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Student Speech and the First Amendment: A Comprehensive Approach

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STUDENT SPEECH AND THE FIRST AMENDMENT: A
COMPREHENSIVE APPROACH

*Lee Goldman**

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INTRODUCTION

Can a school discipline a student for creating a vulgar parody profile of the school principal or another student on the website MySpace? Can it preclude a student from wearing at school a T-shirt that reads, “Homosexuality is shameful”? These are some of the difficult issues raised when students’ First Amendment rights clash with schools’ operational needs and custodial responsibilities.

The Supreme Court has addressed students’ First Amendment speech rights on several occasions, most recently in *Morse v. Frederick*.¹ Lower courts, however, have had great difficulty applying these precedents, particularly when the speech involves the Internet or other new media.² For example, two courts of appeals from the same circuit reached different decisions in Internet-related student speech cases on very similar facts.³ Consequently, student speech cases are among the most commonly litigated cases under the First Amendment, dwarfing the number of cases dealing with “obscenity, indecency, incitement to or advocacy of unlawful activity, defamation, commercial advertising, [and] campaign finance.”⁴

Several commentators have attributed the plethora of lower court cases and inconsistent results to a lack of direction from the Supreme Court.⁵ The criticism of *Morse* in this regard has been especially harsh.⁶ Although

1. 551 U.S. 393 (2007). For a discussion of the cases, see Part I.A.
 2. The Supreme Court cases all involved traditional media and speech that occurred under school supervision. *See* Part I.A.
 3. Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 308 (3d Cir. 2010), *reh’g en banc granted, opinion vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010) (suspension did not violate student’s First Amendment rights), with *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010), *reh’g en banc granted, opinion vacated*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010) (suspension violated student’s First Amendment rights).
 4. Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 208. Given the reluctance of students and parents to incur the costs of litigation for suspensions that often are served before they can be effectively reviewed, the number of litigated cases vastly underestimates the number of student speech controversies. *Id.* at 225–26; *see also* *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979).
 5. *See, e.g.*, Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 837 (2008); Benjamin F. Heidlage, Note, *A Relational Approach to Schools’ Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 576, 579 (2009); Abby Marie Mollen, Comment, *In Defense of the “Hazardous Freedom” of Controversial School Speech*, 102 NW. U. L. REV. 1501, 1510 (2008).
 6. *See, e.g.*, Denning & Taylor, *supra* note 5, at 837; Schauer, *supra* note 4, at 209–10; *The*

the Court's precedents are not unambiguous, this Article suggests that the difficulty in the area results primarily from lower courts' fundamental misunderstanding of the Supreme Court's opinions.

Rather than critique individual lower court decisions, this Article presents a comprehensive approach to student speech cases applicable to both traditional and new media.⁷ The Article argues that student speech should be treated differently depending upon whether the speech occurs under school supervision.⁸ In particular, student speech outside school supervision should receive the same First Amendment protection accorded non-students in parallel settings. Student speech under school supervision may be disciplined if it is lewd, advocates illegal action, can be deemed school-sponsored speech, or can reasonably be predicted to cause a substantial disruption to the school's activities. Moreover, school officials' disciplinary decisions regarding on-campus student speech should be given great deference, particularly if not viewpoint-based.

Part I of this Article reviews the Supreme Court's student speech cases and the general interpretation of those cases by lower courts. Part II.A reviews the special characteristics of the school environment that necessitate special First Amendment rules. Part II.B then explains why off-campus student speech should receive full First Amendment protection, provides case support for that conclusion, and addresses the special cases of student threats and cyberbullying⁹ that arise off campus. Part II.C

Supreme Court, 2006 Term—Leading Cases, 121 HARV. L. REV. 181, 296 (2007).

7. This Article addresses student speech at public primary and secondary schools only. Private schools, by definition, are not government run and, therefore, are not subject to the demands of the First Amendment. U.S. CONST. amend. I. Most undergraduate or graduate students are older, less impressionable, not as vulnerable, and better able to make and evaluate contributions to the "marketplace of ideas" than primary and secondary students. *See Nuxoll v. Indian Prairie Sch. Dist.* No. 204, 523 F.3d 668, 674 (7th Cir. 2008); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 877–79 (2008). Also, college students often live on campus, making speech outside school supervision less readily available, and are not subject to mandatory attendance laws. Accordingly, courts have indicated that college administrators are entitled to less discretion in formulating and applying restrictions on student speech than officials at primary and secondary schools. *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008); *O'Neal v. Alamo Cmty. Coll. Dist.*, No. SA-08-CA-1031-XR, 2010 WL 376602, at *13–14 (W.D. Tex. Jan. 27, 2010). This is consistent with the Supreme Court's recognition that the constitutional rights of minors and adults are not the same. *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639, 2640 n.1 (2009) (Fourth Amendment); *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007) (First Amendment); *Roper v. Simmons*, 543 U.S. 551, 568–70, 578–79 (2005) (Eighth Amendment).

8. This Article uses "speech under school supervision" and "on-campus speech" interchangeably for easier reading. Both indicate speech where the student is under the supervisory authority or control of the school. To be under school supervision, the student does not have to be literally on campus. For example, speech during school trips or school-sponsored activities is considered on campus. "Speech outside school supervision" and "off-campus speech" also are used interchangeably.

9. Cyberbullying refers to the "use of the Internet, cell phones, or other technology to send or post text or images intended to hurt or embarrass another person." Jessica Moy, Note, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and*

describes the proper approach to on-campus student speech cases. The Supreme Court cases, all involving on-campus speech, necessarily control. While this Part does not present a unique standard for evaluating on-campus speech, it enumerates some factors that courts should consider when applying that standard, guidance that is missing from most decisions in the area. Part II concludes with a section suggesting how to distinguish on-campus from off-campus student speech in cases involving new media. Finally, Part III illustrates application of this Article's approach by reviewing a few fact patterns of recent cases.

I. CASE BACKGROUND

A. *The Supreme Court Cases*

The Supreme Court has addressed restrictions on student speech in four cases. The Court's initial foray into the area, *Tinker v. Des Moines Independent Community School District*,¹⁰ demonstrated a strong commitment to the First Amendment rights of students. Since that time, the Court has shown increasing deference to the choices made by school administrators.¹¹

In *Tinker*, plaintiffs sued for damages and an injunction after school officials disciplined them for wearing black armbands to school to protest the Vietnam War.¹² The Supreme Court reversed and remanded the district court's dismissal of the complaint.¹³ The tone of the opinion was set by the Court's oft-quoted language that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁴ However, the Court recognized that school discipline involved a balance of interests by acknowledging the "authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."¹⁵ The Court found the balance favored free speech in *Tinker* because the disciplined conduct in that case was closely "akin to 'pure speech'" and there was no evidence

Cyberharassment After Morse v. Frederick, 37 HASTINGS CONST. L.Q. 565, 566 (2010) (quoting Janis Wolak et al., *Does Online Harassment Constitute Bullying? An Exploration of Online Harassment by Known Peers and Online-Only Contacts*, 41 J. ADOLESCENT HEALTH S51, S51–52 (2007)). Incidents involving cyber and traditional forms of bullying have garnered national attention. Erik Eckholm & Katie Zezima, *Strategies Take Shape for Trials in Bully Case*, N.Y. TIMES, Sept. 16, 2010, at A19, available at <http://www.nytimes.com/2010/09/16/us/16bully.html?ref=bullies>; Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1, available at http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=1 (reporting the suicide of Rutgers University freshman Tyler Clementi after his roommate surreptitiously streamed footage of his intimate dorm room encounter online).

10. 393 U.S. 503, 506–09, 513–14 (1969).

11. See *infra* notes 25–74 and accompanying text.

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

13. *Id.* at 514.

14. *Id.* at 506.

15. *Id.* at 507.

that the restricted behavior materially disrupted the work of the school or any class or collided “with the rights of other students to be secure and to be let alone.”¹⁶ The Court also found it significant that school authorities did not prohibit the wearing of all controversial symbols, but rather, singled out the expression of one particular opinion.¹⁷

Although the district court concluded that school officials had a reasonable fear of a disturbance, the Court emphasized that an “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” could not justify restrictions of otherwise protected student speech.¹⁸ The Court held that student speech is protected unless it “materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school” or “collid[es] with the rights of others.”¹⁹

Justice Hugo Black wrote an influential dissenting opinion.²⁰ He found that there was ample evidence that the challenged armbands took students’ minds off their class work and diverted them to thoughts about the Vietnam War.²¹ However, Justice Black’s more fundamental objection to the majority’s opinion, a position foreshadowing the views of more recent courts,²² was that the Court improperly arrogated to itself, rather than to elected state and school officials, the decision as to which school disciplinary regulations were reasonable.²³ In Justice Black’s view, students are sent to school to learn, and school discipline “is an integral

16. *Id.* at 508, 513–14.

17. *Id.* at 510–11.

18. *Id.* at 508–09.

19. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Subsequent courts have not developed the second prong of *Tinker*’s standard—allowing regulation of speech that collides with the rights of others. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (indicating that no court, to its knowledge, relied solely on the invasion of rights of others to uphold a student speech regulation); Mollen, *supra* note 5, at 1517–18; Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1094 (2008); Emily Gold Waldman, *A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 477 (2008). *But see* *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177–78, 1182–83 (9th Cir. 2006) (finding that T-shirts derogating homosexuals violated the rights of other students and were therefore subject to regulation by school administrators), *vacated*, 549 U.S. 1262 (2007). For a critique of *Harper*, see Bonnie A. Kellman, Note, *Tinkering with Tinker: Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 368–384 (2009). Broad application of the “colliding with the rights of others” prong could eliminate free speech rights at school because arguably the right of others to be let alone includes not being captive to unwanted speech. See, e.g., *Phelps-Roper v. Strickland*, 539 F.3d 356, 362–63 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703, 715–18 (2000)).

20. *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

21. *Id.* at 518.

