STUDENT WORK

CATEGORY SHOPPING: CRACKING THE STUDENT SPEECH CATEGORIES

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I. INTRODUCTION

The American school faces a daunting task.[1] Like most Americans, teenagers do not enjoy being told what they can and cannot say. They also typically resent having to spend the majority of their waking hours within the schoolhouse walls. It is no overstatement to say, then, that schools walk a thin line when they attempt to regulate what these involuntary participants wish to say.[2] The public school is in an even tougher spot. Not only must it navigate the unenviable task of managing a vocal and unwilling population, but it must also comply with the United States Constitution and its guarantee of the freedom of speech.[3]

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1. This Article will focus exclusively on the law pertaining to on-campus speech in primary and secondary public schools. *See e.g.* Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?* 45 B.C. L. Rev. 173 (2003) (recognizing that student speech law may operate differently in the post-secondary context).

2. *See* Stanley Aronowitz & Henry Giroux, *Education under Siege: The Conservative, Liberal, and Radical Debate over Schooling* 95 (Bergin & Garvey Publishers 1985) (noting that "involuntary school attendance does not guarantee student obedience, and in some respects becomes a major issue promoting student resistance").

3. *See Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985) (holding that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (announcing that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

The public school that seeks to limit a student's speech also faces a difficult social paradox. Americans cherish the public education system as one of their most valuable institutions.[4] They want the public school to teach our children not only the knowledge and skills necessary to help them succeed as fully functioning adults, but also the freedoms and responsibilities that come with membership in a democratic society—with the ability to speak being one of the most treasured freedoms and solemn responsibilities.[5] The trouble is that the public school is a unique place—a controlled environment where the freedoms of the student and the supervisory needs of the state are bound to collide.[6] As such, the public school remains a battleground for student rights and state authority, with school officials caught in the crossfire when they attempt to stifle student expression.

Because the public school faces such a difficult task when it regulates student speech, we expect the law to provide clear guidance in the collision. Unfortunately, it has only further complicated the dilemma.[7] Not only is free speech law already riddled with its own problems,[8] but the United States Supreme

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4. In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the United States Supreme Court proclaimed that "education is perhaps the most important function of state and local governments."

5. Here is one way of looking at it:

> It is precisely because education is really, in the end, the process and craft of soul-making, and is as much about transmitting values and loyalties to our children as it is about outfitting them with useful data and "skill sets," that we care, argue, and even fight so much about it.

Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools*? 12 Lewis & Clark L. Rev. 45, 56–57 (2008).

6. One commentator sums it up nicely. It would be hypocritical to teach a student to respect certain freedoms while keeping him or her from exercising them, but allowing him or her to exercise them may undermine the school's ability to maintain an effective learning environment. Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 Baylor L. Rev. 623, 625 (2002).

7. In keeping with the judiciary's fondness for marine metaphors, the Second Circuit offered the following comments: "This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006).

8. *See Saxe v. St. College Area Sch. Dist.*, 240 F.3d 200, 218 (3d Cir. 2001) (acknowledging that "there are no easy ways in the complex area of First Amendment jurisprudence"); Josh Davis & Josh Rosenberg, *The Inherent Structure of Free Speech Law: Government as Patron or Regulator in the Student Speech Cases*, 83 St. John's L. Rev. 1047 (2009) (noting that "'it is not possible to comprehensively flowchart the First Amendment'" (quoting Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.1, 932 (3d ed., Aspen Publishers 2006))).

Court has decided to create special rules for student speech cases on account of the unique nature of the public school environment.[9] The problem is that these rules fail to provide the reliable framework that students, teachers, and administrators need.[10]

Instead of offering a universal legal standard that can be applied to any student speech case, the Court has chosen to create four separate categories of unprotected student speech: (1) disruptive speech;[11] (2) what we might conveniently call "ugly" speech;[12] (3) school-sponsored speech;[13] and (4) speech advocating illegal drug use.[14] Unfortunately, the Court has offered little if any guidance as to when these categories apply.[15] The result, of course, has been that lower courts have had to answer these questions on their own, and they have done so in remarkably different ways.[16]

While most commentators acknowledge that student speech law is inconsistent,[17] this Article will attempt to identify more clearly, precisely how the student speech categories lend themselves to these inconsistencies. In this way, practitioners might appreciate that this Article is not intended as merely an academic exercise. By attempting to reveal the cracks in the student speech

9. *See Morse v. Frederick*, 551 U.S. 393, 396-397 (2007) (reaffirming that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" in light of the "special characteristics of the school environment").

10. The National Association of School Boards has pleaded with the Court to clarify its student speech jurisprudence, urging that "school administrators working to balance free speech, discipline, safety, and effective learning are in desperate need of 'guidance.'" Garnett, *supra* n. 5, at 46; *see* Br. of Amici Curiae Natl. Sch. Bds. Assn. et al. in Support of Petrs. at 3, *Morse v. Frederick*, 2007 WL 140999 (U.S. 2007).

11. *Tinker*, 393 U.S. at 506. See *infra* Part II(A) for a full discussion of this case.

12. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 6 75, 682 (1986). See *infra* Part II(B) for a full discussion of this case.

13. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). See *infra* Part II(C) for a full discussion of this case.

14. *Morse*, 551 U.S. at 397. See *infra* Part II(D) for a full discussion of this case.

15. Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 S. Ct. Rev. 205, 209.

16. *See* Jerry C. Chiang, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 Wash. L. Rev. 403, 404 (2007) (recognizing that lower courts have had to interpret the student speech categories on their own).

17. *See e.g. id.* (noting that "the exact borders of First Amendment protection of student speech in public schools remain unclear"); Davis & Rosenberg, *supra* n. 8, at 1082 (acknowledging that the Court failed to identify "which [student speech] case applies to a given set of facts, assuming each case stands for a separate rule").

categories, the Author hopes that those in the field might discover new ways to manipulate them.

Ultimately, though, this Article will argue that the categories need to be abandoned in favor of a universal legal standard that can be applied to any student speech case. Such a standard would both take into account the role of the public school and be sure to protect against the weaknesses of the current categorical approach. Consequently, this Article will first lay out the categorical approach to student speech law with its four categories of unprotected student speech, identify its soft spots, prepare for a new universal standard by considering the role of the American public school, and finally propose a model universal standard that takes all of this into account. In many ways, we will be cracking the student speech categories.

II. THE STUDENT SPEECH CATEGORIES[18]

Ironically, the Court's categorical approach to student speech cases began with a general rule. Over time, however, the Court has moved away from this universal standard, choosing instead to allow a school to silence speech falling within separate categories of unprotected speech.

A. *Tinker*: Disruption

It all began with *Tinker v. Des Moines Independent Community School District.*[19] There, the Court sided with a group of students who were suspended when they wore black armbands to protest the Vietnam War.[20] Although the Court acknowledged the unique characteristics of the school environment, it pronounced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21] Specifically, the Court held that a school must allow student speech unless the

18. Because this Article is primarily concerned with how the lower courts have applied the categories, each case will be briefly discussed only with regard to how the Court created its respective speech category and how it left room for lower courts to struggle with it.

19. 393 U.S. 503.

20. *Id.* at 504.

21. *Id.* at 506. The Court did not specify what made the public school environment so unique.

speech would "materially and substantially disrupt the work and discipline of the school" or violate other students' rights.[22] Because the armbands did neither, the Court concluded that the students had a right to wear them.[23]

Tinker's rule was straightforward: students had a right to say what they wanted provided it did not disrupt the school.[24] Although lawyers could quibble about what constituted a sufficient disruption,[25] *Tinker* at least attempted to provide a clear standard that could be applied to any student speech case.[26]

B. *Fraser*: Ugly Speech

The Court moved away from *Tinker*'s general rule in *Bethel School District Number 403 v. Fraser*.[27] There, a school punished a student for giving a sexually suggestive speech at a school assembly.[28] This time, the Court took the school's side,[29] but not

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22. *Id.* at 513. In this Article, this will be referred to as the disruption standard or disruption test.

23. *Id.* at 514.

24. Although *Tinker* held that a student may not disrupt "the work and discipline of the school," *id.* at 513, lower courts have disagreed as to which school activities a student may and may not disrupt. Some courts require that the student's speech have some specific effect on class work or the educational process. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004). These courts tend to refuse to allow a school to silence student speech that merely expresses dissent with a school official's authority. *Snyder ex rel. J.S. v. Blue Mt. Sch. Dist.*, 593 F.3d 286, 302 (3d Cir. 2010). Other courts are less demanding. *Compare Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (allowing the school to punish high-school basketball players for circulating a petition in opposition to their coach because it undermined the coach's authority and divided players); *with Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 768–769 (9th Cir. 2006) (refusing to allow the school to punish high-school basketball players for circulating a petition in opposition to their coach because the school could not show the petition would have disrupted a basketball game or any other school activities).

25. *Infra* n. 129; *see generally* Ronald D. Wenkart, *Disruptive Student Speech and the First Amendment: How Disruptive Does It Have to Be?* 236 Ed. Law. Rep. 551 (2008) (outlining how lower courts have struggled to interpret consistently *Tinker*'s disruption standard).

26. *See* Jeremiah Galus, *Bong Hits 4 Jesus: Student Speech and the "Educational Mission" Argument after* Morse v. Frederick, 71 U. Pitt. L. Rev. 143, 150 (2009) (arguing that *Tinker* stood for a general rule before *Fraser* changed the landscape of student speech law).

27. 478 U.S. 675.

28. *Id.* Fraser gave this speech in support of a candidate for student government office:

> I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing

because the student's speech was materially and substantially disruptive.[30] For the Court, Fraser's speech was not like the armbands in *Tinker*—the Court drew a "marked distinction" between the political nature of *Tinker*'s protest and the sexual character of Fraser's speech.[31] As such, the Court held that a school may punish student speech simply because it is "lewd,"[32] "vulgar,"[33] "offensively lewd,"[34] or "plainly offensive."[35] The Court recognized that a school could easily find that such inappropriate speech "would undermine [its] basic educational mission."[36]

After *Fraser*, *Tinker* no longer provided the only rule for student speech cases. On the one hand, *Fraser* allowed a school to silence a nebulous category of speech that may have included anything from merely "inappropriate" speech to "plainly offensive" student expression.[37] In other words, *Fraser* created a category of student speech that we might conveniently call "ugly" student expression. On the other hand, *Tinker* now governed another group of student speech, but it was unclear what comprised that group.

