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Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights

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Abstract. Courts and commentators write as if the speech of K-12 students were endowed with full First Amendment protection, save in narrow circumstances when it is reasonably foreseeable that the speech will cause substantially disruption or materially interfere with the rights of others, when it is vulgar or lewd, when it involves school sponsored communication, or when it advocates for illegal drug use. But even the most superficial observation of student classroom expression reveals the fictional nature of this perspective. Student speech in classrooms is comprehensively and routinely subject to forms of regulation that violate the most elementary rules of what the Court has called "ordinary First Amendment standards." Student classroom speech is controlled by official discretion; it is compelled; it is constrained by content and viewpoint discrimination; it is subject to prior restraints.

The goal of this Essay is to offer a constitutional account of student speech that can explain the contours of its actual regulation. Ordinary First Amendment standards are designed to protect participation in what the Court has called "the market of public opinion." This market must remain perpetually free from state control so that, in the Court's words, government authority can "be controlled by public opinion, not public opinion by authority." The goal is to ensure that the state remain continuously responsive to "that public opinion which is the final source of government in a democratic state."

Often government responds to popular will by creating institutions charged with implementing specific tasks. Government creates courts to apply justice or agencies to administer the social security system. It would be counterproductive in such circumstances to insist on the open-endedness that ordinary First Amendment standards are designed to protect. Instead mission-driven state institutions must effectively control the speech of those within the scope of their authority so that they can achieve their assigned objectives.

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K-12 schools are mission-driven institutions of this kind. They are created to educate students. They are therefore empowered to regulate student speech to achieve the objective of education. Courts debate the nature of this objective. Case law reveals at least three different conceptions of the constitutional objective of education. The Essay denominates these as democratic education, civic education, and critical education. Each distinct account of the educational mission of schools implies a different structure for the regulation of student speech. Courts also differ about whether courts should defer to school regulation of student speech or instead whether they should scrutinize it using independent judicial review. Much can be learned about the actual landscape of student speech rights by systematically exploring the implications of these basic distinctions.

The Essay also evaluates how courts conceive the nature, scope, and force of school managerial authority. That authority receives highly deferential review insofar as students seek to speak qua students. But insofar as students seek to speak qua citizens, the paper assesses the variables and doctrine used by courts to weigh the prerogatives of school managerial authority against the free speech rights of students. Of particular concern in the past several years has been the efforts of schools to control off-campus student speech that might potentially undermine school functioning.

The Essay argues that the general framework of speech regulation within managerial government organizations offers a coherent, consistent, and convincing way to explain the complexities of our actual constitutional jurisprudence of student speech. It seeks to substitute that cogent perspective for fictional appeals to fictional rights, which too often dominate contemporary scholarly and judicial discussion of student speech.

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Introduction

Courts and commentators seem irresistibly drawn to the fiction that speech is everywhere protected except insofar as it conforms to narrow exceptions like fighting words or true threats. Called by some the "two-level" theory of the First Amendment,[1] and by others the "all-inclusive approach,"[2] the fiction has perhaps best been summarized by Justice Souter: "[S]peech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope."[3]

The fiction flies in the face of the obvious fact, long ago noted by Frederick Schauer, that "even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule."[4] The fiction obscures clear constitutional thinking wherever it occurs,[5] but nowhere more so than in the context of student speech.

If a First Amendment scholar were to visit a public school, she would immediately observe an intensely speech-regulative environment, punctuated by periods of relative communicative freedom, perhaps on playgrounds during recess or in the corridors between classes. But in the heart of the school, in the classroom, she would observe that teachers comprehensive control student expression in ways that are inconsistent with virtually every sacred First Amendment doctrine by which we define freedom of speech.

So, for example, the Court has always interpreted the First Amendment "to afford special protection against orders that . . . impose a 'previous' or 'prior' restraint on speech."[6] Prior restraints, which require a speaker to receive official approval before communicating,[7] bear "a 'heavy presumption' against

1. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10; *see also, e.g.*, Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 968 (2016).
2. Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech,"* 116 MICH. L. REV. 667, 681 (2018); *see also, e.g.*, John Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 203-06 (2018).
3. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting).
4. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).
5. *Compare, e.g.*, United States v. Stevens, 559 U.S. 460, 468-72 (2010) (holding that speech is protected by the First Amendment except if it falls within a small, discrete set of historically determined categories), *with* Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 496 (2015) (criticizing *Stevens*).
6. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976).
7. *E.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993).

their constitutionality."[8] They are "the essence of censorship."[9] Even a novice First Amendment scholar, however, would observe that in classrooms teachers routinely impose prior restraints. Students are forbidden from speaking unless recognized, which typically occurs when they raise their hands and receive official permission.[10]

Black-letter constitutional doctrine also holds that "[s]tandardless discretion to censor is anathema to First Amendment values."[11] The Court has held that "[t]he First Amendment prohibits the vesting of . . . unbridled discretion in a government official."[12] Yet a First Amendment scholar would find that teachers govern student expression with virtually unrestrained discretion. Teachers allow some students to speak while suppressing the voices of others. Teachers use flexible professional judgment to guide classroom discussions.[13] As Justice Thurgood Marshall once facetiously noted in an oral argument, even in the absence of statutory authority, a teacher can "tell the children to shut up for the next five minutes, and I don't want to hear a sound out of you."[14]

Another virtually sacrosanct First Amendment principle is that government may not compel persons to speak. Because freedom of speech includes "the decision of both what to say and what *not* to say,"[15] and therefore encompasses the "freedom *not* to speak publicly,"[16] it is a "fundamental rule of

8. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968)); *see* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

9. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

10. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 72 (2018) ("Of course, no serious person [could assert] that honoring the First Amendment in schools meant students could—unsolicited, and in the middle of class—announce their views on presidential power, lead their classmates in a sing-along, or recite a Walt Whitman verse. Such actions would disturb classroom proceedings, and offending students would in no way be permitted to escape school sanctions by blithely invoking free speech."). In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld an explicit system of prior restraints for a school newspaper. *Id.* at 276.

11. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 116 (2008); *see, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-59 (1988).

12. Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992).

13. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 686 (1986).

14. Transcript of Oral Argument at 21, Wallace v. Jaffree, 472 U.S. 38 (1985) (Nos. 83-812 & 83-929), https://perma.cc/PU6L-D2N9; *see* DRIVER, *supra* note 10, at 396 n.*. I am grateful to Justin Driver for this reference.

15. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988).

16. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968)).

protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[17] Yet students are routinely required to speak in American classrooms.[18] Not only are students called upon by their teachers to answer questions, but they are regularly assigned homework and take examinations that compel them to explain their views about controversial historical and ethical questions.

The prohibition of content discrimination is another fundamental First Amendment doctrine. The Court has repeatedly emphasized that "content-based regulations," which "target speech based upon its communicative content," are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[19] This "stringent standard" is meant to express "the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content."[20] Yet no one can visit an American classroom without immediately witnessing the continuous content-based regulation of messages.[21] Students are permitted to speak according to content-based criteria of relevance; their expression is assigned and compelled according to content-based criteria of materiality; and their work is evaluated according to content-based criteria of merit.[22]

Although the Court has repeatedly stressed that viewpoint discrimination is "an egregious form of content discrimination"[23] that is "poison to a free society"[24] and strictly forbidden in both limited public forums[25] and nonpublic forums,[26] it is no exaggeration to characterize classrooms as engines for the

17. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).

18. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2050 (2021) (Alito, J., concurring). Carefully read, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), does not hold to the contrary. *See* Robert C. Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1086-89 (2022).

19. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

20. *Id.* (internal quotation marks omitted) (quoting *Reed*, 576 U.S. at 163).

21. *See Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring).

22. *See* DRIVER, *supra* note 10, at 19.

23. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

24. Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). Justice Brennan has written that "[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

25. Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

26. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so

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imposition of selective viewpoints.[27] Students will have difficulty passing their science courses if they believe that the earth is flat[28] or that human evolution is a myth.[29] Students who believe that the Holocaust never happened will not do well in their history classes.[30]

One could multiply such examples endlessly. Yet commentators, citing the famous assertion of *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[31] nevertheless blithely assert that "students retain broad constitutional rights in school, including the right not to speak."[32] They assert that these rights that can be overridden only "in . . . narrow categories—vulgar speech and speech that advocates illegal drug use,"

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long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

27. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403, 408 (2007) (holding that schools may suppress viewpoints supporting drug use). To believe that schools are necessary to inculcate the values and commitments required for a successful democracy is in effect explicitly to embrace the necessity for both content and viewpoint discrimination. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 3 (1987); *infra* text accompanying notes 67-70. This is also true with respect to the position, twice embraced by the Court itself, that schools are necessary to inculcate the norms of decency and respect required for a civilized society. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); *infra* text at notes 71-76.

28. Approximately 10% of Americans believe that the earth is flat. LAWRENCE HAMILTON, CARSEY RSCH., CONSPIRACY VS. SCIENCE: A SURVEY OF U.S. PUBLIC BELIEFS 2 (2022), https://perma.cc/L5A4-349P.

29. About 33% of Americans believe that human beings have existed in their present form since the beginning. PEW RSCH. CTR., PUBLIC'S VIEWS ON HUMAN EVOLUTION 1 (2013), https://perma.cc/ECN3-ZW3G.

30. "One in 10 young Americans believes that the Holocaust never happened, while 23 per cent think it's a myth or that the number of those killed has been exaggerated." Gustaf Kilander, *Nearly a Quarter of Young Americans Believe the Holocaust Didn't Happen or Has Been Exaggerated*, INDEPENDENT (June 21, 2021, 3:30 PM BST), https://perma.cc/2JBN-52WV. The First Amendment ordinarily precludes viewpoint discrimination because, as John Rawls once put it, in public debate "[t]here are no experts: a philosopher has no more authority than other citizens." John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 140-41 (1995). But within their academic disciplines scholars normally assert their expertise by exercising the prerogative of viewpoint discrimination to privilege one opinion over another. The whole point of schools is to transmit the expertise that underwrites such academic disciplines. That is why schools can give failing grades to students who in their history examinations deny the Holocaust even though the First Amendment prohibits the State from penalizing this exact same denial in public discourse. *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012).

31. 393 U.S. 503, 506 (1969).

32. *E.g.*, Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 310 (2012) (although noting that later cases have eroded speech rights in school).

as well as in the context of speech in "school-sponsored" events and speech that can reasonably be predicted to cause significant disturbance.[33]

Commentators mysteriously instruct us that students "enjoy[] strong First Amendment protection in school with respect to their adult educators, except in a few specific, limited types of circumstances."[34] Law review articles and notes assert that "[t]he student speech framework mandates that, unless the speech advocates illegal drug use, is school-sponsored, or is lewd or obscene, students retain full First Amendment rights" so long as "their speech does not cause or cannot be reasonably foreseen to cause . . . disruption or . . . interference with the rights of others at school."[35] They explain that "the exceptions to *Tinker* make it clear that they are narrow decisions about very specific categories of speech."[36]

Legal scholars take their cue from courts. *Tinker* itself, quoting *Keyishian v. Board of Regents*,[37] asserts that the "classroom is peculiarly the 'marketplace of ideas,'"[38] as though students are just as free to speak in classrooms as the *New York Times* is to publish editorials. Chief Justice Roberts encouraged this strange idea by flatly announcing in *Morse v. Frederick* that "*Tinker* held that student expression may not be suppressed unless school officials reasonably

33. *Id.*; *see* Patrick E. McDonough, Note, *Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech*, 46 SUFFOLK U. L. REV. 627, 640 (2013) (noting that student speech rights are protected subject to "carefully delineated exception[s] to the broad protection for student rights set forth in *Tinker*").

34. Jay Braiman, Note, *A New Case, an Old Problem, a Teacher's Perspective: The Constitutional Rights of Public School Students*, 74 BROOK. L. REV. 439, 445 (2009); *see* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 644 (2002) ("[S]tudent speech that is neither lewd or obscene nor school-sponsored . . . can be regulated only if the school can pass Tinker's substantial and material interference test."); Adam K. Nalley, Note, *Did Student Speech Get Thrown Out with the Banner? Reading "Bong Hits 4 Jesus" Narrowly to Uphold Important Constitutional Protections for Students*, 46 HOUS. L. REV. 615, 638-41 (2009) (apart from "three narrow exceptions"—"vulgar, lewd, obscene, and plainly offensive speech," "school-sponsored" speech or speech carrying "the school's official imprimatur," and speech promoting "the use of illegal drugs"—student speech can be regulated only if it can reasonably be foreseen that it will cause a "'substantial disruption' of the school environment.").

35. Emily Brown, *Walking Out on Student Speech: The Erosion of* Tinker *and How* Pickering *Promises to Restore It*, 19 FIRST AMEND. L. REV. 1, 27 (2020); *see also* Victoria Bonds, Note, *Tinkering with the Schoolhouse Gate: The Future of Student Speech after* Mahanoy Area School District v. B.L., 42 LOY L.A. ENT. L. REV. 83, 88-90 (2021).

36. Benjamin P. Schroff, Comment, *Not Another Teen Tweet: Social Media, Schools, and a Return to* Tinker, 28 AM. U.J. GENDER, SOC. POL'Y & L. 603, 617 (2020). Schroff writes that "*Tinker* exceptions carve out exceptions to student speech rights to maintain an orderly school environment." *Id.* at 621.

37. 385 U.S. 589 (1967).

38. *Tinker*, 393 U.S. 503, 512 (1969) (internal quotation marks omitted) (quoting *Keyishian*, 385 U.S. at 603).

conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"[39]

It is no surprise, then, that lower courts regularly emphasize that "school speech" can be restricted only pursuant to "*Tinker*'s 'general rule,' [that] the government may restrict school speech that threatens a specific and substantial disruption to the school environment or that 'inva[des] . . . the rights of others,'" with the exception of "three 'narrow' circumstances."[40] Those circumstances involve the explicit categories set forth in *Bethel School District No. 403 v. Fraser* ("vulgar, lewd, and plainly offensive speech");[41] in *Hazelwood School District v. Kuhlmeier* ("school-sponsored" speech);[42] and in *Morse v. Frederick* (speech "'promoting illegal drug use'").[43] Some lower courts characterize these exceptions to *Tinker* as "a narrow accommodation" and a "limited carveout from students' general 'free speech rights.'"[44] Like commentators, courts seem to imagine that student speech is protected unless its regulation can be justified by narrow and strict rules.[45]

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39. 551 U.S. 393, 403 (2007) (quoting *Tinker*, 393 U.S. at 513). For a good example of the judicial attribution of ordinary First Amendment rights to students, see the dissenting opinion of Justice Brennan in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 277-78, 285-88 (1988) (Brennan, J., dissenting) (arguing that school actions constituting viewpoint discrimination or that reflect official discretion are unconstitutional).

40. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 303-04 (3d Cir. 2013) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001)) (citing J.S. *ex rel.* Synder v. Blue Mountain Sch. Dist., 650 F.3d 915, 924 (3d Cir. 2011)); *see* Barr v. Lafon, 538 F.3d 554, 563-64 (6th Cir. 2008); Plaintiff A *ex rel.* Parent A v. Park Hill Sch. Dist., No. 21-cv-6153, 2022 WL 390836, at *4 (W.D. Mo. Feb. 8, 2022).

41. 478 U.S. 675, 685 (1986); *see also* Defabio v. E. Hampton Union Free Sch. Dist., 658 F. Supp. 2d 461, 474 (E.D.N.Y. 2009).

42. 484 U.S. 260, 273 (1988); *see also Defabio*, 658 F. Supp. 2d at 474.

43. 551 U.S. 393, 403 (2007); *see also Defabio*, 658 F. Supp. 2d at 474-75.

44. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 187, 188 n.11 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021); *see also, e.g.*, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 390-91 (5th Cir. 2015).