22. See *infra* notes 25–74 and accompanying text.

23. *Tinker*, 393 U.S. at 517 (Black, J., dissenting). To highlight what he perceived as the foolishness of the Court’s review for reasonableness, Justice Black referenced the Court’s controversial and disavowed due process reasonableness review during the *Lochner* era. *Id.* at 519–20.

and important part of training . . . children to be good citizens.”²⁴

The Court’s first step back from the broad protection accorded student speech in *Tinker* occurred in *Bethel School District No. 403 v. Fraser*.²⁵ In *Fraser*, a student gave a lewd, sexually explicit nominating speech before an assembly of fourteen year olds.²⁶ Both the district court and the court of appeals found that the school’s discipline of the student violated his First Amendment rights as explicated in *Tinker*.²⁷ The Supreme Court reversed.²⁸

The *Fraser* Court’s decision was not inconsistent with *Tinker*. There was evidence of disruption from the sexually explicit speech,²⁹ and unlike in *Tinker*, the discipline was not based upon the political viewpoint articulated but upon the manner in which the speaker’s ideas were expressed.³⁰

Nonetheless, the tenor of the opinion reflected a different view about the relative balance between students’ free speech rights and school administrators’ need to maintain discipline in the schools. Although it acknowledged “that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’”³¹ the Court emphasized that the constitutional rights of minors in public schools are different from the rights of adults in other settings.³² Specifically, the Court identified the inculcation of fundamental values, including the teaching of socially appropriate behavior, as a proper function of public schools.³³ Perhaps more telling, the Court cited Justice Black’s dissent in *Tinker*, disavowing a purpose “to hold that the Federal Constitution compels . . . teachers, parents, and elected school officials to surrender

24. *Id.* at 524. Justice Black concluded that the case was “wholly without constitutional reasons . . . [and] subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.” *Id.* at 525. Justice John Marshall Harlan, dissenting separately, expressed the view that school officials’ disciplinary decisions should receive the greatest deference and be upheld unless the complaining party met the burden of demonstrating illegitimate purposes such as a desire to favor specific viewpoints. *Id.* at 526 (Harlan, J., dissenting).

25. 478 U.S. 675 (1986).

26. *Id.* at 677–78. “The assembly was part of a school-sponsored educational program in self-government.” *Id.* at 677. Students were required to attend the assembly or to report to the study hall. *Id.*

27. *Id.* at 679–80.

28. *Id.* at 680.

29. At the assembly, some students “hooted and yelled” while others made gestures graphically simulating the sexual activity alluded to in the student’s nominating speech. *Id.* at 678. One teacher also reported that she found it necessary to forego a portion of her class lesson to discuss the speech with the class. *Id.* Justice William Brennan, concurring in the judgment, specifically found that it was not unconstitutional for the school officials to conclude that Fraser’s language was disruptive. *Id.* at 687–88 (Brennan, J., concurring).

30. *Id.* at 680, 685 (majority opinion).

31. *Id.* at 680 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

32. *Id.* at 682.

33. *Id.* at 681, 683.

control of the American public school system to public school students.”³⁴

In *Hazelwood School District v. Kuhlmeier*, a high school exercised editorial control over a school newspaper that was produced at the school’s expense as part of a journalism class.³⁵ The Court distinguished *Tinker* as involving the question of whether a school needed to tolerate particular student speech.³⁶ In contrast, the *Kuhlmeier* Court defined the question as whether the First Amendment required a school to promote affirmatively particular speech, here, articles chronicling students’ experience with teen pregnancy and divorce.³⁷ Viewing school-sponsored speech as part of the school curriculum,³⁸ the Court held that educators could control the content of student speech in “school-sponsored expressive activities^[39] so long as the educators’ actions are reasonably related to legitimate pedagogical concerns.”⁴⁰ The Court concluded that the principal’s decision to delete two pages⁴¹ of the school newspaper was reasonably related to such concerns.

As in *Fraser*, the tone and language of the *Kuhlmeier* decision were equally, if not more, significant than the result. Citing *Fraser*, the Court reiterated that a “school need not tolerate student speech that is inconsistent with its ‘basic educational mission.’”⁴² The Court included as part of the school’s mission “‘awakening the child to cultural values’” in addition to preparing the student for later professional training and helping him to adjust normally to his environment.⁴³ The Court also quoted Justice Black’s *Tinker* dissent once again, disclaiming a purpose to transfer school control from teachers, administrators, and elected officials to students.⁴⁴

The Court’s most recent student speech case, *Morse v. Frederick*,⁴⁵ continued the trend toward increasing deference to the decisions of school administrators.⁴⁶ In *Morse*, a principal disciplined a student for waving a banner bearing the phrase, “BONG HiTS 4 JESUS” at an off-campus,

34. *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

35. 484 U.S. 260, 262–63 (1988).

36. *Id.* at 270–71.

37. *Id.* at 263, 270–71.

38. *Id.* at 271.

39. The Court included within the scope of its decision all school-sponsored publications and theatrical productions, not just those that were part of a specific class such as the journalism class in *Kuhlmeier*. *Id.* at 271–73. Ostensibly, the Court would consider bulletin board presentations as well as band and choir selections as school-sponsored.

40. *Id.* at 273.

41. *Id.* at 274–76.

42. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

43. *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953)). To the extent the school’s mission includes awakening the child to cultural values, some critical remarks by students might be censored as inconsistent with the cultural values of tolerance or understanding.

44. *Id.* at 271 n.4.

45. 551 U.S. 393 (2007).

46. See Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21 (2008).

school-sponsored event.⁴⁷ The Court began its analysis by rejecting Frederick's argument that this was not a school speech case at all.⁴⁸ Although it acknowledged some uncertainty about the applicability of school speech cases with both on-campus and off-campus components,⁴⁹ the Court stated that "Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."⁵⁰ The Court next found that although the message of Frederick's banner was cryptic, the principal's interpretation that the banner promoted illegal drug use was a reasonable one.⁵¹ Having come to that conclusion, the Court then framed the issue as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."⁵² In answering that question in the affirmative, Chief Justice John Roberts reviewed the Court's earlier student speech cases.⁵³

Chief Justice Roberts interpreted *Tinker* as holding that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was an insufficient justification for banning political speech unaccompanied by any disorder or disturbance.⁵⁴ He said *Fraser* recognized the "special characteristics of the school environment"⁵⁵ and established two principles: (1) the constitutional rights of students in public schools are not co-extensive with those of non-students in other settings and (2) *Tinker*'s mode of analysis was not the sole analytical approach in school speech cases.⁵⁶ The Chief Justice construed *Kuhlmeier* as directed to student speech that the public might reasonably perceive to bear the school's imprimatur and therefore not directly relevant to the case at hand. However, he took the case as confirmation of the two principles he identified from *Fraser*.⁵⁷

Chief Justice Roberts next cited Fourth Amendment precedent, social science studies, and Congressional legislation to establish that deterring drug use by school children is an important, if not compelling, interest.⁵⁸ With that conclusion and the two principles he derived from *Fraser* and *Kuhlmeier*,⁵⁹ Chief Justice Roberts easily concluded that the principal's on-the-spot decision to prohibit Frederick's banner, which she reasonably

47. *Morse*, 551 U.S. at 397–98.

48. *Id.* at 400.

49. *Id.* at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

50. *Id.* at 401 (internal quotation marks and external citation omitted).

51. *Id.*

52. *Id.* at 403.

53. *Id.* at 403–06.

54. *Id.* at 403–04 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

55. *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506).

56. *Id.* at 404–05.

57. *Id.* at 405–06.

58. *Id.* at 406–08.

59. *Id.* at 404–05.

interpreted as promoting drug use, did not violate the First Amendment.⁶⁰

Justice Clarence Thomas joined the majority opinion but wrote a separate concurrence.⁶¹ In his view, *Tinker* should be overruled because the First Amendment, as originally understood, provided no protection whatsoever to student speech in public schools.⁶²

Justice Samuel Alito wrote a separate concurrence, which Justice Anthony Kennedy joined.⁶³ Although they both joined Chief Justice Roberts's opinion, they wanted to highlight that the decision was limited to allowing restrictions of speech reasonably interpreted as advocating illegal drug use and "provides no support for any restriction of speech that [could] plausibly be interpreted as commenting on any political or social issue[.]"⁶⁴ Specifically, Justice Alito noted that the Court's opinion did not endorse the view advocated by the United States and petitioners that school officials be allowed to censor any student speech that "interferes with a school's 'educational mission.'"⁶⁵ Justice Alito identified the threat to the physical safety of students posed by drug use as the special circumstance that justified speech restrictions in *Morse*.⁶⁶

Justice Stephen Breyer, concurring in part and dissenting in part, found the First Amendment issues "difficult" and "portentous."⁶⁷ Accordingly, he preferred to simply hold that the student's claim was barred by the principal's qualified immunity.⁶⁸

Justice John Paul Stevens, joined by Justices David Souter and Ruth Bader Ginsburg, dissented.⁶⁹ The dissent acknowledged that (1) students' constitutional rights at school are not co-extensive with those of adults in other settings and (2) deterring drug use by school children is a "valid and terribly important interest."⁷⁰ However, the dissent believed that viewpoint discrimination begins with a presumption of invalidity⁷¹ and therefore still would not allow censorship of student speech unless either the prohibited message itself violates a permissible rule or expressly advocates conduct that is illegal and harmful to students.⁷² Justice Stevens found Frederick's

60. *Id.* at 409–10.

61. *Id.* at 410 (Thomas, J., concurring).

62. *Id.* at 410–11, 422.

63. *Id.* at 422 (Alito, J., concurring).

64. *Id.*

65. *Id.* at 423 (quoting Brief for Petitioner at 21, *Morse v. Frederick*, 551 U.S. 393 (2007) (No. 06-278)). Such a test, he feared, would risk that some public schools would define their educational mission to include inculcation of whatever political and social issues were held by the majority. *Id.* at 423.

66. *Id.* at 425.

67. *Id.* at 425, 427–28 (Breyer, J., concurring in part and dissenting in part).

68. *Id.* at 425.

69. *Id.* at 433 (Stevens, J., dissenting).

70. *Id.* at 434.

71. *Id.* at 437–38.