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and pushing until finally he succeeds. Jeff is a man who will go to the very end, even the climax, for each and every one of you. So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

Br. of Respts., *Bethel School Dist. No. 403 v. Fraser*, 1986 WL 720451 at **1-2 (U.S. 1986).

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

30. Although some students "hooted and yelled" during the speech, some made sexual gestures, and one teacher chose to forgo some of her lesson to discuss the speech with her students, *id.* at 678, the Court mentioned none of this in reaching its decision.

31. *Id.* at 680. The Court did not explain how this distinction was important, and it never expressly distinguished *Tinker* because of it. As discussed *infra* Part III(A)(1)(c), this has led courts and commentators to wonder whether *Fraser* limited *Tinker* to political speech cases.

32. *Fraser*, 478 U.S. at 687.

33. *Id.*

34. *Id.*

35. *Id.* at 683.

36. *Id.* at 685.

37. As examined *infra* Part III(A)(2), courts disagree on how ugly a student's speech must be to violate *Fraser*. Some courts hold that *Fraser* allows a school to silence only speech that is "lewd, vulgar, indecent, or plainly offensive." *Newsom ex rel. Newsom v. Albemarle Co. Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003). Others allow a school to prohibit student expression whenever it is inconsistent with the school's educational mission. *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000). Still others allow a school to stifle speech that is merely inappropriate. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008).

C. *Hazelwood*: School-Sponsored Speech

The Court created yet another category of student speech when it decided *Hazelwood School District v. Kuhlmeier*.[38] In *Hazelwood*, the Court upheld a school's refusal to publish two student articles in the school newspaper.[39] Like in *Fraser*, it found that this type of speech did not need to be judged under *Tinker*'s strict disruption standard.[40] But it also did not assess the student articles under *Fraser*. Instead, it found that a different rule should apply when a student speaks within a school's nonpublic forum[41]—in other words, when others might reasonably believe that the student's speech "bear[s] the imprimatur of the school."[42] Specifically, it held that a school may stifle such "school-sponsored" speech as long as its decision is "reasonably related to legitimate pedagogical concerns."[43] Finding that the school had not made its newspaper a public forum, the Court held that the school acted reasonably when it refused to publish the student articles.[44]

The Court in *Hazelwood* could have assessed the school's actions under *Tinker* or *Fraser*.[45] If it had done so, the Court might have cleared up some nagging questions regarding the spe-

38. 484 U.S. 260.

39. *Id.* at 264, 276. One article described some students' experiences with pregnancy and the other discussed how divorce affected students. *Id.* at 263.

40. *Id.* at 272–273.

41. For purposes of free speech law, a public forum is a place that is either traditionally open to the public for expressive purposes or one that the government has intentionally opened to the public for such use. *Intl. Socy. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). A nonpublic forum is a place the government has not opened for public discourse. *Id.* at 678. The government may regulate speech in a public forum only if it has a compelling interest in doing so and its regulation is narrowly tailored to furthering its interest. *Id.* It may regulate speech in a nonpublic forum whenever reasonable and as long as the government is not merely attempting to stamp out a particular viewpoint. *Id.* at 679.

42. *Hazelwood*, 484 U.S. at 271.

43. *Id.* at 273. Note how this reasonableness standard is merely the nonpublic-forum standard discussed *supra* n. 41 as applied in the school context.

44. *Id.* at 270.

45. It does not seem that the articles were sufficiently disruptive under *Tinker*—nowhere did the Court suggest that the articles would have disrupted any school activities. But it is surprising that the Court did not also consider whether *Fraser* would have allowed the school to censor the articles. After all, in referring to the student pregnancy article, the Court did acknowledge that the school could have reasonably believed that "such frank talk was inappropriate in a school-sponsored publication distributed to [fourteen]-year-old freshmen . . . ." *Id.* at 274.

cific types of speech that both of those cases were intended to govern. Instead, it chose to add an entirely new category of "school-sponsored" speech to the mix, a category not without its own nagging questions.[46] Thus, *Hazelwood* merely raised more issues with regard to when and how each category should apply to any particular student statement.

D. *Morse*: Drug-Promoting Speech[47]

The Court had an opportunity to mop up the mess in *Morse v. Frederick*.[48] Unfortunately, it only made things worse when it added yet another category to the student speech goulash.

In *Morse*, a school suspended a student for displaying a banner reading "BONG HiTS 4 JESUS" on a public sidewalk during an Olympic ceremony.[49] The Court upheld the school's actions, but not because the student's banner was disruptive, ugly, or school sponsored.[50] Instead, the Court held that a school may also silence student speech when it reasonably believes the speech promotes illegal drug use.[51] Finding that the student's banner reasonably appeared to advocate drugs, the Court held that the school could punish him for displaying it.[52]

In so holding, the Court acknowledged that *Tinker* was no longer the only "mode of analysis" available in student speech cases, but it refused to explain what that mode of analysis was or when it applied.[53] Although it recognized that *Tinker* involved political speech, it declined to decide whether it was limited to political speech cases.[54] When the Court addressed the differences between *Tinker* and *Fraser*, it merely acknowledged that

46. *Infra* n. 130.

47. Because lower courts have not had much of a chance to deal with *Morse*, this Article will briefly discuss Morse and limit the majority of its discussion to how the lower courts have construed *Tinker*, *Fraser*, and *Hazelwood*.

48. 551 U.S. 393.

49. *Id.* at 397.

50. *Id.* at 410.

51. *Id.* at 397.

52. *Id.* at 410.

53. *See id.* at 405 (refusing to resolve the "mode of analysis" debate).

54. *See id.* at 403–404 (refusing to decide whether *Fraser* distinguished *Tinker* based on the political content of the speech involved in *Tinker*).

"[w]hatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*."[55]

E. The Result: Four Categories of Student Speech

Whatever general rule the Court may have attempted to create in *Tinker* has been chiseled away by the Court's subsequent student speech decisions.[56] Now, whether a school may silence student speech depends on whether the speech falls within any one of four categories of unprotected expression: a school may limit student speech if it is disruptive under *Tinker*, ugly under *Fraser*, school sponsored under *Hazelwood*, or drug-promoting under *Morse*.[57] Unfortunately, these categories have plagued the lower courts.

III. CRACKS IN THE CATEGORICAL APPROACH

The student speech categories pose several problems for lower courts. First, courts have trouble deciding which of the categories apply to any given set of facts, often doing so in different ways. Second, even if the courts were to be given clearer guidance, the categories inherently compel illogical results.

A. Category Shopping: Problems in Choosing among the Categories

The inconsistencies found in student speech law are nothing new.[58] Courts and commentators have long lamented that student

55. *Id.* at 405.

56. As discussed *infra* Part III(A)(1)(b), some courts still view *Tinker* as standing for a protective general rule that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

57. Some courts add a fifth category to the mix. In addition to these four categories, they also allow a school to silence student speech when the school's regulation is content neutral. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745 (5th Cir. 2009). These courts apply a "time, place, and manner" standard to such regulations. *Id.* This standard allows a government to regulate the time, place, or manner of speech as long as (1) the government has the constitutional authority to regulate the speech; (2) the regulation furthers an important governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) the regulation goes no further than necessary. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

58. The entire body of free speech law suffers from this affliction. *See* William A. Kaplin, *American Constitutional Law: An Overview, Analysis, and Integration* ch. 12, § B.1, 342 (Carolina Academic Press 2004) (noting that free speech law's "complex maze of path-

speech cases are difficult to reconcile.[59] But we might understand how the courts are able to reach their seemingly irreconcilable decisions by identifying the different ways in which they choose to resolve the three major issues with the student speech categories: (1) how *Tinker* fits in with the other categories; (2) how disruptive, ugly, school sponsored, or drug-promoting a student's speech must be to violate each category; and (3) the extent to which the categories should not overlap.

1. Finding a Place for Tinker

Before a court can properly categorize the specific student speech before it, the court must first determine what the appropriate categories are and how they relate to each other.[60] Courts have had a particularly difficult time with *Tinker*'s role. The problem is that *Tinker* at one time stood for the general rule that student speech was protected unless it was disruptive.[61] But when *Fraser* appeared to distinguish *Tinker* and held that a school could silence ugly speech even if it was not disruptive,[62] *Tinker*'s status was called into question. Was *Tinker* now just another category of unprotected speech, or was it something more?

Lower courts have struggled to answer these questions, and the way they answer them might explain how they reach the seemingly irreconcilable results that they do. Specifically, courts have taken three different approaches: (1) some see *Tinker* as just another category of unprotected speech; (2) some treat *Tinker* as a general rule that protects student speech unless one of the other three categories apply; and (3) others acknowledge that *Tinker* may specifically protect political speech.[63]

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ways" has resulted in a haphazard jurisprudence).

59. *Supra* n. 17; *e.g.* Chiang, *supra* n. 16, at 404 (discussing the lack of clarity in First Amendment jurisprudence relating to student speech); Davis & Rosenberg, *supra* n. 8, at 1048 (observing that "free speech law appears vague at best and incoherent at worst").

60. In other words, we should not assume that the student speech categories are coequal. For example, a court could very well find that it must consider the categories in some sequential order. *See* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 Loy. L. Rev. 355, 391 (2007) (arguing that courts should first analyze whether a student's speech violates *Hazelwood*, then whether it violates *Fraser*, then whether it violates *Morse*, and finally whether it is political under *Tinker*).

61. *Supra* pt. II(A) (discussing the general rule set forth by the Court in *Tinker*).

62. *Fraser*, 478 U.S. at 680, 683.

