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REPLACING *TINKER*

Noah C. Chauvin *

INTRODUCTION

The Supreme Court’s decision in *Mahanoy Area School District v. B.L. ex rel. Levy*¹ is a victory for the free speech rights of schoolchildren. *Mahanoy* involved Brandi Levy, a then-high school student who was disciplined by her cheerleading coach for posting a vulgar message on social media disparaging the school and two of its athletic teams.² She challenged the coach’s actions in federal court, arguing that the school did not have the authority to discipline her for her speech, which took place off campus and outside of school hours.³

She won at every level. The district court granted her a preliminary injunction and then summary judgment.⁴ The Third Circuit agreed that the school district had violated her First Amendment rights, finding that the school erred in punishing Ms. Levy for her speech, which was protected by the First Amendment.⁵ Significantly, the Third Circuit concluded that Ms. Levy’s speech occurred “off campus” and that the *Tinker v. Des Moines Independent Community School District* standard—which allows schools to punish student speech that school officials reasonably believe will substantially disrupt school operations or impinge upon the rights of

* Attorney Advisor, U.S. Department of Homeland Security. I am grateful to the editors of the *University of Richmond Law Review*, whose careful work greatly improved this Article. All views—and all errors—are strictly my own.

1. 141 S. Ct. 2038 (2021).

2. *Id.* at 2043. Although Ms. Levy repeatedly used a word in her social media message that in some contexts refers to copulation, there is little dispute that her meaning was merely vulgar, not obscene. *See id.* at 2046; *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 191–92 (3d Cir. 2020).

3. *Mahanoy*, 141 S. Ct. at 2043.

4. *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607, 616 (M.D. Pa. 2017) (granting B.L. a preliminary injunction); *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 445 (M.D. Pa. 2019) (granting B.L. summary judgment).

5. *Mahanoy*, 964 F.3d at 194.

others—did not apply to off-campus speech.⁶ The school district filed a petition for a writ of certiorari which the Supreme Court of the United States granted, agreeing to answer the question of whether the *Tinker* standard applies to off-campus student speech.⁷

The Supreme Court's opinion, written by Justice Stephen Breyer,⁸ is not quite the blockbuster that many anticipated it would be.⁹ As is typical of Justice Breyer's approach to judging, the opinion is relatively narrow, focusing on the specifics of the case without establishing any bright-line rules.¹⁰ While the majority criticized the Third Circuit's decision, explaining that it "d[id] not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus," it declined to "set forth 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 protect the learning environment and the members of the school community.¹¹

However, the opinion did identify "three features of off-campus speech" that distinguish it from speech that takes place on-campus

6. *Id.* at 180–81, 189–91 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)).

7. Petition for Writ of Certiorari at I, *Mahanoy*, 141 S. Ct. 2038 (2021) (No. 20-255), 2020 U.S. S. CT. BRIEFS LEXIS 6442 at 4; *Mahanoy*, 141 S. Ct. at 2043.

8. *Mahanoy*, 141 S. Ct. at 2042.

9. See, e.g., Adam J. Tragone, *UPDATE: Supreme Court to Hear Mahanoy Area School District v. B.L. First Amendment Speech Protection Case*, NAT'L L. REV. (May 10, 2021), <https://www.natlawreview.com/article/update-supreme-court-to-hear-mahanoy-area-school-district-v-bl-first-amendment> [<https://perma.cc/ZQ4W-HTKV>] ("The Supreme Court of the United States will hear argument in *Mahanoy Area School District v. B.L.* and whatever the result, the decision will fundamentally change how a public school can discipline students for speech that occurs outside the school."); see also 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, 627–28 (2020) (arguing that the Supreme Court should grant certiorari in *Mahanoy* and create a bright-line rule preventing schools from regulating off-campus speech).

10. See *Mahanoy*, 141 S. Ct. at 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule . . ."); see also Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J.L. & POL'Y 1, 13–14 (2021); Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 357–59 (2019); Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1677 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)). The relative narrowness of the opinion may be why seven other Justices agreed to join it.

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

and weaken a school's need and ability to regulate it.¹² Specifically, the majority noted that: (1) schools rarely stand *in loco parentis* when it comes to students' off-campus speech; (2) school regulation of off-campus speech could lead to outright bans on certain kinds of student speech, which courts should be skeptical of—especially if they are bans on political or religious speech; and (3) schools have an interest in protecting even unpopular expression by their students, because schools, as “the nurseries of democracy,” should model important civic values for their students.¹³

Based on these features and the circumstances of the case, the Court concluded that the school district had acted impermissibly in punishing Ms. Levy for her off-campus speech.¹⁴ The Court explained that while Ms. Levy's post included vulgar language, given that the post was made off campus and outside of school hours, it was Ms. Levy's parents—not her school—that were responsible for determining what punishment (if any) was appropriate.¹⁵ Further, there was no evidence that Ms. Levy's off-campus speech caused a substantial disruption to the functioning of the school, either by disrupting the classroom or the cheerleading team's activities, or by negatively impacting cheerleaders' team morale.¹⁶ Therefore, the Court concluded that, though Ms. Levy's social media post was hardly the sort of soaring political rhetoric we often imagine to be the core concern of the First Amendment, it still merited protection.¹⁷ Quoting an earlier opinion involving similar vulgarity, the Court concluded: “We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege . . . fundamental societal values are truly implicated.”¹⁸

Because the *Mahanoy* majority opinion eschewed bright-line rules and gave little concrete guidance on the boundaries of appropriate speech regulation by schools, some see it as a rather tepid victory for student speech rights.¹⁹ Still, the Court's decision comes

12. *Id.* at 2046.

13. *Id.*

14. *Id.* at 2048.

15. *Id.* at 2047.

16. *Id.* at 2047–48.

17. *Id.* at 2048.

18. *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

19. See Catherine J. Ross, *One “Vulgar” Cheerleader Vindicated—But Other Students May Still Face Discipline for Off-Campus Speech*, FIRST AMEND. WATCH AT N.Y.U. (July 6, 2021), <https://firstamendmentwatch.org/one-vulgar-cheerleader-vindicated-but-other-students-may-still-face-discipline-for-off-campus-speech> [<https://perma.cc/P3MR-5DCC>].

as something of a relief to student speech activists, who feared that the Court may only have agreed to hear the case as a means of further restricting student speech rights.²⁰ Instead, they got an opinion that “reaffirmed the animating spirit of *Tinker*”²¹—a sure victory.

However, in this Article, I wish to question whether reaffirming the animating spirit of *Tinker* is the best way to protect student speech rights. In allowing schools to punish student speech that school officials reasonably believe could be substantially disruptive, *Tinker* finds students’ free expression rights on unstable ground. This is true for two reasons. First, the *Tinker* standard allows school officials to regulate student speech based on their own perceptions of what its impacts will be.²² While these perceptions must be reasonable, courts have shown extraordinary deference to educators’ claims that student speech could be substantially disruptive. Second, the substantial disruption standard allows speech to be restricted not because it is in some way unlawful, but rather because of what others’ reactions might be to it.²³ As I discuss below, government regulations with either one of these defects would generally be found unconstitutional in a nonschool context, because they give government officials too much discretion to burden or proscribe unpopular speech—the very harm the First Amendment’s free speech guarantee is designed to guard against.²⁴

For these reasons, I argue that *Tinker*’s substantial disruption standard ought to be replaced by something like the public forum doctrine, which tailors governments’ power to restrict speech in a given forum based on the forum’s traditional use and the government’s role in creating it and is highly skeptical of government discretion in determining what expression will be allowed in the forum.²⁵ In my view, schools should be allowed to regulate student speech only when they create or control the forum in which it is

20. See Nico Perrino, *So to Speak Podcast Transcript: Mahanoy v. B.L. Supreme Court Ruling Analysis*, FIRE (July 2, 2021), <https://www.thefire.org/so-to-speak-podcast-transcript-mahanoy-v-b-l-supreme-court-ruling-analysis> [<https://perma.cc/NJ67-78R2>].