72. *Id.* at 435. Justice Stevens acknowledged that "while conventional speech may be restricted only when likely to 'incit[e] . . . imminent lawless action,' it is possible that [the Court's] rigid imminence requirement ought to be relaxed at schools." *Id.* at 439 (quoting *Brandenburg v.*

obscure message to fall far short of express advocacy⁷³ and accused the majority of abdicating their constitutional responsibilities by giving such great deference to the principal's judgment about the meaning of Frederick's message.⁷⁴

B. Lower Courts' Interpretations of the Supreme Court Cases

One might describe *Fraser* and *Morse* as mere offshoots of *Tinker*'s "substantial disruption" standard by viewing lewd speech and advocacy of illegal activity as disruptive to a school's mission to teach fundamental values. Under that approach, *Kuhlmeier* would be viewed as involving government, not student, speech. By providing a single standard, such an interpretation would remedy Justice Thomas's criticism in *Morse* that the Court's jurisprudence says "that students have a right to speak in schools except when they don't."⁷⁵

While many would question whether it should be the role of schools to inculcate values,⁷⁶ the Supreme Court has suggested that schools should be able to teach "fundamental" values.⁷⁷ School officials and Justices may disagree about what values are fundamental. However, the hypothesized interpretation of the Supreme Court precedent would not give school officials the power to define broadly their "educational mission" to include controversial political or social views as feared by Justice Alito in *Morse*.⁷⁸

Whatever the merits of the hypothesized unified view of the Supreme Court case law, it is not the interpretation adopted by lower courts, and it is inconsistent with language in the majority opinion in *Morse*. Lower courts generally have concluded that *Tinker*'s "substantial disruption" standard remains the basic rule when analyzing student speech issues unless the speech is lewd, advocates drug use, or bears the school's imprimatur. That is, *Fraser*, *Kuhlmeier*, and *Morse* are seen as mere exceptions to *Tinker*'s general rule.⁷⁹ Lower courts' categorical approach to student speech cases

Ohio, 395 U.S. 444, 447 (1969)).

73. *Id.* at 439.

74. *Id.* at 441.

75. *Id.* at 418 (Thomas, J., concurring).

76. The real question is to what extent should schools be able to inculcate values. See Heidlage, *supra* note 5, at 589–90 & nn.111–12 (2009); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 63–64 (2002). Some value inculcation is inevitable, if only through the choice of the curriculum. *Id.* at 84.

77. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 683 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *accord Bd. of Educ. v. Pico*, 457 U.S. 853, 889 (1982) (Burger, J., dissenting).

78. 551 U.S. at 423 (Alito, J., concurring).

79. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 296 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 769 (5th Cir. 2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212–13 (3d Cir. 2001) (Alito, J.); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); see also Denning & Taylor,

is supported by Chief Justice Roberts' emphasis in *Morse* that *Fraser* and *Kuhlmeier* established that *Tinker* was not the sole mode of analysis in student speech cases.⁸⁰

Where lower courts have erred, however, is in application of the *Tinker* standard. More recent lower courts, possibly reacting to the development of new media such as the Internet, cell phones, and social networking sites,⁸¹ generally have applied the "substantial disruption" standard to off-campus speech and find such speech unprotected when it reasonably may cause substantial disruption at the school.⁸² Moreover, lower court decisions, like the Supreme Court cases, do not identify how a court should determine whether there is a "substantial disruption" beyond almost meaningless general statements. To find a "substantial disruption," courts, following *Tinker*, require more than an undifferentiated fear or apprehension of disturbance or avoidance of discomfort or unpleasantness.⁸³ On the other hand, lower courts state that school officials do not have to wait until an actual disruption occurs before disciplining student speech.⁸⁴ With such limited guidance, ad hoc determinations as to whether there is a reasonable threat of "substantial disruption" necessarily are the rule.⁸⁵

As the following sections suggest, these decisions misunderstand and poorly apply the Court's jurisprudence. Student speech that does not occur under school supervision should receive the same First Amendment protection as non-student speech. Conversely, student speech that occurs under school supervision should be subject to a multi-factor balancing test with great deference given to administrators, especially when the school's discipline is not based upon the viewpoint of the speaker.

supra note 5, at 859–60.

80. See *Morse*, 551 U.S. at 404–05 (majority opinion).

81. See Heidlage, *supra* note 5, at 574, 580.

82. See, e.g., *J.S. ex rel. Snyder*, 593 F.3d at 298 & n.6; *Doninger*, 527 F.3d at 48; *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (finding no disruption); *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp. 2d 1114, 1124 (E.D. Mo. 2010) (also "true threat" case); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455–56 (W.D. Pa. 2001) (finding no disruption). Many commentators also favor applying *Tinker* to off-campus speech. See Heidlage, *supra* note 5, at 585 & nn. 87–88 (citing sources); Emily K. Kerkhof, Note, *MySpace, Yourspace, Ourspace: Student Cyberspeech, Bullying and Their Impact on School Discipline*, 2009 U. ILL. L. REV. 1623, 1649–50 (2009). Older courts were more willing to make geographical distinctions, limiting *Tinker*'s application to on-campus speech. See, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 & n.13 (2d Cir. 1979); *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986).

83. See, e.g., *J.S. ex rel. Snyder*, 593 F.3d at 298; *Evans*, 684 F. Supp. 2d at 1373; *Mardis*, 684 F. Supp. 2d at 1123; *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998); *Killion*, 136 F. Supp. 2d at 455.

84. See, e.g., *J.S. ex rel. Snyder*, 593 F.3d at 298; *Doninger*, 527 F.3d at 51; *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 673 (7th Cir. 2008); *Beussink*, 30 F. Supp. 2d at 1180.

85. See Papandrea, *supra* note 19, at 1065 ("The lower courts are all over the map in the way in which they apply *Tinker*'s requirement that the expression cause a material-and-substantial disruption or interfere with the rights of others."); accord Kerkhof, *supra* note 82, at 1648–49.

II. A COMPREHENSIVE APPROACH TO SCHOOL SPEECH ISSUES

Before explaining and justifying the recommended approach to student speech, it is useful to discuss the unique characteristics of the public primary and secondary school environment that necessitate special First Amendment treatment of student speech issues.

A. *Special Characteristics of the School Environment*

The school environment requires distinctive First Amendment rules if schools are to function properly. Schools must decide on a curriculum; teachers are not free to discuss whatever subject strikes their fancies. Teachers need to be able to discipline students for talking out of turn or otherwise disrupting class with speech unrelated to the day's lesson. Grades necessarily are based on the content and quality of the students' writings. Topics often must be assigned—students are not always free to choose their own message.

Mandatory attendance laws also define the school environment. Such laws result in a student's forced exposure to the speech of other students. Avoidance of the person or turning off the medium of communication is not an option.⁸⁶ Moreover, required attendance prevents parents from providing protection and guidance to their children during school hours and limits parents' ability to monitor and exercise control over the persons with whom their children associate.⁸⁷ As a consequence, schools have a custodial responsibility to protect students' safety and can consider the rights of other students when defining limits on student speech.⁸⁸ In some areas, such as sexual harassment, the law requires school officials to protect the rights of others.⁸⁹

86. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.).

87. See *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring); Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 573 n.105 (2009).

88. Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (discussing students' rights under the Fourth Amendment).

89. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a) (2006). Schools can be liable for sexual harassment of a student on school grounds if the school

- (1) ha[s] had adequate notice that it could be held liable for the conduct at issue;
- (2) ha[s] acted with deliberate indifference to known acts of harassment;
- (3) exercise[s] substantial control over the harasser and the context where the known harassment occurs; and (4) . . . the harassment is so “severe, pervasive, and objectively offensive” that it effectively bars the victim’s access to an educational opportunity or benefit.

Papandrea, *supra* note 19, at 1095 (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)); *Davis*, 526 U.S. at 644–50.

B. Rules for Student Speech Outside School Supervision

1. Rule and Justifications

Of course, noting that the school environment requires special rules does not define what those rules should be. However, as discussed below, the unique characteristics of the school environment generally are not present when student speech occurs outside school supervision. Accordingly, this Article recommends that student speech outside school supervision receive full First Amendment protection⁹⁰ and specifically rejects *Tinker*'s "substantial disruption" test, the dominant test applied by lower courts to off-campus student speech.⁹¹

When student speech occurs outside school supervision, the speech is not graded, will not directly disturb the classroom⁹² or impact the curriculum, and does not require snap decisions by school administrators.⁹³ Other students are not required to listen to student speech outside school supervision. Speech outside school supervision cannot threaten schools with Title IX liability. Schools, by definition, have no custodial responsibility for students outside their supervision. While student speech occurring outside school supervision may threaten students under school supervision, such risks may be protected against under the "true threat" doctrine.⁹⁴

Providing full protection of off-campus speech has the advantage of clarity. Clear rules generally are desirable because they provide predictability and reduce the need for litigation. However, the value of clarity in this area is particularly acute. Unclear rules risk chilling speech. It is for that reason that the vagueness and overbreadth doctrines have special application in the First Amendment context.⁹⁵

Equally important, unless rules are clear, school officials will have little incentive to protect students' First Amendment rights. School officials have a qualified immunity. They cannot be subject to a damages award unless their conduct violates "clearly established" statutory or

90. This Article does suggest a slight difference in the student speech context in the definitions of "true threats," *see infra* notes 124–28 and accompanying text, and possibly "fighting words," *see infra* note 149 and accompanying text.

91. *See supra* note 82 and accompanying text.

92. Off-campus speech, by definition, does not take place in a classroom or at a school activity. As such, it cannot directly interfere with a teacher's lesson or the school-supervised activity. Although off-campus speech may later create incidental disruption on campus, *see, e.g., infra* notes 100–01, 199–207 and accompanying text, such disruption is "different in kind to a student standing up during a lecture and telling the teacher that . . . the teacher is a terrible teacher." Tabor, *supra* note 87, at 592. There also are alternative measures to deal with speech that only indirectly causes a disruption. *Id.* at 593; *see also infra* notes 153–58 and accompanying text.

93. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007); *id.* at 427 (Breyer, J., concurring in part and dissenting in part).

94. *See infra* Part II.B.3.

95. *See United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

constitutional rights of which a reasonable person would have known.”⁹⁶ To be clearly established, “the right allegedly violated must be defined at the appropriate level of specificity[.]”⁹⁷ Although students still could get injunctive relief, few families will choose to absorb the costs of litigation to reverse a suspension that often has already been served.⁹⁸ Thus, without clear rules, school officials will have little fear that their disciplinary decisions will be reversed.