45. For example, although it is perfectly obvious that "a strict rule against content-based or viewpoint-based discrimination in public schools would make it impossible for schools to make curricular choices and to teach effectively," Mary-Rose Papandrea, Mahanoy v. B.L. *& First Amendment "Leeway,"* 2021 SUP. CT. REV. 53, 92, courts and commentators nevertheless earnestly debate whether the First Amendment permits schools to impose such discrimination on student speech. *See, e.g.*, Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002) (describing a split in the circuits "over whether *Hazelwood* requires the schools' restrictions on school-sponsored speech be viewpoint neutral"); DRIVER, *supra* note 10, at 120; Brown, *supra* note 35, at 12. *See generally* Rebeca Giradin, Note, *Making* Hazelwood *Age-Appropriate: How Viewpoint Neutrality and Recontextualizing the Age-Appropriate Standard Might Save School-Sponsored LGBT Speech*, 31 WM. & MARY BILL RTS. J. 209 (2022) (arguing that "age-appropriateness" is sometimes used to erroneously silence LGBT student speech under the viewpoint neutrality requirement); Susannah Barton Tobin, Note, *Divining* Hazelwood: *The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217

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It is apparent that something has gone seriously wrong with the constitutional conception of student speech in both judicial opinions and scholarly commentary. It is not true that student speech is free and unregulated unless subject to specific and explicit exceptions. It would in fact be more accurate to say that student speech is pervasively regulated unless there are reasons to exempt it from the comprehensive authority of the school. The question explored in this Essay is how we can make constitutional sense of the actual situation of student speech. We need, in the words of Benjamin Cardozo, "a conception of law which realism can accept as true."[46]

My thesis is simple but radical. It is that the ordinary First Amendment standards to which courts and commentators appeal as a baseline do not apply to schools. Like all government mission-driven institutions, schools are empowered to regulate the speech of those within the scope of their managerial authority as required to achieve their organizational mission. The purpose of schools is to educate students. The obligation of courts is to review school restraints on student speech to determine, first, whether regulated student speech is within the scope of the managerial authority of a school, and second, whether restraints on student speech are required by the legitimate pedagogical purposes of the school. In making these determinations, courts must also decide whether to defer to the judgment of school authorities.

I. The Authority of Management and the Authority of Governance

We should note, first and foremost, that the situation of student speech is not in fact anomalous. Ordinary First Amendment doctrines that protect speech—those prohibiting content discrimination, prior restraints, compelled speech, and so on—do not apply to all speech, but only to speech that we deem constitutionally relevant to the formation of public opinion.[47] The object of ordinary First Amendment doctrine is to ensure, as the Court instructed us in *West Virginia State Board of Education v. Barnette*, that in the United States "authority . . . is . . . controlled by public opinion, not public opinion by

(2004) (arguing in favor of "the viewpoint neutrality requirement" for school speech cases). A strict requirement of viewpoint neutrality, of course, would be inconsistent with the view that schools should instill the values necessary for democratic citizenship. Sometimes, however, the criterion of viewpoint neutrality is interpreted to mean merely that schools may distinguish among student views only in ways that are educationally justified. *See* Morse v. Frederick, 551 U.S. 393 (2007).

46. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 127 (1921).

47. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 3-25 (2012).

authority."[48] First Amendment doctrine is designed to protect "the market of public opinion"[49] so that government may remain continuously responsive to "that public opinion which is the final source of government in a democratic state."[50]

What the Court has called "ordinary First Amendment standards"[51] prevent government from manipulating the agenda of public opinion through content discrimination, or from influencing the content of public opinion through compelled speech, or from precluding the full and fair formation of public opinion through the use of prior restraints, and so on. Ordinary First Amendment doctrine seeks to preserve the independence of public opinion from state control. The proper scope of ordinary First Amendment doctrine is defined by this purpose. The doctrine applies to those forms of expression that are constitutionally deemed necessary for the formation of public opinion.

Following the Court's usage, I shall use the term "public discourse" to refer to the set of communications considered integral to the formation of public opinion.[52] The delicate task of ordinary First Amendment doctrine is to keep public discourse open-ended and continuously responsive to the developing attitudes of the public. Within the realm of public discourse, no idea is ever off the table. Government should remain always answerable to the evolving views of its people.[53]

Public discourse must remain open-ended because popular attitudes and opinions are constantly changing. Yet governments must sometimes respond to popular will by making concrete and determinate decisions.[54] Although open-endedness is a virtue with respect to the ever-flowing stream of public opinion, perpetual indecision is a disability once governments have decided to implement actual choices made in response to popular demand.[55]

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48. 319 U.S. 624, 641 (1943).

49. Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940).

50. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24, 39 (2d Cir. 1917).

51. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy 141 S. Ct. 2038, 2045 (2021).

52. *See, e.g.*, Metromedia, Inc. v. San Diego, 453 U.S. 490, 515 (1981); Citizens United v. FEC, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring); Snyder v. Phelps, 562 U.S. 443, 460 (2011).

53. *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 35-43 (2014).

54. On the distinction between *politics*, which "has to do with policies or expressions of the state will," and *administration*, which "has to do with the execution of these policies," see FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 18 (London, Macmillan & Co. 1900).

55. The logic and conclusions of this paragraph and the succeeding several paragraphs are explained and justified in detail in Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1765-71 (1987).

Governments typically implement decisions by creating organizations. If a state decides to extend social security benefits to its population, it creates a bureaucracy to execute that choice. If a state decides to offer justice to litigants, it establishes a court system. If a state decides to provide for the national defense, it creates the institution of the military. And so on.

No such organization could function were the First Amendment interpreted to require toleration of the never-ending and indeterminate dialogue characteristic of public discourse. A government institution must instead organize and direct its resources, including its human resources—like the speech of its human employees—to achieve the purposes for which it is created.

Judges, military officers, and supervisors of government bureaucracies are accordingly authorized to regulate the speech of those within their respective organizations in ways that are fundamentally inconsistent with ordinary First Amendment standards.[56] It is no accident that all managers of government organizations regulate the speech of subordinates by exercising content discrimination and discretion, by imposing prior restraints, or by compelling speech. Without such authority no government organization could function.

Constitutional protections of speech within government organizations thus have an entirely different character than constitutional protections within public discourse. We might describe this difference by saying that whereas the State exercises the authority of *governance* over public discourse, the Constitution permits government to exercise full *managerial* authority within the context of mission-driven state organizations. Managerial authority empowers government to regulate speech to achieve relevant institutional missions. Sometimes courts defer to government claims of managerial authority, and sometimes they subject such claims to independent review.[57] In all cases, managerial authority must justify restraints on speech in terms of a legitimate organizational mission.[58]

II. Managerial Authority in Schools

Government exercises managerial authority in the context of many institutions, like bureaucracies, courts, and the military. It also exercises this kind of authority in schools.[59] Public schools are created to achieve the purpose of education. The State is accordingly empowered to regulate the speech of

56. *See id.*

57. *See generally, e.g.*, *id.* at 1771-75, 1809-23 (discussing the Court's varying levels of deference to managerial authority).

58. *See id.* at 1765-71.

59. *See, e.g.*, Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 731 (2012).

teachers and students in ways that advance this purpose.[60] If schools lacked this authority—if students could speak whenever and however they wished—the project of education would be rendered impossible.

Sometimes, as in *Tinker*, the Court has been skeptical of the assertion of school authorities that they must censor student expression to advance a school's educational mission.[61] In such circumstances, the Court has exercised independent review over school decisions to suppress student speech, asking whether such suppression is really necessary to serve a school's educational mission.[62] And sometimes, as in *Hazelwood*, the Court has deferred to the judgment of school officials that restrictions on student speech are necessary for the educational process.[63] In all cases, however, courts ultimately ask whether a school's regulation of student speech serves "legitimate pedagogical concerns."[64]

To answer this question, courts must determine the "basic educational mission" of public schools.[65] In the past, the Court has offered at least three distinct accounts of that mission.[66] In cases like *Tinker* and *Barnette*, the Court has elaborated a vision of what we might call "democratic education," in which the purpose of public education is to prepare children for their role as independent democratic citizens capable of participating in the rough and tumble world of public discourse.[67] The Court announced in *Tinker* that schools need to prepare students for "this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[68] Schools therefore "may not be enclaves of

60. *See* Robert Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, *in* THE FREE SPEECH CENTURY 106, 120-21 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

61. 393 U.S. 503, 509-11 (1969).