21. *Id.*; see also David L. Hudson Jr., *First Amendment News 302.2: Supreme Court Breathes New Life Into Tinker and Rules in Favor of Student Speech*, FIRE (June 29, 2021), <https://www.thefire.org/fan-302-2-supreme-court-breathes-new-life-into-tinker-and-rules-in-favor-of-student-speech> [<https://perma.cc/34KQ-9367>]; Ross, *supra* note 19 (“Justice Breyer’s eloquent dicta . . . reaffirmed the vision that had animated *Tinker*.”).

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

23. *Id.*

24. See *infra* notes 123–31 and accompanying text.

25. *E.g.*, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

expressed. Otherwise, they should be without the power to regulate student speech. Even within the forums that they control, I argue that schools' ability to regulate student speech should be circumscribed.

I am neither a naïf nor a free speech absolutist²⁶—I recognize that there will be times when schools will have a legitimate need to impose content- and viewpoint-based restrictions on student speech that would be impermissible under the First Amendment in other contexts. Still, as I outline below, replacing the *Tinker* standard will limit school officials' authority to restrict student speech based on their own interpretations of it and will prevent them from proscribing speech based on other students' predicted or actual reactions to it. Not only will this mean that student speech is better protected than it currently is by *Tinker*'s substantial disruption standard, but it will bring the principles governing student speech regulation more closely in line with the rules that limit the government's authority over speech in nonschool contexts—allowing America's public schools to better serve their purpose as “nurseries of democracy.”²⁷

The Article proceeds in three parts. In Part I, I discuss the ways in which the *Tinker* standard is unusual: it allows effects-based regulation of speech and vests government officials with substantial discretion to determine which speech should be proscribed. I explain that these differences arise from conceptual flaws in the *Tinker* standard, that these flaws have the practical consequence of making the *Tinker* standard fundamentally unworkable, and that they warrant replacing the *Tinker* standard.

In Part II, I pick up on this thread and suggest that the *Tinker* standard be replaced with something approximating the public forum doctrine.²⁸ Specifically, I say that schools should only be allowed to regulate student speech if they create or control the forum in which that speech occurs. I argue that such a standard would remove a great deal of subjectivity from school officials' speech decisions, would be easier to apply, and would place a meaningful and readily identifiable limit on schools' authority to regulate “off-campus” speech.²⁹

26. My writing, however, does sometimes tend towards redundancy.

27. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021).

28. As I explain in Part III, “something like” does a fair amount of work in my formulation.

29. It would also make it easier to identify what counts as “off-campus” speech, as

Finally,³⁰ in Part III, I consider two counterarguments: first, that abandoning *Tinker* would leave schools powerless to address harmful speech such as bullying, especially if it occurred off campus, and second, that doing away with *Tinker* would prevent schools from enacting necessary speech controls while children are on campus. Although both arguments have some merit, I ultimately reject them.

I. EFFECTS-BASED SPEECH REGULATIONS

As noted above, the Supreme Court held in *Tinker v. Des Moines Independent Community School District* that schools may restrict speech if school officials reasonably anticipate that it will “substantially interfere with the work of the school or impinge upon the rights of other students.”³¹ Additionally schools may proscribe student speech that could reasonably be perceived as coming from the school;³² speech that is “lewd,” “indecent,” or “vulgar;”³³ and speech that celebrates, advocates for, or promotes illegal drug use.³⁴

When it was first decided in 1969, *Tinker* was rightly lauded as an “important” decision because it “impose[d] new limitation on the power of the state to restrain students from speech or conduct which would clearly be protected by the [F]irst [A]mendment if engaged in by adults.”³⁵ Still, it is undeniable that in the pantheon of free speech decisions, *Tinker* is odd. Outside of the schoolhouse gate, two related principles animate the law concerning First

discussed more fully in Part II.

30. Not really “finally,” per se—there is a conclusion. But it’s a paragraph long and doesn’t contribute anything substantive, so it doesn’t go in the roadmap.

31. 393 U.S. 503, 509 (1969).

32. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (explaining that, when it comes to “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school[,] . . . [e]ducators are entitled to exercise greater control over [these forms] of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school”).

33. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986).

34. *Morse v. Frederick*, 551 U.S. 393, 402–03 (2007).

35. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 154, 157–58 (1969); see also JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 84 (2018); Christopher J. Roederer, *What Was Wrong with Tinker: Mind the Gap*, 45 U. DAYTON L. REV. 229, 255 (2020). Indeed, as Professor R. George Wright has documented, “*Tinker* . . . remains popular, with or without some qualification, disclaimer, or particular interpretation, among contemporary free speech scholars.” R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1, 3 (2014).

Amendment free speech rights: the government may not restrict speech based on its content, and government officials do not have discretion to decide what speech is allowed. Of course, there are limits on these principles. The State may still proscribe, for instance, incitements to violence,³⁶ so-called fighting words,³⁷ and child pornography.³⁸ In each of these categories, speech may be limited based on its content and government officials will, by necessity, have some measure of discretion in determining which speech may be proscribed. Still though, as a general matter, content-based restrictions and unrestrained government discretion are not permissible forms of speech regulation under the First Amendment.

It was not always so. Indeed, the story of free speech litigation over the last century can be summed up as the expansion of protections for speech regardless of its content and the corresponding cabining of government officials' discretion to restrict speech for subjective reasons.³⁹ The First Amendment got off to an inauspicious start in the Supreme Court in the 1919 case of *Schenck v. United States*.⁴⁰ In that case, Justice Oliver Wendell Holmes, Jr., writing for a unanimous Court, held that words may be proscribed if they "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁴¹ On this basis, the Court upheld the convictions of two pamphleteers who had circulated a leaflet advocating for resisting the draft through means such as petitioning the government.⁴² Because it was illegal to interfere with the recruiting service, and because the Court could "not see what effect [the leaflet] could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out," it found that the pamphleteers' conviction did not violate the First Amendment.⁴³

36. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also* *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–10 (1982).

37. *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969).

38. *United States v. Williams*, 553 U.S. 285, 297–99 (2008); *New York v. Ferber*, 458 U.S. 757, 764–65 (1982).

39. *See* Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in *THE FREE SPEECH CENTURY* 1, 5–6 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

40. 249 U.S. 47, 52–53 (1919).

41. *Id.* at 52.

42. *Id.* at 50–53.

43. *Id.* at 51–53.

The result in *Schenck* seems shocking to our modern sensibilities: how could one ever lawfully advocate for political change if the government has the power to outlaw such advocacy? It would be a frightening world indeed if the government could, at its discretion, imprison anyone who criticized it. Recognizing these issues with the clear and present danger test, the Supreme Court subsequently substantially narrowed it.

In *Brandenburg v. Ohio*, the Court considered Clarence Brandenburg's First Amendment challenge to his conviction under a state statute that proscribed "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."⁴⁴ Mr. Brandenburg was a leader of a Ku Klux Klan group who gave a speech in a field in the middle of the night to eleven other Klan members and some members of the local media.⁴⁵ As part of that speech, he declared that the Klan was not "a revengent organization," but that if the federal government "continue[d] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."⁴⁶ In reversing his conviction, the Supreme Court explained that the First Amendment "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴⁷ This was a substantial restriction on the governments' powers to restrict even abhorrent speech that could interfere with legitimate governmental goals.