63. Some commentators have even suggested that *Tinker* now plays no meaningful role whatsoever, arguing that the case has been all but implicitly overruled. *See* Curtis G.

a. *Tinker* as an Alternative Category of Unprotected Speech

One way some courts have chosen to resolve *Tinker*'s role is to treat it as just another category of unprotected speech. To these alternative-category courts, *Tinker*'s disruptive speech is merely one among the four different types of speech that a school may permissibly regulate.[64] For example, in *Scott v. School Board of Alachua County*,[65] a high school suspended a group of students who displayed Confederate flags on school grounds.[66] In a per curium opinion,[67] the Eleventh Circuit upheld the school's actions, finding that the flags were both inappropriate under *Fraser*[68] and disruptive under *Tinker*.[69]

For alternative-category courts like *Scott*, *Tinker* is merely a fourth arrow in the court's quiver—an alternative means of limiting student speech available just as readily as any one of the other three categories.[70] While the school was able to ban the Con-

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Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU Educ. & L.J. 1, 14 (noting that *Tinker* now merely serves as a meaningless "analytical backdrop that has been largely ignored by the Court in the forty years since the decision was issued"); Miller, *supra* n. 6, at 636 (acknowledging that *Fraser* may have "transformed the *Tinker* pronouncement into a mere decoration, something to be mentioned formally at the beginning of an opinion but never actually followed"). No court appears to have explicitly taken this position.

64. The other three types of speech are *Fraser*'s ugly speech, *Hazelwood*'s school-sponsored speech, and *Morse*'s drug speech. *Supra* pts. II(B)–(D).

65. 324 F.3d 1246 (11th Cir. 2003).

66. *Id.* at 1247.

67. The court quoted the district court's order granting summary judgment for nearly all of its analysis. *Id.* at 1247–1249.

68. *Id.* at 1249. The court found that "'certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context.'" *Id.* (quoting *Denno v. Sch. Bd. of Volusia Co.*, 218 F.3d 1267, 1273 (11th Cir. 2000)). See *supra* note 37 for a list of other courts that have used *Fraser* to ban merely "inappropriate" speech.

69. *Scott*, 324 F.3d at 1249. Racial tensions justified the school's fears that the flags might cause a disruption. *Id.*

70. Other courts have followed the alternative-category approach. *See e.g. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175, 1177 n. 14 (9th Cir. 2006), *vacated sub nom.*, *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (noting that because the student's speech violated *Tinker*, it did not need to consider whether the speech violated the "plainly offensive" category established in *Fraser*); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365–1366 (10th Cir. 2000) (finding that *Tinker* allowed the school to punish a student for drawing a Confederate flag in math class); *Brandt ex rel. Brandt v. Bd. of Educ. of Chi.*, 326 F. Supp. 2d 916, 921–922 (N.D. Ill. 2004) (hinting that it could have used *Tinker* or *Fraser* to allow the school to ban offensive student T-shirts).

federate flags because they were inappropriate under *Fraser*, *Tinker* additionally allowed the school to prohibit them because they were disruptive.

b. *Tinker* as a Protective General Rule

Not all courts treat *Tinker* as an alternative category of unprotected speech. Instead, some courts interpret *Tinker*'s pronouncement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[71] as creating a general rule that primarily *protects* student speech unless it is disruptive.[72] As such, instead of using the case alongside *Fraser*, *Hazelwood*, and *Morse* as merely another way of limiting student speech, these courts view the latter three cases as carving out exceptions to *Tinker*'s protective general rule.

The Second Circuit followed this approach in *Guiles ex rel. Guiles v. Marineau*.[73] There, a seventh grader wore a T-shirt impugning President George W. Bush by placing his depiction amid various political and drug-related images.[74] After wearing the shirt several times without disruption, the school forced the student to place duct tape over the drug and alcohol images.[75] The court found that the school's actions violated the student's First Amendment rights.[76] Citing *Tinker*'s pronouncement that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[77] the court found that *Tinker* generally protected student speech and that *Fraser* and *Hazelwood* created specific exceptions to this general rule.[78]

71. 393 U.S. at 506.

72. One court has noted that the Second, Third, and Ninth Circuits now follow this approach. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 639 (D.N.J. 2007). Several commentators have also espoused this approach. *See e.g.* Dickler, *supra* n. 60, at 383 (arguing that the latter three cases in the *Tinker* quartet (*Fraser*, *Hazelwood*, and *Morse*) created exceptions to *Tinker*'s protective standard); Miller, *supra* n. 6, at 662 (offering that *Fraser* and *Hazelwood* "created narrow exceptions" that can be used to avoid *Tinker*'s expansive protection).

73. 461 F.3d 320.

74. *Id.* at 322. The shirt portrayed President Bush as "Chicken-Hawk-In-Chief," placing his depiction amid images of oil rigs, dollar signs, lines of cocaine, and a martini glass with an olive in it. *Id.*

75. *Id.* at 322–323.

76. *Id.* at 330–331.

77. *Id.* at 324 (quoting *Tinker*, 393 U.S. at 506).

78. *Id.* at 325–326.

Although the court acknowledged that schools enjoy wide latitude to prohibit speech that violates *Fraser* or *Hazelwood*, it held that *Tinker* protects all other speech unless the school can meet its "more exacting" disruption test.[79] After first finding that the shirt did not violate *Fraser* or *Hazelwood*,[80] the court then found that it was not disruptive under *Tinker*'s more protective rule.[81] Thus, *Tinker* allowed the student to wear it.[82]

How a court chooses to use *Tinker* can affect the way it decides any given case. Because general-rule courts like *Guiles* view *Tinker* as primarily *protecting* student speech, it is more difficult for a school to prove that a student's speech is disruptive in these courts than in alternative-category courts. Not only do general-rule courts like *Guiles* refuse to consider whether a student's speech violates *Tinker* unless the speech does not violate any of the exceptions, but they also treat *Tinker*'s disruption standard as "more exacting"[83] on a school than these "more permissive"[84] exceptions.[85] This is not the case with alternative-category courts like *Scott*. Because alternative-category courts view *Tinker* as just one of four ways to limit student speech, they treat its disruption standard as no more or less difficult to satisfy than any of the other three categories.[86]

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79. *Id.* at 325. This case was decided before *Morse* would have added another exception to *Tinker*'s general rule. In fact, *Guiles* might have been decided differently if the court could have used *Morse*'s category of unprotected drug speech. *DePinto*, 514 F. Supp. 2d at 641 n. 5.

80. *Guiles*, 461 F.3d at 327–329.

81. *Id.* at 330. The student had worn his shirt repeatedly without causing any disruptions. *Id.* at 331.

82. *Id.* at 330–331.

83. *Id.* at 325; *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 528 (9th Cir. 1992); *see also Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 577–578 (6th Cir. 2008) (citing *Boroff*, 220 F.3d at 468 (referring to *Tinker*'s disruption test as a "high standard")). One commentator, following the general-rule approach, describes *Tinker*'s disruption standard as "a heavy burden to carry." Miller, *supra* n. 6, at 653.

84. *Saxe*, 240 F.3d at 216.

85. Some general-rule courts might even "tinker" with the language of *Tinker*'s disruption test to make it more demanding on a school. *Tinker* requires the school to show only a reasonable fear of a "*substantial* disruption of or *material* interference with school activities." 393 U.S. at 514 (emphasis added). Nevertheless, at least two courts following the general-rule approach required the schools in their cases to show a "*specific* and *significant* fear of disruption." *Saxe*, 240 F.3d at 211 (emphasis added); *DePinto*, 514 F. Supp. 2d at 646.

86. Some courts appear confused about which approach to follow. In *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001), for example, the court appeared to align itself with the general-rule courts when it cited *Saxe*, a general-rule

It should not be surprising, then, that these two types of courts might reach inconsistent results. Indeed, in *Sypniewski v. Warren Hills Regional Board of Education*,[87] the Third Circuit confronted a case similar to *Scott* but reached a different result largely because it chose to treat *Tinker* as a protective general rule rather than as an alternative category of unprotected speech. *Sypniewski*, like *Scott*, involved a school with a history of racial hostility, particularly with regard to the Confederate flag.[88] Sypniewski ran with a "gang-like" group of students known as "the Hicks," a group that fancied wearing clothing emblazoned with the Confederate flag to school on "White Power Wednesdays."[89] The school suspended him after he wore a Jeff Foxworthy shirt with the word "redneck" on it[90]—a word that Sypniewski believed went hand-in-hand with the same Confederate flag the *Scott* court had allowed a school to ban under *Tinker*.[91]

Surprisingly, however, the court did not side with the school as the *Scott* court had.[92] Unlike the *Scott* court, though, the court used *Tinker* as a protective general rule, finding that student speech that does not violate *Fraser* or *Hazelwood* "is subject to *Tinker*'s general rule" and may be regulated only if the school can point to a substantial disruption.[93] Accordingly, after finding that the shirt did not violate the *Fraser* or *Hazelwood* exceptions,[94] it seemed to demand that the school show a more compelling fear of

court, for the proposition that "'[s]peech falling outside [*Fraser* and *Hazelwood*] is subject to *Tinker*'s general rule.'" *Id.* at 453 (quoting *Saxe*, 240 F.3d at 214). Instead of first analyzing whether the speech violated *Fraser* or *Hazelwood* as would be expected of a general rule court, however, the court first analyzed whether it violated *Tinker*. *Id.* at 454.

87. 307 F.3d 243 (3d Cir. 2002).

88. *Id.* at 246, 254.

89. *Id.* at 247.

90. *Id.* at 249–251. The shirt featured comedian Foxworthy's timeless "You Might Be a Redneck if . . . " routine. *Id.* at 249–250. This particular shirt offered to help sports fans identify whether they were of the redneck variety. *Id.*

91. Sypniewski wore his "redneck" shirt after the school forbade students from wearing Confederate flag clothing. *Id.* An editorial in the school newspaper acknowledged that Sypniewski associated the word "redneck" with the Confederate flag. *Id.* at 255. He was also pictured in a local newspaper article wearing a shirt with the words "Not only am I perfect, I'm a Redneck too!" and with the Confederate flag showing through the letters. *Id.* at 247. Moreover, two school administrators attested that the racist, Confederate-flag-wearing group "the Hicks," with which Sypniewski associated, was also called "the Rednecks." *Id.* at 255.

92. *Id.* at 258.

93. *Id.* at 254. This case was decided before *Morse* was.