62. *Id.* at 514.

63. 484 U.S. 260, 272-73 (1988). The question of when a court should exercise deference in the review of managerial authority is best analyzed in terms of whether independent review will itself interfere with the managerial authority needed effectively to administer an institution. *See* Post, *supra* note 55, at 1811-12.

64. *Hazelwood*, 484 U.S. at 273.

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

66. The discussion in this paragraph and the next several paragraphs is elaborated in Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 317-25 (1991).

67. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507-11 (1969); W. Va. St. Bd. Educ. v. Barnette, 319 U.S. 624, 637 (1943). In *Barnette*, the Court characterized the purpose of schools as "educating the young for citizenship." *Id.* This purpose, said the Court, "is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

68. *Tinker*, 393 U.S. at 508-09.

totalitarianism" in which officials exercise "absolute authority."[69] *Tinker* instructs us that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[70] They must be given a fair degree of autonomy.

In cases like *Hazelwood* and *Bethel*, by contrast, the Court has advanced the distinct concept of what might be called "civic education," in which "the objectives of public education" include "the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system'" as well as the "habits and manners of civility."[71] Civic education attempts to induce students to internalize community norms that define respect and dignity. Often courts that celebrate civic education stress the concept of *in loco parentis*.[72] This is likely because they imagine that schools stand in the place of primary families, which are principally responsible for reproducing community norms.[73]

Within civic education, as distinct from democratic education, students are regarded as passive and malleable recipients of social norms the State believes should be instilled in the younger generation. The task of the school is to offer "role models" whose "conduct and deportment" are to be internalized by students.[74] Justice Black's dissent in *Tinker* celebrated this concept of education, which, as Justin Driver describes, requires students to exercise "respect, deference, and obedience toward school officials."[75] "School discipline," Black explained, "like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[76]

A third concept of education, which we might call "critical education," postulates that the central goal of schooling is to instill the essential cognitive skills necessary "to discover and disseminate knowledge by means of research

69. *Id.* at 511.

70. *Id.*

71. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (first quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979); and then quoting CHARLES A. BEARD, MARY R. BEARD & WILLIAM BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (rev. ed. 1968)); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

72. *See, e.g.*, *Bethel*, 478 U.S. 675, 684 (Our "cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.").

73. On the relationship between democracy and community, see generally Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV 163 (John W. Chapman & Ian Shapiro eds., 1993). Because democracy always presupposes community, we can expect courts at different times to appeal to both civic and democratic forms of education.

74. *Bethel*, 478 U.S. at 683.

75. DRIVER, *supra* note 10, at 78; *see also Tinker*, 393 U.S. at 524 (Black, J., dissenting).

76. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

and teaching."[77] Critical education focuses on the acquisition of the intellectual skills necessary for independent analytic thinking. The Court has most typically applied this concept of education to higher education, to public colleges and universities.[78] The project of critical education underwrites contemporary American principles of academic freedom.[79]

It is striking that in cases like *Tinker*, *Barnette*, and *Mahanoy Area School District v. B.L. ex rel. Levy*, where the Court has adopted the concept of democratic education, the Court has concomitantly exercised independent review to determine whether regulations of student speech are necessary for the educational mission of schools.[80] In cases like *Bethel* and *Hazelwood*, by contrast, where the Court has embraced the concept of civic education, the Court has instead chosen to defer to the judgment of educators.[81] Although the

77. *Report of the Committee on Freedom of Expression at Yale*, 4 HUM. RTS. 357, 357 (1975).

78. *Compare Bethel*, 478 U.S. at 681, 685 (explaining that the "basic educational mission" of K-12 schools includes "teaching student the boundaries of socially appropriate behavior"), *with* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) (per curiam) (explaining that students in public higher education institutions cannot be punished for "the mere dissemination of ideas—no matter how offensive to good taste"). From a constitutional point of view, the educational mission of universities does not include inculcating the "conventions of decency." *Id.*; *see* Healy v. James, 408 U.S. 169, 180-81 (1972).

Distinct educational institutions will likely also be dedicated to distinct educational missions. The educational mission of a law school will no doubt differ from that of medical school. *See generally, e.g.*, Robert Post, Comment, *Comment on Freedom of Expression in American Legal Education*, 51 HOFSTRA L. REV. 667 (2023) (discussing the educational mission of American law schools). Courts have recognized that some higher education institutions seek to train students for distinct professional roles. *See, e.g.*, Hunt v. Bd. of Regents of the Univ. of N.M., 792 F. App'x 595, 605 (10th Cir. 2019); Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016). Some commentators have objected to the constitutional acknowledgement of such discrete educational missions. *See, e.g.*, Neal H. Hutchens & Mercy Roberg, *Professionalism Standards and College Students' First Amendment Speech Rights*, 342 EDUC. L. REP. 16, 19-24 (2017); Shanelle Doher, Note, *Silencing Students: How Courts Have Failed to Protect Professional Students' First Amendment Speech Rights*, 80 WASH. & LEE L. REV. ONLINE 247, 301 (2023).

79. *See generally* MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009) (arguing that academic freedom requires the freedom necessary to create new knowledge and to instill in students a mature independence of mind); POST, *supra* note 47 (same).

80. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046-47 (2021). The *Mahanoy* Court explicitly characterized schools as "nurseries of democracy." *Id.* at 2046; *see also supra* note 67 and accompanying text.

81. *Bethel*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[W]e hold that educators 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. This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of

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Court has not explicitly explained why this might be so, it is most likely premised on the idea that independent judicial review threatens to undermine the authority that civic education holds necessary to induce students deferentially to accept school officials as role models.[82]

III. The Scope of a School's Managerial Authority

The concept of managerial authority requires courts to determine where the authority of management ends and where the distinct authority of governance begins.[83] Managerial authority is at its maximum within the physical space of a government institution. The Court has stressed, for example, that a judge in his own courtroom "has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'"[84] In such circumstances ordinary First Amendment standards have little or no application.[85] But a judge's managerial authority does not suddenly evaporate at the courthouse steps; it instead diminishes as trial participants leave the courtroom and attempt to speak as citizens.[86]

In the context of government employment, the Court has drawn an important distinction between when employees speak "as citizens on matters of public concern" and when they speak as employees.[87] When subordinates

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parents, teachers, and state and local school officials, and not of federal judges. . . It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicate[d]as to require judicial intervention to protect students constitutional rights." (citations omitted)).

82. *See supra* note 63.

83. For a discussion of this question, see Post, note 55 above, at 1784-97.

84. United States v. Young, 470 U.S. 1, 10 (1985) (quoting Quercia v. United States, 289 U.S. 466, 469 (1933)); *see also* Sacher v. United States, 343 U.S. 1, 36-38 (1952) (Frankfurter, J., dissenting).

85. Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005) ("The courtroom is a nonpublic forum, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir. In fact, the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech." (citation omitted)); Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991) (Rehnquist, C.J., opinion of the Court) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.").

86. *See Gentile*, 501 U.S. at 1048-51 (Kennedy, J., opinion of the Court) (striking down Nevada's statute restricting attorney speech outside the courtroom for being "so imprecise that discriminatory enforcement is a real possibility"); United States v. Brown, 218 F.3d 415, 426 (5th Cir. 2000).