Treating speech outside of school supervision as deserving of full First Amendment protection has the advantage of making restrictions on speech under school supervision more like a time, place, and manner regulation. By leaving other channels for student speech open, greater restrictions on student speech can be justified where they are truly needed.⁹⁹

This is not to say that off-campus student speech does not have the ability to result in substantial disruption on campus. For example, posting on the Internet that another student is gay can cause harassment at school, which interferes with the learning process.¹⁰⁰ Similarly, comments on social networking sites criticizing teachers can interfere with the student-teacher relationship at school.¹⁰¹ Undoubtedly, such concerns have led lower courts to apply *Tinker*’s “substantial disruption” test to student speech wherever it occurs.¹⁰²

The problem with the “substantial disruption” test as applied to off-campus speech, however, is that it covers too much. A letter to the editor of the *New York Times* criticizing a school’s choice of curriculum can create a substantial disturbance on campus. Such a letter may result in a flood of calls to administrators or even make adoption of the school’s curriculum choice impossible. Similarly, the “substantial disruption” test could allow the government to punish students for watching popular television shows or reading particular magazines, newspaper articles, or books for fear that discussion at school of such normally protected speech will disrupt classes or interfere with the fundamental values that the school seeks to teach.¹⁰³ It is not even clear that truthful speech accusing a teacher

96. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (finding that it is not enough that the government actor’s conduct is ultimately found unlawful).

97. *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

98. *See Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

99. *Id.*; *accord Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001).

100. *See Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 674 (7th Cir. 2008). Judge Richard Posner opined that if a student’s negative comments about homosexuality “will lead to a decline in students’ test scores, upsurge in truancy, or other symptoms of a sick school,” it may be prohibited under *Tinker*. *Id.*

101. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 293 (3d Cir. 2010), *reh’g en banc granted, opinion vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

102. *See Papandrea, supra* note 19, at 1056 (“[M]ost courts . . . have suggested that they might be willing to apply *Tinker* in any student expression case, even if the student speech is plainly off campus, as long as the speech causes a substantial disruption at the school.”).

103. *See id.* at 1093.

of sexual harassment or school officials of providing answers to standardized tests would be protected under the “substantial disruption” test.¹⁰⁴

Application of *Tinker* to off-campus speech also risks extension of *Fraser* and *Morse* to student speech outside school supervision. Although that risk has not yet come to fruition in reported cases,¹⁰⁵ the prospect of schools policing sexual innuendo in student homes is more than a little troubling and may inhibit a variety of student expression. Conversely, the fear that on-campus precedents would be applied to off-campus speech may cause courts to give less deference than is desirable to school officials in cases of on-campus speech restrictions.¹⁰⁶ This may handcuff courts from properly dealing with the worst cases of abuse—the types that cause students to stay home from or change schools.¹⁰⁷

Moreover, adoption of the *Tinker* test for speech outside school supervision is not necessary to protect against the most troubling problems created by student speech. Speech that a reasonable person would interpret as a threat to student or teacher safety may be disciplined under the “true threat” doctrine.¹⁰⁸ Fighting words or obscenity also may be challenged under the First Amendment principles applicable to non-students.¹⁰⁹ Off-campus comments that result in on-campus harassment or disruption may not be punished, but the persons engaging in the harassment or disruption on campus may be disciplined. Where a student while off campus *advocates* punishable behavior that causes a material disruption on campus, he may be disciplined as a co-conspirator. Of course, students injured by off-campus speech still have recourse to the offending student’s parents, the police, and tort law.¹¹⁰

104. While no court to date has abused the “substantial disruption” test to the extent hypothesized in the text, reliance on judicial discretion to sensibly apply such an amorphous test would risk chilling protected expression and devalue all First Amendment speech rights.

105. *See id.* at 1069–70. Given the cost of litigation and the generally short duration of most sanctions, many cases of school discipline are not challenged, much less reported. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 (2d Cir. 1979); Schauer, *supra* note 4, at 225–26. Accordingly, schools may already be applying *Fraser* and *Morse* to student speech outside school supervision.

106. *Thomas*, 607 F.2d at 1044–45 (“[O]ur willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.”).

107. *See* Kerkhof, *supra* note 82, at 1650 n.233 (citing Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 55 (2005)).

108. *See infra* Part II.B.3.

109. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (“fighting words”); *Miller v. California*, 413 U.S. 15, 36 (1973) (obscenity).

110. *See* Denning & Taylor, *supra* note 5, at 883–84 & n.263; Papandrea, *supra* note 19, at 1100–01.

2. Supreme Court Support for Full First Amendment for Student Speech Outside School Supervision

Although the Supreme Court has never heard a case in which a student was disciplined for speech outside school supervision, the dichotomy this Article suggests finds strong support in Supreme Court opinions.

The Court has repeatedly indicated that off-campus speech receives greater protection than on-campus speech. In *Morse*, the Court declared, “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”¹¹¹ Similarly, in *Kuhlmeier*, the Court stated, “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”¹¹²

However, the strongest endorsement of full First Amendment protection for student speech outside school supervision derives from the analytical approach of the majority in *Morse*. Before addressing the First Amendment rules applicable to student speech, the Court rejected the defendant’s argument that the case was not a school speech case at all.¹¹³ To conclude the case was indeed a school speech case, the Court relied upon the facts that (1) the event occurred during school hours and was an approved event or class trip and (2) teachers and administrators were interspersed among students whom they were charged with supervising.¹¹⁴ The clear implication was that if the student speech did not occur under school supervision, *Morse* would not be a student speech case, and normal First Amendment protections would apply.

The apparent basis for lower courts’ applications of *Tinker*’s “substantial disruption” standard to off-campus speech appears to be the language in *Tinker*:

“[C]onduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”¹¹⁵

111. *Morse v. Frederick*, 551 U.S. 393, 405 (2007); *see also id.* at 434 (Stevens, J., dissenting) (“I take the Court’s point that the message on Frederick’s banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere.”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (“If respondent had given the same speech outside of the school environment, he could not have been penalized . . .”).

112. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citation omitted) (quoting *Fraser*, 478 U.S. at 685).

113. *Morse*, 551 U.S. at 400–01 (majority opinion).

114. *Id.*

115. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 313 n.15 (3d Cir. 2010) (Chagares, J., concurring in part) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)), *reh’g en banc granted, opinion vacated*, No. 08-4138, 2010 U.S. App. LEXIS

However, immediately prior to the quoted language, the *Tinker* Court said,

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects[,] . . . if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.¹¹⁶

Thus, when placed in context, the highlighted language was not meant to indicate that speech outside school supervision was subject to *Tinker*'s standard, but rather to ensure that speech on campus, but outside the classroom, was subject to regulation under *Tinker*.¹¹⁷

3. True Threats

Given the modern rash of violent crimes in school settings,¹¹⁸ one might fear that schools would not be able to protect adequately students if they could not consider Columbine-type threats made outside of school supervision when disciplining students. However, this fear is unjustified. Subjecting student speech outside school supervision to non-student First Amendment principles does not immunize student speech. In particular, the Supreme Court has long recognized that the Constitution permits government to proscribe "true threats."¹¹⁹

A statement constitutes a "true threat" if it would communicate to a reasonable person a serious intent to cause a present or future harm.¹²⁰ "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"¹²¹ Nonetheless, speech is not a true threat merely because it is "vituperative, abusive, and inexact."¹²² For example, in *Watts v. United States*, the

7342 (3d Cir. Apr. 9, 2010).

116. *Tinker*, 393 U.S. at 512–13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

117. *J.S. ex rel. Snyder*, 593 F.3d at 313 n.15. The case cited by *Tinker* after the "in class or out of it" language, *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749, 753 (5th Cir. 1966), also involved on-campus speech.

118. See *Time Line of Worldwide School Shootings*, INFOPLEASE, <http://www.infoplease.com/ipa/A0777958.html> (last visited Jan. 24, 2011).

119. See *Virginia v. Black*, 538 U.S. 343, 360 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

120. See *Black*, 538 U.S. at 360; *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp. 2d 1114, 1118 (E.D. Mo. 2010); *O'Neal v. Alamo Cmty. Coll. Dist.*, No. SA-08-CA-1031-XR, 2010 WL 376602, at *12 (W.D. Tex. Jan. 27, 2010).

121. *Black*, 538 U.S. at 359–60 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)).

122. *Watts*, 394 U.S. at 708.

defendant was prosecuted under a statute making it illegal to threaten the life of the President of the United States.¹²³ The Supreme Court reversed the defendant's conviction and found that the defendant's statements that he would refuse induction into the armed forces and if they ever made him carry a rifle, the first man he would want to get in his sights was L.B.J., were mere hyperbole and not a true threat against the life of the President.¹²⁴

While courts, such as the Court in *Watts*, may be reluctant to find a "true threat" outside the school context, they appear much more willing to give great deference to primary and secondary school administrators imposing discipline when the school officials find a true threat.¹²⁵ There are sound reasons for the difference. First, the true threat cases outside the school context generally have involved criminal prosecutions.¹²⁶ In criminal cases, the consequences of finding the defendant's speech unprotected are significantly greater than in school discipline cases, and the prosecutor needs to establish her case "beyond a reasonable doubt." Second, courts are aware of the epidemic of school violence and are sensitive to the risks schools would face if they failed to act when confronted with student threats.¹²⁷ Finally, "the heightened vulnerability of students arising from the lack of parental protection and the close proximity of students with one another makes schools places of 'special danger' to the physical safety of the student."¹²⁸ As a result, the majority, if not all, of the judges in *Morse* opined that they would be more willing to defer to school administrators where student safety was involved than they would to decisionmakers outside the school context.¹²⁹ Thus, under the proposed approach to off-campus student speech, school officials, through the "true threat" doctrine, would still be able to rely on speech outside their supervision to suspend students who the officials reasonably perceive as posing a physical threat to other students.¹³⁰

123. *Id.* at 705.

124. *Id.* at 706, 708 (referring to then-President Lyndon Baines Johnson).

125. *See, e.g.,* *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771–72 (5th Cir. 2007); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007); *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 626–27 (8th Cir. 2002); *see also O'Neal*, 2010 WL 376602, at *13–14 (finding that college officials are subject to the "true threat" standard of *Watts* rather than the lesser standard applicable to primary and secondary school officials).

126. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 856 (Pa. 2002). Of course, the major Supreme Court "true threat" cases involved criminal prosecutions. *See Black*, 538 U.S. at 348–49; *R.A.V.*, 505 U.S. at 379–81; *Watts*, 394 U.S. at 706–08.

127. *See, e.g., Ponce*, 508 F.3d at 771–72; *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 983–84 (11th Cir. 2007).

128. *Ponce*, 508 F.3d at 770 (quoting *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring)).

129. *See Morse*, 551 U.S. at 409–10 (majority opinion); *id.* at 424–25 (Alito, J., concurring); *id.* at 439 (Stevens, J., dissenting).

130. Discipline needs to be timely. Absent further incidents, allowing a student to attend classes for extended periods following the challenged speech should negate a school official's claim that she perceived a true threat. *Cf. Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir.