94. *Id.* at 254.

disruption than the *Scott* court had. Although the *Scott* court held that a student's statement is disruptive whenever it has "become associated with racial prejudice [and is thus] likely to provoke feelings of hatred and ill will in others,"[95] the *Sypniewski* court apparently did not think Sypniewski's racially loaded use of the word "redneck" was enough. Unlike in *Scott*, the school had to show more than a "mere association" between the speech and the school's racial problem.[96] Instead, it had to "point to a particular and concrete basis for concluding that the association is strong enough to give rise to [a] well-founded fear of genuine disruption," and it could not.[97]

Thus, because the court chose to use *Tinker* as a general rule, Sypniewski could wear his "redneck" shirt even though he saw no difference between the word and the flag *Scott* had banned.[98]

c. *Tinker* and Political Speech

Lower court decisions may also depend on whether a student's speech is political. After all, *Tinker* unmistakably involved political speech,[99] and the Court recognized this in both *Fraser* and *Morse*. In *Fraser*, the Court drew a "marked distinction" between the political speech in *Tinker* and the sexual speech in its own case,[100] and the *Morse* Court flatly acknowledged that the students in *Tinker* "sought to engage in political speech . . . ."[101] Nevertheless, the Court refused to decide in either case whether this meant that *Tinker* was limited to political speech cases[102] or if

95. *Scott*, 324 F.3d at 1249. The *Scott* court made this statement when it was analyzing whether Confederate flags violated *Fraser*, but it found that they violated *Tinker* for the same reasons. *Id.*

96. *Sypniewski*, 307 F.3d at 257.

97. *Id.* The court found that the school could not prove that Sypniewski had used the word "redneck" as a gang reference for the racist student group called "the Hicks." *Id.* at 255–256.

98. Interestingly, although the court noted that the school could have banned the Confederate flag, it ignored the fact that Sypniewski and his friends seemed to use the flag and the word "redneck" interchangeably. *Id.* at 254; *see also supra* n. 91 and accompanying text (confirming that the Sypniewski associate the term "redneck" with the confederate flag).

99. The students wore black armbands to protest the Vietnam War. *Tinker*, 393 U.S. at 504.

100. 478 U.S. at 680.

101. 551 U.S. at 403.

102. A plurality of Justices might have been prepared to limit *Tinker* to political speech cases two years before *Fraser* was decided. They stated that *Tinker* "held that students'

it even meant that *Tinker* was particularly concerned with political speech at all.[103] Thus, lower courts have had to resolve these questions on their own.[104]

At least one circuit seems to assume that *Tinker* might be concerned with political student speech. In *S.G. ex rel. A.G. v. Sayreville Board of Education*,[105] the Third Circuit upheld a school's disciplinary decision, making a point to note that "nothing in the record . . . suggests that [the students] were making a political statement . . . ."[106] But what would the court have done if the students *were* making a political statement?

The Ninth Circuit might have answered this question in *Chandler v. McMinnville School District*.[107] There, a school suspended two students when they protested its decision to hire replacement teachers during a teachers' union strike by wearing things with the word "scab"[108] on them.[109] In holding that the students stated a claim under *Tinker*'s protective general rule,[110] the court went out of its way to emphasize the political character of the students' speech, finding that when "arguably political speech

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rights to freedom of expression of their *political* views could not be abridged . . . ." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866 (1982) (emphasis added). More recently, Justice Stevens noted that *Tinker* gave students a "First Amendment right to *political* speech." *Troxel v. Granville*, 530 U.S. 57, 88 n. 8 (2000) (Stevens, J., dissenting) (emphasis added).

103. The *Morse* Court did seem concerned, making a point to clarify that "this is plainly not a case about political debate over the criminalization of drug use or possession." 551 U.S. at 403.

104. As of now, no court limits *Tinker* to political speech cases. *Snyder*, 593 F.3d at 312 (Chagares, J., concurring in part and dissenting in part). Instead, those courts recognizing the political nature of *Tinker*'s speech are more likely to interpret *Tinker* as being particularly, but not exclusively, concerned with political speech. *See* Dickler, *supra* n. 60, at 360 (commenting that *Tinker* is especially concerned with political speech); *but see* Bentley, *supra* n. 63, at 19 (arguing that *Tinker* should be limited to political speech cases); *e.g. Guiles*, 461 F.3d at 326 (acknowledging that to the extent *Tinker* is concerned with political speech, "schools must tolerate a great deal of [political] student speech that is not lewd or vulgar").

105. 333 F.3d 417 (3d Cir. 2003). *Sayreville* is examined *infra* Part II(A)(4).

106. *Sayreville*, 333 F.3d at 422. The school suspended a kindergartner for saying "'I'm going to shoot you'" during a game of cops and robbers on the playground. *Id.* at 418–419.

107. 978 F.2d 524 (9th Cir. 1992).

108. A scab is "a worker who refuses to join a labor union or to participate in a union strike, who takes a striking worker's place on the job, or the like." Dictionary.com, *Scab*, http://www.dictionary.reference.com/browse/scab (accessed Apr. 11, 2011).

109. 978 F.2d at 526. The students' fathers were both participating in the strike. *Id.*

110. *Id.* at 530.

is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion."[111]

In sum, just as courts are able to reach puzzling results by using *Tinker* as either an alternative category of unprotected speech or as a protective general rule, cases like *Sayreville* and *Chandler* suggest that they might also depart depending on how they treat political speech under *Tinker*.[112] A universally applicable general rule would avoid these problems.

Unfortunately, finding a place for *Tinker* has not been the only problem lower courts have had to confront with the student speech categories. After a court determines how *Tinker* fits in with the other three categories, it must then decide which of the four categories apply to the speech before it.

2. Requisite Egregiousness: How Bad a Student's Speech Must Be

A school may stifle student speech when the speech is disruptive under *Tinker*, ugly under *Fraser*, school sponsored under *Hazelwood*, or drug-promoting under *Morse*.[113] But this is only the beginning of the inquiry. A court must still determine how disruptive, ugly, school sponsored, or drug-promoting a student's speech must be.

The courts have a particularly difficult time with *Fraser* and how ugly a student's speech must be to justify a school's regulation.[114] Some courts interpret *Fraser* broadly. The Sixth Circuit did so in *Boroff v. Van Wert City Board of Education.*[115] There, a student wore various T-shirts promoting countercultural heavy-metal musician Marilyn Manson[116] on several occasions and was

111. *Id.* at 531.

112. *Compare Lowery*, 497 F.3d at 596 (finding that *Tinker* did not protect high school basketball players when they circulated a petition against their coach); *with Pinard*, 467 F.3d at 768–769 (finding that *Tinker* did protect high school basketball players when they circulated a petition against their coach). For another comparison, see *infra* note 128 and accompanying text. Some courts might avoid pegging a student's statement as political for a reason. *See e.g. Harper*, 445 F.3d at 1171, 1177 (holding that *Tinker* does not allow a student to wear a shirt bearing an anti-homosexual message on a "Day of Silence" initiated by a student group called the Gay-Straight Alliance).

113. *Supra* pt. II.

114. Chiang, *supra* n. 16, at 404–405; *see also supra* n. 37 (providing examples of how different courts interpret *Fraser*).

115. 220 F.3d 465.

116. Marilyn Manson is known as the lead singer of a "goth" rock band. *Id.* at 466. He

informed by the school administration that T-shirts featuring the controversial singer were not to be worn on school grounds each time.[117] The court upheld the school's actions under *Fraser*.[118] After announcing that *Fraser* gave schools wide latitude to limit speech inconsistent with their educational missions, it found that "this particular rock group promotes disruptive and demoralizing values [that] are inconsistent with and counter-productive to education."[119]

Not all courts construe *Fraser* so broadly. Consider *DePinto v. Bayonne Board of Education*.[120] To protest a school dress code, a group of elementary school students wore buttons displaying the words "No School Uniforms" within a slashed red circle.[121] Behind the words, the button displayed a photograph of the Hitler Youth,[122] dozens of young Nazis shown in uniform and looking in the same direction.[123]

The court found no problem with the buttons under *Fraser*.[124] In fact, it distanced itself from the *Boroff* court's broad interpretation, finding instead that *Fraser* applies only to speech that is

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has been accused of being a satanic worshiper and illegal drug user. *Id.* In a blog post on his *MySpace* page, Manson conveyed his anger about having been misrepresented by the media:

> I can, but do not need to defend myself [a]nd the absurd accusations that the average press has clinged [sic] onto. . . . But if one more "journalist" makes a cavalier statement about me and my band, I will personally or with my fans help, greet them at their home and discover just how much they believe in their freedom of speech.

Marilyn Manson, MySpace.com: Marilyn Manson's Blog, *Soon to Be Buried in a Shallow Grave*, http://www.myspace.com/marilynmanson/blog/502274106 (July 26, 2009, 10:18 a.m.).

117. *Boroff*, 220 F.3d at 467. The school gave the student three options: wear the shirt inside-out, change shirts entirely, or leave and be counted truant. *Id.* The first shirt to draw the school's attention portrayed a three-faced Jesus along with the words "See No Truth. Hear No Truth. Speak No Truth." *Id.* The back of the shirt spelled out the word "BELIEVE" with the letters "LIE" emphasized. *Id.* It is unclear whether the student's other shirts were more or less provocative than this one.

118. *Id.* at 470.

119. *Id.*

120. 514 F. Supp. 2d 633.

121. *Id.* at 636.

122. The Hitler Youth was an organization of young Germans indoctrinated in Nazi ideology and trained for a lifetime of faithful military allegiance to the Third Reich. Michael H. Kater, *Hitler Youth* 14 (Harvard U. Press 2004).

123. *DePinto*, 514 F. Supp. 2d at 636.