87. Garcetti v. Ceballos, 547 U.S. 410, 418-21 (2006).

speak as employees, their expression is subject to very broad government control.[88] The State can at its discretion impose prior restraints and content discrimination; it can compel speech. But the imperatives of managerial authority also endow the State with control over employee speech even when employees attempt to speak as citizens.[89] So long as an employee's speech is within the scope of an employer's authority, her speech can be regulated if it potentially impairs "the effective and efficient" functioning of a government employer, even if the employee attempts to speak as a citizen.[90]

It is for this reason that government employees can constitutionally be sanctioned for speech that is disseminated with their own resources and communicated after work hours and outside of government property.[91] The Court has instructed us that when employees attempt to speak as citizens, their speech rights must be balanced against the managerial prerogatives of their government employer.[92] These prerogatives dissipate only when a government employer's connection to an employee's speech is so attenuated that the employer has no more reason to regulate the employee's speech than the State might have to regulate the speech of any member of the public.[93] In such circumstances, employees are entirely outside the scope of the State's managerial authority and are instead protected by the ordinary principles of First Amendment jurisprudence.[94]

In the context of the speech of government employees, then, courts have roughly delineated three distinct phases of managerial authority. When persons speak in their capacity as employees, courts award government broad discretionary managerial authority to control their expression to achieve organizational ends. But when persons within the scope of the state's managerial authority nevertheless seek to step outside their assigned role as employees and to speak as citizens, courts must balance the needs of government managerial authority against employee First Amendment rights. Finally, when persons who are employees speak in ways that are beyond the scope of the state's managerial authority, they receive the full protection of ordinary First Amendment doctrine.

One can perceive roughly the same schema in the context of student speech. Because the heart of the educational process lies in the classroom, schools retain maximal authority to regulate classroom discussion during

88. *Id.* at 419.

89. Connick v. Myers, 461 U.S. 138, 146-47 (1983).

90. *Id.* at 149-51.

91. City of San Diego v. Roe, 543 U.S. 77, 78-79, 84-85 (2004) (per curiam).

92. *Connick*, 461 U.S. at 149-54.

93. Pickering v. Bd. of Educ., 391 U.S. 563, 573-74 (1968).

94. *Id.* at 574.

school hours on a school campus. But as these conditions weaken, so too does the strength of a school's managerial authority.[95]

Recently there has been intense debate about whether schools can regulate student speech that is communicated outside school hours without the use of school property. In 2021, the Court in *Mahanoy* addressed the question of when "ordinary First Amendment standards must give way off campus" to the prerogatives of a school's managerial authority.[96] The Court sought to explain when "the special characteristics that give schools additional license to regulate student speech" might extend outside of school facilities and hours.[97]

It is paradoxical but true that despite the great number of reported cases in which students constitutionally challenge school-based restrictions on their speech, only a very few involve instructional exchanges within the classroom itself, where control over student speech is at its zenith. Courts do not seem to find it difficult to dismiss such cases.[98] It is commonly accepted that schools need a relatively free hand to regulate speech in their core educational processes—speech involved in the supervision of classroom discussion, the assignment of homework and classroom exercises, and so on. In my experience, reported cases tend to arise instead when schools seek to regulate speech outside these core processes that administrators believe will negatively impact a school's educational mission.[99]

A student wears a T-shirt or bracelet, for example, that administrators fear will disrupt the school's pedagogical environment because other students

95. *See, e.g.*, Eric Hogrefe, Note, *Student Speech Online: A Matter of Public Concern*, 19 NW. J. TECH. & INTELL. PROP. 307, 320-22 (2022); McDonald, *supra* note 59, at 739-41.

96. 141 S. Ct. 2038, 2045 (2021).

97. *Id.*; *see* also *id.* at 2046.

98. *See, e.g.*, Wood v. Arnold, 915 F.3d 308, 318-19 (4th Cir. 2019) (upholding a school's right to require a student to fill in two missing words from the *shahada* on the grounds that a student's right against compelled speech "has limited application in a classroom setting in which a student is asked to study and discuss materials with which she disagrees"); Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 349-50 (5th Cir. 2017) (distinguishing an assignment in Spanish class requiring the recitation of the Mexican Pledge of Allegiance from *Barnette* on the grounds that the former assignment did not seek to inculcate belief); Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995) ("The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question."); *see also* W.C. v. Rowland Unified Sch. Dist., No. 17-CV-02168, 2017 WL 11509987, at *1 (C.D. Cal. June 15, 2017) ("[A]n educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. . . . [T]he First Amendment does not require an educator to change the assignment to suit the student's opinion . . . ." (quoting Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002))).

99. *See also, e.g.*, Hogrefe, *supra* note 95, at 321 ("Students enjoy no protection for what they write in a homework assignment, but they do enjoy protection when talking to their friends on the weekend.").

might find it offensive or distracting.[100] Or one student bullies another outside of class and so corrupts the school's atmosphere for learning.[101] Or a student insults a faculty member on the student's own time and using the student's own resources, thus diminishing the teacher's pedagogical authority within the school.[102] My strong impression is that these kinds of cases make up the vast bulk of litigation involving student speech rights. They do not involve judicial supervision of actual processes of instruction, but instead seek to determine when a school's managerial authority can spill beyond the boundaries of core classroom instruction and control student speech in ways that could not otherwise be regulated.[103]

IV. The *Tinker* Settlement

The "*Tinker*-plus-narrow-exceptions" doctrine that courts use to decide such cases differs fundamentally from ordinary First Amendment standards. This is because the essential question that cases following *Tinker* seek to answer is when schools might restrict speech within the scope of their managerial authority that might adversely affect their educational mission. *Tinker* might best be interpreted as holding that schools are not "total institutions";[104] even on school grounds during school hours, students retain independence from school managerial authority unless and until a school can

100. *E.g.*, Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 430-32 (4th Cir. 2013); B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 300 (3d Cir. 2013); Barr v. Lafon, 538 F.3d 554, 557 (6th Cir. 2008); Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006); Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037, 1039 (N.D. Cal. 2011), *aff'd*, 745 F.3d 354 (9th Cir. 2014).

101. *E.g.*, Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 711-14 (9th Cir. 2022); J.S. *ex rel.* M.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 298-300 (Pa. 2021).

102. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920-22 (3d Cir. 2011); Klein v. Smith, 635 F. Supp. 1440, 1440-41 (D. Maine 1986).

103. The Court in *Hazelwood* was groping toward this distinction when it attempted to distinguish *Tinker* on the ground that it addressed only the ability of educators "to silence a student's personal expression that happens to occur on the school premises." 484 U.S. 260, 271 (1988). Instead of building on this insight, however, *Hazelwood* strongly intimated that its holding applied to cases in which student speech might be "erroneously attributed to the school." *Id.*; *see* Morse v. Frederick, 551 U.S. 393, 405 (2007) ("[*Hazelwood*] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur.").

104. ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 4-5 (1961) ("When we review the different institutions in our Western society, we find some that are encompassing to a degree discontinuously greater than the ones next in line. Their encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure . . . . These establishments I am calling *total institutions* . . . .").

reasonably "forecast" that their speech will cause "substantial disruption of or material interference with school activities."[105]

Note that this doctrinal formulation implies that a school is entitled to exercise comprehensive control over student speech during core educational processes. Justice Fortas was explicit in *Tinker* that the decision did "not concern speech or action that intrudes upon the work of the schools."[106] Speech within "the work" of schools may be systematically and proactively managed: This is what happens in classrooms, in homework assignments, in official school activities like sports, and so on.[107] It is only speech *outside* that work that is subject to the *Tinker* test of disruption. The "substantial disruption of or material interference" standard measures when the contingent impact of peripheral student speech on core educational processes justifies the exercise of managerial authority.

Tinker's substantial disruption standard authorizes schools to regulate student speech in ways that would be forbidden within public discourse.[108]

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105. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969); *see also id.* at 513 ("If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.").

106. *Id.* at 508.

107. On one interpretation of *Tinker*, resistance to such management in classroom discussions is what it *means* to disrupt the work of a school.

108. It has been perceptively observed that the *Tinker* substantial disruption standard is anomalous "in the pantheon of First Amendment free speech law" because in the context of student speech, courts "may 'not distinguish between "substantial disruption" caused by the speaker and "substantial disruption" caused by the reactions of onlookers or a combination of circumstances.' In other words, whereas listener reaction is generally an illegitimate reason for restricting speech, *Tinker* allows school officials to punish speech for precisely this reason." Noah C. Chauvin, *Replacing* Tinker, 56 U. RICH. L. REV. 1135, 1144 (2022) (quoting Dariano v. Morgan Hills Unified Sch. Dist., 767 F.3d 764, 778 (9th Cir. 2014) (internal quotation marks omitted)); *see Dariano*, 767 F.3d at 776; Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 249 (2001); Papandrea, *supra* note 45, at 74; *see also* David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1118 (2020) (discussing "[a]n area of uncertainty" as to "whether courts will allow the negative reaction of listeners to silence the student speakers"). But in point of fact the *Tinker* test is not all that unusual in the context of managerial authority. The Court appealed to an analogous concept of disruption, for example, in the context of polling places, which were deemed nonpublic fora. *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1886-88 (2018).