The trend away from subjective governmental authority to limit speech based on its content is perhaps best exemplified by the cases concerning the so-called "heckler's veto." A heckler's veto occurs when a person or persons opposed to a speaker's message acts in a manner that is dangerous or disruptive, in the hope of silencing the speaker.⁴⁸ For a long time, such tactics were effective. For instance, in *Feiner v. New York*, the Supreme Court found that the conviction of a civil rights agitator for incitement of a breach of the peace based on a speech he had given urging African Americans to

44. 395 U.S. 444, 444–45 (1969) (per curiam) (alteration in original) (quoting OHIO REV. CODE ANN. § 2923.13 (1969)).

45. *Id.* at 445–46.

46. *Id.* at 446.

47. *Id.* at 447.

48. See Noah C. Chauvin, *Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 33 (2018).

fight for their civil rights did not violate the First Amendment.⁴⁹ In upholding the man's conviction, the Court explained that the man was not arrested for his speech but for "the reaction which it actually engendered"—"some pushing, shoving and milling around" in the crowd of people listening to the man, who disapproved of what he was saying.⁵⁰ Arresting the man, the Court said, was an appropriate response to the "crisis" his words precipitated.⁵¹

Such a principle is clearly untenable. If listeners could silence a speaker merely by reacting poorly to his or her message, there would be little purpose in having a First Amendment at all. After all, the point of the First Amendment is to protect unpopular speech, as popular speech rarely needs protection from governments based on the sovereign power of the majority.⁵² These concerns are only exacerbated when the government need not prove any actual disturbance and instead may merely show that its agents expected one.

The Supreme Court recognized its error relatively quickly; twelve years after it decided *Feiner* it ruled in *Edwards v. South Carolina* that Black civil rights protestors could not be prosecuted for breach of the peace when there was no evidence that their march had led to any actual breach.⁵³ The Court subsequently expanded this principle, finding in *Gregory v. Chicago* that peaceful political protestors could not be held criminally liable for the unruly actions of those responding to their protest.⁵⁴ These principles hold no matter how repugnant the speech at issue: courts have consistently prevented government officials from restricting or burdening even the speech of Nazis based on what the officials predict will be the public's reaction to that speech.⁵⁵ As these heckler's veto cases demonstrate, the First Amendment generally will not tolerate expansive authority on the part of government agents to decide what speech they will prohibit or burden based on its content.

49. 340 U.S. 315, 317–18, 321 (1951).

50. *Id.* at 317, 319–20.

51. *Id.* at 321.

52. See Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021); Noah C. Chauvin, Essay, *Governments "Erasing History" and the Importance of Free Speech*, 41 N. ILL. U. L. REV. 1, 10–11 (2020).

53. 372 U.S. 229, 229–30, 233–34 (1963).

54. 394 U.S. 111, 113 (1969).

55. *E.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133 (1992); Collin v. Smith, 578 F.2d 1197, 1206–07 (7th Cir. 1978); Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 26 (Ill. 1978).

Tinker stands apart from these modern heckler's veto cases in that courts considering student speech may "not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of onlookers or a combination of circumstances."⁵⁶ 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.⁵⁷ Similarly, as long as school officials can provide some evidence supporting their assertion that speech will be disruptive, they may restrict it⁵⁸—something not generally allowable under the First Amendment. *Tinker* bucks the general trend not in that it originally allowed content-based and discretionary speech regulation, or even in that it allowed the government to restrict speech based on listeners' reactions to it—such standards were common as the First Amendment free speech standards were developed—but in that, in the fifty-plus years since it was decided, the protections *Tinker* affords have been narrowed, rather than expanded.⁵⁹

That the *Tinker* standard is an oddity in the pantheon of First Amendment free speech law, though, is not enough to justify doing away with it. A great many legal standards and concepts apply differently to children because children are different than adults.⁶⁰ The relevant question, therefore, is whether the *Tinker* standard treats children differently from adults in an acceptable manner and for acceptable reasons. In other words: does the *Tinker* substantial disruption standard treat schoolchildren's speech differently than that of adults because of the differences between children and adults?

It does not. The *Tinker* substantial disruption standard is conceptually flawed because it allows school officials to censor student speech almost with impunity. In theory, this should not be the case. The Supreme Court has described *Tinker*'s substantial disruption

56. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014).

57. *See DRIVER*, *supra* note 35, at 88–89.

58. *See Wright*, *supra* note 35, at 12–14.

59. *E.g.*, *Morse v. Frederick*, 551 U.S. 393, 402–03 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

60. This is particularly true in the context of public-school students, whom the courts have found have significantly different rights than do adults. *See, e.g.*, *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

standard as “demanding,” because it is not supposed to allow school officials to censor student speech based only on the officials’ belief that given speech will cause a substantial disruption.⁶¹ Indeed, as the Eleventh Circuit has explained, “student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to ‘a showing of mild curiosity’ by other students, ‘discussion and comment’ among students, or even some ‘hostile remarks’ or ‘discussion outside of the classrooms’ by other students.”⁶²

Yet, while courts have read these limitations onto the standard, *Tinker*’s language itself—which allows school officials to censor speech they reasonably believe will “substantially interfere with the work of the school or impinge upon the rights of other students”⁶³—contains no such limitation. It is an objective standard—school officials may not limit speech based solely on how they feel about it—but as long as they can point to some evidence tending to show that speech is or will be disruptive, it is entirely within their power to prohibit it. This is especially true because the core of “the work of the school” is to educate students, and even minor distractions can substantially interfere with this vital role.⁶⁴ Indeed, there is no reason under the plain language of the standard that school officials could not treat their own response to student speech as itself a substantial disruption, and as is discussed below, some school officials have done so. For these reasons, there is very little reason to imagine that, under the *Tinker* standard, schools are restricted to punishing student speech that occurs on campus—in the age of the internet and social media, even off-campus speech can easily have disruptive on-campus effects.⁶⁵

61. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2047–48 (2021); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

62. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1271–72 (11th Cir. 2004) (internal citations omitted); see also CATHERINE J. ROSS, *LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS’ FIRST AMENDMENT RIGHTS* 157 (2015).

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

64. *Wright*, *supra* note 35, at 13–14; see also C. Eric Wood, Note, *Learning on Razor’s Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Speech*, 15 TEX. J. C.L. & C.R. 101, 136–38 (2009).

65. Amanda N. Harding, Note, *Unfriending Tinker: The Third Circuit Holds Schools Cannot Regulate Off-Campus Social Media Speech*, 66 VILL. L. REV. 219, 238–39 (2021) (“[T]o preserve the intent behind *Tinker* and ensure a safe, secure school environment, the *Tinker* exception must apply to off-campus student social media speech.”).

This conceptual flaw with the substantial disruption standard has practical consequences. As Professor Catherine J. Ross has explained:

School officials must decide rapidly how to respond to political hyperbole, racially offensive speech, and speech supporting or condemning homosexuality, among other hot-button topics. Material disruption includes many situations that fall far short of danger to life and limb, and schools also sweep in many minor inconveniences that they regard as material interference with education. The courts have encouraged that tendency by failing to articulate the boundaries of material disruption more precisely.⁶⁶

It is not just that the *Tinker* standard allows school officials to abuse their power to censor in theory: school officials, often with the blessing of the courts, have been able to use the flexibility of the substantial disruption standard to undermine student speech—notwithstanding the basic principle that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression”⁶⁷ and that minimal disturbances are not sufficient to “meet *Tinker*’s demanding standard.”⁶⁸ Indeed, schools seeking to censor student speech under *Tinker* do so primarily through the substantial disruption prong of the test, not the impingement on the rights of others prong,⁶⁹ perhaps because the first prong is much easier to satisfy.