124. *Id.* at 650. Using *Tinker* as a protective general rule, the court also found that *Hazelwood* and *Morse* did not apply before finally finding that the school failed to show a sufficient disruption under *Tinker*. *Id.* at 645–646. See *supra* note 85 and accompanying text for how this general-rule court may have heightened *Tinker*'s disruption test.

lewd, vulgar, indecent, or plainly offensive and that it does not cover speech that is merely inconsistent with a school's educational mission.[125] Although the court acknowledged that the Hitler Youth photo may have offended some at the school by invoking "thoughts of unspeakable acts," it emphasized that the photo did not contain any sexual images or bad words.[126]

As *Boroff* and *DePinto* illustrate, the way courts choose to interpret how egregious a student's speech must be within each category might explain their inconsistencies. These two courts had very different opinions on how ugly a student's speech had to be to violate *Fraser*.[127] As a result, while one allowed a school to ban a shirt promoting a popular rock band, another had no problem with a button displaying young Nazis.[128] Courts also have a difficult time deciding how disruptive a student's speech must be under *Tinker*[129] and how school sponsored it must be under *Hazelwood*.[130] Like *Boroff* and *DePinto*, the way the courts answer

125. *DePinto*, 514 F. Supp. 2d at 644–645.

126. *Id.* Other courts also refuse to apply *Fraser* unless the speech is sexual or profane. *E.g. LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (discussed *infra* Part III(A)(3)).

127. Some courts might do well to demand uglier speech under *Fraser*. As discussed *supra* note 37, some courts use *Fraser* to prohibit merely "inappropriate" speech. But even those courts that restrict *Fraser* to profanity and sex may still stretch it too far. One court used *Fraser* to allow a school to keep a student from wearing a shirt reading "Drugs Suck!," finding that the word "suck" conveyed sexual connotations. *Broussard by Lord v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526, 1537 (E.D. Va. 1992).

128. Another possible explanation for the inconsistency is that the *DePinto* buttons may have contained a clearer political message than *Boroff*'s T-shirts. As discussed *supra* Part III(A)(1)(c), some courts may view *Tinker* to be especially concerned with political speech. *DePinto* may be one of them. In finding that *Tinker* protected the Hitler Youth photo, the court noted that another court had emphasized that a school could censor a "political message" only when the school could meet *Tinker*'s disruption test. *DePinto*, 514 F. Supp. 2d at 645–646 (citing *Guiles*, 461 F.3d at 331).

129. Some courts require a school to point to a specific and quantifiable disruption. *See Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674 (7th Cir. 2008) (finding that schools must show that speech "will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school"). Others are satisfied when a student's speech merely challenges a school official's authority. *See Lowery*, 497 F.3d at 596 (finding that high school basketball players caused sufficient disruption when they circulated a petition in opposition to their coach "by eroding [the coach's] authority and dividing players into opposing camps").

130. Some courts refuse to find that a student's speech is school sponsored unless the school had affirmatively limited the types of things that the student could say within a particular forum. *E.g. Bannon v. Sch. Dist. of Palm Beach Co.*, 387 F.3d 1208, 1213 (11th Cir. 2004) (finding that a student's religious messages on a school mural were school sponsored because the school limited what students could include in the mural). Other courts are willing to assume that student speech is school sponsored merely because it occurs on

these questions might explain how they are able to reach the results that they do.[131]

3. Categorical Integrity: Keeping the Categories Separate

It would be one thing if courts disagreed only about how egregious a particular type of speech had to be within each category. But courts also disagree on how to draw the lines between the various categories. While some courts attempt to keep the categories separate so that one does not govern speech more properly governed by another, others blur the lines.

Some courts are careful not to apply one category to a type of speech governed by another. Consider *LaVine v. Blaine School District*.[132] In that case, a high school expelled a student after he shared his poem with several friends and a teacher.[133] In the poem, a love-stricken teenager brings a gun to school and murders twenty-eight other students.[134] The court upheld the

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school grounds. *E.g. Brandt*, 326 F. Supp. 2d at 921 (noting that a student's shirt was school sponsored simply because "[a] school is generally considered a nonpublic forum"). These courts assume that a student's speech is school sponsored unless the school opened the forum to indiscriminate expressive use. *E.g. O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 377 (D.N.J. 2006) (finding that a student's performance in a talent show was not school sponsored because the school became a public forum when it invited students to select their own performances).

131. Courts have not yet had an adequate opportunity to grapple with how drug-promoting a student's speech must be under *Morse*. Yet again, because *Morse* only requires a school to show that it could have reasonably interpreted a student's statement to promote drug use, 551 U.S. at 397, it may not leave much room for a student to argue that his or her drug speech was protected. This might explain the lack of cases on the subject.

132. 257 F.3d 981.

133. *Id.* at 983–985.

134. The student wrote the poem after he and his girlfriend broke up. *Id.* at 984. Here is part of the poem, spelling and grammatical errors in tact:

> Death I feel, crawlling down, my neck at, every turn, and so, now I know, what I must do.
>
> I pulled my gun, from its case, and began to load it.
>
> I remember, thinking at least I won't, go alone, as I, jumpped in, the car, all I could think about, was I would not, go alone.
>
> As I walked, through the, now empty halls, I could feel, my hart pounding.
>
> As I approched, the classroom door, I drew my gun and, threw open the door, Bang, Bang, Bang-Bang.
>
> When it all was over, 28 were, dead, and all I remember, was not felling, any remorce, for I felt, I was, clensing my soul.

Id. at 983 (emphasis omitted).

expulsion, finding that the school reasonably feared that the poem would be disruptive under *Tinker*.[135]

In so holding, however, the court made a point to clarify that the poem did not implicate either *Fraser* or *Hazelwood* and that *Tinker* was therefore the category that applied instead.[136] Although the court might have chosen to find that the poem was disruptive under *Tinker* in light of its offensive content,[137] the court recognized that *Fraser* was the category that governed offensive speech, and it found that the poem was not lewd, vulgar, obscene, or plainly offensive because it did not contain sexual images or profanity.[138] The court might have also found that the school's actions were reasonable under *Hazelwood* because of the poem's offensiveness,[139] but it was careful to recognize that, as the school had not published the poem in the school newspaper or made it a part of an assignment, no one could have reasonably believed it was school sponsored under *Hazelwood*.[140] Instead, the poem was disruptive under *Tinker* because the school reasonably feared that LaVine might have planned to harm himself or others at school.[141]

Other courts do not recognize such clear boundaries between the categories. In fact, while the *LaVine* court was careful not to use *Hazelwood* to silence merely offensive speech, *Brandt ex rel. Brandt v. Board of Education of Chicago*[142] did just the opposite in a case involving speech that was arguably less offensive than LaVine's murderous poem. In *Brandt*, a group of eighth-grade students in a gifted class created a T-shirt for themselves.[143] The

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135. *Id.* The court treated *Tinker* as a general rule, finding that *Tinker* applies only when none of the exceptions do. *Id.* at 988.

136. *Id.* at 989. The court did not consider *Morse* because it had not yet been decided.

137. Some courts do just this. *Infra* n. 159.

138. *LaVine*, 257 F.3d at 989. Note how narrowly this court chose to construe *Fraser*. In fact, it would have found profanity only if the poem had contained one of "the infamous seven words that cannot be said on the public airwaves." *Id.* See *supra* note 37 for other options.

139. Under *Hazelwood*, a school need only show that its regulation of school-sponsored speech was "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

140. *LaVine*, 257 F.3d at 989.

141. *Id.* at 990.

142. 326 F. Supp. 2d 916. This case eventually made its way up to the Seventh Circuit after the plaintiffs amended their complaint. *See Brandt*, 480 F.3d 460 (2007), *cert. denied*, 552 U.S. 976. But because the amended complaint raised different issues for the appellate court, the trial court's decision will provide the basis for this discussion.

143. 326 F. Supp. 2d at 917. The school held a contest to choose the design that would

shirt depicted a "silly" cartoon boy giving a thumbs-up on the front with the word "Gifties" on the back.[144] On the shirt, one of the boy's pupils was dilated, one of his arms ended in a handless nub, and he had a large head with a mouth full of teeth separated by large gaps.[145] For the gifted students, the shirt was a comical way of poking fun at themselves.[146] Citing "safety" reasons, the school prohibited the students from wearing the shirts and disciplined them when they did.[147]

The court upheld the school's actions.[148] But unlike the *LaVine* court, the court used *Hazelwood* in doing so,[149] but only because it was not as careful with *Hazelwood* as the *LaVine* court had been. Unlike the *LaVine* court, it did not explain how the school had sponsored the Giftie shirts. Instead, it simply noted that schools were generally nonpublic fora.[150] Having thus assumed as a given that the shirts were school sponsored under *Hazelwood*, the court then noted that the school's actions were "reasonably related to legitimate pedagogical concerns."[151] Why? Because the Giftie shirts were *offensive* to physically disabled children.[152]

The *Brandt* court was not as careful as *LaVine* to keep the categories separate. While the *LaVine* court recognized that *Fraser* was the category to govern offensive speech and thus

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adorn the "official" shirt of the entire eighth-grade class. After one of the gifted students' designs was not selected, the gifted class made their own shirt. *Id.*

144. *Id.* at 917–918.

145. *Id.* at 917.

146. *Id.* at 918.

147. *Id.*

148. *Id.* at 921–922.

149. The court applied *Hazelwood* in dicta. Surprisingly, the court found that the First Amendment did not apply at all because mere "expressions of individuality [such as the Giftie shirt] are not within the scope of First Amendment protection." *Id.* at 921. When this case reached the Seventh Circuit, the court there held similarly. *See Brandt*, 480 F.3d at 465–466 (holding that clothing conveying no particular message is not "speech"). Have these courts effectively created yet another category of individuality speech?

150. *Brandt*, 326 F. Supp. 2d at 921.

151. *Id.* Although the court did not cite *Hazelwood*, there is no question that this is the *Hazelwood* analysis. *Hazelwood* allows a school to silence school-sponsored speech when the school's decision is reasonably related to legitimate pedagogical concerns, and a student's speech is school sponsored when the student speaks in a nonpublic forum. 484 U.S. at 273.

152. *Brandt*, 326 F. Supp. 2d at 922. The court seemed to invoke other categories for the same reason. As for *Tinker*, it noted that the shirt's offensiveness was "a threat to the maintenance of appropriate discipline." *Id.* The shirt's content also posed "grave concerns" under *Fraser*. *Id.*

refused to analyze the student's offensive poem under *Hazelwood*, the *Brandt* court used *Hazelwood* to allow the school to ban the Giftie shirts merely because of their apparently offensive content.[153] As a result, these two courts were able to reach puzzling results. While one held that a goofy cartoon character was unacceptable, the other found that a poem about murdering innocent teenagers was just fine.