On ambiguities in the *Tinker* standards, see DRIVER, note 10 above, at 76-77. The basic point, as the Court articulated in *Hazelwood*, is that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the

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This is because courts apply the *Tinker* standard to student speech that lies within the scope of a school's managerial authority. What is constitutionally determinative about the regulation of such speech is its effect on the institutional mission of a school.

This suggests that the standard account of student speech has it exactly backwards. It is not correct to say, as *Tinker* asserts, that a classroom is a "marketplace of ideas" in the same sense that public discourse is a marketplace of ideas.[109] Nor is it correct to say, as Chief Justice Roberts asserts in *Morse*, that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"[110] Student speech within the core educational processes of a school is comprehensively and proactively managed in the interest of education. The *Tinker* test addresses student speech transpiring outside these core processes.

If we were to adopt the metaphoric scheme of the government employee cases, we would say that when students speak *as* students, as they typically do in classrooms, a school can exercise virtually comprehensive managerial authority over their expression.[111] But when students within the managerial scope of a school instead speak *as* citizens, their First Amendment rights must be balanced against the needs of a school's educational mission.[112] The *Tinker* substantial disruption test articulates the terms of this balance.

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government could not censor similar speech outside the school." 484 U.S. at 266 (citation omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U. S. 675, 685 (1986)).

109. 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). Instead, classrooms, especially in higher education, can be paradigmatic sites of academic freedom, in which critical discussion is encouraged and facilitated. *See* Post, *supra* note 60, at 113-14. Academic freedom and freedom of speech are in many respects quite different. For discussion of these differences, see generally POST, note 47 above; and Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530 (2015). In K-12 settings, classrooms have far less freedom than in the context of higher education.

110. 551 U.S. 393, 403 (2007) (quoting *Tinker*, 393 U.S. at 513).

111. *See* Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006). Of course, the regulation of student speech in a classroom must be justified by legitimate pedagogical concerns. *Barnette* represents an unusual circumstance in which students in a classroom sought to refrain from speaking *as* citizens. It might similarly be said that in the many cases involving student t-shirts and other political paraphernalia displayed in the classroom, students were not attempting to speak *as* students but instead *as* citizens. It is for that reason that the *Tinker* substantial disruption test was appropriately applied. *See supra* note 100.

112. *See Garcetti*, 547 U.S. at 419; Connick v. Myers, 461 U.S. 138, 150-53 (1983). On the scope of a school's managerial authority, see text at note 122 below.

V. The Educational Mission of Schools and Off-Campus Speech

This account of how schools regulate student speech makes especially puzzling Justice Alito's odd concurring opinion in *Morse*, in which he explicitly rejected the argument "that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'"[113] Justice Alito conceded, as was necessary, that schools are required regularly to control student speech in ways that would plainly be forbidden to government regulations of public discourse.[114] And he recognized that this special power must "be based on some special characteristic of the school setting."[115] Justice Alito identified that special characteristic to be "the threat to the physical safety of students."[116]

Fourteen years later in *Mahanoy*, however, Justice Alito realized that concerns for physical safety could not explain the comprehensive control that schools exercise over student speech in classrooms, which after all constitutes the essence of the educational process. Justice Alito therefore reversed his previous position and authored a separate opinion acknowledging that a school's managerial control over student speech needed to be explained in terms of "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission."[117]

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113. 551 U.S. at 423 (Alito, J., concurring) (quoting Brief for Petitioners at 21).

114. *Id.* at 425.

115. *Id.* at 424.

116. *Id.*

117. 141 S. Ct. 2038, 2051 (2021) (Alito, J., concurring). In his *Mahanoy* opinion, Justice Alito offered many examples of the comprehensive control over speech that school authorities must exercise to accomplish the educational mission of a school. *Id.* at 2049-53. In *Morse*, Justice Alito had been quite clear that the doctrine of *in loco parentis* could not explain the comprehensive authority that schools seemed to possess over such speech:

> When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*. For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students.

551 U.S. at 424 (Alito, J., concurring). But in *Mahanoy*, Justice Alito adopted the doctrine of *in loco parentis* to explain the school's comprehensive authority over speech:

> Because no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech in these ways, the Court may have felt no need to specify the source of this authority or to explain how the special rules applicable to in-school student speech fit into our broader framework of free-speech case law. But when a public

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Invoking institutional mission, however, is only part of the story. A student may write an editorial in a privately-owned local paper that is independent of the school. The editorial may oppose a bond issue that a school board regards as essential for its educational mission. Absent extraordinary circumstances, however, the school has no managerial authority over the student's editorial, even if the editorial is responsible for the failure of the bond issue and hence actually injures the school district's mission.[118] The student editorial is entirely outside the scope of the school's managerial authority.

Student speech is within the scope of a school's managerial authority only when that speech is specifically connected to a student's participation in the activities of the school itself, either by bullying another student,[119] by targeting a specific teacher or administrator who must maintain authority over students,[120] or by otherwise interfering with the school's functioning in

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> school regulates what students say or write when they are not on school grounds and are not participating in a school program, the school has the obligation to answer the question with which I began: Why should enrollment in a public school result in the diminution of a student's free-speech rights?
>
> The only plausible answer that comes readily to mind is consent, either express or implied. The theory must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights.
>
> This understanding is consistent with the conditions to which an adult would implicitly consent by enrolling in an adult education class run by a unit of state or local government. If an adult signs up for, say, a French class, the adult may be required to speak French, to answer the teacher's questions, and to comply with other rules that are imposed for the sake of orderly instruction.
>
> When it comes to children, courts in this country have analyzed the issue of consent by adapting the common-law doctrine of *in loco parentis*.

141 S. Ct. at 2050-51 (Alito, J., concurring). Justice Alito was forced to acknowledge, however, that the theory of *in loco parentis* ultimately reduces to the question of the educational mission of schools. He reasoned: "So how much authority to regulate speech do parents implicitly delegate when they enroll a child at a public school? The answer must be that parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission . . . ." *Id.* at 2052.

The conclusion reached by Justice Alito, which seems to me the correct one, illustrates the fictional nature of appeals to "consent" and "*in loco parentis*" to explain why schools can control student speech. The relevant analytic work is done, and must be done, by substantively unpacking the nature of a school's "educational mission."

118. *See infra* note 122.

119. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) ("[Student-on-student bullying] is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986))); Doe *ex rel.* Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 497-98, 505-06 (1st Cir. 2021); Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 711, 721 (9th Cir. 2022).

120. H.K. *ex rel.* Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 354, 358 (6th Cir. 2023); Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 399-400 (5th Cir. 2015) ("[T]hreatening,
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ways predicated on the student's status as a member of the school community.[121] If the school has no relationship to a student's speech beyond what it might have with regard to the speech of any member of the public, the school cannot claim managerial authority to regulate that speech.[122] In such circumstances, the *Tinker* substantial disruption standard has no place, and ordinary First Amendment doctrine should be applied.

The Court's recent decision in *Mahanoy* addresses the question of when a school can assert managerial authority over student speech communicated off campus, on the internet, on private time and in private circumstances, without the aid of school equipment.[123] Relying, in part, on the importance of "clarity and predictability," the Third Circuit had held that the *Tinker* substantial disruption test "does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[124] Such speech, the

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harassing, and intimidating a teacher impedes, if not destroys, the ability to teach; it impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place. . . . [I]t disrupts, if not destroys, the very mission for which schools exist—to educate.").