Thus, for instance, in *Walker-Serrano ex rel. Walker v. Leonard*, then-third grader Amanda Walker-Serrano was found to have caused a substantial disruption for protesting her class’s trip to the circus.⁷⁰ Specifically, Ms. Walker-Serrano circulated a petition among her classmates which said that “we 3rd grade kids don’t want to go to the circus because they hurt animals. We want a better feild [sic] trip.”⁷¹ Ms. Walker-Serrano circulated the petition among her classmates, and managed to get several dozen signatures on it.⁷² The “substantial disruption” occurred when, during a period when they should have been reading at their desks, several students gathered around Ms. Walker-Serrano’s desk to discuss the petition.⁷³ Based on this, the Middle District of Pennsylvania

66. ROSS, *supra* note 62, at 150.

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

68. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2047–48 (2021).

69. *See* ROSS, *supra* note 62, at 150.

70. 168 F. Supp. 2d 332, 344 (M.D. Pa. 2001).

71. *Id.* at 335.

72. *Id.*

73. *Id.* at 344. Ms. Walker-Serrano disputed this version of events, saying that a single

found that school officials were reasonable in silencing Ms. Walker-Serrano, because there had been “an actual classroom disruption” and it was reasonable to “believe that the situation could escalate further.”⁷⁴

Similarly, in *Cl.G. ex rel. C.G. v. Siegfried*, the District of Colorado held that a student who, while off campus, outside of school hours, and from his personal device, posted an antisemitic message on social media was properly suspended under *Tinker*.⁷⁵ Specifically, the student posted a picture of three of his friends, wearing clothing they had found in a thrift store, with the caption “Me and the boys bout to exterminate the Jews.”⁷⁶ Predictably, the message was seen by several of the student’s schoolmates, some of whom were understandably upset and showed it to their parents.⁷⁷ The parents, too, were understandably upset, and contacted the police, school officials, and members of the Jewish community.⁷⁸ Ultimately, four parents contacted the school expressing their concerns, several local news stories were run about the social media post, and the school devoted a thirty-minute advisory period to discussing the incident.⁷⁹ At the same time, the student was suspended pending the school’s “investigati[on] to determine the impact [of the student’s post] on the school environment”; eventually, the student was suspended for one year.⁸⁰ After the student ultimately sued, the District of Colorado held that he had failed to state a First Amendment claim upon which relief could be granted, as his actions led to a substantial disruption or, alternatively, foreseeably could have led to a substantial disruption.⁸¹

Likewise, the District of Arizona held in *Ryan v. Mesa Unified School District* that a high school softball coach was entitled to qualified immunity on a student-athlete’s claim that the coach had violated the First Amendment when he dismissed her from the team in part for posting “ITS WAR BITCHES’ [sic]” to one of her social media accounts.⁸² The parties disputed who the post was

student came to her desk to ask for her phone number; they did not discuss the petition. *Id.* at 336.

74. *Id.* at 344.

75. 477 F. Supp. 3d 1194, 1208–10 (D. Colo. 2020).

76. *Id.* at 1200.

77. *Id.* at 1201.

78. *Id.*

79. *Id.* at 1201–02.

80. *Id.* at 1201–03.

81. *Id.* at 1209–10.

82. 195 F. Supp. 3d 1080, 1085, 1095 (D. Ariz. 2016).

directed at.⁸³ Tensions were high on the team before the social media post; many members of the team and its coaching staff were deeply religious, which caused tensions with other team members, including the *Ryan* plaintiffs.⁸⁴ For instance, the plaintiffs contended that the coach encouraged pregame group prayers, which made some members of the team uncomfortable.⁸⁵ Unsurprisingly, the teenagers on the team were unable to navigate their differences gracefully; some team members appeared to revel in making their religious or more sheltered teammates uncomfortable by playing sexually explicit music, and less-religious team members were sometimes excluded from group activities.⁸⁶

It was in this context that the District of Arizona found—without analysis—that it was objectively reasonable for the coach to conclude that the student-athlete’s social media post would cause a substantial disruption on the team.⁸⁷ There was no evidence that the team was less effective because of the post, that team members were actively fighting because of it, or that more than a single player felt that there was actually a schism on the team. The court never explained why teenagers not getting along—hardly a shock to anyone who has ever known or interacted with teenagers—is itself a substantial disruption absent this kind of evidence.

These are cases involving student expression that was good, bad, and ugly. Each case involved an alleged “substantial disruption” of school activity. Each of these disruptions is comparable to the discussions that took up “5 to 10 minutes of an Algebra class ‘for just a couple days’” and the “upset” prompted by B.L.’s messages, disruptions the *Mahanoy* Court held “d[id] not meet *Tinker*’s demanding standard.”⁸⁸ And yet, in *Walker-Serrano*, *Siegfried*, and *Ryan*, experienced school administrators and judges disagreed.

It is possible to view these cases as aberrations, as failings not of the substantial disruption standard itself but of its application in particular instances. This is wrong. In fact, the *Tinker* standard’s conceptual flaws naturally lend it to such abuse. The school officials in *Walker-Serrano* could call a few students standing at

83. *Id.* at 1085.

84. *Id.* at 1083–84.

85. *Id.*

86. *See id.* at 1084–86.

87. *Id.* at 1095.

88. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2047–48 (2021).

another student's desk a substantial disruption,⁸⁹ just as the school officials in *Siegfried* could say the same of their own response to a student's speech,⁹⁰ and the coaches in *Ryan* could pretend that teenagers not getting along was a substantial disruption of school activities⁹¹ because the *Tinker* substantial disruption standard gives school officials nearly unfettered discretion to decide what speech is allowable and what speech is not. After more than fifty years during which the substantial discretion standard has failed—both in theory and in practice—to rein in the censorious excesses of school officials, it is time to replace it.

II. A REPLACEMENT STANDARD

Tinker is odd when considered in the context of the law governing nonschool speech. It may even be odd enough that we wish to replace it with something. As with all constitutional standards of long enough standing, however, the question is: replace it with what?⁹² For the sake of predictability and the benefit of students, administrators, attorneys, and judges, one tempting solution is to impose a bright-line rule that is easy to apply.⁹³ Two possible bright-line rules seem possible. The first would be Justice Clarence Thomas's approach, which would find that as a matter of history, students have little to no free speech rights as against their public schools.⁹⁴ The second would be the opposite approach, finding that public school students have free speech rights that are indistinguishable from those of adult members of the community in a public park, even when the students are on campus.⁹⁵ Neither approach is particularly compelling; the Constitution is not so

89. 168 F. Supp. 2d 332, 344 (M.D. Pa. 2001).

90. 477 F. Supp. 3d 1194, 1209–10 (D. Colo. 2020).

91. 195 F. Supp. 3d at 1095.

92. See, e.g., *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring) (discussing whether a longstanding free exercise standard should be replaced); see also *Wright*, *supra* note 35, at 24–25.

93. Of course, then legal scholars would suffer, as they would have less to write about. But this is likely of concern only to legal scholars, who could frankly stand to do a little less writing.

94. See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2059, 2061 (Thomas, J., dissenting); *Morse v. Frederick*, 551 U.S. 393, 410, 419–20 (2007) (Thomas, J., concurring).