In sum, just as courts are able to reach seemingly inconsistent results by using *Tinker* in different ways[154] and by disagreeing about how egregious a student's speech must be within each category,[155] *LaVine* and *Brandt* demonstrate that the way in which courts choose to draw the boundaries between the categories might also explain how the courts are able to reach the results that they do.[156]

4. The Kitchen Sink: A Case Study in Seemingly Haphazard Categorization

Courts may struggle with more than one of these issues at a time. When they do, the result is a sort of student speech casserole—a kitchen sink full of the categorization problems discussed throughout this Article.

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153. Courts that simply assume schools are generally nonpublic fora are walking on thin ice. When a court assumes as a given that *Hazelwood* applies, it provides the school the chance to argue that its regulation meets *Hazelwood*'s meager reasonableness test merely because the school was trying to prevent speech that was disruptive, offensive, or drug related, without necessarily proving that the speech was sufficiently disruptive, offensive, or drug related under *Tinker*, *Fraser*, or *Morse*.

154. *Supra* pt. III(A)(1).

155. *Supra* pt. III(A)(2).

156. Courts do not only blur the lines between *Hazelwood* and *Fraser*. Some courts use *Tinker* to prohibit *Fraser*'s ugly speech. In one case, for example, the Third Circuit analyzed whether a student's "shirt was offensive[ ] and *consequently potentially disruptive*[ ]" under *Tinker*. *Sypniewski*, 307 F.3d at 254, 255 (emphasis added). Some might also use *Fraser* to prohibit *Tinker*'s disruptive speech. *See* Miller, *supra* n. 6, at 659 (arguing that speech might be "plainly offensive" under *Fraser* if it is disruptive, but not necessarily as disruptive as *Tinker* would require). Some use *Hazelwood* to prohibit *Tinker*'s disruptive speech. *E.g. Bannon*, 387 F.3d at 1217 (finding that the school "had a legitimate pedagogical concern [under *Hazelwood*] in avoiding the disruption to the school's learning environment"). Others blur the lines between *Tinker*, *Fraser*, and *Hazelwood* at the same time. Consider how the Ninth Circuit combined these categories so that speech that violates one category would have to violate the others: "[S]peech that is vulgar, lewd, obscene, or plainly offensive . . . by definition, may well impinge[ ] upon the rights of other students, and therefore its suppression is reasonably related to legitimate pedagogical concerns." *Chandler*, 978 F.2d at 529 (internal quotations and citations omitted).

This is exactly what happened in *S.G. ex rel. A.G. v. Sayreville Board of Education*.[157] There, a five-year-old kindergartner was playing a game of cops and robbers with his friends at recess.[158] During the game, he shouted to one of his friends, "'I'm going to shoot you.'"[159] After another student tattled[160] on the boy, the school suspended him, citing a zero-tolerance policy regarding statements referring to weapons or violence.[161]

The court upheld the suspension,[162] but it was not exactly clear why.[163] It began with *Fraser*.[164] Noting that *Fraser* allowed a school to foster "socially appropriate behavior," the court hinted that the school might have been able to determine that playground "threats" and pretend gun use were unacceptable.[165] It then suggested that *Tinker* could not help the boy, noting that he did not make any political statement and that his speech was not otherwise "expressive."[166] Finally, in what may be the closest thing to a holding, the court flatly concluded that the school acted properly because its regulation "was a legitimate decision related to reasonable pedagogical concerns" under *Hazelwood*.[167] In doing so, it ignored whether the boy's playground speech was school sponsored.[168] Instead, the court determined the school acted rea-

157. 333 F.3d at 417.

158. *Id.* at 418–419.

159. *Id.* at 419.

160. In a field often dominated by antiquated legal jargon and complicated analytical reasoning, at least there are those who can put things in terms that even their kindergarten clients can understand. The boy's lawyer argued in his appellate brief that "there was no evidence presented . . . to contradict a reasonable inference that [the snitching student] was anything other than a classic school yard tattle tale." Br. of Appellants, *S.G. ex rel. A.G. v. Sayreville Bd. of Educ.*, 2002 WL 32922256 at *22 (3d Cir. 2002).

161. *Sayreville*, 333 F.3d at 418–419.

162. *Id.* at 425.

163. Interestingly, the court entertained the possibility that the categories might not even apply to elementary school students at all. *Id.* at 423 (citing *Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (7th Cir. 1996)). Although it refused to decide the issue, the court did note that an elementary school's authority is "undoubtedly greater" than a high school's authority. *Id.*

164. *Id.* at 421.

165. *Id.* at 422.

166. *Id.* at 422, 423.

167. *See id.* (finding that the school properly regulated speech without giving a satisfactory explanation). Although the court did not cite *Hazelwood* and misstate its rule, it undoubtedly applied *Hazelwood*, which allows a school to regulate school-sponsored speech whenever its regulation is "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

168. Perhaps the court agreed with *Brandt* that schools are generally nonpublic fora. *Brandt*, 326 F. Supp. 2d at 921. *Brandt* is discussed *supra* Part III(A)(3).

sonably under *Hazelwood* because the boy's statement "undermine[d] the school's basic educational mission . . . ."[169]

Sayreville is so baffling because the court struggled with each of the categorization problems discussed in this Article. First, it had a difficult time deciding how *Tinker* fit in with the other categories. Although the court appeared to treat *Tinker* as an alternative category of unprotected speech when it used it to justify why the school could punish the boy, it never found that the statement was disruptive as would be expected of an alternative-category court.[170] Instead, it seemed to suggest that *Tinker* would have *helped* the boy if only his statement had been political or otherwise expressive—something we might have expected from a general-rule court.[171] But the court did not follow the general-rule approach either. While a general-rule court would only analyze *Tinker* if none of the exceptions applied,[172] the *Sayreville* court considered *Tinker* even though it later found that the boy's statement violated *Hazelwood*. It is unclear, then, exactly what the court thought of *Tinker*.

Second, the court also struggled to define meaningfully how ugly a student's speech had to be under *Fraser*. In fact, it found that *Fraser* prohibited both merely inappropriate speech *and* speech that undermines a school's educational mission.[173] Having construed *Fraser* so broadly, it is not surprising the court allowed a school to suspend a five-year-old boy for playing a harmless game with his friends at recess.[174]

Third, the court also blurred the lines between *Fraser* and *Hazelwood*. Although the court ultimately found that the school's decision was reasonable under *Hazelwood*, it never considered whether the student's speech was school sponsored in the first place.[175] Thus, it was able to find that the student's playground

169. *Sayreville*, 333 F.3d at 423.

170. See *supra* Part III(A)(1)(a) for a discussion of alternative-category courts.

171. See *supra* Part III(A)(1)(b) for a discussion of general-rule courts.

172. See *supra* Part III(A)(1)(b) for a discussion of general-rule courts and when they apply *Tinker*.

173. See *supra* note 37 for the different ways in which lower courts interpret *Fraser*.

174. Interestingly, the Third Circuit refused to apply *Fraser* in a case involving arguably uglier speech. *See Sypniewski*, 307 F.3d at 247, 269 (finding that a high school could not ban a student's "redneck" shirt, even though racial tensions in the school were "significant" when he wore it). Perhaps the *Sypniewski* court agreed with *Sayreville* that high schools have less authority to regulate speech than elementary schools. *Supra* n. 163.

175. *Hazelwood* lets schools reasonably limit only school-sponsored speech. 484 U.S. at

statement violated *Hazelwood* merely because it was inconsistent with the school's educational mission, but not necessarily as inconsistent as *Fraser* itself might have required. The kindergartner suffered as a consequence.

Cases like *Sayreville* allow us to see all that is wrong with the Court's categorical approach.[176] As lower courts continue to struggle with problems regarding *Tinker*'s role, the scope of each category, and the lines between each, they will continue to reach puzzling results.

B. Irreparable Cracks: Ignoring Content, Context, and Consequence[177]

It is questionable whether the student speech categories can ever be clarified.[178] But even if the Court did answer some questions, the categories are still bound to produce illogical results because they ignore important factors that should play a role in the analysis.

1. Categorical Ignorance: Ignoring Content, Context, and Consequence

It seems unimaginable that a school could stifle student speech regardless of its content, context, or disruptive effect. But this is exactly what the student speech categories do.

273.

176. *Sayreville* is not the only decision riddled with categorization issues. See *Brandt*, 326 F. Supp. 2d at 922 (illustrating how the *Brandt* court also seemed to apply several categories haphazardly).

177. This Part is inspired by Professor Jerry C. Chiang who argued that the Court in *Fraser* implicitly considered the content, context, and consequence of Fraser's speech when allowing the school to punish it. Chiang, *supra* n. 16, at 405.

178. Justice Stevens had this to say about the Court's categorical approach to free speech in general:

> Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries.

R.A.V. v. City of St. Paul, Minn., 505 U.S. at 426 (Stevens, White & Blackmun, JJ., concurring in judgment).

Tinker was more mindful. While *Tinker* primarily focused on the disruptive effects of speech, it also allowed for the speech's content and context to be considered.[179] Indeed, it would be difficult to assess how a student's statement could disrupt a school without first asking what the student said and in what context he or she said it.

Fraser, *Hazelwood*, and *Morse* were not as concerned with these questions. Instead, these cases suggested that there were times when the content of speech may be so egregious or the context in which it arises so sensitive that a school should be able to silence the student on those grounds alone.[180] *Fraser* does not ask whether a student's statement harmed other students or whether the student made his or her statement in the classroom or on the playground. It simply asks whether the speech was lewd, vulgar, indecent, or plainly offensive.[181] In this way, *Fraser* focuses exclusively on content and largely ignores context and consequence. Similarly, because *Hazelwood* applies only if a student speaks in a context that would lead others to believe that his or her speech bears the school's approval,[182] it is primarily concerned with the context in which the student speaks, and it downplays content and consequence. *Morse*, like *Fraser*, is concerned only with content. *Morse* simply asks whether the student's statement advocates drug use.[183] It is irrelevant that the drug-promoting speech may not harm the listeners; the location in which the student expresses his or her viewpoint is equally unimportant.[184]

179. 393 U.S. at 513.

