent judges from using a "free-floating test for First Amendment coverage."[124] The *Stevens* Court held fast to a concern that weighing analysis was "highly manipulable."[125] The only regulations the Court found the First Amendment allowed are those that target historically and traditionally recognized forms of low level speech such as obscenity, defamation, fraud, incitement, and speech integral to a crime.[126] According to the Court's line of reasoning, violent video depictions were not among any historical or traditional categories of low value speech, and therefore the prohibition against their depiction was a content based intrusion on expression. As I will demonstrate in Section B of this Part, the very manipulability the Court initiated in the crush video case is the one that it, inconsistently, imbedded in the student speech cases.

Following up, the year after the *Stevens* decision, Justice Scalia further entrenched the categorical reasoning in his opinion to *Brown v. Entertainment Merchants Association*, which struck a state law that restricted the sale and rental of violent video games to minors.[127] As in *Stevens*, the majority refused to defer to public officials' assessments of speech unworthy of constitutional protection. The Court made clear that "without per-

120. *Stevens*, 559 U.S. at 497 (2010).
121. *Id.* at 497 (discussing 18 U.S.C. § 48 (2006)).
122. H. R. REP. No. 106-397, at 2–4 (1999).
123. *Stevens*, 559 U.S. at 486.
124. *Id.* at 461, 470.
125. *Id.* at 472.
126. *Id.* at 468.
127. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

suasive evidence" that some new restriction on expressive content "is part of a long (if heretofore unrecognized) tradition of proscription," lawmakers cannot alter First Amendment doctrine on the basis of balancing assessments about the social costs and benefits of controversial expressions.[128] Scalia was not remiss to assert that even the judiciary must not multiply the limited number of low-value speech categories such as obscenity, incitement, fraud, defamation, speech linked to criminal activity, and fighting words.[129] This list, he claimed constituted a "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[130]

The Supreme Court confirmed its commitment to the bright-line, categorical approach in *United States v. Alvarez*, where it found the Stolen Valor Act of 2005 to be unconstitutional.[131] The decision overturned the conviction of Xavier Alvarez, who had lied about having been awarded the Congressional Medal of Honor.[132] In his plurality opinion, Justice Kennedy condemned the use of any "free-floating test" of "ad hoc balancing of relative social costs and benefits" and characterized it as "startling and dangerous."[133] In the school speech area, several scholars have questioned the merits of the *Stevens* categorical approach and its rigidity in follow-up cases like *Alvarez*,[134] but, even leaving aside

128. *Id.* at 792.

129. *Id.* at 790–91.

130. *Id.* at 791(citing Chaplisky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

131. 132 S. Ct. at 2551 (2012) (plurality opinion).

132. *Id.* at 2542.

133. *Id.* at 2544 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

134. *See* Tsesis, *supra* note 8, at 506–14 (demonstrating that the Court's categorical approach deviates from the balancing intrinsic to foundational obscenity, fraud, and defamation precedents); *see also* William D. Araiza, Citizens United*,* Stevens*, and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 836–37 (2011) (recognizing that rigid rules do have some value for interpretation because "they provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue," but cautioning that some judges might invoke rigid rules "to hide behind that standard when striking down speech restrictions that may be justified by their unique factual or social context"); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388 (2009) (drawing attention to a variety of low-value categories that reflect a balancing of values); David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 85–86 (2012) (discussing why the historically linked approach is "fundamentally illusory" and contrary to balancing methodologies the Court relied on to find obscenity and fighting words were

that controversy, the leeway *Morse*, *Fraser*, and *Hazelwood* granted administrators to decide what is substantially disruptive allows for "startling and dangerous" administrative decisions to be made to suppress speech because of its message.[135]

Student speech is conspicuously missing from the lists of low-value speech proffered in *Stevens*, *Entertainment Merchants Association*, and *Alvarez*. Indeed, the Court's reliance on strict scrutiny in *Entertainment Merchants Association* to vindicate adolescents' ability to partake in expressive conduct confirms that, outside of schools, the First Amendment protects youths' First Amendment rights.[136] Communication within schools has never explicitly been found to be a low-value speech; indeed *Tinker* signaled that student speech should be taken seriously and constitutionally protected for its valuable contribution to political discourse and the marketplace of ideas. But the erosion of the test for substantial disruption—which after *Morse* has effectively deferred to school officials' decisions to suppress an ad hoc list of student communications,[137] even about matters of political and social importance—has de facto treated student communications as a new category of low-value speech. This is a curious result because fundamental rights are not lost at school, rather extra disciplinary authority reflects the need to prevent disruption of education, not a justification for viewpoint suppression about matters even as controversial as drug use or school administration. The Court's formalistic methodology leaves little room for nuanced judicial weighing of factors such as student age, educational values, and pedagogical concerns. Instead, the Court has been lax in its review of student speech cases. As a result, administrators now enjoy extensive latitude to discipline students for even core political speech.

outside of First Amendment protection); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652 (2005) ("In a striking number of cases the Court has forgotten the reasons behind particular rules and has come to treat them as nothing more than statements of constitutional requirements. This . . . distorts the relationship the Court has to other governmental actors and to the American people.").

135. *Alvarez*, 132 S. Ct. at 2554.

136. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799–801 (2011) (requiring government to prove up a restriction on children's speech using the strict scrutiny standard).

137. *See supra* text accompanying notes 101–03.

B. *MORSE*'S IMPACT ON STUDENT SPEECH

Recent lower court decisions have grappled with the analytical divide between *Morse* and *Tinker*. Several of them have adopted a categorical rejection of free speech claims in favor of administrative efficiency. For half a century, there has been a consensus that public school students enjoy First Amendment protections. Insofar as student speech is political and not materially disruptive or substantially disorderly, one would anticipate rigorous judicial scrutiny of school districts' restrictions on student expression. *Morse*, *Fraser*, and *Hazelwood* eroded the safeguards of *Tinker*, categorically rejecting student speech claims rather than balancing them against school governance thereby allowing school officials to rely on an ad hoc sense of content-based propriety to censor students. The determination of whether student speech is about a public matter, lewd, embarrassing to other students and their parents, or supportive of crime is now largely left to superintendents, principals, and teachers. Judicial deference to their judgments has relegated many types of valuable student conversations to the same rational basis level of scrutiny as those 2 categories listed in *Stevens*, *Entertainment Merchants*, and *Alvarez* as outside the First Amendment ambit.

In choosing to defer to school administrators, as in *Morse*, rather than engage in heightened scrutiny analysis, as in *Tinker*, courts have created a de facto low-value speech category that impacts student communications both inside and outside schools. Following *Morse* and treating student speech as low value creates problems, specifically because it provides significant disciplinary latitude to punish children for offensive communications; expands the disciplinary reach of schools; and allows for increased administrative censorship. This provides the significant disciplinary latitude to punish children for offensive communications. Yet, the Court has recognized the inherent ambiguity of using a patently offensive standard, since many people take offense at political statements and social commentary.[138] The First Amendment is implicated by granting administrators

138. *See* Frederick v. Morse, 551 U.S. 393, 409 (2007) ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some.").

nearly unlimited ad hoc discretion about what constitutes a reasonable disciplinary measure, and in its most recent cases the Court has allowed for a loosely defined pedagogical concern to trump student free expression. Contextual adjudication, not categorical deference to school authorities, is necessary in this area because student dialogue on controversial issues is so important to children's civic and personal improvements. Without more stringent protections, students are chilled from openly discussing matters such as abortion, divorce, and illegal drugs. This effectively stymies student voices, and it is likely to suppress student engagement, development, and deliberation.

The *Morse* majority's reliance on speculative rational basis review has created a de facto low-value speech category that impacts student communications both inside and outside schools. *Morse* bolstered the interpretive status of appellate cases that upheld disciplinary measures rendered against students who made offensive statements off campus.[139] Prior to *Morse*, speech outside school, even lewd gestures directed at a teacher, had been deemed constitutionally protected and beyond the control of school disciplinarians.[140] For instance, when materials inadvertently appeared on campus—in one case because the writer's younger brother took to school a composition depicting a violent siege—a court found any school inconvenience to educational discipline was outweighed by the values of free speech.[141] This form of balancing has now given way in many jurisdictions to categorical rejection of student claims.

139. Prior to *Morse* there was a judicial uncertainty about how to review cases of student speech occurring off campus but subsequently brought into the school. *See* Sullivan v. Hous. Indep. Sch. Dist., 475 F.2d 1071, 1075–77 (5th Cir. 1973) (holding that school authorities could censure the sale within and near school of an underground student newspaper, not sanctioned by the school, containing an expletive against education); Sullivan v. Hous. Indep. Sch. Dist., 307 F. Supp. 1328, 1333–35 (S.D. Tex. 1969) *supplemented*, 333 F. Supp. 1149 (S.D. Tex. 1971) *vacated*, 475 F.2d 1071 (5th Cir. 1973) (additional facts).