95. Even the most ardent supporters of students' free speech rights do not tend to go this far. See, e.g., *Mahanoy*, 141 S. Ct. at 2045; *Schroff*, *supra* note 9, at 627–28.

wooden as to require either the total elimination or the total deification of students' free speech rights.⁹⁶

It is clear that what is needed is not a bright-line rule, but a standard that respects the free speech rights of students and their educators' need to enforce order in school. Here, too, there are options. On the one hand, courts might impose a standard that weighs the schools' interests in regulating speech heavily, reasoning that school officials are in the best position to determine what level of speech regulation is necessary to ensure that schools are able to fulfill their educational mandates.⁹⁷ Conversely, courts might choose a standard that preferences student speech rights, reasoning that schools can only fulfill their duty of educating informed citizens in an environment which closely reflects that which students will encounter outside of the schoolhouse gate.⁹⁸ It is towards this end of the spectrum that I believe student speech standards should fall.

To implement more adult-like speech protections for student speech, I propose that *Tinker's* substantial disruption standard be replaced with something approximating the public forum doctrine. Under the public forum doctrine, governments may regulate speech that takes place on their property in proportion to the use to which the property has traditionally been put and the uses for which it is designated.⁹⁹ The public forum doctrine refers to places such as parks and public sidewalks that have been traditionally "devoted to assembly and debate" as traditional public forums.¹⁰⁰ Speech in these places is entitled to a high level of protection: the government may not ban all expressive activity in them, but may instead implement time, place, and manner restrictions.¹⁰¹ Any content-based restrictions must be narrowly tailored to a compelling governmental interest.¹⁰² Similar principles apply to so-called limited public forums—spaces not traditionally open to speech that

96. Indeed, as the Constitution is printed on parchment made from animal skins, rather than paper made from wood pulp, it is not "wooden" at all. *Differences Between Parchment, Vellum and Paper*, NAT'L ARCHIVES, <https://www.archives.gov/preservation/formats/paper-vellum.html> [<https://perma.cc/3GU7-UZXN>] (Aug. 15, 2016).

97. See, e.g., Reesa Miles, Note, *Defamation Is More than Just a Tort: A New Constitutional Standard for Internet Student Speech*, 2013 BYU EDUC. & L.J. 357, 384–89.

98. See ROSS, *supra* note 62, at 288–92; Christopher Cavaliere, Note, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 912 (2011).

99. E.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

100. *Id.* at 45.

101. *Id.*

102. *Id.* In other words, content-based restrictions on speech in public forums must satisfy so-called strict scrutiny.

the government has opened to expressive activity.¹⁰³ Here too, governments are limited to content-neutral time, place, and manner restrictions on speech, but they may elect to close the forum at any time.¹⁰⁴ Finally, there are nonpublic forums: public property that is neither traditionally open for expression nor designated for that purpose by the government.¹⁰⁵ In these, the government is not limited to time, place, and manner restrictions and may regulate speech based on its content, but may not restrict speech based on its viewpoint.¹⁰⁶

Courts have considered applying the public forum doctrine to schoolchildren's speech in certain contexts. However, they generally reject the idea that schools serve as either traditional or limited public forums.¹⁰⁷ Schools need to be able to restrict "speech that is inconsistent with [their] pedagogical mission,"¹⁰⁸ and requiring them to implement only content- or viewpoint-neutral speech regulations could interfere with this legitimate need. Thus, schools generally only qualify as limited public forums in contexts in which they allow any expression, such as in the booking of school facilities by student or community groups or during school talent shows.¹⁰⁹

I do not wish to import the public forum doctrine into the school context wholesale. As I discuss below in Part III, I do not believe that such an importation would work. Among other things, even in nonpublic forums, governments may not enact viewpoint-based restrictions on speech, but such restrictions are sometimes necessary in schools. Rather, I wish to bring certain features of the public forum doctrine to bear on the school context.

103. *Id.* at 45–46.

104. *Id.* at 46.

105. *Id.*

106. *Id.* Content-based restrictions foreclose entire topics of discussion, whereas viewpoint-based restrictions proscribe certain viewpoints. So, a government that passes a law saying that no one can discuss baseball on government property has enacted a content-based restriction, whereas a government that passes a law saying that no one can root for the Washington Nationals on government property has enacted a(n egregious) viewpoint-based restriction. See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 11–12 (1993).

107. *E.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Henerey ex rel. Henerey v. St. Charles Sch. Dist.*, 200 F.3d 1128, 1132–33 (8th Cir. 1999); *Brody ex rel. Sugzdzinis v. Spang*, 957 F.2d 1108, 1118–20 (3d Cir. 1992); *Walker-Serrano ex rel. Walker v. Leonard*, 168 F. Supp. 2d 332, 345 (M.D. Pa. 2001).

108. *Henerey*, 200 F.3d at 1132.

109. See, e.g., *Hazelwood*, 484 U.S. at 267; *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 377 (D.N.J. 2006).

The first such feature is the public forum doctrine's geography-based focus. The public forum doctrine tailors the appropriate level of speech regulation to the use a particular piece of property is either traditionally put to or otherwise designated for.¹¹⁰ Similar principles ought to apply to schools. Schools should only be allowed to regulate student speech to the extent that they create or control the forum in which it takes place. As I explain further below, I do not mean for this to be a strictly geography-bound test. Indeed, while the public forum doctrine traditionally focused on government regulations of speech on government property,¹¹¹ it has subsequently been expanded to include spaces the government opens for expression in cyberspace.¹¹² Thus, for instance, government officials may not restrict the interactive spaces of their social media accounts based on the viewpoints expressed by the people posting there.¹¹³

Under traditional public forum doctrine, then (and here I refer to the traditional doctrine of public forums, not the doctrine of traditional public forums), the government's power to restrict speech is analyzed with respect to their ownership or dominion over the forum. Similar principles should apply to schools. In school buildings, on school trips or on the school bus, or even on school-issued technology such as tablets or laptops,¹¹⁴ schools should have the power to regulate student speech. However, what children say to one another outside of school or on their personal devices (particularly when used off campus) should fall outside of the school's dominion.¹¹⁵

110. *E.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

111. *E.g.*, *id.* at 45.

112. *E.g.*, *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019). *See generally* Patricia Beety & Joline Zepcevski, *Technological Transformation of the Public Square: Government Officials Use of Social Media and the First Amendment*, 47 MITCHELL HAMLINE L. REV. 510 (2021).

113. *Knight First Amend. Inst.*, 928 F.3d at 238.

114. This is not to say that schools should necessarily be monitoring everything that students are doing on school-issued technology. If schools are going to trust their students with such technology, then they should trust them (within reason) to use it appropriately. But to the extent that schools become aware of inappropriate speech on school technology, it should be within their power to restrict or punish it. Likewise, restrictions on the use of school technology, such as by blocking certain websites or setting terms of use are not constitutionally impermissible "prior restraints"; governments have the right to determine by what terms their technology is used.

115. This is particularly the case because school authority in these cases would substantially infringe on parental rights. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021); *see also id.* at 2048, 2053 (Alito, J., concurring).

The second feature I wish to import from the realm of public forum analysis is a general skepticism of governmental discretion in determining what speech to allow. Within the public forum doctrine, this skepticism is expressed in the near prohibition on content-based restrictions on expression in traditional and limited public forums, and in the fact that viewpoint-based restrictions are presumptively not allowed in any type of forum.¹¹⁶ As I will discuss below in Part III at length, skepticism of government discretion cannot manifest in the same way in schools, because schools have a legitimate interest in enacting some content- and viewpoint-based restrictions on speech. However, as discussed above in Part I, one of the problems with the *Tinker* substantial disruption standard is that it gives school officials too much discretion to decide what speech qualifies as a substantial disruption—even, in some cases, allowing them to classify their own response to speech as a reasonably foreseeable disruption that justifies censorship.¹¹⁷ Any replacement for the *Tinker* standard should be much more skeptical of such discretion.