121. *See, e.g.*, *Mahanoy*, 141 S. Ct. at 2045. A school can plainly exercise managerial authority over student speech involving plagiarism, for example. *See* Hedges v. Wauconda Cmty. United Sch. Dist., 9 F.3d 1295, 1302 (7th Cir. 1993) ("Schools routinely deny students the ability to express themselves by adopting the words of others."). In cases of bullying, McDonald convincingly argues that

> it is important to distinguish between situations where the bullying speaker is engaging in such communication as a general citizen, or because of their status as a student. Hence, in situations where the disputed content is unrelated to the communicants' roles as students, but rather arose out of non-school related interactions or relationships, it would be difficult to justify applying anything but ordinary free speech rules to such disputes with two notable exceptions. The first is where the speaker actively or constructively directs such speech onto school grounds, and the second is where such speech raises substantial institutional concerns that . . . violence might occur at school.

McDonald, *supra* note 59, at 749.

122. As the Court concluded in rejecting a school board's claim of managerial authority over the speech of a teacher: "In these circumstances . . . the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968). From a normative, constitutional perspective, the scope of a school's managerial authority with respect to employees and students ought to be analogous. Each ought to depend on the justification for the uniquely intrusive prerogatives of managerial authority. *Pickering* teaches that such a justification exists only when a speech act affects a school's mission in a manner that is distinctive and different in kind than would the speech act of any random member of the public.

123. 141 S. Ct. at 2042-43.

124. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 188-89 (3d Cir. 2020).

Third Circuit concluded, should receive the full protection of ordinary First Amendment doctrine.[125]

But the Supreme Court disagreed, offering a subtle reading of the various managerial connections that a school might have to such speech, including the prevention of bullying and the enforcement of school rules regarding "lessons, the writing of papers, the use of computers, or participation in other online school activities."[126] The Court declined to articulate "a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up the school community."[127] The scope of a school's managerial authority over private student speech, *Mahanoy* held, cannot be definitively ascertained by any simple geographic criterion such as whether it occurs on or off campus. Because the student speech at issue in *Mahanoy* directly implicated the speaker's participation in school activities and team projects, the Court ruled that it was within the scope of the school's managerial authority and that *Tinker*'s substantial disruption should accordingly apply.

The *Mahanoy* Court articulated three factors that ought to tilt the *Tinker* balance toward protecting student speech that is privately disseminated off campus. The first, and most theoretically interesting, is that "a school, in relation to off-campus speech, will rarely stand *in loco parentis*" because "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[128] The second is

125. *Id.* at 192.

126. *Mahanoy*, 141 S. Ct. at 2045.

127. *Id.*

128. *Id.* at 2046. This holding is in sharp tension with Justice Thomas's assertion in dissent that a school ought to have authority to "punish 'vulgar' speech" even if it occurs off campus. *Id.* at 2061 (Thomas, J., dissenting). The apparent rule of *Mahanoy* is directly to the contrary: that schools cannot use *Tinker*'s substantial disruption standard to justify regulating private, off-campus speech to protect the mission of civic education. The justification for this holding is that the school does not stand *in loco parentis* with respect to such speech. *See supra* text accompanying note 72. This holding, together with the Court's finding that B.L.'s speech did not otherwise cause substantial disruption in the school, underpins the Court's decision that B.L.'s speech was protected by the First Amendment under the *Tinker* test. *Id.* at 2047-48.

In assessing *Mahanoy*'s discussion of the doctrine of *in loco parentis*, it is important to note that within school speech cases the doctrine of *in loco parentis* has performed two distinct functions. The first is to signify parental consent to a school's educational mission. In the modern Court, this function has been stressed by Justice Alito. *See id.* at 2051-52 (Alito, J., concurring); *supra* note 117. The second, and more important function, is to epitomize the aspiration of civic education to become, like parents, a site of primary socialization for fundamental community norms. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

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that if a school were to assert comprehensive control over off-campus student speech, it would leave little room for students to speak as citizens; thus, "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."[129] The third factor is that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[130] This factor is best interpreted as signifying *Mahanoy*'s explicit commitment to democratic education.

Lower courts are now fiercely debating the implications of *Mahanoy*.[131] The Court's decision has been sharply criticized for its "ad hoc mode of analysis."[132] Yet the administration of all managerial domains poses issues that

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Justice Breyer's invocation of the doctrine of *in loco parentis* in *Mahanoy* might be understood as a simple inducement to Justice Alito to join Justice Breyer's opinion for the Court. *See* 141 S. Ct. at 2046; *supra* note 117. But, given the precise facts of *Mahanoy*, Justice Breyer's use of the doctrine is better interpreted as signifying that the project of civic education has no force in the context of private, off-campus student speech. *Mahanoy* essentially tells us that a school has no business imposing civility norms on students who are so distant from the managerial authority of a school. *See* 141 S. Ct. at 2047 ("[W]e consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time. . . . under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B.L.'s parents had delegated to school officials their own control of B.L.'s behavior . . . ." (internal citations omitted)).

129. *Mahanoy*, 141 S. Ct. at 2046.

130. *Id.*

131. *See, e.g.*, H.K. *ex rel.* Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 357-58 (6th Cir. 2023) (explaining that based on Justice Alito's concurrence, the court "can view a school's ability to regulate off-campus speech on a spectrum"); Chen *ex rel.* Chen v. Albany Unified Sch. Dist, 56 F.4th 708, 719-20 (9th Cir. 2022) (determining that the circuit's "sufficient-nexus test" aligns with *Mahanoy*); C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1276-78 (10th Cir. 2022) (explaining that "*Mahanoy* clarified that risk of transmission to the school does not inherently change the off-campus nature of all speech on social media"); Doe *ex rel.* Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 505-06 (1st Cir. 2021) (finding that *Mahanoy*'s determination that schools' interest in regulating "serious or severe bullying or harassment" infringing on the rights of others "remains even in off-campus circumstances" (quoting *Mahanoy*, 141 S. Ct. at 2045)); Castro v. Clovis Unified Sch. Dist., 604 F. Supp. 3d 944, 949 n.4, 952 (E.D. Cal. 2022); Plaintiff A *ex rel.* Parent A v. Park Hill Sch. Dist., 2022 WL 390836, at *4-5 (W.D. Mo. Feb. 8, 2022); Wang v. Bethlehem Cent. Sch. Dist., 2022 WL 3154142, at *17-20 (N.D.N.Y. Aug. 8, 2022); J.S. *ex rel.* M.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 313-16 (Pa. 2021); *see also* Lindsay Dial, Note, *When Pixels Hurt: A Categorical Exclusion to* Tinker *for Cyber-Abuse*, 10 BELMONT L. REV. 143, 150 (2022) (explaining that *Mahanoy* failed to resolve lower courts' confusion as to "when students' First Amendment rights are diminished for engaging in such activity").

132. Mary-Rose Papandrea, *The Future of the First Amendment Foretold*, 57 WAKE FOREST L. REV. 897, 915 (2022); *see also* Bonds, *supra* note 35, at 103.

are intrinsically polycentric.[133] They are not susceptible to the clear ex ante rules that are so desirable in the governance of public discourse. That is why the judge in her courtroom, or the teacher in his classroom, or the manager in her office, is typically afforded wide discretion and flexibility. There are many pathways by which student off-campus speech can affect the functioning of a school in ways that might justify the need for managerial authority,[134] and it is likely that rules of thumb will eventually emerge to guide the adjudication of this issue. But at present, *Mahanoy* is wise not to attempt to foresee what these might be. The emergence of social media is such a recent phenomenon that we have not yet understood or assimilated its full implications.

VI. The Appeal of Ordinary First Amendment Standards

The criticism of *Mahanoy* illustrates that the field of student speech seems to be dominated by a paradigm holding that "student speech standards" should be brought "more closely in line with the standards that generally apply to non-school-related speech."[135] Once we understand the sociological stakes in the distinction between managerial authority and public discourse, however, we can appreciate that the actual meaning of this paradigm is that students should be treated more like citizens and less like students. This is because the

133. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (hypothesizing that managerial direction could be a solution to polycentric problems).