4. The Special Case of Cyberbullying

Commentators who recommend that school officials should have broad power to discipline speech outside school supervision generally are motivated by a desire to combat cyberbullying.¹³¹ Undoubtedly, cyberbullying has become a significant problem and presents unique First Amendment issues. It is not easy to balance the respective interests of the alleged bully, her victim, the school, and society. However, in no event should the appropriate remedy be a school official unilaterally assuming the power to discipline speech occurring outside her supervision.

There is little question that cyberbullying is on the increase and can cause substantial damage to troubled teens.¹³² A 2010 study by the Cyberbullying Research Center found that one in five middle school students were affected by “willful and repeated harm” inflicted through phones and computers.¹³³ According to the Federal Probation Juvenile Department, “[ninety] percent of middle-school students have had their feelings hurt online’”¹³⁴ Victims of bullying experience a variety of psychological harms that, in extreme cases, may lead to suicide.¹³⁵

Although it is natural to want to avoid the damage cyberbullying can cause, there are reasons to be reluctant to regulate such student communications outside school supervision. Verbal bullying occurred long before computers and text messaging were invented. Moreover, given the closed environment in which children grew up, derogatory statements about a student quickly circulated throughout the neighborhood. Yet, such name-calling outside of school has never been subject to school regulation. Rather, it is standard First Amendment doctrine that speech that does not invade the privacy of others should not be restricted just because some may find the speech offensive.¹³⁶ While there might be little harm in eliminating

2004) (noting that the student attended school without incident for two years before threatening drawing surfaced).

131. See, e.g., Kerkhof, *supra* note 82, at 1650–51; Renee L. Servance, Comment, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1238–39; Tabor, *supra* note 87, at 562–63.

132. See, e.g., *Cyberbullying*, STOPBULLYINGNOW!, <http://www.stopbullyingnow.hrsa.gov/adults/cyber-bullying.aspx> (last visited Jan. 24, 2011); Posting of Tara Parker-Pope to N.Y. Times Well Blog, *More Teens Victimized by Cyber-Bullies*, <http://well.blogs.nytimes.com/2007/11/27/more-teens-victimized-by-cyber-bullies/> (Nov. 27, 2007, 13:51 EST).

133. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 28, 2010, at A1, available at <http://www.nytimes.com/2010/06/28/style/28bully.html>.

134. Moy, *supra* note 9, at 566 (quoting Alvin W. Cohn, *Juvenile Focus*, 71 FED. PROBATION 44, 50 (2007)).

135. Servance, *supra* note 131, at 1216–17; Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, at ST9, available at <http://www.nytimes.com/2007/12/16/fashion/16meangirls.html>.

136. See *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (“After all, much political and religious speech might be perceived as offensive to some.”); see also *Cohen v. California*, 403 U.S. 15, 21–22 (1971). Of course, if speech is so offensive as to provoke imminent unlawful action, it may be regulated under the “fighting words” doctrine. See *id.* at 20; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

a student's ability to call a fellow student "a stupid, fat whore," not all cases of what may be considered cyberbullying have such little social value. Regulation of cyberbullying also may silence religious or political views. For example, a student might be disciplined for expressing the opinion that homosexuality is immoral on another student's Facebook page. A truthful statement posted on the Internet claiming that a candidate running for class president cheated on an exam and then lied about it could result in discipline. In one case, an honor student was disciplined for posting on Facebook, "To those select students who have had the displeasure of having Ms. Sarah Phelps [a teacher], or simply knowing her and her insane antics: Here is the place to express your feelings of hatred'"¹³⁷ Whether or not one views this as a political comment about government workers, silencing such speech undermines the First Amendment value in self-expression said to be necessary to the autonomous self¹³⁸ and undercuts school teachings about the value of First Amendment freedoms.¹³⁹ Additionally, silencing such speech may lead students to act out their complaints in more violent ways. Finally, regulating cyberbullying increases the likelihood that schools will be able to monitor students' phone messages, mall conversations, and discussions with friends. That prospect will inevitably result in chilling student speech and raises the ugly head of a totalitarian state.

On the other hand, a strong case can be made for some regulation of cyberbullying. First, as suggested above, cyberbullying can cause significant harm. Cyberbullying, as any form of bullying, can result in a wide range of psychological harm. Victims of bullying may suffer low self-esteem, anxiety, depression, or social withdrawal.¹⁴⁰ Increased difficulty concentrating, stress, or truancy may compromise the student's education.¹⁴¹ Medical journals also report that kids who are tormented online are more likely to get detention or be suspended.¹⁴² Some victims of bullying may eventually strike back with violence toward the bully or innocent bystanders.¹⁴³ In any event, "studies show serious long-term effects into adulthood such as depression, negative self-concept, and suicide."¹⁴⁴ Second, the maturity levels of students make them particularly

137. Carmen Gentile, *Student Fights Record of 'Cyberbullying,'* N.Y. TIMES, Feb. 8, 2009, at A20, available at <http://www.nytimes.com/2009/02/08/us/08cyberbully.html>.

138. See *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978); Chemerinsky, *supra* note 46, at 23.

139. See Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 826 (2009).

140. Servance, *supra* note 131, at 1216.

141. *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 671, 674 (7th Cir. 2008); Parker-Pope, *supra* note 132.

142. Parker-Pope, *supra* note 132.

143. Severance, *supra* note 131, at 1216–17.

144. *Id.* (citing Sandra Graham & Jaana Juvonen, *Self-Blame and Peer Victimization in Middle School: An Attributional Analysis*, 34 DEVELOPMENTAL PSYCHOL. 587, 587 (1998); Ken Rigby, *Health Consequences of Bullying and Its Prevention in Schools*, in PEER HARASSMENT IN SCHOOL:

susceptible to the harms from bullying.¹⁴⁵ The Supreme Court has recognized that minors' immaturity should be taken into account when shaping First Amendment protection in the context of indecent speech.¹⁴⁶ The government's interest in protecting minors from psychologically damaging speech seems at least as strong as its interest in shielding youngsters from sexual expression.¹⁴⁷ Just as the Court has suggested that the requirement for a true threat may be reduced in the school context,¹⁴⁸ the vulnerability of students may justify lowering the threshold for finding speech to constitute "fighting words."¹⁴⁹ Third, the "marketplace of ideas" metaphor for First Amendment protection has limited force in the context of cyberbullying. Although, as suggested above, regulating cyberbullying may chill some beneficial speech, the reality is that most disciplined speech will have little social value. Moreover, in the cyberbullying context, the marketplace metaphor suffers from a market failure.¹⁵⁰ There is no adequate response to false ideas when psychological damage has already been done to vulnerable minors. Finally, cyberbullying can be distinguished from the verbal abuse experienced face-to-face. With the use of technology, derogatory statements may be transmitted widely and instantaneously from anywhere. More important, the statements are written. While verbal abuse can cause the same harm as cyberbullying, policing such abuse is impractical because the bully and victim often will tell different stories. Where the harassment is written, there are not the same proof problems.¹⁵¹

Nonetheless, even if cyberbullying is a major problem that needs to be addressed, the remedy should not be a school official assuming the power to discipline off-campus speech. Punishment, in the first instance, should be left to parents. The Supreme Court has indicated that the parental right is a fundamental one under the Fourteenth Amendment.¹⁵² It should not be interfered with absent special circumstances.¹⁵³ Parents know their children

THE PLIGHT OF THE VULNERABLE AND VICTIMIZED 310, 322–23 (Jaana Juvonen & Sandra Graham eds., 2001)).

145. One commentator has suggested that the special vulnerability of students justifies regulating off-campus cyberspeech harassing students but not speech directed toward teachers or school officials. *See* Tabor, *supra* note 87, at 599–603.

146. *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978); Ginsberg v. New York, 390 U.S. 629, 638–39 (1968).

147. *See* Tabor, *supra* note 87, at 600.

148. *See* Morse v. Frederick, 551 U.S. 393, 409–10; *id.* at 424–25 (Alito, J., concurring); *id.* at 439 (Stevens, J., dissenting).

149. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

150. *See* Blocher, *supra* note 7, at 829–30, 834–35.

151. However, there still may be an issue as to who sent the problematic communication. *See* Hoffman, *supra* note 133 (reporting how principal concluded that harassing text messages were not sent by the owner of the phone).

152. *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

153. *See* Troxel, 530 U.S. at 80 (Thomas, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972).

better than anyone and have the greatest ability and interest in teaching appropriate behavior. In the case of conflicting lessons, parents should be able to determine which interest should prevail when their child is under their supervision. For example, assume that Bill has been using the Internet to harass Jane, who has been too embarrassed by the messages to notify anyone. After repeated disturbing messages, Jane finally responds with an e-mail, “You are a stupid jerk, and I and everyone else hates you.” Application of a school’s no tolerance for cyberbullying policy would result in Jane’s discipline. Jane’s parents, however, may be more sympathetic to Jane’s injury and want to provide a different message. While not condoning her method of expression, Jane’s parents may want to provide positive feedback for the normally shy Jane’s standing up for herself. In cases where parents fail to act or there is more systematic or severe harassment, recourse may be made to tort and criminal laws.¹⁵⁴ The higher burden of proof required by such laws reduces the risk of chilling protected speech. Tort and criminal laws do impose litigation costs. However, such costs may have beneficial effects. Students and their parents will have little incentive to challenge questionable conduct that does little more than cause minor hurt feelings. School officials, however, would not be immune from such complaints. Trying to resolve all cases of hurt feelings, whether generated on or off campus, would open up a Pandora’s box of problems for school administrators. Conversely, the penalties available through the judicial system more effectively can deter the more serious instances of cyberbullying. Leaving discipline to parents and the judicial process also has the advantage of keeping schools institutions of learning as opposed to penal institutions. If schools start policing and punishing off-campus speech, students’ views of schools, teachers, and administrators may be altered in a manner that interferes with the learning process itself.

This is not to suggest that the school should have no role in remedying cyberbullying. On the contrary, there are several approaches that some schools have adopted that should have wider application. For example, some high schools have achieved great results through the “Names” program, which the Anti-Defamation League sponsors and supervises. “Guided by teachers, trained student volunteers and league facilitators, students talk with the unflinching candor of children about topics most adults would prefer to avoid: gossip, rumor, physical harassment, racism, homophobia, depression, eating disorders, self-mutilation, drinking, drugs, suicide—the full range of bullying behavior and its consequences.”¹⁵⁵ Although the “Names” program requires two months of training by

154. See Denning & Taylor, *supra* note 5, at 883–84 & n.263; Papandrea, *supra* note 19, at 1100. But see Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 275–80 (2008) (detailing practical problems with pursuing criminal or civil remedies).