In the public forum context, the level of skepticism is related to the use to which the forum is put. In traditional public forums, government discretion is highly constrained, governments have much greater power to regulate nonpublic forums, and limited public forums fall somewhere in the middle.¹¹⁸ In the school context, as well, similar principles should apply. In classrooms, schools' authority to regulate student speech is at its zenith; as will be explained in more detail in Part III, both content- and viewpoint-based restrictions must be tolerated to some degree in classroom settings, where the quality of students' education depends in large part on teachers being able to keep students on-task and learning the material properly. In other settings, such as the lunchroom, schools' discretion is much lower. There, too, some content- and viewpoint-based restrictions may be tolerable—we do not want young children discussing sex or students of any age cursing—but any such restrictions should be looked upon with a particularly jaundiced eye.

Importing these two features of the public forum doctrine into the First Amendment law governing school speech regulation

116. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Perry Educ. Ass'n*, 460 U.S. at 45.

117. *E.g.*, *C1.G. ex rel. C.G. v. Siegfried*, 477 F. Supp. 3d 1194, 1209–10 (D. Colo. 2020).

118. *See Perry Educ. Ass'n*, 460 U.S. at 46–47.

would help correct some of the issues with *Tinker*'s substantial disruption standard by making it more difficult for school officials to arbitrarily decide which student speech is tolerable based on its content. Indeed, it would have several benefits.

Perhaps the greatest benefit of moving away from the substantial disruption standard and to something akin to a public forum analysis for student speech is that such a shift would make it easier to define the bounds of a school's authority to regulate student speech. There is no question that there *are* bounds on a school's authority—*Tinker* allows greater restrictions on students' First Amendment rights than would generally be acceptable¹¹⁹—but where those bounds fall remains unclear.¹²⁰ This makes it difficult for school officials, students, parents, and attorneys to predict how courts will treat restrictions on student speech that arguably occurs off campus.

The lack of clarity arises partly from the fact that what we think of as "school" is not limited to what happens on the campus grounds.¹²¹ A great many activities that are clearly a part of school—athletics practices and games, band performances, and class trips, to name just a few—take place off campus, so a standard that finds that schools only have the power to regulate student speech on campus would prevent schools from exercising their authority in situations in which they have a clear interest in doing so. Another portion of the confusion arises from changing technology. At the time *Tinker* was issued, it made sense to focus a school's power to regulate on speech that took place inside the schoolhouse gate, as what a student said in, for example, the privacy of her own home would rarely impact the orderly operation of the school. Now, with the advent of social media, school-issued tablets and laptops, and remote learning, this is no longer the case. Finally, as

119. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); see also *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2048 & n.1 (2021) (Alito, J., concurring) (arguing that *Tinker* deals only with on-campus student speech); *Erzonznik v. Jacksonville*, 422 U.S. 205, 212 (1975) ("[M]inors are entitled to a significant measure of First Amendment protection."); DRIVER, *supra* note 35, at 8.

120. E.g., *Mahanoy*, 141 S. Ct. at 2045 ("[W]e do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus."); *Morse v. Frederick*, 551 U.S. 393, 401 (2007) ("There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."); Ross, *supra* note 19.

121. E.g., B.L. *ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 178–79 (3d Cir. 2020).

discussed above in Part I, the unclear boundaries come partially from conceptual problems with the *Tinker* standard: since *Tinker* allows regulation of speech that school authorities reasonably anticipate will “substantially interfere with the work of the school or impinge on the rights of other students,”¹²² schools seemingly have the power to punish any speech they believe will be disruptive or harmful, no matter where it takes place.¹²³

The standard that I propose would largely eliminate these problems. It would provide that a school’s power to regulate student expression stops the moment the student expresses himself or herself in a forum not of the school’s making. Thus, the things that students say using school laptops at home or on the bus on the way to an athletic competition, even though occurring “off campus,” would fall within the scope of permissible school regulation. On the other hand, things said during a sandlot baseball game taking place on a school field on the weekend, even though technically “on campus,” would fall outside of the school’s domain, as would the social media posts a high school cheerleader makes at the Cocoa Hut on a Saturday morning.¹²⁴ Focusing on the school’s creation or control of the forum—rather than the degree to which the speech does or does not interfere with school operations—would help make difficult questions about the bounds of a school’s authority to regulate speech much more straightforward to answer.

Another benefit is pedagogical: moving away from the *Tinker* substantial disruption standard to something approximating the public forum analysis for student speech means that students will be educated in a speech environment that much more closely approximates the one they will encounter outside of school. In his *Mahanoy* opinion, Justice Breyer observed that, as “the nurseries of democracy,” public schools have “an interest in protecting a student’s unpopular expression,” to help train students in “the workings in practice” of a well-functioning republic.¹²⁵ Replacing the

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

123. *See id.* at 513 (“[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.”); Harding, *supra* note 65, at 238–39 (“[T]o preserve the intent behind *Tinker* and ensure a safe, secure school environment, the *Tinker* exception must apply to off-campus student social media speech.”).

124. *See Mahanoy*, 141 S. Ct. at 2043.

125. *Id.* at 2046; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—

Tinker standard will help schools achieve this aim. Under current school speech doctrine, school officials may limit student speech if the officials reasonably believe that other people will have a forceful negative reaction to it.¹²⁶ But, as discussed above in Part I, this is not how speech regulation works outside of the schoolhouse gate. Ordinarily, government officials may not restrict otherwise-lawful speech merely because it is controversial or because listeners may or do have a negative reaction to it.¹²⁷ And, a government decision to restrict speech based on an official's content- or viewpoint-based assessment of what the likely audience reaction will be to that speech—as school officials must do when determining whether speech will substantially disrupt school operations—is highly suspect in nonschool contexts.¹²⁸

Therefore, replacing the substantial disruption standard with something similar to the public forum doctrine would help serve the important educational interests identified in the *Mahanoy* majority opinion by bringing student speech standards more closely in line with the standards that generally apply to non-school-related speech. Students would receive an education in the speech principles that will govern their and others' speech for the rest of their lives.¹²⁹ They might be forced to confront speech that makes them profoundly uncomfortable, that challenges fundamental aspects of their beliefs or identities, or that they find deeply insulting.¹³⁰ But they will encounter this kind of speech outside of school as well, and it will do them good to experience it first, to learn how to disagree amicably, and to find a way to live alongside even those with whom they vehemently disagree,¹³¹ in a safe and supportive school environment.¹³²

demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.”).

126. See *Tinker*, 393 U.S. at 509.

127. See Chauvin, *supra* note 48, at 44–47 (“[O]ver time, the Court’s jurisprudence in this area has increasingly trended towards familiar territory: even in the face of widespread discomfort, disgust, and outrage at a speaker’s message, the government has a duty to protect citizens’ free speech rights, and must remain content-neutral when regulating speech.”).

128. *E.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133–35 (1992).

129. See ROSS, *supra* note 62, at 288–92.

130. See, *e.g.*, *supra* notes 70–87 and accompanying text.

131. These are skills students will require when they encounter such speech in the outside world.

132. In fact, some might argue that students will best learn to cope with the fact that others disagree with them if the school environment is not particularly “safe,” at least where safety means protection from ideas that offend. See GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* 204–06 (2018).