180. In a way, these cases implicitly suggest that harmful consequences may be *assumed* when the content is especially egregious or the context overly sensitive.

181. *Fraser*, 478 U.S. at 683, 687. Although Chiang argues that *Fraser* implicitly considered content, context, and consequence, *Fraser requires* a school to show only that the content of a student's speech was sufficiently ugly. If the Court did consider the context and consequences of Fraser's sexual assembly speech, it apparently did not think these considerations were important enough to include in its holding. Chiang, *supra* n. 16, at 410–414.

182. *Hazelwood* allows schools to regulate school-sponsored speech—speech occurring within a school's nonpublic forum. 484 U.S. at 273.

183. 551 U.S. at 397.

184. Indeed, the Court in *Morse* had no problem with the fact that the students had unveiled their "BONG HiTS 4 JESUS" banner on a public sidewalk off campus. *Id.*

2. Problems with Categorical Ignorance

Rules that emphasize some factors and ignore others are bound to produce results that are difficult to justify. Because content-based rules like those evinced in *Fraser* and *Morse* ignore consequences of speech, for example, they allow a school to punish a student even when no one is harmed. *Fraser* allowed a school to punish a student for wearing a shirt promoting a rock-and-roll band even though no one had complained.[185] Similarly, *Fraser* permitted a school to suspend a five-year-old for playing cops and robbers with his friends at recess.[186] One court even used *Fraser* to uphold a school's decision to punish a student for wearing a shirt reading "Drugs Suck!"[187] Content-based categories like those created by *Fraser* and *Morse* allow schools to punish children for harmless (even sometimes desirable) speech.

Content-based rules also encourage schools to standardize American children.[188] Because these rules allow schools to punish speech purely on the basis of its content, they allow teachers, administrators, and judges to determine the value of a student's statement without any regard to its context or effects. The result is a government-imposed orthodoxy that should unsettle even the most authoritarian citizen.[189]

Rules emphasizing context are not without problems of their own. Not only do context-based rules like that in *Hazelwood* allow schools to punish harmless speech, but they allow them to do so without seriously asking whether the content of that speech is even worth silencing.[190] As such, these rules tend to create double

185. *Boroff*, 220 F.3d at 470.

186. *Sayreville*, 333 F.3d at 423.

187. *Broussard*, 801 F. Supp. at 1537 (discussed *supra* n. 127).

188. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . ." *Pierce v. Socy. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

189. *See* Kerry L. Morgan, *Real Choice, Real Freedom* 264 (U. Press of Am. 1997) (noting that when the government regulates standards of thought, "[i]s it not evident that the government is conforming the people to its own ideas?"). One famous early twentieth-century writer even suggested that the aim of public education "is simply to reduce as many individuals as possible to the same safe level, to breed and train a standardized citizenry, to put down dissent and originality." John Taylor Gatto, *Against School: How Public Education Cripples Our Kids, and Why*, Harper's Mag. 33, 35 (Sept. 2003) (quoting H.L. Mencken).

190. In *Hazelwood*, for example, the Court held that a school may censor a student's newspaper article not necessarily because the content is unacceptable, but because the

standards: a student may permissibly say something deemed unacceptable so long as it happens to be said in the right place, but another student may be punished for making the exact same statement in another setting.[191]

Because the Court's post-*Tinker* categories ignore important questions of content, context, or consequence,[192] they are bound to produce results that will continue to leave us shaking our heads. A rule that considers each of these factors would be more appropriate.[193]

IV. PREPARING FOR A NEW UNIVERSAL STANDARD

It would be very difficult to formulate a general standard for student speech cases without first considering how any new rule should resolve the clash between student rights and school authority.[194] We might view the school and its authority to regulate speech in several ways: (1) the school is a teacher; (2) the school prepares its students for democratic citizenship; (3) the

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article is "ungrammatical, poorly written, [or] inadequately researched . . . ." 484 U.S. at 271.

191. *Cf.* Bruce C. Hafen, *Developing Student Expression through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663, 724 (1987) (arguing one year before *Hazelwood* that students should not be able to prevent a school from regulating their speech merely because the place where the students speak looks like a public forum).

192. Even consequence-based rules like in *Tinker* may have their problems. *See* R. George Wright, Tinker *and Student Free Speech Rights: A Functionalist Alternative*, 41 Ind. L. Rev. 105, 133–134 (2008) (arguing that schools should not always be able to regulate speech merely because it is harmful because students may still have valuable interests at stake).

193. The categorical approach also presents separation-of-powers problems. Educational policy has traditionally been the province of state legislatures. *Epperson v. Ark.*, 393 U.S. 97, 104 (1968). But the speech categories allow *courts* to make value judgments such as whether speech is offensive or school sponsored. Not only does this present constitutional issues, but as Chief Justice Rehnquist observed, "[u]surpation of the traditionally local control over education . . . takes the judiciary beyond its proper sphere." *Mo. v. Jenkins*, 515 U.S. 70, 138 (1995). Interestingly, two commentators argue that the judiciary is well-equipped to make policy decisions. Michael A. Rebell & Arthur R. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* 201 (U. of Chi. Press 1982).

194. Thus, it will be impossible to avoid making some value judgments about what a school is and perhaps what it should be. *See* Patricia F. First, *Researching Legal Topics from a Policy Studies Perspective*, in *Research That Makes a Difference: Complementary Methods for Examining Legal Issues in Education* 85, 91 (David Schimmel ed., Natl. Org. on Leg. Problems of Educ. 1996) (recognizing that to ignore values is to "play a losing game of value neutrality").

school is an autonomous institution; and (4) the school is either a patron or regulator of student speech. This Article will suggest an alternative: (5) the school is a microcosm of our larger democratic government.

A. The School as a Teacher: A Curricular Model

The school might be seen first and foremost as a teacher. And if the school is primarily a place of learning, then a new rule might distinguish between those regulations intended to further the learning process on the one hand and those that have little to do with it on the other.

Indeed, Professor Erwin Chemerinsky argues that all school speech regulations can be classified as either "curricular" or "non-curricular."[195] As such, he proposes that while schools should have wide latitude to regulate speech in curricular activities, non-curricular speech should be vigilantly protected unless it is disruptive under *Tinker*.[196] For Chemerinsky, "[t]here is a clear difference between the government choosing the curriculum it will teach and the government deciding that it does not like a certain message . . . ."[197]

The curricular model is appealing for its simplicity. It makes sense to view the school as a place of learning. And because it suggests that the school as a teacher should have the power to effectuate the learning process, it would allow a straightforward rule that defers to a school's decision when it furthers this process and strikes it down when it does not.

Unfortunately, though, Chemerinsky's model is only the beginning of the inquiry. It is fine to say that a school is a teacher and should be able to regulate curricular speech, but Chemerinsky does not specify which student activities are "curricular."[198]

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195. Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 UC Davis L. Rev. 825, 825 (2009).

196. *Id.* at 836.

197. *Id.*

198. Chemerinsky simply suggests that "focusing on whether the government is the speaker and on the underlying values of the First Amendment often should be helpful in resolving the hard cases." *Id.* at 841. This would probably not be enough for those who might argue that the public school's curriculum is merely a state tool used to suppress subordinate expression. *See* Aronowitz & Giroux, *supra* n. 2, at 85 (noting that radical educational theorists believe that schools must suppress counter-ideologies in order to maintain the status quo).

We must still ask what we expect the school to teach and what we hope the student is learning.

B. The School's Educational Mission: A Democratic Education Model

How we define what a public school should be teaching can have drastic effects on how much power we grant it to regulate speech within that domain. Surely, we expect the school to instill the substantive knowledge and practical skills necessary to succeed in the adult world. But is there no more to school than reading, writing, and arithmetic?[199]

Professor Amy Gutmann urges that schools serve a much more important purpose.[200] She argues that the public school prepares its students to become democratic citizens.[201] It is a place where students learn to appreciate the First Amendment by being allowed to use it responsibly.[202] The more the school restricts the student's ability to exercise his or her right, the less prepared he or she is to live the life of a democratic citizen.[203] Accordingly, Gutmann argues for a student-centered approach that would protect most student speech for the sake of democracy.[204]

Some might doubt whether the public school should be engaging in the values business.[205] And as attractive as the democratic education model is in theory, it may prove unworkable in practice.[206] On the one hand, its student-centered approach may grant

199. Even the judiciary recognizes that "schoolteachers provide more than academic knowledge to their students . . . ." *Lee v. York Co. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007).

200. Amy Gutmann, *What Is the Value of Free Speech for Students?* 29 Ariz. St. L.J. 519, 523 (1997).

201. *Id.*

202. *Id.*

203. *Id.* In fact, it would be hypocritical to teach students to respect the right of free speech with one hand while refusing to let them use it with the other. Miller, *supra* n. 6, at 625.

204. Gutmann argues that "[a]t best, over-directive educators . . . are more paternalistic—at worst, they are more tyrannical—than democratic purposes permit." Gutmann, *supra* n. 200, at 523.

205. One commentator retorts that the government "mistakenly believes that it has the power and capacity to prepare American students for responsible citizenship." Morgan, *supra* n. 189, at 213. Another writer agrees that primary and secondary schools are ill equipped to teach democratic values through experimentation because the younger students are unable to appreciate the lesson. Bentley, *supra* n. 63, at 32.

206. Several commentators argue that the American public school is not even success-

too much power to the student at the expense of school order.[207] On the other hand, it may allow schools to cry "democratic education" as a pretext to regulate speech even further.[208]

Nevertheless, the democratic education model is difficult to ignore when formulating a new student speech rule.[209] The curricular model demonstrated that the school, as a teacher, should have the power to further the learning process.[210] The democratic education model suggests that to the extent the school teaches important lessons about democratic citizenship, it may not be able to do so if it stifles student experimentation with democratic tools like the right to free speech. As such, it hints toward a rule that would respect a school's regulatory authority only when it is necessary to prepare its students for responsible democratic citizenship.