155. Gerri Hirshey, *Pushing Back at Bullying*, N.Y. TIMES, Jan. 28, 2007, http://www.nytimes.com/2007/01/28/nyregion/nyregionspecial2/28rbully.html?pagewanted=1&_r=1.

students and staff, “[a] follow-up survey of the ‘Names’ program in San Diego in 2000 found that 60 percent of students said that after the session they would be less likely to call someone a name; nearly half reported positive changes in other students’ behavior.”¹⁵⁶ Of course, even without the power to discipline, school officials can talk to the alleged offender and explain the harm he is causing. In more serious cases of harassment, administrators can refer complaints to the police.¹⁵⁷ Administrators also can monitor the offender’s behavior at school.¹⁵⁸ The worst cyberbullies are likely to engage in bullying tactics there too. Those behaviors could and should be subject to discipline. Guidance counselors can meet with and assist the victims of bullying. Schools can educate parents about the possible harms of digital media and encourage them to more closely supervise their children’s digital speech activities.¹⁵⁹ Schools, through Parent Teacher Associations, might organize “parents’ counsels” that are charged with investigating allegations of cyberbullying. Where wrongdoing is found, the counsel or a school administrator can publicize the name of the wrongdoer, notify his parents, and correct any false claims that may have been made. What school officials should not do, however, is independently discipline student speech outside their supervision. Even if one concluded that schools should and constitutionally could discipline off-campus cyberbullying, authorization should come from state legislatures, rather than having non-elected administrators unilaterally assume that power. Thus, neither cyberbullying nor threats of violence justify extending school authority to student speech outside their supervision.

C. Rule for Student Speech Occurring Under School Supervision

1. General Approach

When student speech occurs under school supervision, the Supreme Court’s student speech cases control.¹⁶⁰ Unless speech is lewd, advocates drug use, or bears the school’s imprimatur, lower courts generally have concluded that *Tinker*’s “substantial disruption” standard remains the basic test for analyzing on-campus student speech issues.¹⁶¹ The difficulty is determining what speech under school supervision satisfies the *Tinker* standard.¹⁶² This section presents an approach to that problem.

156. *Id.* Cyberbullying education also has had international success. A study conducted in Norway “found that the incidence of bullying in Norwegian schools fell by [fifty] percent or more in the two years after an anti-bullying campaign; truancy, theft and vandalism also dropped markedly.” *Id.*

157. The police have greater investigative resources than school administrators, and the mere police involvement should act as a deterrent to further cyberharassment.

158. *See Hoffman, supra* note 133.

159. *See Papandrea, supra* note 19, at 1100.

160. *See supra* notes 25–74 and accompanying text.

161. *See sources cited supra* note 79.

162. *See Kerkhof, supra* note 82, at 1648–49.

There is little question that students' constitutional rights at school must be restricted for schools to properly function.¹⁶³ The Supreme Court also has recognized the practical need to give school officials' disciplinary decisions substantial deference if federal courts are not to usurp the authority of school boards and administrators.¹⁶⁴ Given this deference to school administrators, the need to restrict student rights and the difficulty in determining what constitutes a substantial disruption, it might seem more efficient, as Justice Thomas suggests, to disavow any review of school administrators' disciplinary decisions.¹⁶⁵ After all, few cases are likely to be reversed; yet the number of cases brought and the costs of pursuing litigation are huge. Such an approach, what Professors Martin Redish and Kevin Finnerty call the "civic republican" model of value inculcation,¹⁶⁶ although tempting, is untenable. For example, a school board could prohibit any statement in support of the Republican Party or Republican candidates. In short, the government could indoctrinate youth to its desired views and create a totalitarian state.¹⁶⁷ As Judge Richard Posner has stated,

The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.¹⁶⁸

With the threat of totalitarianism in the absence of any First Amendment rights and the operational needs of the schools to significantly restrict First Amendment rights, the "substantial disruption" test necessarily requires a balance of the school's, the students', and the public's respective interests. Unfortunately, courts have not adequately identified how the proper balance should be achieved. To remedy that problem, this Article enumerates a number of factors that administrators

163. See *supra* Part II.A.

164. See *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007); *id.* at 421 (Thomas, J., concurring); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 273 (1988); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 525–26 (1969) (Black, J., dissenting).

165. See *Morse*, 551 U.S. at 410–11 (Thomas, J., concurring) (rejecting First Amendment protection for student speech based upon his understanding of the original meaning of the Constitution).

166. Redish & Finnerty, *supra* note 76, at 85–86, 96.

167. *Bd. of Educ. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring); *Tinker*, 393 U.S. at 511; Redish & Finnerty, *supra* note 76, at 78–83.

168. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001).

and judges should consider when determining whether on-campus student speech should be deemed to create a substantial disruption under *Tinker*. Administrators' evaluation of the recommended factors should be given great deference, particularly when the school discipline is not viewpoint-based. If, as suggested in this Article, students' off-campus speech carries full First Amendment rights,¹⁶⁹ students in today's technological age generally will have ample avenues of communication available to them off campus to adequately express their ideas and feelings.

2. Factors to Consider When Determining Whether *Tinker*'s "Substantial Disruption" Standard Has Been Met

a. Curricular Matters

When evaluating a school's interest, the initial inquiry is whether the speech is related to curricular matters. Schools necessarily make content-based restrictions when deciding on curriculum and choosing and evaluating assignments. They must be permitted to do so if schools are to function properly. As Professor Mark Cordes has said, "Schools exist for educational, and not speech purposes, and therefore legitimate curricular and educational concerns should necessarily trump student speech interests."¹⁷⁰

The Supreme Court has recognized that schools have a role in inculcating fundamental values.¹⁷¹ Thus, restrictions on the manner of student speech designed to teach civility also might be given great deference. Although what constitutes a fundamental value is subject to debate, restrictions silencing discussion on controversial issues, such as abortion or the war in Iraq, would be the most problematic. Nonetheless, courts should be reluctant to overly rely on a school's ability to teach fundamental values when analyzing student speech cases. Often, so-called "fundamental values" can conflict, particularly if one acknowledges that the right to free speech is a fundamental one. If a student wears a T-shirt that reads, "Homosexuality is shameful,"¹⁷² does discipline further the fundamental values of civility and tolerance or violate the fundamental values in diversity of opinions and free religious expression?¹⁷³

169. See *supra* Part II.B.1.

170. Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL RTS. J. 657, 688 (2009); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 271 (1988).

171. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979).

172. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

173. One also can question whether schools should instill fundamental values or merely teach them. That is, while it is clear the school can and should teach (and can test) that it is important to be civil to others, it is less clear that they should be able to silence a contrary view or punish a student for not adopting those teachings in his everyday life.

b. Location of Speech

Related to whether speech affects curricular matters is the location where the speech occurs. Speech that takes place in the classroom or during an assembly more clearly threatens a disruption than speech uttered in the halls or the cafeteria. This is not to suggest, however, that speech that occurs in a classroom necessarily is disruptive. Obviously, a proper student response to a teacher's query causes no disruption. Even unauthorized speech in the classroom may not cause any harm. For example, if a student posts something on his website during class while he waits for his fellow students to finish an assignment that he has completed, there has been no substantial disruption from the act of posting.

c. Type of Restriction—Discriminatory or Neutral?

A critical question when evaluating a student's and the public's interest is where on the viewpoint-/content-neutrality spectrum the school's regulation lies. Viewpoint discrimination is the most suspect under the First Amendment.¹⁷⁴ "It is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"¹⁷⁵ Yet, government regulation based on viewpoint is an anathema to positive change and maximizes the risk of creating a totalitarian state. Quite simply, ideological discipline is not a proper undertaking for school authorities.¹⁷⁶ Accordingly, a school official's viewpoint-based discipline of student speech should receive the least deference, and courts should be least willing to find that the student speech was likely to cause a substantial disruption. Content-based restrictions, although not as egregious as viewpoint-based regulations, also normally are presumptively invalid.¹⁷⁷ One reason is that, in some circumstances, content-based restrictions, by preserving the status quo, act as de facto viewpoint discrimination. For example, a rule prohibiting discussion of the United States' involvement in the war in Iraq

174. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983))); accord *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting). When curricular assignments designate a particular viewpoint, the presumption should be that the assignment is for legitimate pedagogical purposes and not motivated by a desire to regulate the opinion or perspective of the student. Cf. *Kuhlmeier*, 484 U.S. at 273 ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

175. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

176. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

177. *Rosenberger*, 515 U.S. at 828; see also *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Content-based restrictions concerning curricular matters, however, are necessary for effective operation of schools and cannot be considered presumptively invalid.

silences dissent as effectively as a regulation regulating only speech contrary to the war effort. Thus, a court should give limited deference to school officials' content-based discipline of student speech, at least outside curricular matters. Finally, content-neutral regulation on student speech raises the fewest First Amendment concerns. Accordingly, an administrator's content-neutral discipline of student speech should be given the most deference and courts should be most willing to uphold a finding that the student's speech would result in a substantial disruption.

d. Effect on Political Institutions

Also relevant to the public's interest is the extent to which school regulations undermine political institutions. This corresponds to the greatest fear of restriction on student speech—the creation of a totalitarian state. Thus, a school's prohibition of speech endorsing a particular candidate for office is much more problematic than restrictions on a student's ability to make gratuitous derogatory comments about fellow students. This is not to suggest that only political speech deserves First Amendment protection. The First Amendment also protects the individual's right to self-expression, which is an essential aspect of personhood and autonomy.¹⁷⁸ Rather, it is a frank recognition that to the extent that one is balancing interests, distinctions can be made between the values of certain types of speech.¹⁷⁹ While valuing speech may be inconsistent with First Amendment theory, the Court often has considered whether a regulation affects “core” First Amendment speech or low-value speech that offers little contribution to the “marketplace of ideas.”¹⁸⁰

e. Effect on Rights of Others

Language in *Tinker* suggests that interference with the rights of others is an alternative prong to demonstration of a substantial disruption to justify regulation of student speech.¹⁸¹ Courts, however, have rightly been hesitant to rely on that justification for regulation.¹⁸² Applied literally, *Tinker*'s interference with the rights of others prong might eliminate all student First Amendment speech rights. After all, other students arguably have a right not to be captive to unwanted speech.¹⁸³ Nonetheless, to the

178. See *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *Baker*, *supra* note 138, at 994; *Chemerinsky*, *supra* note 46, at 23.