In many respects then, replacing the *Tinker* substantial disruption standard with something approximating the public forum doctrine would be highly beneficial. Such a standard would constrain the arbitrary exercise of government censorship power and provide a clearer indication of in what circumstances schools could regulate their students' speech. It would therefore make it easier for students, their parents, school officials, lawyers, and judges to determine what speech regulations are appropriate, and what ones are constitutionally suspect. And, it would serve important pedagogical interests by training students on how to responsibly exercise one of our most crucial civil liberties. So far, so good. But, as with any standard, there must be drawbacks. What are they, and how do we deal with them?

III. CONCERNS AND LIMITATIONS

Even if there are good reasons for replacing the *Tinker* standard, and even if something like the limited public forum test is a viable alternative, there are potential issues that must be resolved. In this Part, I address two of them: first, the argument that eliminating the substantial disruption standard would leave schools powerless to address off-campus speech, such as bullying, that causes meaningful problems on campus, and second, the related argument that a standard like the limited public forum test would severely limit schools' ability to legitimately restrict on-campus student speech, such as vulgar language or off-topic classroom discussion. Although these are both legitimate concerns, I ultimately reject them.

As to the first concern, it is true that while the *Tinker* standard is often referred to as the "substantial disruption" or "substantial interference" standard (as, indeed, I have repeatedly referred to it in this Article), it actually has two parts: it allows proscription of speech that school officials reasonably anticipate will "substantially interfere with the work of the school or impinge upon the rights of other students."¹³³ One could legitimately worry that doing away with *Tinker* could have the unintended consequence of preventing schools from proscribing bullying or other forms of speech that impinge on the rights of other students.¹³⁴

133. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (emphasis added).

134. See Harding, *supra* note 65, at 238–39; Martha McCarthy, *The Fate of Student Off-*

However, this concern is without merit. There may have been a time at which the impingement portion of the *Tinker* standard was a necessary limit on the First Amendment rights of schoolchildren, but at this point any need is, at best, vestigial. This is because forms of speech which impinge upon the rights of others, such as harassment, fighting words, true threats, and child pornography, already fall outside the scope of the First Amendment's speech protections.¹³⁵ Schools do not need *Tinker* to proscribe such speech because they already have the authority to do so. There are real concerns about when and where schools may exercise this authority, but those concerns sound primarily in the Ninth and Fourteenth Amendments, not in the First Amendment.¹³⁶

The second concern, that a standard that looks something like the public forum analysis would prevent schools from implementing legitimate restrictions on student speech, warrants more in-depth consideration. This is a valid concern, particularly because, while governments are allowed to discriminate based on content in some forums, they are not allowed to discriminate based on viewpoint in *any* type of forum.¹³⁷ The trouble is that in a classroom, where the goal is to transmit knowledge, school officials need leeway to limit student speech based on both content and viewpoint.¹³⁸

Campus Expression: Mahanoy Area School District v. B.L., 387 WEST'S EDUC. L. REP. 439, 451–52 (2021).

135. See Matthew Strauser & Noah C. Chauvin, *Student-Athlete Employee Speech*, 19 VA. SPORTS & ENT. L.J. 171, 176–77 nn.49–55, 178–79 (2020). Of note, *Tinker* was decided about three and one-half months before the Supreme Court's decision in *Brandenburg v. Ohio*. See *Tinker*, 393 U.S. at 503; *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

136. See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring) (discussing the rights of parents in their childrens' education and parents' explicit or implicit delegation of some of that authority to schools); *id.* at 2059–62 (Thomas, J., dissenting) (discussing role of Fourteenth Amendment in schools' regulation of student speech).

137. *E.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Anderson v. Milwaukee Cnty.*, 433 F.3d 975, 979–80 (7th Cir. 2006); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004).

138. See DRIVER, *supra* note 35, at 72 (“Of course, no serious person asserted 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.”); *The Supreme Court, 1968 Term, supra* note 35, at 160 (“School authorities must be allowed to protect the primary educational function of teaching in the classroom and the secondary functions of school administration which necessitate maintenance of at least minimal order outside the classroom. Schools must also insure the physical safety of their students.” (internal citation omitted)). Strict adherence to one of the public forum categories could therefore “distract[] attention from the first amendment values at stake.” Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224

Consider an algebra class in which the teacher has asked the students to solve for x in the equation $2x + 3 = 7$. If a student raises her hand and begins to expound on her theory that the teacher, the school principal, and several members of the state's congressional delegation are lizard people bent on controlling humanity, the teacher needs to be able to cut her off, and, if the student will not stop or has exhibited a pattern of such behavior, dole out an appropriate punishment. This is a content-based restriction on the student's speech, and it is plainly legitimate. The teacher must be allowed to restrict classroom discussion to algebra; otherwise, her students would be able to filibuster their way out of having to learn any math at all.¹³⁹ Similarly, if a student raises his hand and says that $x = 4$, or gives such an answer on a homework assignment, quiz, test, or other such assessment, the teacher must be able to tell him that he is wrong. This is a viewpoint-based restriction on the student's speech— $x = 4$ is a viewpoint, of sorts—but again, it is plainly legitimate for a teacher to correct a student's errors when they are pedagogically relevant.¹⁴⁰ Schools need the authority to “punish” students for failure to demonstrate knowledge of the curriculum, even though governments generally may not restrict a person's speech based on the views he or she expresses.¹⁴¹

Similarly, schools have a legitimate interest in preventing or punishing on-campus vulgarity.¹⁴² Yet, there is no way to enforce such a prohibition without limiting certain viewpoints. “Fuck the Draft” is, after all, a different message from “I Abhor the Draft.”¹⁴³ But while “the States, acting as the guardians of public morality, may [not] properly remove . . . offensive word[s] from the public

(1984).

139. A dream for many students, I am sure.

140. A less abstract example than incorrect solutions for x in an algebra class might involve student answers on an assessment regarding the evolution unit of a biology class. One can easily imagine a student, when asked to explain the mechanism by which evolution operates, writing something like “There is no such mechanism. All of God's creatures are as He made them.” This is a perfectly valid viewpoint, but the teacher still must be able to mark it wrong.

141. Of note, however, is that schools cannot justify their decision to “punish” students for incorrect answers on the belief/conduct distinction that allows governments to, for instance, punish hate crimes, *see Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993), because any of the means that a student could reasonably be expected to use to express his belief that $x = 4$ (or that evolution is belied by God's intelligent design) are pure speech.

142. I do not mean for schools' ability to limit vulgarity to be bounded by geography; they also have, for instance, an interest in prohibiting vulgarity that occurs off campus during school trips or outings.

143. *Cohen v. California*, 403 U.S. 15, 25–26 (1971).

vocabulary” of adults,¹⁴⁴ they have much greater leeway when it comes to the children whom they are charged with caring for and educating.¹⁴⁵ This leeway is at its zenith when schools are regulating vulgarity, obscenity, or the kind of vicious name-calling at which children are so adept. So here, too, some degree of viewpoint discrimination is called for.

I am hesitant to push these principles too far, however. My algebra example involved questions of objective fact,¹⁴⁶ but what happens when students’ coursework calls on them to make subjective evaluations? It is broadly recognized that schools have at least some role to play in teaching their students certain values (including by removing offensive words from students’ public vocabulary),¹⁴⁷ but can schools ever tell students that their religious, philosophical, or political beliefs are wrong?¹⁴⁸ And, what to do with factually inaccurate statements that occur *outside* of the classroom? If a student tells his friends at lunch that the moon landings

144. *Id.* at 22–24.

145. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986); *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 48–49 (2d Cir. 2008); *Posthumus v. Bd. of Educ. of Mona Shores Pub. Schs.*, 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005); *see also* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 653 (2011) (“Protecting the school from disruption, of course, is not the only rationale in schools’ quivers when it comes to on-campus hostility about school officials. The educational rationale is also applicable here, at least in the context of lewd, vulgar, or plainly offensive speech (as in *Fraser*) or school-sponsored speech (as in *Hazelwood*). It is on this basis that schools can legitimately prohibit vulgar speech that does not rise to the level of causing a substantial disruption.”).

146. Similarly, the biology example I gave, *supra* note 140, involved one of the most widely accepted theories in science.

147. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021) (asserting that schools have “a strong interest in ensuring that future generations understand the workings in practice” that underpin our representative democracy). I disagree with Justice Breyer on this point. *Schools* do not necessarily have an interest in instilling democratic values in their students. Rather, *society* has an interest in schools instilling such values. *See Bethel Sch. Dist.*, 478 U.S. at 683 (“Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’” (internal citation omitted)); Wright, *supra* note 35, at 5–6.

148. To me, the answer is obviously “no.” After all, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (noting that students’ free speech rights are relatively high with regards to “personal expression that happens to occur on the school premises”). But a compelling argument can be made that, for instance, the State’s “fundamental, overriding interest in eradicating racial discrimination in education” means that school officials can enact a curriculum that requires students to affirm that racial discrimination is bad—even if such an affirmation runs counter to a student’s deeply held religious beliefs. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

were faked, can a teacher punish him for it? What if he denies the Holocaust?

In areas in which there is legitimate debate, where what is at issue is not objective fact but subjective interpretation of those facts or values, schools should not be in the business of “prescrib[ing] what shall be orthodox.”¹⁴⁹ Rather, decisions about such issues should be left up to the students and their parents.¹⁵⁰ Even where issues *outside* of the scope of legitimate debate—as in the example of the lunchroom Holocaust denier—schools should not be in the business of punishing students for erroneous statements if those statements are not made in the context of a curricular activity or to harass other members of the school community.¹⁵¹ Instead, the school’s response should be, at most, to provide the erring student with correct information—hardly a radical notion in a school.

Still, even with these limitations, it is clear that schools need to be able to effect both content- and viewpoint-based restrictions on their students’ speech. Any student speech standard that denied them this authority would undercut the schools’ abilities to do their jobs effectively.¹⁵² This is why I do not propose using the public forum doctrine to govern student speech without modification—even treating schools as a nonpublic forum would require speech regulations to be viewpoint-neutral, and if schools were viewed as limited public forums, any speech regulations would have to be content-neutral, as well.¹⁵³

Instead, my proposed standard would limit the reach of schools’ authority to regulate student speech to forums the school creates or controls, such as the school building itself, off-campus school

149. *Barnette*, 319 U.S. at 642.

150. Indeed, one could question whether the State ought to or is allowed to be in the business of inculcating values in students at all. But questions regarding the appropriate balance of parents’ and students’ individual rights as against the sovereign power of the majority are outside of the scope of this Article.

151. Some courts have found that “[s]chool officials have greater constitutional latitude to suppress student speech than to punish it.” *E.g.*, *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 777 (9th Cir. 2014); *see also* *Walker-Serrano ex rel. Walker v. Leonard*, 168 F. Supp. 2d 332, 334 (M.D. Pa. 2001) (“Unlike *Tinker*, *Fraser*, and *Hazelwood*, Plaintiff was not completely silenced on the issue. She was never disciplined.”). Even accepting this distinction as valid (and it is not obvious to me that we should), schools should also not be in the business of restricting wrong or wrong-headed speech that is not made within the context of curricular activities and does not interfere with the rights of other students.

152. On this point I agree with even those who are skeptical of students’ free speech rights. *See* *Roederer*, *supra* note 35, at 258.

153. *See* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811, 817 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

trips, and school-issued technology. Within these bounds, schools would be able to regulate student speech using a lower standard than would generally apply to government speech restrictions. This standard would allow, where appropriate, content- or viewpoint-based restrictions or prohibitions on speech.

“Where appropriate” is an important limitation here, however. For instance, school officials should not be allowed to censor speech based on viewpoint simply because they do not *like* a viewpoint—only because it is wrong. Viewpoint-based restrictions, then, should be limited to situations where objective facts are at issue in the classroom (or on assessments), or to restricting vulgarity, obscenity, and other school-inappropriate speech. Outside of the classroom, or where subjectivity is called for, school officials should not be allowed to censor based on viewpoint. Likewise, content-based regulations should generally be restricted to those contexts where they serve a pedagogical purpose. In the classroom and in certain other limited contexts, such as during sports games, educators should have the power to restrict the content of discussion to the topic at hand. In all other contexts, school officials should have very limited authority to regulate speech based on its content. One can imagine some circumstances in which such regulations will still be permitted—elementary school students will not be allowed to have sexually explicit discussions in the lunchroom—but these exceptions will be few and far between.

Under my proposed replacement standard, then, school officials will still be left with appropriate discretion to regulate student speech. Indeed, my discussion of the standard in this Part might lead some to raise the opposite concern: that using something like the public forum analysis leads to the same issues as using the *Tinker* standard. Specifically, one might worry that the standard would give school officials too much discretion to determine which speech they censor. When is a question one of objective fact, rather than subjective? In what situations are content-based restrictions on speech appropriate? My standard leaves these decisions to educators to make in the first instance.

It is true that the proposed standard is just a framework. As such, it leaves to school officials and courts the task of filling in the details. Too, it grants discretion to school officials to determine when content- or viewpoint-based restrictions on speech are appropriate. But it is a discretion significantly more constrained than that granted to school authorities under *Tinker*. As discussed above, it will substantially limit school officials’ authority to

regulate speech based on its content or viewpoint—a limit not in place under *Tinker*. It will also limit school officials’ ability to restrict speech based on listener reaction to it, an important innovation.

Of course, in a “perfect” world, we would be able to craft a single, easy-to-apply standard that would perfectly constrain educators’ discretion and guarantee maximal protection for students’ speech rights in every case. But such a world does not exist,¹⁵⁴ and school officials necessarily must have some discretion in determining for themselves how best to balance students’ rights against the legitimate needs of the school.¹⁵⁵ That being the case, we must content ourselves with identifying and enacting standards governing student speech rights that reasonably constrain arbitrariness, protect students’ speech rights, and bring student speech protections more closely in line with the protections that apply to adults. The standard I have proposed as a replacement to *Tinker* achieves these ends.

CONCLUSION

The *Mahanoy* opinion is undoubtedly a victory for student speech rights. That it is a somewhat tepid victory is a result of the Supreme Court’s understandable hesitance to “set forth a broad, highly general First Amendment rule” with sweeping and difficult-to-predict consequences.¹⁵⁶ The *Mahanoy* factors give courts the flexibility to decide cases with an eye toward their individual characteristics, unbound by bright-line rules that may lead to unfair outcomes. However, by leaving in place *Tinker*’s effects-based test for permissible censorship, the Court muddies the First Amendment waters by maintaining a standard that differs fundamentally from the way restrictions on speech are typically analyzed. The Court’s efforts to protect fairness—not to mention schoolchildren’s free speech rights—would be better served by bringing the free

154. Thank goodness! It would be immeasurably boring, and then what would I have to write about?

155. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 382, 392 n.4 (2009) (Thomas, J., concurring in part and dissenting in part); *Hardwick ex rel. Hardwick v. Hayward*, 711 F.3d 426, 440 (4th Cir. 2013); see also Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 728 (2009); Miles, *supra* note 97, at 389.

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

speech doctrines that apply to public schools in line with those that apply outside the schoolhouse gate.