140. *See, e.g.*, Klein v. Smith, 635 F. Supp. 1440, 1441–42 (D. Me. 1986) (finding student could not be disciplined for lewd gesture made outside school); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo.1998) (holding that student was likely to succeed on a First Amendment claim for material derogatory statements about school administration that were posted on student's personal Internet page).

141. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004) ("Given the unique facts of the present case, we decline to find that Adam's drawing constitutes student speech on the school premises. Adam's drawing was completed in his home, stored for two years, and never intended by him to be brought to campus.").

The holding in *Morse*, in favor of the school principal's decision to suspend a student for his presumed viewpoint about marijuana, signaled an increased tolerance for administrative censorship. By upholding the principal's decision to suspend, the majority in effect indicated lower courts had been mistaken that *Tinker* prohibited viewpoint discrimination.[142] *Morse*, in fact, appears to have modified the standard from *Tinker*, offering schools greater powers to control student messages with negligible judicial oversight.

Furthermore, *Tinker* required judges to carefully evaluate the contextual circumstances to determine whether students were engaged in the fundamental right of self-expression and then balancing it against the reasonable need for the school to maintain order.[143] This flexible model for judicial analysis differs from the categorical requirements of the *Stevens* line of cases.[144] *Tinker* held that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[145]

Whereas in *Morse*, the Court allowed a principal to treat an unpopular message as if it were outside the ambit of the First Amendment, without any show of disruption. Some lower courts have likewise relied on administrative decision makers, without subjecting disciplinary decisions to careful scrutiny.

In this Section, I trace some of the most impactful recent developments in the school speech context, which have degraded political, social, and artistic student speech below the level of constitutionally protected expression. In some cases, courts have given lip-service to the *Tinker* formula while countenancing punishments for expressing views on school grounds or off of them, making it seem that *Tinker*'s most famous principle, that students do not "shed their constitutional rights to freedom of speech or expression at the school house door,"[146] has been much

142. For a prior case arguing that *Tinker* applied to viewpoint discrimination, see Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 430 (9th Cir. 2008).

143. I based this statement from a variety of pre-*Morse* cases asserting that *Tinker* requires judges to engage in totality of the circumstances analyses. *See* Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 768 (9th Cir. 2006); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001); Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973).

144. *See supra* text accompanying notes 123–34.

145. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

146. *Id.* at 506.

eroded by later jurisprudence, especially *Morse*. The effect has been to qualify student speech protections to a point analogous to the low value categories listed in the *Stevens* line of cases.[147]

1. On-campus Speech

In a case illustrative of the increasingly deferential judicial track, *Dariano v. Morgan Hill Unified School District*,[148] a circuit court upheld school administrators' decision to repress political student speech. The principal and assistant principal of a Northern California high school had ordered the student body not to wear U.S. flags in a prominent place during a Cinco de Mayo celebration. Dianna Dariano was among a small group of students who arrived in school on that festive date wearing images of the flag.[149] Worried a racial skirmish might ensue, the principal and assistant principal directed them to either turn their shirts inside out or to leave school with an excused absence.[150] Dariano's mom pulled her from school, but two other students chose to cover the flag and return to class.[151] In addition, students with less prominently displayed flag logos on their clothes were also allowed to return to class.[152]

At trial, administrators explained that they had acted to quell the student protest for fear that their demonstrative display of the U.S. flag at a celebration of Mexican history could incited violence.[153] Their assessment of the circumstances was based on the school's history of ethnic violence. During the previous six years, thirty racial fights between Hispanic and Caucasian students had occurred at the high school.[154] However, on the day of Dariano's flag protest no physical altercations took place; indeed, she had only been subject to mild verbal taunting about her patriotic display.[155]

There was no reason for the court to treat the flag display as a low-value form of speech. To the contrary, Dariano's display was clearly meant to be a political statement, similar to the black armband used by students in *Tinker*. Nothing in the record

147. *See supra* text accompanying notes 105–07, 119–40.

148. Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014).

149. *Id.* at 764.

150. *Id.*

151. Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037, 1039 (N.D. Cal. 2011).

152. *Id.*

153. *Dariano*, 767 F 3d. at 778.

154. *Id.* at 774.

155. *Id.*

demonstrated the administration's claim that wearing a flag was immediately likely to trigger a fight.[156] Neither did anyone threaten Dariano with any menacing word of gestures.[157] She was merely subject to razzing, so ordinary at high schools. Even though her wearing a flag decal fit into no historically and traditionally accepted category of unprotected speech, the school administration acted to suppress her message. And the Ninth Circuit countenanced this censorship without requiring the school to present proof of substantial educational disruption. Administrators exploited the ambiguity of recent school speech cases, treating the matter as only requiring rational basis review.[158]

Dariano was a glaring departure from *Tinker* analysis; indeed, it was closely aligned to the categorical dismissal of student speech as being of low value and not warranting stringent First Amendment protections. The trial court deferred to school officials' decision to suppress the American flag in order to prevent an as-yet unplanned and unformulated disruption.[159] Rather than protecting the messenger, officials favored those who wished her message to be silenced. The court gave greater weight to the demands of the silencer than the expression of Dariano. This was a diametrical opposite approach to the one announced in *Tinker*, but much in line with *Morse*. In *Tinker*, the Supreme Court had found insufficient the school's claim that it had the discretion to deny students the right to express their political points of view because "[o]utside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises."[160] In *Dariano*, to the contrary, the circuit court believed the negative remarks made to students wearing the flag decal—

156. *See* R.A.V. v. St. Paul, 505 U.S. 377, 408 (1992) (White, J., concurring) (asserting that the fighting words doctrine concerns "a class of speech that conveys an overriding message of personal injury and imminent violence").

157. *See* Elonis v. United States, 135 S. Ct. 2001, 2027 (2015) (relying on a scienter framework to analyze a federal statute prohibiting threats from being conveyed through interstate communications media).

158. Reed v. Town of Gilbert, 135 S. Ct 2218, 2231 (2015).

159. *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 779 (9th Cir. 2014) ("Here, both the specific events . . . and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real"); Dariano v. Unified Sch. Dist., 822 F. Supp. 2d 1037, 1045 (2011) ("[T]he Court finds that based on these undisputed facts, the school officials reasonably forecast that Plaintiffs' clothing could cause a substantial disruption with school activities.").

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

"Why are you wearing that? Do you not like Mexicans?"[161]—provided the school with reason to reasonably believe violence might ensue and therefore to halt the messengers from traversing the facilities.[162] School officials could have understood those two questions as starting points for moderated dialogue between the opposing factions of students. Without any disruption at school, the principal and assistant principal lacked objective indicia for shutting down the messengers.

Relying on other students' warnings (such as, a comment to the assistant principal that, "You may want to go out to the quad area. There might be some—there might be some issues")[163] and a past history of fights, officials impeded Dariano and her group from displaying their political message during the school's celebration of Cinco de Mayo. The court engaged in no more than rational basis review, despite the strict scrutiny protections political speech ordinarily receives. In a school environment, the *Tinker* standard would have been appropriate for deciding the conflict because the message was political and deliberative;[164] instead, the court adopted the lowest level of scrutiny, allowing for administrator speculation to gainsay student self-expression. In effect, the court empowered school officials to act on a "heckler's veto."[165] Rather than treating the flag t-shirt as a symbol protected under the First Amendment, the court used only minimum judicial oversight and, thereby, allowed school staff to define a low-value category and to rely on it to the student speaker's detriment. Rather than exactingly scrutinizing the constitutionality of suppressing a political message, the circuit court enabled school administrators to act on a category of patriotic symbols they believed might lead to violence. That is too plastic and inchoate a standard to safeguard the high constitutional stakes of the case.

In a separate district court case from a different appellate circuit than *Dariano*, the judge likewise treated commentary on a public issue as if it were low-level speech along the *Fraser*, *Hazelwood*, and *Morse* line of cases, rather than invoking the robust protections of *Tinker*. *J.A. v. Fort Wayne Community School*

161. *See, e.g.*, *Dariano*, 767 F.3d at 767.

162. *Id.* at 777.

163. *Id.* at 767.

164. Texas v. Johnson, 491 U.S. 397, 405 (1989) ("The very purpose of a national flag is to serve as a symbol of our country.").

165. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 880 (1997) (rejecting the use of a heckler's veto to censor expression).

arose when school officials prohibited a high school student, J.A., from wearing a bracelet with the inscription, "I <3 boobies. (Keep a Breast)."[166] J.A.'s communicative conduct violated the school rule barring that specific message from being worn in school.[167] School administrators instituted the policy because they deemed the terminology to be "offensive to women and inappropriate for school wear," having previously received a complaint about a single male student wearing the bracelet and harassing a female student.[168] J.A. explained to officials that her mother, who was a breast cancer survivor, gave her the bracelet, and that she wore it at school to raise awareness about the disease.[169] The school's censorship was not limited to substantially disruptive speech, which would have been a legitimate exercise of school authority under *Tinker*, but stifled J.A.'s social advocacy based on an overbroadly defined category of vulgarity. The slogan originated with the creator of the bracelet, Keep a Breast Foundation.[170]

In upholding the school policy, the court gave inadequate consideration to *Tinker*, citing it only in passing, for the pro forma principle that students retain free speech rights.[171] The bulk of the opinion defers to school authority, even though at issue was explicit content and viewpoint discrimination.[172] Thereby, the court treated a statement raising awareness about a serious health matter as if it was a form of low-value speech, such as might have been listed by the Court in *Stevens*, enjoying no First Amendment protection, and treated under the rational basis standard.[173] Rather than giving any substantial weight to the student's argument and rigorously examining her legal claims, the court relied on *Fraser*'s recognition that administrators can prohibit vulgar and lewd expressions.[174] The district court judge ignored the clear difference between the "explicit sex-

166. No. 1:12-CV-155JVB, 2013 WL 4479229, at *2 (N.D. Ind. Aug. 20, 2013).
167. *Id.* at *1
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at *2.
172. *See id.* at *2–7.
173. *Id.* at *3 ("Giving appropriate deference to schools requires courts to review school determinations by asking whether an objective observer could reasonably interpret the slogan as lewd, vulgar, obscene, or plainly offensive.").
174. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

ual metaphor" used by the student at a school sponsored assembly in *Fraser*,[175] and the clearly health-related message in the case before it.[176]

The court openly discounted the First Amendment value of J.A.'s speech. It acknowledged that the bracelet contained "commentary [about] social or political issues,"[177] which might have been expected to elicit some form of heightened scrutiny. In addition, the court entirely discounted a critical factor of the *Tinker* test by deeming it irrelevant that the school conceded the bracelet caused no substantial disruption.[178] Nevertheless, the court illogically treated the matter as if it involved communication unworthy of constitutional protection, as if a statement about women's healthcare were similar to obscenity. School officials were only required to demonstrate that based on their professional assessment of the student's "age, maturity, and other characteristics" they were better able to decide whether to suppress ideas than judges.[179] That standard is unobjective, prone to school officials' subjective error, and chilling of student speech. Deference to school administrators even led the judge to adopt a very questionable school characterization of a phrase as lewd that the student wore to raise cancer awareness, even though it was clearly linked to treatment of a life-threatening disease.[180] With First Amendment rights at stake, the district court's approach shifted the duty to interpret the Constitution from the judiciary to school administrators.

The Supreme Court's weakening of student speech in cases like *Fraser* and *Morse* to a lower value speech category, which can be abridged, even absent any clear proof of substantial disruption or interference with education, has led to inconsistent holdings. In *B.H. v. Easton Area School District*, the Third Circuit addressed the constitutionality of suppressing the identical message, "I <3 boobies! (KEEP A BREAST)," as the one found to be unprotected speech in *J.A.*[181] In *B.H.*, middle school girls wore bracelets with that message at school.[182] The Third Circuit held

175. *Id.*
176. *J.A.*, 2013 WL 4479229, at *1.
177. *Id.* at *5.
178. *Id.*
179. *Id.* at *7.
180. *See id.* at *1, *7.
181. B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 297–98 (3d Cir. 2003).
182. *Id.* at 298–99.

that the message was not plainly lewd.[183] The en banc court recognized that the danger of school officials acting capriciously by simply invoking "a parade of horribles" would allow school officials to suppress political and social comments on the basis of protecting students against "ambiguously lewd speech."[184] Relying on the officials' slippery slope argument, "schools could eliminate all student speech touching on sex or merely having the potential to offend."[185] The bracelet did not even contain a swear word.[186] Unlike the *J.A.* court, the Third Circuit carefully parsed *Tinker* in light of later Supreme Court holdings for the proposition that administrators can limit student speech to prevent disruption from lewd or profane speech, illegal drug use advocacy, or disruption of pedagogy.[187] The school did not provide evidence warranting deference for any of those three concerns.[188]

2. Off-Campus Speech

Several courts have also treated social commentary students made off campus as unprotected and subject to the disciplinary authority of school officials. Some lower courts have interpreted *Morse* to grant school administrators great latitude for sanctioning categories of communications outside the confines of school. Even if we were to accept the holding in *Morse*, rejecting the criticism I leveled against it earlier in this article,[189] the case should be limited to school-sponsored activities, not extended to speech made outside and then accessed inside educational institutions.[190]

Before the digital age, the demarcation between home and school were self-evident. The Internet has enabled students to create messages at home and to direct them to the entire student body. With the expansion of the Internet's domain into high schools and grade schools, courts have grappled with how to characterize postings made at the students' homes or elsewhere

183. *Id.* at 320.

184. *Id.* at 317.

185. *Id.*

186. *Id.* at 297–98. For a list of so-called infamous "filthy words," see FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

187. *Id.* at 304 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Morse v. Frederick, 551 U.S. 393, 422 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

188. *See id.* at 303–07.

189. *See supra* text accompanying notes 77–91.

190. *Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

outside the school property and only later streamed on-campus. The digital complexity of determining whether the complaint arises on campus or off is evident from a Second Circuit case, *Doninger v. Niehoff*, involving the alleged violation by high school administrators of a student's First Amendment rights.[191]

Avery Doninger and several of her fellow students posted an initial e-mail from the high school's computer lab, voicing disgruntlement about an administrative decision to delay an upcoming school concert, called Jamfest.[192] The school principal then asked Doninger to retract a mistake in the text of that message; instead, Doninger posted an anti-administration blogpost from home.[193] The post appeared on an independent, private website, calling for student activism to convince the school principal and superintendent to host the event without excessive delay.[194]

The court found the post to be vulgar, even though the only statements approaching vulgarity were the student's provocatively telling readers "to piss [the principal] off more" and calling persons at the central office a lewd appellation, "douchebags."[195] Although the offending statements were uploaded from a private computer, as part of a call for collective action on a matter impacting students' lives, the court deferred to administrators' judgments—as if the statements were of low value rather than as calls for social and political activism.[196] The district court had found that punishing the student for speech made off campus would have a chilling effect on her future e-mail and blog communications.[197] That finding did not, however, lead the court to use heightened scrutiny, despite the school's obvious censure of content.[198]

191. 527 F.3d 41, 43 (2d Cir. 2008).

192. *Id.* at 44.

193. *Id.* at 45.

194. *Id.*; Brief of Amicus Curiae, ACLU of Connecticut, in Support of Plaintiff's Motion for a Temporary Restraining Order/Preliminary Injunction at 1, Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) (No. 3:07-cv-1129 (MRK)) (stating that the student created the blog post from home).

195. *Doninger*, 527 F.3d at 45–46.

196. *See id.* at 53.

197. *Id.* at 47.

198. *See id.* at 47–53.

The court of appeals affirmed the district court's refusal to issue an injunction against the school, finding Doninger was unlikely to prevail in her First Amendment complaint.[199] The holding sanctioned the administrators' punishment of a student who had passionately expressed opposition about the timing of a school event. The court of appeals empowered the school to prevent her from expressing a contrarian viewpoint on a matter affecting a large segment of the student population.

While the Second Circuit couched its holding in *Tinker*'s recognition of school officials' need to prevent substantial disruptions of school discipline,[200] the holding countenanced a chilling of student speech on an important community matter. The lewd label blinded the court to any deep analysis of the context in which the blog posts were made, the location of the electronic transactions, the school politics involved, and other nuanced topics that should have played a role in the decision. The court ruled that school officials could silence speech posted on an off-campus computer, when officials could reasonably foresee the message reaching school and being likely to create a disruption.[201] The foreseeability approach countenances school officials' speculative assessment of risks posed by speech made outside the institution, indicating that the court has now undervalued the message's significance to core First Amendment interests: personal activism, political empowerment, and information dissemination.

In fact, the court of appeals in *Doninger* could identify little disruption of school work, much less any substantial disruption, other than a couple of students commenting on the blog posting and a "deluge of calls and emails" to the school superintendent and principal, who admonished offending students during the morning class period.[202] The court's rationale upholds the suppression of controversial ideas for an administratively created disruption in student classes. The circuit court found it sufficient that officials perceived Doninger's communications to be "potentially disruptive of efforts to resolve the ongoing controversy."[203]

199. *Id.* at 53.
200. *Id.*
201. *Id.* at 48.
202. *Id.* at 50–51.
203. *Id.*

The court found it consequential that the student's statements were "at best misleading and at wors[t] false."[204] This justification for stifling speech run counter to the Supreme Court's finding that in matters involving public controversies, public officials, and public speakers, the Constitution protects the value of even false statements that are not asserted maliciously or in reckless disregard for the truth.[205] While analysis in the school setting differs, where a student makes controversial, and sometimes misleading, statements outside school that by themselves do not harm education, it is convincing to believe that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[206]

While the student used wording inappropriate for the classroom, on balance the utterance in question was part of a broader communication that was relevant to the student body, occurred off campus, and constituted social activism. Her speech should not have been treated like a low value category; instead, it should have received heightened judicial scrutiny. Doninger participated with other students in collective expression in an effort to organize nonviolent protest opposing the decision of school administrators, which was an exercise of free speech.