134. It is sometimes argued that when students "are engaged in off campus, non-school-related activities during non-school hours, they are *not* students. They are, instead, people—people, in particular, outside the control of the school." Calvert, *supra* note 108, at 271; *see* Kara A. Schmidt, Comment, *Out of Bounds: Reviving* Tinker's *Territorial Nexus to Constrain School's Disciplinary Power Over Student Internet Speech*, 28 GEO. MASON L. REV. 853, 872 (2021) ("The rationale behind limiting the school's authority to the school's environs is simple: students are more than just students. Each of these young people has a life outside the classroom. Outside the school, they should be primarily considered citizens, not students."); *see also* Sullivan v. Hous. Indep. Sch. Dist., 307 F. Supp. 1328, 1340-41 (S.D. Tex. 1969).

But just as employees—by virtue of their special connection to their government employers—may have their speech as citizens limited in ways that others may not, *see supra* note 89 and accompanying text, even when they speak outside their employment in non-employment related activities during non-employment hours, *see supra* note 91 and accompanying text, so too may a school regulate student speech in analogous situations. This is the case even if that speech reflects a student's effort to speak as a citizen rather than as a student. A preliminary question is whether the relationship between a student's speech and her specific status as a student puts her within the scope of a school's managerial authority. If this question is answered affirmatively, the school's control over the student's speech will turn on the application of *Tinker*'s substantial disruption test.

135. Chauvin, *supra* note 108, at 1156; *see id.* at 1150 (proposing that something akin to the public forum doctrine should replace *Tinker*'s substantial disruption standard).

point of ordinary First Amendment standards is to protect the capacity of persons to participate in the formation of public opinion.[136]

We might perhaps understand the dominant paradigm to express an underlying hostility to education and a concomitant need to limit the authority of schools. But a more generous interpretation would be that the paradigm rests on a particular theory of education. The implicit premise is that education is more effective if students are treated as independent adults, like participants in public discourse, rather than as obedient and passive recipients of a schoolmaster's lessons.[137]

On this account, however, the dominant paradigm rests on a fundamental confusion. Theories of education are quite distinct from theories of rights, even of First Amendment speech rights. All theories of education address how students learn. Teaching students inevitably requires a positive curriculum that may demand compelled examinations, or assigned essays about particular topics, or carefully structured discussions. Although such regulations of speech may be forbidden by ordinary First Amendment standards, they will nevertheless be justified by the managerial authority of the school if they are required by the school's "basic educational mission."[138] These tight controls over student speech will be necessary even if the educational objective of a school is to create democratically independent adults.

Although a theory of rights might inform us about how to limit pedagogical control over speech, it can never alone substitute for an affirmative theory of education that generates positive educational programming. No explication of ordinary First Amendment rights will ever inform us about how children learn and develop, because such rights are formulated to protect adult political participation and not the education of students.[139] In any school, even in a school committed to democratic education, legitimate educational programming will take precedence over First Amendment rights. The latter cannot substitute for the former.

Tinker attempts to carve out discrete areas of student speech in which independent First Amendment rights might be exercised. This is a noble and

136. POST, *supra* note 47, at 1-25.

137. *See, e.g.*, CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 288-89 (2015) ("School environments characterized by respect for students yield higher academic achievement and reduced disciplinary problems."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 285-86 (1988) (Brennan, J., dissenting). This disagreement about the purpose of education in American constitutional law is a modern incarnation of the argument between Jean Piaget and Emile Durkheim about the ultimate goal of education. *See* Post, *supra* note 66, at 321 n.238.

138. *Hazelwood*, 484 U.S. at 266 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986)).

139. POST, *supra* note 47 at 1-25.

important ambition. But three points should be stressed. The first is that *Tinker* applies only if a student is within the scope of a school's managerial authority.[140] If a student is outside that scope, ordinary First Amendment protections, which are far more stringent than *Tinker*, ought to apply. The scope of a school's managerial authority must be determined by reference to the connection between a school's educational mission and the particular student speech that a school seeks to regulate.[141]

Second, if a student is within the scope of a school's managerial authority and speaking as a student in a core educational process, the *Tinker* disruption standard is virtually inapplicable. The disruption of a school's educational mission occurs *by definition* when students speak obstreperously in class or refuse to complete course assignments. In such circumstances, the *Tinker* substantial disruption test is for all practical purposes indistinguishable from the implementation of a school's educational mission. Constitutional review should therefore focus on the question of whether student speech regulation serves a legitimate state educational purpose.[142]

Third, when a student within the scope of a school's managerial authority seeks to speak as a citizen, *Tinker* is clear that the educational mission of a school must take priority.[143] Because public discourse is ancillary to the core educational enterprise of a school, it is protected only so long as it does not derail that enterprise. Determining how much disruption constitutes *substantial* disruption will of course always require highly contextual judgments about which there will be considerable room for debate. But because defining what disrupts a school is merely the other side of the coin of defining what a school ought to accomplish, those committed to protecting independent student speech might most profitably focus on the question of how schools can pedagogically instill the prerequisites of mature and independent democratic citizenship. Although this is a question of education, not of rights, it is a question that will ultimately inform what constitutionally ought to count as substantial disruption under *Tinker*.

I suspect that those who put First Amendment rights at the center of their understanding of student speech may also be fearful that, as Justice Alito wrote in his *Morse* concurrence, defining the managerial authority of schools in terms of educational mission "can easily be manipulated in dangerous ways":[144]

> [T]he "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school

140. *See supra* notes 104-05 and accompanying text.

141. *See supra* note 122 and accompanying text.

142. *See supra* note 121.

143. *See supra* notes 108-10 and accompanying text.

144. 551 U.S. 393, 423 (2007) (Alito, J., concurring).

> administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.[145]

"The 'educational mission' argument," Alito wrote, "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment."[146]

Although Justice Alito no doubt puts his finger on a significant problem, it is a profound mistake to imagine that "the First Amendment" lies "at the very heart" of a school. The *raison d'être* of schools is instead education. And, as Justice Alito later came to realize, schools cannot fulfill that purpose unless they are authorized to regulate student speech in ways required by their educational mission.[147] We should of course worry when that mission is manipulated and distorted. But in the past half century, courts have demonstrated both the resources and ability to assert constitutional control over a school's articulation of its educational mission[148] as well as over a school's decisions to suppress student speech in the service of that mission.[149] Courts have sometimes used these capabilities aggressively in the manner of *Tinker*, and they have sometimes used them in a highly deferential manner, as in *Bethel*.[150]

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145. *Id.* As Justice Alito explained:

> During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war.

Id.

146. *Id.*

147. *See supra* text accompanying notes 113-17.

148. *See* Post, *supra* note 66, at 317-25; *supra* text accompanying notes 64-78. Courts of course always retain jurisdiction to determine whether the regulation of student speech, even the regulation of student speech within core precincts of the classroom, serves a legitimate educational purpose. If student speech is penalized for improper purposes, as for example for retaliation or sexual harassment, nothing in the nature of managerial authority insulates schools from liability. In practice the decisive question will be whether courts review official censorship in a posture of deference or instead of *de novo* review.

149. *See supra* note 81.

150. *See* Post, *supra* note 55, at 1809-24.

Conclusion

Acknowledging the managerial authority of schools to regulate student speech in the service of education will not alter existing judicial capacities and options. Courts can continue to enforce the limits of school managerial authority to create space for the competing right of students to express themselves as independent citizens. Courts constantly confront the challenge of defining such space when they ascertain the free speech rights of public employees who seek to speak about matters of public concern.[151]

Recognizing the reality of managerial authority in the context of schools will alter current practice primarily by endowing our judiciary with a realistic and theoretically justifiable account of the constitutional nature of student speech. It will encourage courts to be more self-conscious in elucidating the legitimate educational mission of schools and in explaining the connection between that mission and judicial decisions whether or not to defer to school authorities. It will focus judicial attention on clearly defining the scope of school managerial authority.

The hope, in short, is that analyzing school speech through the lens of managerial authority will improve the clarity and perspicuity of judicial decisionmaking.

151. *E.g.*, Connick v. Myers, 461 U.S. 138, 140 (1983).