179. Moreover, the interests in self-expression and personal autonomy are largely protected by the ability to express oneself freely outside school supervision.

180. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech . . . is ‘at the core of what the First Amendment is designed to protect.’” (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion))); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (noting the distinction between the political message in *Tinker* and the sexual message in *Fraser*'s speech); *New York v. Ferber*, 458 U.S. 747, 762 (1982) (noting that the First Amendment value of child pornography is exceedingly modest).

181. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

182. See sources cited *supra* note 19.

183. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 363 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000)).

extent the determination of whether there is a substantial disruption requires a balancing of interests, it is natural to consider the challenged speech's effects on other students. For example, one might distinguish between a T-shirt that says, "Homosexuality is a sin" and one that says a particular student is sinful because he is gay, based upon the differential effects upon that student. The latter message is likely to bring greater attention and embarrassment to and increased harassment of the targeted student. Consideration of the rights of others even more clearly deserves weight where a school's failure to act may subject it to a lawsuit for negligent supervision or harassment.¹⁸⁴

f. Age of Students

The age of the student disciplined and her audience also should be considered. The younger the audience, the more impressionable and vulnerable it may be and the greater the damage that can be done by some poorly chosen words.¹⁸⁵ The younger the speaker, the more important it is to teach discipline and manners and the less likely that the speaker would be making a significant contribution to the "marketplace of ideas."¹⁸⁶ By recognizing that age may be relevant to determining whether school discipline is justified, however, I do not suggest that minors have no First Amendment rights at all. The law is clearly to the contrary.¹⁸⁷

g. Criticism of School Officials

Where the student has criticized school officials, less deference should be given to administrators' disciplinary decisions.¹⁸⁸ When school officials are criticized, their objectivity is compromised. Furthermore, the student's speech can be considered political and his self-expression may reduce the frequency of more objectionable behavior. A reviewing court must ensure that the basis for what might otherwise be punishable conduct is not mere pretext for the administrator's hurt feelings.

h. Experience

Experience with a type of speech is relevant to assess the likelihood and seriousness of a potential disruption. If similar speech generally has created disruptions in the past, an administrator's prediction of a future disruption should be considered reasonable.¹⁸⁹ Obviously, evidence of the actual disruption experienced also is relevant.

184. See *Nuxoll v. Indian Prairie Sch. Dist.* No. 204, 523 F.3d 668, 675 (7th Cir. 2008).

185. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

186. See *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996).

187. See *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

188. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992).

189. A prior experience of disruption is most relevant if it occurred at the same school under similar circumstances. However, administrators and judges may consider prior experiences at other schools.

3. Concluding Thoughts About the Proposed Balancing Test for Speech Under School Supervision

As with any balancing test, there will be fact patterns where the relevant factors may be difficult to apply, and results may be unpredictable. For example, is disciplining a student for an anti-homosexuality message content-neutral or content-based when the speech is found to violate a school policy requiring civility? Does discipline silence a political or religious message, or is the student's message just a gratuitous attack on particular individuals? Does the speech violate the fundamental value in tolerance of others, or does it further the fundamental value in morality?

In cases of doubt, deference should be given to the findings of school administrators,¹⁹⁰ at least where the discipline is not viewpoint-based. School officials are in a better position to evaluate the effects of a student's speech, and de novo review of officials' decisions could create a flood of litigation. Open-ended balancing with deference to administrators should discourage much litigation because administrators' qualified immunity will preclude a damages award in all but the worst cases.¹⁹¹ Deference, however, is not abdication.¹⁹² The courts need to protect against the worst cases of abuse to prevent creation of a totalitarian state and to teach students about the value of their constitutional rights. Moreover, the extent of deference suggested is only legitimate if, as is also recommended, students have full First Amendment rights when not under school supervision. Only under those circumstances do students truly have alternate channels of communication open and can the suggested balancing be justified under the First Amendment.¹⁹³

D. *Classifying Speech as Outside or Under School Supervision when There Are Elements of Both*

Under the proposed comprehensive approach to school speech cases, it is critical to distinguish speech under school supervision from speech outside school supervision. Unfortunately, in today's technological age, that distinction is not self-defining, and cases often have both on-campus and off-campus elements. For example, a defamatory Web posting may be created at home but accessed at school.

Based upon analogies to more traditional communication methods, this Article recommends that student speech should be classified as under school supervision when the student's conduct that is the basis for

190. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 863–64 (1982) (“The Court has long recognized that local school boards have broad discretion in the management of school affairs. . . . [Court precedent] reaffirmed that . . . federal courts should not ordinarily ‘intervene in the resolution of conflicts which arise in the daily operation of school systems.’”); *Ingraham v. Wright*, 430 U.S. 651, 681–82 (1977).

191. *See supra* notes 96–98 and accompanying text.

192. *See Pico*, 457 U.S. at 864.

193. *See supra* note 104.

discipline occurred under school supervision.¹⁹⁴ If the challenged conduct is the act of creating a Web posting, the relevant inquiry is where the posting was created. If the challenge is to the message's posting, where and under what circumstances the message was published determine whether the message should be considered communicated under school supervision. Of course, even if one concludes that the challenged behavior occurred under school supervision, discipline would not be appropriate unless the speech caused a substantial disruption or was otherwise subject to discipline under applicable Supreme Court precedent.¹⁹⁵ A few examples can illustrate.

If a student created a lewd Internet profile of the school principal on MySpace using his home computer that is accessed by the principal at school, the student's speech should be considered outside school supervision. The site's creation clearly occurred outside school supervision. The communication should not be considered on-campus because the student did not communicate it under school supervision. Access by others who are on campus alone cannot be sufficient to consider a computer posting published under school supervision. In the computer age, too much can be accessed from school. Letters to the editor of the *New York Times* or short stories in magazines can be accessed from school. For that matter, the principal's reading of the posting at school entails no more school involvement than if the student wrote a letter to the *New York Times* and the principal read the letter when he took the *Times* to his office. Thus, even if the site caused a substantial disruption at the school, discipline would not be appropriate. To consider the student as having published a site under school supervision, the student should have to access the site at school and show others or tell others to access the site while they are at school. If the site were published under school supervision, it would be subject to discipline under *Fraser* because it was lewd, whether or not there was a substantial disruption.

If the same profile was created while at school, the message could not be directly disciplined unless the student also made the publication at school. However, discipline could be justified for the creation of the profile if the student made unauthorized use of school computers or Web resources not open to the general public.¹⁹⁶ Schools should have the right to control the use of their property that does not function as a public forum,¹⁹⁷ and they could adopt any rule for its use, including a rule

194. If a student advocates others to engage in punishable activity while they are at school, the student should be considered under school supervision as a co-conspirator regardless of where the advocacy took place. *Cf. Boucher v. Sch. Bd.*, 134 F.3d 821, 828–29 (7th Cir. 1998) (vacating preliminary injunction of student's expulsion after the student authored an article in an underground newspaper describing how to hack into the school's computer and encouraging others to do so).

195. *See supra* notes 25–74 and accompanying text.

196. The creation of the profile obviously could be subject to discipline if the student improperly took class time to create the profile. *See Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002).

197. If government property is a public forum, then the state's right to limit private speech is “sharply circumscribed.” *Gold v. Wilson Cnty. Sch. Bd. of Educ.*, 632 F. Supp. 2d 771, 786

precluding use of school computers to create anything that is likely to cause a substantial disruption at school. In this way, the school might indirectly discipline the student's message.

Discipline for unauthorized use of school computers or improperly taking class time to create a site is justified as legitimate conduct, not speech, regulation. If a student created the site on his own laptop during recess, there would be no basis for disciplining the creation of the site. Even though the creation would be considered under school supervision, the mere creation would not have caused a substantial disruption or otherwise fall within Supreme Court precedents. These results correspond to the results of similar student conduct without the use of a computer. If a student writes a note to transmit to another, the student could be disciplined for wasting class time or for the content of the note if it was communicated. No discipline would be appropriate if it was created during recess and not communicated. Continuing with this analogy, communications that are created and received instantaneously, such as instant messages or phone calls, should be treated like the sent note (or in-school conversation)—the creation and communication should be considered under school supervision.¹⁹⁸

III. ILLUSTRATIVE APPLICATION TO LOWER COURT CASES

This Article's comprehensive approach to student speech cases is best illustrated by reviewing some of the most recent reported lower court cases.

A. *Layshock v. Hermitage School District*¹⁹⁹

In *Layshock*, a high school student created a parody profile of the school principal on the website MySpace from his grandmother's house during non-school hours.²⁰⁰ The profile was arguably vulgar, emphasizing the principal's large size.²⁰¹ As part of the profile, the student posted a photograph of the principal taken from the school district's website.²⁰² "[W]ord of the profile 'spread like wildfire' and soon reached most, if not all," of the student body.²⁰³ On December 15, the student accessed the profile during his Spanish class and showed it to some of his classmates.²⁰⁴ On another occasion, a teacher had to tell a group of students who were

(M.D. Tenn. 2009) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

198. Of course, the recipient also might be subject to discipline for engaging in instant messaging or accepting a phone call during inappropriate times.

199. 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

200. *Id.* at 252.

201. *Id.* at 252–53.

202. *Id.* at 252.

203. *Id.* at 253.

204. *Id.*

congregating around a computer and giggling to close the parody down.²⁰⁵ A number of teachers called the co-principal on December 15 to report that students wanted to discuss the profile during class.²⁰⁶ Administrators were not able to block students from accessing the site because the technology coordinator was on vacation.²⁰⁷ Instead, the school precluded student use of computers except in the computer lab and library where the students could be supervised.²⁰⁸ On December 21, the school learned the name of the student who created the profile.²⁰⁹ Without prompting from anyone, the student apologized to the principal for creating the profile, and his parents punished him.²¹⁰ At the beginning of the following year, the school district held an informal hearing after which it disciplined the student.²¹¹

Analysis of the above fact pattern under this Article's approach would begin with identifying what speech and conduct occurred under school supervision. The creation of the website parody and the copying of the principal's photo did not occur on campus and therefore would be subject to full First Amendment rights. The student's access of the site at school combined with his showing it to some of his classmates constituted speech under school supervision. Access by other students on campus alone should not be attributed to the disciplined student.