In another case recognizing the right of schools to punish out-of-school speech, the Fourth Circuit reviewed a high school student's suspension for posting a message under the heading, "S.A.S.H.," which stood for "Students Against Sluts Herpes."[207] The target of that acronym was a fellow student, Shay N.[208] The poster, Kara Kowalski, invited 100 people to view and participate in group posts deriding Shay. School administrators subsequently suspended Kowalski for ten days and prevented her from being crowned to the elected office of Queen of Charm. Despite the expressive event having occurred off campus and not

204. *Id.* at 51.

205. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

206. *Id.* at 279 n.19, (quoting J. S. MILL, ON LIBERTY 15 (R. B. McCallum ed., 1946)).

207. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).

208. *Id.*

having disrupted schoolwork, the court found the punishment did not violate *Tinker*'s First Amendment immunities.[209] The circuit court seems to have authorized school authorities in the Fourth Circuit to suspend students for comments made about their colleagues almost anywhere and anytime.

A separate case from the Third Circuit also dealt with student comments made off campus, *J.S. v. Blue Mountain School District*, also considered whether school officials could take adverse action based on reasonable anticipation of substantial educational disruption.[210] However, the outcome was very different than the laxer treatment of free speech in the Second and Fourth Circuits. In *J.S.*, one weekend two students used the personal computer of a parent to create a fallacious MySpace account, purporting the webpage to have been made by the middle school principal.[211] The profile contained "nonsense and juvenile humor" with sexual vulgarity and profanity, including claims that the principal engaged in child abuse and bestiality.[212] At first the profile was public, but the day after creating it J.S. made access to it private to twenty-two friends.[213] As a consequence, the principal suspended J.S. from school for ten days.

The principal certainly could have brought a common law defamation suit, but was school action constitutionally permissible? The school district proffered evidence demonstrating that students discussed the profile at school, creating a minor disturbance in the math class that involved six or seven students speaking about the profile in the middle of a lesson.[214] The Third Circuit found the school had failed to meet its evidentiary burden of showing that these "rumblings" rose to a predictable and substantial disruption standard articulated in *Tinker*.[215] That landmark case had received only perfunctory treatment in *Doninger* and *Kowalski*. The Third Circuit carefully compared the facts in *Tinker* to those in the record on appeal. The *Tinker* Court found the students' use of the armband to be protected form of speech despite the predictably upsetting nature of the opposition to the Vietnam War.[216] Comparatively, J.S.'s crass profile did not

209. *Id.* at 572.
210. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 928 (3d Cir. 2011).
211. *Id.* at 920.
212. *Id.*
213. *Id.* at 921.
214. *Id.* at 923.
215. *Id.* at 928–29.
216. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 560 (1969).

even name the principal, nor the location of his school.[217] Hence, the Third Circuit determined that the *Tinker* precedent did not justify the suspension in this case.[218]

III. STUDENTS AS CITIZENS AND PEOPLE

Lower court decisions evince the jurisprudential uncertainty that is the byproduct of *Fraser*'s, *Morse*'s, and *Hazelwood*'s departure from the rigorous protection of student free speech articulated by the Supreme Court in *Tinker*. Resolution of the recent circuit splits discussed in Part II requires the theoretical guidance of a contextual framework for evaluating school regulations that impose a substantial burden on student communications. Judges should probe issues such as (1) whether school officials restricted students' expressions because of the content or viewpoint of the message; (2) whether the censorship stifled speech that has been historically regarded within or extrinsic to free speech values of citizens, including young citizens; (3) whether the student speech advanced deliberation, education, debate, acculturation, and so on; (4) whether the policy and punishment—be it suspension, expulsion, or a trip to the principal's office—was narrowly tailored to the stated purpose; and (5) whether any less onerous limitations were available without stifling communications. Unlike the categorical approach, balancing parties' interests allows for a contextual evaluation for the nuanced resolution of conflicts between students' right to expression and administrators' obligation to maintain discipline.

This part of the Article proffers a tiered approach. Speech interests are not all identical. Contrary to the premises of the absolutist approach, not all content restrictions are as averse to First Amendment values as others. Political speech is at the core of the First Amendment[219] but incitement is not even protected by the Constitution.[220] When student speech is about politics, personal development, or the expansion of knowledge, judges should apply a strict scrutiny analysis, unless it disrupts educational programs. In circumstances where limitations on students' expression are created to advance certain neutral time, place, and manner concerns, the intermediate scrutiny standard

217. *J.S.*, 650 F.3d at 920.

218. *Id.* at 929–30.

219. Virginia v. Black, 538 U.S. 343, 365 (2003) (asserting that "lawful political speech" is "at the core of what the First Amendment is designed to protect").

220. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002).

is appropriate. Finally, courts faced with cases involving speech with a low First Amendment threshold of importance—such as defamation, true threats, and fallacy—should defer to school officials' expertise, unless they are enforced for arbitrary reasons.

School interests are at their apogee when administrators seek to punish communications outside the purview of the First Amendment, such as incitement, copyright violations, or defamations, and student interests are at their highest when they want to exercise core First Amendment values, such as politicking, artistry, or informativeness. Contextual analysis is critical to proportional analysis, requiring judges to weigh competing interests. Courts should be most deferential to students when they seek to achieve core constitutional rights.

In some circumstances, school authority extends beyond the categories announced in the *Stevens* line of cases. The balancing approach recognizes that cases giving rise to more than one constitutional concern require proportionate scrutiny of all pertinent law, not an automatic presumption in favor of free speech. Part III.C illustrates this point by balancing interests of students wanting to display Confederate symbols while at school against officials' authority to fulfill the Thirteenth Amendment's obligation to prevent displays of the badges of slavery and involuntary servitude, such as Confederate flags.

A. CONSTITUTIONAL CONTEXTUALIZATION

The Supreme Court countenances limitations on high school students' expressive liberties that would otherwise be deemed unconstitutional if they were imposed on adults. Fleeting profanity, advocacy of illegal drug use, and journalism about reproduction are expressions whose contents, when uttered by adults, cannot be repressed absent a compelling government interest and narrow tailoring. But as demonstrated in Parts I and II, school administrators prohibit all these types of speech.[221] The Court's recent categorical deference to school officials chills students who wish to express unorthodox or offensive ideas. Indeed, the degree of deference the Court gives to school administrative decision makers fails to exercise the judiciary's role of identifying what constitutes protected speech.

221. *See supra* Parts I, II.

Courts typically take student vulnerability for granted as a justification for school restrictions,[222] creating categories deferential to authorities without adequately balancing them with the compelling constitutional interests in expression. Given the pragmatic needs of classrooms, part of the educator's role is to maintain order, disallowing and punishing the use of vulgarities, insults, and other forms of harassing distractions. Where students substantially and disruptively interfere with others' learning experiences, teachers have a substantial interest in censoring the manner and timing of outbursts. It is reasonable to expect younger learners to have different sensibilities than older high school students. Nevertheless, the First Amendment protects the ability to engage in political discussions irrespective of age. Classrooms and school auditoria are interactive forums where teachers direct education but leave space for students to develop civic consciousness by respectful expressions of sincerely held beliefs and ideas. So too, self-expression through art and humor are important for persons of all ages. Education at the grade school and high school levels traditionally drives students to discuss subjects with greater degrees of sophistication as they grow older, formulate opinions through close examinations of topics, dispel false information by open conversation, and learn more about themselves.

A categorical approach that relies on age as a determinant of what speech is protected in classrooms and school hallways gives insufficient weight to the extent to which grade schools and high schools function as part of the cultural milieu of civic development. The exercise of free speech has personal and social value at all levels of human development, from childhood to adulthood. As things stand, courts all too often find permissible restrictions burdening the expression of students' viewpoints.[223] The categorical method of adjudication discounts factors critical to the preservation of a flourishing learning environment conducive to student civic growth. A tiered approach to review school speech regulations will better protect students' abilities to participate at school as citizens of a deliberative democracy, while giving

222. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (discussing school officials' expertise in identifying the emotional maturity of students); L.L. v. Evesham Twp. Bd. of Educ., 141 F. Supp. 3d 288, 296 (D.N.J. 2015) (asserting that students are particularly vulnerability to harassment).

223. *See, e.g.*, Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002) ("[W]e conclude that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech.").

principals and teachers enough discretion in classrooms and during other school events.

To some degree, the treatment of student speech should be informed by the judicial treatment of public employees.[224] Though not entirely symmetrical, pertinent analytical similarities exist between the two contexts. For example, using swearwords can be grounds for adverse action against public employees[225] without violating the First Amendment, just as it can against a student.[226] Schools do not even violate the First Amendment for firing adult employees who advocate that students ingest stimulants,[227] but it is quite another thing to fire teachers who abstractly support the legalization of narcotics. Furthermore, where public employees make statements of public concern outside the employment setting, employers cannot reprimand them for disrupting the workplace, for undermining discipline, or for harming harmonious employee interaction.[228] Student off-campus speech should likewise be treated as a matter for private concern when it does not substantially interfere with school discipline, teaching, and ordinary pedagogical functions.

The analogy is, however, inexact despite the similarities between students and public university employees; universities are not mandated to retain untenured employees,[229] and employees can quit whether or not they pursue alternative employment.[230] Underage students, however, are statutorily required

224. *See* Nicole B. Cásarez, *The Student Press, the Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1, 7–26 (2008) (expounding on the "extent to which the First Amendment protects speech by public school students on one hand, and public employees on the other, has developed along strikingly similar lines").

225. Martin v. Parrish, 805 F.2d 583, 584–86 (5th Cir. 1986) (holding an employee has no First Amendment right to use profanity in the classroom and comparing the decision to terminate to the school's decision in *Fraser*).

226. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

227. Schul v. Sherard, 102 F. Supp. 2d 877, 886 (S.D. Ohio 2000) (finding that high school's interest in terminating an employee who promoted the use of caffeine among student athletes exceeded free speech interests of the offending coach).

228. Pickering v. Bd. of Ed., 391 U.S. 563, 569–70, 572–73 (1968).

229. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 76 (3d ed. 2005) ("The American rule is that oral contracts of indefinite duration (the most common form of employment contract) are presumed to be 'at will' contracts.").

230. The Thirteenth Amendment of United States prohibits forced labor. U.S. CONST. amend. XIII.

to attend schools for a legally defined number of years.[231] And students are not unionized, while public employees bargain collectively and strike, which in the case of teacher unions can cause disruptions in education.[232]

Despite asymmetries, the Court's public employee balancing doctrine can also be pertinent to the adjudication of disputes between school disciplinarians wanting to punish a perceived infraction and students seeking to communicate controversial messages to others at and outside school. The free speech value of giving students adequate latitude to express themselves creatively, politically, and descriptively coincides with the value of public employee expressions on those subjects. In neither case is the Free Speech Clause an absolute. In those circumstances when students and employees do not speak as citizens but respectively as learners or public agents, the state can place reasonable limitations on them without violating the First Amendment. This suggested mode of analysis does not subject either category of speaker to the low rigor scrutiny that the Court relied on in *Morse*, *Hazelwood*, and *Fraser*. Instead, it requires nuanced adjudication of conflicting state and private interests.

Rather than periodically treating student speech as a low-value category warranting only ad hoc balancing and rational basis review, adjudication should be treated as part of a continuum. All relevant factors—speech and administrative—should be reviewed and reflected in the judgment. This will inevitably boil down to contextual adjudication that takes into account general First Amendment doctrine, free speech principles, as well as the particular circumstances of speech limitations—arising during classwork, school politics, informal conversations, hallway banter, composition, classrooms, recess, and so forth. The peculiar setting of primary and secondary schools will require some balance of free speech and pedagogy which are typically not pertinent with public employees, but concerns for education should not be excuses for the suppression of controversial ideas.

Contexualization is a form of balancing that should include considerations of whether the student expression is protected by core First Amendment values. For example, students who speak

231. John R. Bunker, *Check-Out Time at the Hotel California*, 11 ST. JOHN'S J. LEGAL COMMENT. 137, 146 (1995) (providing citations to all fifty states' compulsory school laws).

232. *See* Randall W. Eberts & Joe A. Stone, *Teachers Unions and the Productivity of Public Schools*, 40 INDUS. & LAB. REL. REV. 354, 361 (1987); Peggie R. Smith, *Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 603–04 (2006).

of politics engage in conversations that help them grow as citizens.[233] And suppression of this form of expression—whether it concerns national, state, or school topics—would be particularly suspect because of the social value of civic participation and its relation to representative governance. On the other hand, it is within the power of administrators to discipline students for intentionally violent or threatening statements which intrude the educational interests of students and pedagogues. Even where restrictions are justifiable under certain circumstances that pose a substantial disruption of schooling, the selected disciplinary measure should not be categorical but narrowly tailored to address a pressing educational concern. A court would do better independently to engage in a sophisticated analysis of these factors, rather than reflexively relying on the expertise of school disciplinarians. Balancing considerations are relevant no matter which of the three traditional forms of scrutiny are applicable to a case.[234] Nevertheless, administrators should have a more difficult threshold to clear in cases involving core speech about such matters as elections and an easier one where suspect expressions, such as class bullying or ethnic slurs, are of little, if any, educational value.

233. *See* Joseph E. Kahne & Susan E. Sporte, *Developing Citizens: The Impact of Civic Learning Opportunities on Students' Commitment to Civic Participation*, 45 AM. EDUC. RES. J. 738 (2008) (describing an empirical study to prove that civic learning opportunities in high school improve students' attitudes about civic involvement); Josh Pasek et al., *Schools as Incubators of Democratic Participation: Building Long-Term Political Efficacy with Civic Education*, 12 APPLIED DEVELOPMENTAL SCI. 26, 26 (2008) (providing empirical support proving the effectiveness of high school on political socialization and suggesting the use of more targeted civic education).

234. *See* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 641 (2000) ("[C]ourts will normally uphold restrictions, or even complete prohibitions, of low-value speech as long as the government can show a rational basis for its actions."); Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249, 1249 n.5 (2002) (reviewing JEB RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001)) ("I see strict scrutiny as a form of balancing, with the weights on the scales being set against the government's action."); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 676–77 (2008) ("[I]ntermediate scrutiny expressly balances the government's interests against the free speech interests at stake."); Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L. J. 917, 919 (2009) ("Strict scrutiny can be seen as a form of balancing, but with a very strong thumb on the scale in favor of the speech interest.").

B. CONTEXTUALIZING STUDENT SPEECH: THE NEED FOR STRICT SCRUTINY WHEN STUDENT SPEECH IS ABOUT POLITICS, PERSONAL DEVELOPMENT, OR THE EXPANSION OF KNOWLEDGE

Students are civic and self-expressive players who contribute to the interpersonal life of schools by engaging classmates and teachers in political, social, artistic, and informative conversations. Under ordinary circumstances, courts review limits on the content of speech using strict scrutiny judicial review.[235] While the school environment is a distinct setting for the exchange of ideas and experiences,[236] student access to views and ideas allows them to be active and effective participants in pluralist society, local communities, student organizations, and many other formal and informal associations.[237] In practical terms, this means that schools should be subject to strict scrutiny analysis in cases where students are denied access to information, such as when authorities remove books from library shelves perceived to be not in keeping with "orthodox" views "in politics, nationalism, religion, or other matters of opinion."[238]

In educational settings, application of the strict scrutiny test requires some contextualization.[239] A judge must ascertain (1)

235. Williams-Yulee v. Fla. Bar, 135 S.Ct. 1656, 1666 (2015) (relying on strict scrutiny to uphold a state bar rule against judicial candidates personally soliciting campaign funds); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (finding that even outrageous "political and social discourse" is constitutionally protected form of viewpoint); Herbert v. Lando, 441 U.S. 153, 188–89 (1979) (Brennan, J., dissenting) (asserting that the informative function of the press enjoys First Amendment protections). Courts rely on the strict scrutiny test to identify whether a content-based restriction on speech is "narrowly tailored to serve a compelling government interest." Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

236. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (reviewing First Amendment considerations "in light of the special characteristics of the school environment").

237. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982) (asserting that access to information "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.").

238. *Id.* at 872 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

239. Stated more broadly, students have a right to gain meaningful information without arbitrary school censorship. That is, there's a difference between lesson plans formulated to be appropriate for students of a particular age and the suppression of ideas triggered by the suppression of information. This opens an important topic on the audience implications for students to the "right to receive ideas," which is too much afield of this article but will need to be parsed at greater length in future work. *See id.* at 867 ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send

whether administrators censored information to suppress a viewpoint; (2) whether the regulation is of a type that is customarily imposed for pedagogical purposes; (3) whether allowing students to discuss the controversial ideas would advance their deliberative skills; (4) whether punishment was needed to advance education; and (5) whether something less onerous—such as discussion or debate—could have been imposed instead of suppression of speech. All these considerations are meant to balance society's interest in education with a student's right to access and disseminate information.[240]

Strict scrutiny signals the doctrinal presumption that a judge should strike official actions unless there is an overriding legal interest, such as national security, judicial neutrality, or electoral integrity.[241] That is a high standard for schools to meet, but simply evaluating whether officials have a compelling reason to suppress student speech is too ambiguous. Consistency and predictability is well served by a greater certainty about the proper mode to analyze facts in the context of constitutional precedents.

Historically, courts have been reluctant to rely on strict scrutiny assessment in the special circumstances of child and adolescent education.[242] Their hesitancy is born of the reality of education. Besides the acquisition of knowledge, discipline is essential to the dissemination of information, culture, and discipline to young learners. Schools cannot be treated as traditional public forums because maintaining a successful learning environment ordinarily requires educators to quell student disruptions and to forbid mischievous behaviors, reward positive

them . . . ."); *see also* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 377 n.39 (2014).

240. *See Pico*, 457 U.S. at 879 (Blackmun, J., concurring).

241. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665–66 (2015) (implying the *Humanitarian Law Project* holding was based on strict scrutiny); *id.* at 1666 (plurality relying on strict scrutiny to uphold a content-based campaign solicitation restriction on judicial candidates); *id.* at 1676 (Scalia, J., dissenting) (accepting plurality's claim that strict scrutiny applies, but disagreeing that the state met its burden); Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (applying "more rigorous" than intermediate scrutiny); Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion upholding a distance restriction for campaigning near a campaign booth on the date of election).

242. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

behaviors, and rely on pedagogical techniques for students to succeed.[243]

The need to maintain order in the classroom does not diminish students' interests in challenging and articulating positions about controversial matters, such as the illegality of narcotics. Without seriously reflecting on the political nature of drug-related protests, the Court in *Morse* discounted a student's ability to express opposition to laws criminalizing the use of marijuana;[244] although, that is clear viewpoint discrimination.

Classrooms should be treated similarly to nonpublic forums, where administrators can use reasonable and neutral criteria, such as their places of residency or test scores for enrollment and curriculum purposes, but cannot resort to viewpoint discrimination.[245] This is not to say that schools have no role in the development of childhood character, civility, and temperance. To the contrary, as Amy Gutmann points out, "The aim of cultivating good character authorizes teachers to respect only a limited range of values professed . . . by children. Indiscriminate respect for children's values cannot be defended either as an ultimate end or as a tenable means to cultivating good character."[246] Nevertheless, when students express controversial views, whether about something at the level of national politics or about their own school, differences with the administration should not be stymied, suppressed, or punished but engaged, answered, and appraised.

Schools are not, however, quintessential nonpublic forums "[w]here the government is" simply "acting as a proprietor, managing its internal operations."[247] Unlike airports or government

243. Letter from U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html ("Many schools have adopted comprehensive, appropriate, and effective programs demonstrated to: (1) reduce disruption and misconduct; (2) support and reinforce positive behavior and character development; and (3) help students succeed.").

244. *See* Morse v. Frederick, 551 U.S. 393, 440 (2007).

245. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 64 (1983) ("[W]hatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum, once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint.").

246. GUTMANN, *supra* note 1, at 56.

247. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). Alan Brownstein argues that public schools should be treated as nonpublic forums. As he points out, "hallways, school yards, and lunch rooms of public schools have not been deliberately opened up by school authorities for

office buildings, schools are organized to enhance students' abilities to deliberate, analyze, ascertain, reflect, and share ideas. The *Tinker* test recognizes the unique pedagogical settings of K–12 education. Educators can rely on content-neutral, time, place, and manner considerations; however, within the parameters of a specific class or an educational program, any further rules must be reasonable and viewpoint neutral.[248] Strict scrutiny should apply to the suppression of students' viewpoints. While teachers need the latitude to supervise lesson plans and prevent students from disrupting learning in the classroom and on the playground, students should be allowed freely to voice ideas, facts, and views absent a compelling state interest. It is reasonable for teachers or administrators to require students to stay on topic in class, rather than interrupting about irrelevant subjects

unfettered discussion and debate any more than the foyers and hallways of most government buildings have been opened up for unfettered discussion and debate." Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 731 (2009).

It may also be argued that schools are limited public forums. Justice Blackmun takes the latter position in a dissenting argument. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 829 (1985) (Blackmun, J., dissenting) (asserting that *Tinker* established a limited public forum test for public school regulation). It is no wonder that in the same passage, Blackmun expresses a concern that nonpublic forum analysis to schools would collapse the distinction between limited public forum and nonpublic forum. *Id.* The Court indeed uses the same test for both types of forums. *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (asserting that in limited courts test whether a restriction on communication is reasonable and non-viewpoint specific); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) ("With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that '[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)). In fact, in a recent dissent from a denial of certiorari, Justice Thomas appeared to disavow the doctrinal distinctions between the two. Am. Freedom Def. Initiative v. King Cty., 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting) ("If the government creates a limited public forum (also called a nonpublic forum)—namely, 'a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects'—then speech restrictions need only be 'reasonable and viewpoint neutral.'" (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)). It strikes me, however, that nonpublic forum characterizes a broader set of locations, while limited public forum refers to specific locations, like library study rooms or school auditoria, reserved for specific individuals or organizations.

248. Hastings Christian Fellowship v. Martinez, 561 U.S. 661, 679 (2010) (stating that "restrictions on access to a limited public forum . . . must be reasonable and viewpoint neutral").

that would disrupt fellow students. However, the First Amendment prohibits administrators from censoring students communicating unorthodox views to teachers, principals, and classmates.

The Supreme Court has failed to give adequate weight to student speech, countenancing overt viewpoint restrictions on speech about drugs,[249] abortion, and pregnancy.[250] This approach treats student speech as of some low-order category, external to the First Amendment, much as incitement or child pornography. This approach is entirely incongruous with the Court's prohibition of viewpoint discrimination absent compelling state interest and narrow tailoring. Justices have increasingly construed the significance of schools' special expressive characteristics as a rationale to attribute a low value to student communications.[251] The deference the Court has shown schools in the last three decades has short-shifted the intellectual and political growth and sophistication of children as they progress through grade school and high school.[252] Moreover, lower courts should differentiate between speech causing non-educational disruptions, such as threats made on school playgrounds,[253] and others causing political disturbances, such as speech about controversial subjects such as grading standards and purported racism.[254]

The Court's trend to treat student speech as having a low value runs counter to my proposed heightened level of scrutiny for viewpoint restrictions on student speech. The Court's repeated deference to school officials in cases like *Morse*, recognized the need for sufficient flexibility to allow officials to deter

249. *Morse*, 551 U.S. at 393.

250. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

251. *See* Frank D. LoMonte, *Shrinking* Tinker: *Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1348 (2009) (criticizing "the extraordinary deference that is afforded to administrators in managing school affairs and the relatively low value afforded to the speech of young people").

252. Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 523 (1997) ("[L]aws governing free speech in schools should increasingly respect the free speech rights of students varied by age.").

253. S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3rd Cir. 2003) (declining to differentiate under what circumstances a school may violate an elementary school student's freedom of speech rights).

254. Baxter v. Vigo Cty. Sch. Corp., 26 F.3d 728, 736–38 (7th Cir. 1994) (upholding a principal's qualified immunity against a law suit challenging the punishment of a student for wearing a t-shirt to protest grades and racism).

and punish disciplinary breakdowns. Yet, the judiciary sometimes bows to speculative claims, unsupported by evidence, such as the notions that the "BONG HITS 4 JESUS" poster would entice children to experiment with drugs[255] or that the demand to hold a music festival earlier in the school year might cause disruption.[256]

The Supreme Court's lack of exacting scrutiny empowers school suppression of controversial ideas.[257] As explained in Part II, several lower court decisions have followed recent Supreme Court student speech precedents by adopting rational basis review of school disciplinary measures. This approach is consistent with the deferential review of low value categories in *Stevens*, *Alvarez*, and *Entertainment Merchants*.

In *Fraser*, *Hazelwood*, and *Morse*, the Court granted schools authority to regulate content of student speech without a rigorous framework against discretionary viewpoint discrimination. As Mary-Rose Papandrea has explained:

> [T]o the extent the Court's school speech jurisprudence is based on the "special circumstances" of the school environment—and not on the age of their students—it must at bottom rest on the sense that schools have a mission, and that offering students full speech rights would interfere with that mission.[258]

Speculation about the possibility of disruption or even illegality is insufficient reason to abridge speech in a setting meant to expose children to democratic deliberation, tolerance, information, free thought, wisdom, and alternative perspectives. Rather than emphasizing the obvious value of speech to social development, the judicial trend has become to emphasize discipline to the detriment of expression. Instead of taking a hands-off approach, courts should rigorously safeguard student speech, absent specific evidence of the substantial disruption that *Tinker* set as an exception to the general latitude to student communications. Expressing controversial viewpoints has never been considered disruptive in other areas of free speech jurisprudence, and this principle should apply to young citizens.

Rather than a categorical acceptance of school administrators' decisions, courts should use contexualized analysis in adju-

255. Morse v. Frederick, 551 U.S. 393, 4398–99 (2007).

256. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2014).

257. R.A.V. v. St. Paul, 505 U.S. 377, 382–91 (1992) (discussing historically unprotected categories of speech and finding that the First Amendment generally prohibits viewpoint discrimination).

258. Papandrea, *supra* note 1.

dicating student speech cases that involve core First Amendment values. While the classroom requires discipline commensurate with age and learning environments, students should be free to vent ideas about politics, art, and even the sciences within and without the school walls. Inevitably, young learners will express many false ideas, but school is a great marketplace of ideas for setting them aright. First Amendment protection of viewpoints is not a shield against bad grades for poorly reasoned, articulated, or unsupported school work. In an educational environment, some limitations are necessary to maintain classroom discipline, advance knowledge, and evaluate quality; however, in school settings outside the classroom, such as lunchrooms and playgrounds, discussions on controversial subjects should typically be free of censure because of the civic values involved. On the other hand, where the suppression of content is only coincidental to school time, place, or manner regulations (such as rules on noise in lunch rooms or length of class periods) or the regulation of conduct (such as on disruptive classroom antics), courts should be more deferential to administrators. I propose a balanced method to respect the value of student engagement in creative and political thought while also being cognizant that without supervision many K–12 classrooms will likely deteriorate into a free-for-all.