The speech outside school supervision does not fall under any exception to First Amendment protection and therefore would be protected speech. The speech under school supervision was properly disciplined if it could be considered "lewd, vulgar and offensive" under *Fraser* or to have created a "substantial disruption" under *Tinker*.²¹² The website might be considered lewd, vulgar, and offensive,²¹³ and accordingly, its publication on campus properly would be subject to discipline. If *Fraser* did not apply, it would be necessary to decide if the school district had properly found

205. *Id.*

206. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 592 (W.D. Pa. 2007), *aff'd*, 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

207. *Layshock*, 593 F.3d at 253.

208. *Id.*

209. *Id.* at 254.

210. *Id.*

211. *Id.* As punishment, the student was (1) placed in the Alternative Educational Program, a program "typically reserved for students with behavior and attendance problems who are unable to function in a regular classroom," for the rest of the year; (2) banned from all extracurricular activities; and (3) prohibited from participating in his graduation ceremony. *Id.* at 254. "Prior to creating the Myspace profile, Justin was classified as a gifted student, was enrolled in advance placement classes, and had won awards at interscholastic academic competitions." *Id.* at 254 n.6.

212. The speech could not be attributed to the school and did not advocate illegal conduct. Therefore, *Kuhlmeier* and *Morse* have no application.

213. The district court so found but ruled for the plaintiff because the website was created off campus. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599-600 (W.D. Pa. 2007), *aff'd*, 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010). The court did not view the student's publication of the speech on campus as subjecting the speech to *Fraser*'s standard. *Id.*

that the sharing of the website with other students during Spanish class created a substantial disruption. Given that the website was accessed during class, the speech could be viewed as affecting curricular matters, for which school discretion is at its greatest. Regulation of the speech does not seem to be viewpoint-based, although it might be thought of as content-based. Nonetheless, the discipline did not threaten political institutions—the speech was a sophomoric attempt at humor and not a critique of the government or its officials. In plaintiff's favor is that the speech did not affect the rights of other students,²¹⁴ and the student and his audience were relatively old. Also, the speech did insult a school administrator. As such, there is a greater risk that the alleged basis of the discipline is a pretext for revenge. The risk is not as great as it could be where, as here, the insulted administrator was not responsible for the disciplinary decision. However, objectivity still may be compromised by a desire to protect and defend subordinates or others with whom the decisionmaker regularly works. The severity of the punishment given the extent of disruption might make a court particularly sensitive to the objectivity of the decisionmaker. Accessing a website and showing it to others during class certainly has the potential to cause a substantial disruption. It appears, however, that the teacher was unaware of the student's behavior,²¹⁵ and it is unclear whether other students were actually disturbed. There is little question that the need to limit use of the computers and to respond to student demands to talk about the site during class could be considered a "substantial disruption." The issue would be whether that disruption was the result of the site's creation or the publication at school. Given the difficulty in making this determination, this Article would presume it was the result of the student's on-campus conduct unless the student could prove otherwise. The student's protection is simply not to access the site or show others at school. Ultimately, the decision to discipline the student in *Layshock* should have been found constitutional.²¹⁶ The on-campus publication had little value; the student could adequately express himself by creation of the site and its sharing outside school supervision; the speech was vulgar and did create some disruption; and the school district's decision should be given some deference as it was not viewpoint-based. While troubled by the extent and appropriateness of the discipline given the violation and the prior history of the student, those concerns are more fittingly reviewed under a due process or equal protection analysis.²¹⁷

214. The speech obviously affected the principal, but the principal cannot be viewed as vulnerable, and the school does not have a custodial responsibility to the principal.

215. *Layshock*, 496 F. Supp. 2d at 601.

216. The district court found that there was not a substantial disruption, and the school district did not appeal that ruling. *Layshock*, 593 F.3d at 260–61.

217. See U.S. CONST. amend. XIV, § 1. Such challenges might be especially attractive given that there were three other more vulgar websites that went unpunished. *Layshock*, 593 F.3d at 253–54.

B. J.S. *ex rel.* Snyder v. Blue Mountain School District²¹⁸

J.S., a fourteen-year-old eighth grader, and a friend of hers created a fictitious profile of her principal on MySpace using her parents' home computer.²¹⁹ The profile did not state the principal's name but used a photograph of him taken from the school district's website.²²⁰ The profile contained profanity-laced statements insinuating that the principal was a sex addict and pedophile.²²¹ J.S. created the profile as a joke and because she was mad at the principal due to the way he treated her for an earlier dress code violation.²²² The day after the profile was created, several students approached J.S. at school and told her they found the site funny.²²³ That evening, J.S. made the profile "private" limiting access to twenty-two other students who were given friends status.²²⁴ Two teachers had to quiet their classes when students talked about the profile.²²⁵ The school computers block access to MySpace, so students could only view the site from an off-campus location.²²⁶ After meeting with the students and their parents, the principal suspended J.S. and her friend for ten days.²²⁷ The enraged principal also threatened legal action and contacted the police.²²⁸ Two students decorated the offending students' lockers welcoming them back to school following their suspension.²²⁹

Under this Article's proposed approach, the school discipline was unconstitutional. All of J.S.'s and her friend's challenged actions took place outside school supervision.²³⁰ The principal, however, might pursue claims of criminal harassment or defamation.²³¹

If the speech in *J.S.* had occurred on campus, it would certainly have been subject to discipline under *Fraser*. If it had occurred on campus, whether the speech could be disciplined under *Tinker* would be a close question. The analysis would be similar to that described above for *Layshock*.²³² Obviously, since the speech occurring on campus is merely hypothetical, it is impossible to know the location of the speech or the disruption that the speech itself (as opposed to the website's creation) caused. Although the students' relatively young age would militate in favor

218. 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, opinion vacated*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

219. *Id.* at 290–91.

220. *Id.* at 291.

221. *Id.*

222. *Id.* at 291–92.

223. *Id.* at 292.

224. *Id.*

225. *Id.* at 293.

226. *Id.* at 292.

227. *Id.* at 293.

228. *Id.*

229. *Id.* at 294.

230. The court of appeals upheld the school discipline applying *Tinker* to "off-campus speech that causes or reasonably threatens to cause a substantial disruption." *Id.* at 301.

231. *Id.* at 301–02 & n.9.

232. *See supra* notes 199–216 and accompanying text.

of discipline, deference would be limited given that the original decisionmaker was the very person who had been defamed.

C. *Mardis v. Hannibal Public School District*²³³

In *Mardis*, the plaintiff student was chatting via instant messages on a private computer with a friend outside of school hours.²³⁴ In that October 24, 2006, conversation, the plaintiff told his friend that he was going to get a gun and kill certain classmates.²³⁵ The friend responded with encouragement and laughter, suggesting that “the [p]laintiff should shoot all of the black women because ‘[t]he death of a black person cracks me up.’”²³⁶ Nonetheless, within hours, the friend forwarded the plaintiff’s message to school administrators.²³⁷ The police arrested the plaintiff on charges of making those threats, and upon order of the juvenile court, he was admitted to a hospital’s psychiatric ward.²³⁸ Upon release from the hospital on October 30, 2006, the plaintiff was returned to the juvenile court and remained in juvenile detention through February 9, 2007.²³⁹ On October 31, 2006, the day following the plaintiff’s release from the psychiatric ward, the school district suspended the plaintiff for ten days.²⁴⁰ On November 3, 2006, the district’s superintendent extended the plaintiff’s suspension through the end of the school year.²⁴¹ As a result of the plaintiff’s threat, the school was inundated with calls from concerned parents and forced to significantly increase its security.²⁴²

According to the approach recommended by this Article, the superintendent properly suspended the plaintiff in *Mardis*. The student’s communications were entirely outside school supervision and, therefore, were entitled to the same First Amendment protection as a non-student. Nonetheless, even under normal First Amendment standards, the plaintiff’s speech was properly considered a true threat. There was some indication that the plaintiff’s friend interpreted the plaintiff’s threats as a joke.²⁴³ However, given the friend’s immediate report of the threat, the police arrest, and hospital commitment, the school administrators’ conclusion that the plaintiff communicated “a serious expression of an intent to commit an act of unlawful violence”²⁴⁴ had more than adequate support.²⁴⁵

233. 684 F. Supp. 2d 1114 (E.D. Mo. 2010).

234. *Id.* at 1115.

235. *Id.*

236. *Id.* at 1121.

237. *Id.* at 1119.

238. *Id.* at 1115.

239. *Id.*

240. *Id.*

241. *Id.* at 1116.

242. *Id.* at 1123–24.

243. *Id.* at 1121.

244. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

245. The court in *Mardis* upheld the school’s discipline both as a “true threat” and under *Tinker*’s “substantial disruption” standard. *Mardis*, 684 F. Supp. 2d at 1119, 1124. This Article’s

CONCLUSION

Student speech cases dominate courts' First Amendment dockets. Confusion seems to be the rule. This Article has recommended a comprehensive approach to such cases that is consistent with Supreme Court precedent and best balances students', schools', and the public's interests. When student speech occurs outside of school supervision, the speech should receive the same First Amendment protection as a non-student's speech. Speech outside school supervision does not implicate the "essential characteristics" of the school environment that justify special First Amendment treatment of student speech. Providing full First Amendment protection to off-campus speech also has the benefit of clarity. Moreover, by giving students full protection for such speech, one can justify tighter restrictions of on-campus speech where school regulation is most necessary. With alternate channels of communication open, regulation of on-campus speech obviously raises fewer First Amendment concerns.

When student speech occurs under school supervision, great deference should be given to administrators' disciplinary decisions, especially when not viewpoint-based. Constant review is undesirable and, with alternate channels of expression available, is generally unnecessary. Many restrictions on First Amendment rights are simply required for a school to run efficiently. Nonetheless, deference cannot justify abdication. Unregulated restrictions of student speech, particularly with mandatory attendance laws, can lead to a totalitarian state. Under Supreme Court precedent, speech on campus can be regulated if it is lewd, advocates drug use, bears the school's imprimatur, or is likely to create a "substantial disruption" on campus. This Article has identified a number of factors for courts to consider when determining whether speech is likely to cause a substantial disruption. Although not always self-defining, the recommended factors can reduce the amount of ad hoc decisionmaking and best balance the respective interests involved in student speech regulation.

proposal would find the latter holding erroneous as the student's conduct occurred entirely outside school supervision.