Nevertheless, rather than treating student speech as a low-value category, unworthy of close judicial scrutiny, the Court should use sophisticated judicial review. Students function in various environments while they are at school and school-related activities. In certain circumstances their abilities to deliberate on public matters is on a par with any other citizen's. This is particularly true where student communications are political, artistic, or self-assertive. On the other hand, content neutral educational restrictions are necessary to advance pedagogical goals. And as a government actor in a representative democracy, it is legitimate, indeed necessary, for the school to promulgate pluralism and tolerance in school and society at large.

C. CONFLICTING CONSTITUTIONAL CONCERNS: THE CASE OF CONFEDERATE SYMBOLS

The balancing test will sometimes require judicial weighing of conflicting constitutional interests. Students' right to free speech is not absolute, and sometimes their communications raise competing legal concerns. There is no First Amendment

justification for harassment.[259] This is not only based on norms of civility but constitutional and statutory provisions. This section of the Article articulates how the Thirteenth Amendment's grant of authority to punish student displays of the badges of slavery and the statutory mandate to prevent educational harassments balances against speakers' First Amendment interests.

1. The Thirteenth Amendment and the Badges of Slavery and Involuntary Servitude

Schools are authorized to enforce rules predicated on constitutional norms, even in some narrow contexts where competing interests limit student speech. Illustrative of this point are cases that deal with students who challenge school punishments for wearing Confederate logos. Such symbolism is semantically and historically connected with the badges of slavery and involuntary servitude.[260]

The popular symbol for the Confederate flag is based on the St. Andrew's Cross.[261] It was the battle flag of the Confederacy and communicated support for a secessionist rebellion, fought to defend the institution of slavery. In the mid-twentieth century, segregationists proudly waived the Confederate flag as a statement opposing the holding in *Brown v. Board of Education* that separate-but-equal public school education violates the Equal Protection Clause.[262] Schools have a special obligation to prevent

259. *Cf. R.A.V.*, 505 U.S. at, 410 (1992) (White, J., concurring) (stating that the First Amendment does not protect the perpetrators of workplace harassment); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1363, 1364 (10th Cir. 2000) (finding due process to have been satisfied in the punishment of a middle school student who drew Confederate flag against school anti-harassment policy).

260. *See* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002).

261. MARC HOWARD ROSS, CULTURAL CONTESTATION IN ETHNIC CONFLICT 286 (2007); Gerald R. Webster & Jonathan I. Leib, *Fighting for the Lost Cause: The Confederate Battle Flag and Neo-Confederacy*, *in* NEO-CONFEDERACY: A CRITICAL INTRODUCTION 173 (Euan Hague et al. eds., 2008).

262. *See* LAWRENCE BLUM, "I'M NOT A RACIST, BUT . . .": THE MORAL QUANDARY OF RACE (2002);WILLIAM PENCAK, CONTESTED COMMONWEALTHS: ESSAYS IN AMERICAN HISTORY 334 (2011) (recounting that in the 1950s and 1970s "the state flags of Georgia (1956) and South Carolina (1963) incorporated the Confederate Battle Flag . . . an action taken by their legislature explicitly to support segregation as well as to honor the Confederacy"); John Walker Davis, *An Air of Defiance: Georgia's State Flag Change of 1956*, 82 GA. HIST. Q. 305, 317 (1998) (relating the uses of Confederate flag in Georgia as a rallying symbol against desegregation); Chris Springer, *The Troubled Resurgence of the Confederate Flag*, HISTORY TODAY (1993) (discussing symbolic features of the Confederate

on-campus advocacy in support of violent, hateful ideology, such as the one that supports a symbol historically referent of slavery and involuntary servitude.[263]

Several circuits have reviewed public school punishments or suspensions of students for wearing clothes containing Confederate symbolism.[264] In *Defoe v. Spiva*, the Sixth Circuit Court of Appeals upheld the constitutionality of a Tennessee school board's ban against wearing Confederate symbols at school.[265] The majority reviewed the board's determination that displaying a symbol at a school with decades of racial tension was likely to disrupt and materially interfere with school activities.[266] The court stated that the school could regulate display of that "controversial racial and political symbol."[267] Speech was not the only constitutional interest at stake in the case. The circuit court failed to evaluate the First Amendment issues in the context of alternative Thirteenth Amendment values. It should have clarified how schools, their boards, and teachers can invoke objective criteria for identifying why Confederate symbols are particularly disruptive in light of the nation's history, not only in terms of existing exigencies. The school's duty to provide equal educational opportunities and to prevent school harassment under Title VI of the Civil Rights Act of 1964[268] legitimized the administration's decision to prohibit students from wearing the symbol of slavery to school.

flag) http://www.historytoday.com/chris-springer/troubled-resurgence-confederateflag.

263. *Tsesis*, *supra* note 260, at 543 (discussing the cultural significance of Confederate symbols placed on state property). *See also* Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203, 215 (2011) (arguing that a "potential contemporary interpretation of badges of slavery . . . is the use of Confederate signs and symbols as a means of expressing a hostile agenda toward African-Americans").

264. *See, e.g.*, A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 223 (5th Cir. 2009) ("[T]he racially inflammatory meaning associated with the Confederate flag and the evidence of racial tension at BHS establish that defendants reasonably forecast that the proscribed speech might cause substantial disruption of school activities."); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 741 (8th Cir. 2009) (holding that evidence of prior "racially-motivated violence, racial tension, and other altercations directly related to adverse race relations in the community and the school" justified school district's ban on Confederate symbols in school).

265. Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010).

266. *Id.* at 334.

267. *Id.* at 336 (quoting Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536, 542 (6th Cir. 2001)).

268. 42 U.S.C. § 2000d (2012).

Preventing the use of Confederate symbolism at school is one of those rare cases in which government has a compelling interest to suppress cultural or political statements.[269] Confederate symbols are insignia with a distinct history that signal violence and oppression. The Confederate battle flag was a call to arms, to protect the institution of slavery and racial subordination.[270] Human bondage was not the only evil of slavery. In the Old South, blacks were also denied an education and even prohibited from learning how to read.[271] The Confederate flag, therefore, is also a statement against equal, desegregated education.

Admittedly, not all people understand it that way and controversy exists about the meaning of the Confederate flag. While some would agree that it is a symbol of the badges and incidents of slavery, such as educational inequality, others believe it symbolizes only benign Southern culture.[272] Nevertheless, the fact that there is a relevant constitutional provision empowering government to prohibit the uses of badges and incidents of slavery, makes the situation unique. Matters are of course different if the flag is displayed in a historical text or school museum, where it is part of a narrative of past events. And courts should examine the context of the challenged display.

269. The seminal case of a compelling government interest in suppressing political speech upheld a ban on electioneering within one hundred feet of a polling station on the day of elections. Burson v. Freeman, 504 U.S. 191, 211 (1992).

270. *See* James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513 (1991) (describing how the Confederate Flag was meant to rally soldiers to battle).

271. Theodore Weld, in 1839, exclaimed that enslaved parents had "as little control over [their children] as have domestic animals over the disposal of their young." THEODORE D. WELD, AMERICAN SLAVERY AS IT IS 56 (Arno Press 1968) (1839). Slave parents were particularly restrained from educating their children. Indeed, many states forbade slaves from receiving any form of education, even though some blacks learned clandestinely with the help of sympathetic or self-interested whites. Concerning African American resourcefulness in using linguistic skills to elevate themselves from slavery and cultural prejudices, see Kimberly Rae Connor, *To Disembark: The Slave Narrative Tradition*, 30 AFR. AM. REV. 35, 36 (1996); Joyce E. Williams & Ron Ladd, *On the Relevance of Education for Black Liberation*, 47 J. NEGRO EDUC. 266 (1978). In the South, general education for blacks began only in 1861 in Fortress Monroe, Virginia. Ellis O. Knox, *A Historical Sketch of Secondary Education for Negroes*, 9 J. NEGRO EDUC. 440, 445 (1940).

272. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2262 (2015) (asserting that some wave the Confederate battle flag "to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War," while "[t]o others, it symbolizes slavery, segregation, and hatred").

School officials' actions are warranted in those cases where students laud the Confederacy because, at least part of the student body, will not only take offense but is also likely to become violently angered, alienated, or harassed by school authorities' toleration of the symbol's display.[273] In their effort to advance civic responsibility in students and inculcating the antidiscrimination value of the Reconstruction Amendments, education administrators can legitimately find that wearing a Confederate t-shirt or flying a Confederate flag while on school grounds or during school activities undermines the lessons of civil equality inculcated into our federal government by the constitutional prohibition of slavery and its badges and incidents.[274]

An elaborate Fourth Circuit discussion, in *Hardwick v. Heyward*, examined the enforcement of a South Carolina school district's dress code, which forbade students from wearing "anything . . . deemed to be offensive," such as drug advocacy or alcohol advertisements.[275] Even though that policy did not specifically mention Confederate symbols, officials repeatedly warned a student to abide by a ban of Confederate symbols.[276] After receiving explicit warnings from school officials, a student was suspended, and her parents subsequently brought a cause of action on First Amendment and Equal Protection grounds.[277] School officials answered that the policy and disciplinary measures were needed because of the disruptive nature of the symbol and past racial conflicts at the plaintiff's school. As with *Defoe*, the *Hardwick* circuit court relied on *Tinker*, finding that "school officials could reasonably forecast that all of these Con-

273. *See* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 327 (6th Cir. 2010) (upholding the decision of school to suspend student wearing clothing with Confederate symbol in part based on testimony of school official that "displays of the Confederate flag would be a distraction to any student offended by it and could result in some sort of dangerous disagreement resulting in conflict or violence"); Barr v. Lafon, 538 F.3d 554, 560 (6th Cir. 2008) (finding that a school's ban of Confederate symbols in school did not violate the First Amendment because officials foresaw disruptions and the school's principal saw "the confederate flag as both offensive and disruptive").

274. *See* Denno v. Sch. Bd., 218 F.3d 1267, 1273 (11th Cir. 2000) (finding that educators could prohibit the use of Confederate symbols at schools to advance lessons of civility, in keeping with the Supreme Court's holding in *Fraser*).

275. Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 430 (4th Cir. 2013).

276. Hardwick *ex rel.* Hardwick v. Heyward, 674 F. Supp. 2d 725, 729 (D.S.C. 2009).

277. *Hardwick ex rel. Hardwick*, 711 F.3d at 430–32.

federate flag shirts" she had worn "would materially and substantially disrupt the work and discipline of the school."[278] Officials were not required to wait until there was an actual disruption but could "reasonably forecast" its likelihood and act accordingly. The court did not treat the school regulation as a categorical limitation on low-value statements; instead, the court used a sophisticated analysis of the contextual type I have proposed in this Article to identify a likely disruption. In addition to its review of conflicting speech and educational interests, the history of the Confederate symbol, and the effect of the policy on the general welfare of the school, the *Hardwick* court also found the dress code to be neither overbroad nor vague. But the Court overlooked the relevance of the Thirteenth Amendment in ascertaining the validity of restricting student's speech to advance the compelling constitutional value of interracial tranquility in school. Contextual balancing of constitutional interests can help schools maintain educational environments where so powerful a badge of slavery is outside the pale of decency.

Contrary to my perspective, Professor Catherine Ross takes the view that Confederate flag displays should be treated as ordinary political speech under the *Tinker* standard.[279] From her perspective, "What the Confederate flag meant to those who waved it in the late 1860s might not be what it means to individuals who display it have a century later."[280] To the contrary, I believe the Confederate symbol is permanently connected to the slave supporting culture from which it became the standard for battle against the Union. Its expression of states' rights is bound to the political outlook that encouraged state governments to permanently safeguard the institution of slavery. The same is true of other symbols of destructive regimes: the swastika has a permanent connection with Nazis, the hammer and sickle refers to the Bolshevik regime, and the ISIS (Islamic State in Iraq and Syria) flag is connected to the demand of a radical Islamic caliphate. These are not merely emblems of historical moments. Indeed, when they are depicted in a history book, in a transparency shown in journalism class, or a newspaper article handed out during a roundtable of a contemporary issues course, all of these flags are protected speech. Certainly having a Confederate symbol display in a textbook, a poster presentation, or some other

278. *Id.* at 438.

279. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 184 (2015).

280. *Id.* at 183.

educational setting are protected aspects of the First Amendment marketplace of ideas. They are relevant to the exchange of ideas in the academic setting. It is when they are worn on t-shirts, drawn, hung on lockers, printed on school newspaper logos, and used in advocacy contexts that they bring to mind the heinous ideologies of those regimes. Where Confederate flags are depicted in schools outside the educational process, administrators can ban them pursuant to the principles of the Thirteenth Amendment.

Ross's point, nevertheless, brings to mind an important insight: context matters. Not all Confederate displays are likely to be harassing enough to disrupt education. Unless Confederate symbols are persistently or pervasively on display at a school, it is unlikely that a court would find the harassment to be present.[281] Requiring proof of educational disruption before enforcing a policy prohibiting the display of Confederate symbols creates an objective standard, one that can be tested against facts on the ground, rather than on the basis of a subjective heckler's veto, predicated on hypersensitive students.[282]

2 Harassment Statutes and Hate Messages

Administrators are presented with a separate set of legal concerns when confronting students who appear at school-sponsored activities wearing clothes displaying hate messages unconnected to Confederate symbols. A student may, for instance, dress in a shirt with a swastika; a degrading statement characterizing homosexuals as pedophiles; or a genocidal message, such as, "The Only Good Indian Is a Dead Indian." In those circumstances, federal law should define the extent to which principals or teachers can maintain discipline without infringing on the First Amendment rights of students.

Title VI of the Civil Rights Act of 1964 obligates recipients of federal educational subsidies to maintain environments where

281. *Cf.* Atkins v. Bremerton Sch. Dist., No. C04-5779RBL, 2005 WL 1356261, at *2 (W.D. Wash. June 7, 2005) (stating that under federal law prohibiting discrimination in education settings, actionable conduct must be persistent, pervasive, or severe).

282. *See* Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 521 (3rd Cir. 2011).

students are not subject to racism, color preferences, or xenophobia.[283] Title VI enjoins recipients from operating institutions where "harassing conduct (e.g., physical, verbal, graphic, or written) . . . is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient."[284] A school engaging in discrimination or failing to reasonably investigate and respond to notifications of hostility can be found liable.[285] The school might directly receive notice of harassment (as by letter or oral communication with a school agent) or indirectly (as by media report).[286] In some cases the "pervasiveness, persistence, or severity of the racial harassment may be enough to infer that the recipient had notice of the hostile environment."[287]

Not all expressions of derogatory "views, words, symbols or thoughts that some person finds offensive" are actionable.[288] However, displaying hate symbolism and messages at school goes beyond mere offensiveness. Displays of degrading, genocidal, or dehumanizing symbolism constitute harassment that is unprotected by the First Amendment. Intimidating, threatening, and coercive educational harassment interferes with students' abilities to study. It can interfere with students' progress through hallways, limit their participation in curricular and after-school activities, intimidate them from joining clubs, or lead to truancy.

Harassing interference with education is analogous to workplace harassment, where hostility can impede job performance.[289] In the workplace setting, the free speech claim is such a nonstarter that even when the parties briefed the question, the Supreme Court refused to reach the issue.[290] Harassment in the

283. 42 U.S.C. § 2000d (2012). The statute extends to members of religious groups. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) ("[V]ictims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965.").

284. Racial Incidents and Harassment Against Students at Educational Institutions, Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994).

285. *Id.* at 11,450.

286. *Id.*

287. *Id.*

288. U.S. Dep't of Justice & U.S. Dep't of Educ., *supra* note 243.

289. *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 92 (2009) (stating that Title VII of the Civil Rights Act protects against discrimination of employment opportunities based on race and gender).

290. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 13 (asserting

workplaces and schools targets captive audiences; under those circumstances, officials are granted greater discretion to create time, place, and manner restrictions against severe, pervasive, or persistent discriminatory expressions, such as pro-Nazi homophobic, and anti-Indian emblems.[291] If a school fails to act against pervasive and severe racist harassment, Title VI grants the Justice Department or Department of Education the authority to intervene and pursue remedies.

CONCLUSION

In recent years, courts have increasingly deferred to public school authorities in student speech cases. This trend has diminished the scope, thoroughness, and rigor of judicial review, treating certain forms of student speech as low value categories unworthy of First Amendment protections. This precedential shift in K–12 has empowered administrators to punish students who express controversial points of view about matters such as pregnancy, abortion, and illegal drugs. Some courts have even refused to engage in First Amendment review of school punishments for student speech made off campus on social media. That tends to chill student communications about matters like student government, events, community, and maturation.

School is too important a locus for deliberation, petition, and assembly to leave decisions negatively impacting students' free speech rights at the sole discretion of administrators. Student speech is essential to the development of individuals and the flourishing of civic society. Courts should therefore review whether a school suppressed speech because of the student's expressed political, artistic, or scientific viewpoint. Speech restrictions on core First Amendment values and uttered outside the school should warrant strict scrutiny review, but where statements are communicated during school sponsored activities

that "the Supreme Court's failure to notice a First Amendment question would signal its unanimous view that there was no question to be noticed—a judgment that the prohibited category was so clearly unrelated to the First Amendment's purposes that it should not be dignified with an explanation as to why it constituted an 'exception'"). *Compare* Brief for Respondent at 31, Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302223 (briefing First Amendment implications), *and* Reply Brief of Petitioner at 10, Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 632335 (briefing First Amendment implications), *with* Harris v. Forklift Sys. Inc., 510 U.S. 17 (omitting discussion of First Amendment concerns).

291. *See* Baty v. Willamette Indus., Inc., No. 96-2181-JWL, 1997 WL 292123, at *7–8 (D. Kan. 1997); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534–36 (M.D. Fla. 1991).

judges should rely on a contextually rich time, place, and manner analysis.