C. The School as an Autonomous Institution: A Deferential Model

So far, we have positioned the school only as a place of learning. More specifically, we have assumed that it operates as an extension of the state in an effort to teach its fledgling citizens how to maintain its democratic government.[211] As such, a rule operating on these assumptions would allow the school to regulate speech only when it is necessary to further a democratic education.

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fully preparing its students for citizenship in the first place. Colin Greer, *The Great School Legend: A Revisionist Interpretation of American Public Education* (Basic Books 1972); *accord* Morgan, *supra* n. 189, at 265 (stating that if the public school is supposed to be teaching students about citizenship, "then why are state educated children and their state educated parents so ignorant of these things?"); Wright, *supra* n. 192, at 120–126 (citing statistics to show how the public school has failed to prepare its students for citizenship).

207. Bentley, *supra* n. 63, at 32.

208. *See* Morgan, *supra* n. 189, at 266 (arguing that the democratic education model "will eventually be employed as a pretext to enslave the people *and* ensure the perpetual existence of the regime[ ]"); *see also Morse*, 551 U.S. at 423 (Alito, J., concurring) (noting that a broad-educational-mission defense would allow schools to suppress speech with which they merely disagree); Garnett, *supra* n. 5, at 55 (worrying "about the imposition of majoritarian orthodoxies in the guise of mission-required discipline").

209. Even if we do not agree with it, Gutmann's democratic education model is ubiquitous among academics who have proposed student speech reform.

210. Chemerinsky, *supra* n. 195, at 835.

211. According to Aronowitz and Giroux, radical educational theorists believe that the school is "part of a state apparatus" and exists solely to maintain the state's power. Aronowitz & Giroux, *supra* n. 2, at 70.

Professor Bruce Hafen, however, suggests that the public school should be seen not merely as the state acting on the individual, but as an independent institution that provides a link *between* the individual and the state.[212] Thus, he argues that schools should enjoy an autonomy similar to other "mediating institutions" like churches,[213] private organizations, and the family.[214]

Although Hafen's model suffers from the same philosophical abstractions as Gutmann's democratic education model, it can help formulate a new rule for student speech cases. It reminds us that while the public school is certainly in the business of teaching, it is also an institution in its own right that should be permitted to manage its own internal affairs.

At the same time, however, we should not forget that the public school is, in fact, still a governmental agency. As such, it seems inappropriate to grant it as much autonomy as other nongovernmental institutions.[215] So the question becomes: over which areas should a public school be able to manage its internal affairs freely?

D. The School as a Patron or Regulator: A Managerial Necessity Model

Two authors are prepared to argue that determining the areas in which public schools should be able to manage their internal affairs freely should occur by distinguishing between

212. Hafen, *supra* n. 191, at 699–700, 702.

213. Churches are exempt from Title VII's employment discrimination provisions. 42 U.S.C. § 2000e-1(a) (2006). The Court has found such an exemption valid because it "alleviat[es] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

214. Hafen, *supra* n. 191, at 702. Hafen recognizes that the "law tends generally to stop at the threshold of mediating institutions, not only because it *should not* regulate [their actions], but because it *cannot* regulate such delicate processes without impairing their existence." *Id.* at 719 (emphasis in original).

215. Let us not forget that various forms of discrimination still flourish in America. Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?* 28 L. & Inequal. 119, 119 (2010). Although Hafen urges that the public school is an institution that promotes First Amendment values, Hafen, *supra* n. 191, at 720, these seemingly beneficent institutions can just as easily be held captive by administrators and teachers who are either ignorant of or hostile to that same Amendment. *See e.g. Boroff*, 220 F.3d at 470 (holding that the school could punish a student for wearing a shirt promoting a heavy-metal musician).

those situations in which the school acts on its *own* behalf and those in which it merely attempts to regulate private conduct.[216] Professors Josh Paul Davis and Joshua D. Rosenberg argue that the courts usually defer to school speech restrictions when the school is acting on its own behalf, or as a "patron" of student speech.[217] Specifically, schools enjoy broad authority to regulate student speech when the school acts to protect its own message, when it subsidizes student speech, and when it protects an internal school function from interference.[218] If the school is not acting on its own behalf but merely attempts to control private expression, courts are more likely to protect the student speech.[219]

Although Davis and Rosenberg's model is intended to explain only why the courts might reach seemingly inconsistent results in student speech cases,[220] it might still help formulate a new rule. As we have already seen, the school can be viewed as both a teacher and an independent institution.[221] As such, we might feel compelled to allow it to regulate not only the learning process, but most of the activities that occur within its autonomous domain. A patron-regulator distinction suggests, however, that the school should be able to regulate student speech only when it can claim a clear interest in doing so. In other words, we might say that a school acts reasonably when it manages its own affairs and that it acts unreasonably when it merely attempts to control student behavior.

This might sound a lot like what we expect from our government at large. We understand that the government has a right to regulate its mail system, but we cringe at the thought of a state agent peering through our letters to prevent the use of unacceptable language. Indeed, our new rule might do well to see the public school as nothing less than a microcosm of our democratic government—a closed environment with the power to enforce its own laws, but only when it has a stake in doing so.[222]

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216. Davis & Rosenberg, *supra* n. 8, at 1048.

217. *Id.* at 1051.

218. *Id.*

219. *Id.* at 1054.

220. *Id.* at 1056 (acknowledging that their "project is primarily positive, not normative").

221. *Supra* pts. IV(A)–(C).

222. One commentator acknowledges that "[a] school is not the world. And yet it is *a* world, a small republic of the intellect within the political community." Eva T. H. Brann,

E. A Proposal: The School as a Microcosm of Democratic Government

When we see the public school as a microcosm of our democratic government, we recognize that it is, at once, an extension of the state itself as well as an insulated institution charged with the unique task of preparing our children for democratic participation.[223] As such, we acknowledge that while the school may serve as a beneficent link between the student and his or her government, it can also often act upon the student in a way repugnant to that democracy.[224] This forces us to erect safeguards to prevent the school from using its government-like powers in an unreasonable manner. Specifically, although we accept that this little republic must have the power to manage its affairs, the affairs it manages should be its *own* and not the otherwise private conduct of the young citizens who are compelled to participate in it.

Although we might see the public school as a microcosm of our democratic government, this does not necessarily mean that it should only be able to regulate the speech that the state can regulate outside the schoolhouse walls.[225] The school is, after all, a unique environment with unique concerns, and it should be able to address those concerns when necessary.[226] This means that students may not enjoy the same free speech rights as those citizens who speak outside the school. Nevertheless, because we see the school as a miniature democratic government, its admittedly broader regulatory authority should not extend any further than is democratically appropriate to meet its unique concerns.

Paradoxes of Education in a Republic 146 (U. of Chi. Press 1979) (emphasis in original).

223. In this sense, our microcosmic model incorporates the contributions of Chemerinsky, Gutmann, Hafen, and Davis and Rosenberg. It recognizes that the school is an autonomous institution that teaches its students how to be democratic citizens and is one that must choose between acting on its own behalf and regulating the private conduct of its students.

224. *See* Arthur E.. Lean, *Review of* Public Education and the Future of America, 6 History of Educ. J. 166, 167 (1954) (recognizing that the public school is an imperfect manifestation of an imperfect government).

225. Indeed, the Court has consistently held that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Fraser*, 478 U.S. at 682 (citing *Thomas v. Bd. of Educ., Granville C. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979). Cohen was an adult who had a right to wear a jacket reading "Fuck the Draft" in a courthouse corridor. *Cohen v. Cal.*, 403 U.S. 15, 15 (1971).

226. *Supra* n. 9.

V. CRACKING THE CATEGORIES: A NEW MODEL STUDENT SPEECH STANDARD

Given that a school's authority should not extend further than is democratically appropriate to meet its unique concerns, we might propose a universal rule that allows a public school to stifle student speech only when the reasonable democratic citizen would believe that the speech substantially undermines the school's ability to protect its own interests.[227]

A. The School May Protect Only Its Own Interests

Drawing on our earlier discussion, we might say that a public school has a legitimate interest in its curriculum, its image, and the welfare of the students with whom it has been charged to supervise.[228] Thus, the reasonable democratic citizen might permit a school to regulate student speech that threatens these interests, but only these interests.

Some of the speech that formerly comprised the Court's categories may implicate these interests. Take the school's interest in its curriculum, for example. Citizens may very well find that some speech that might have been disruptive under *Tinker* might also undermine the school's ability to transmit its curriculum. Consequently, although our citizen would refuse to assume that a school has a legitimate claim over *all* of *Tinker*'s disruptive speech, he or she might permit the school to regulate it when it disrupts a teacher's ability to teach in the classroom.[229]

The same goes for the school's interest in conveying its own image. Although our citizen might recognize that a student may have the ability to usurp a school's image when the school sponsors his or her message, he or she will not assume that *all* of

227. Let us assume that the reasonable democratic citizen is a disinterested observer who is neither purely authoritarian nor overly permissive.

228. Davis and Rosenberg identified some of these same interests when they attempted to explain when a school acts as a patron of its own message. Davis & Rosenberg, *supra* n. 8, at 1051.

229. To prevent abuse, our citizen might demand that the school show a direct relation between the student's speech and the anticipated disruption to another student's ability to learn in the classroom. In other words, our citizen might refuse to allow a school to argue that a student's statement has some indirect or attenuated effect on the learning environment in general. See *supra* note 24 for a list of courts that demand a specific disruption to students' ability to do class work.

Hazelwood's school-sponsored speech has such an effect. Instead, he or she might refuse to allow a school to silence such speech unless the school has affirmatively endorsed it or the listeners could reasonably believe it has. Unlike some courts, our citizen would never assume that a school is generally a nonpublic forum—he or she might instead require the school to show that it had actually limited what its students could say within a particular forum.[230]

The reasonable democratic citizen may also find that the Court's former categories implicate a school's interest in its students' well-being. But because our citizen is aware that a school may often use the welfare of its students as an excuse to silence student expression with which it merely disagrees,[231] he or she might demand that the school anticipate a specific harm to a specific group of students.[232] For example, although he or she may determine that some ugly or drug-related speech threatens to harm innocent students, he or she would be careful to consider the context in which the student offered the statement to ensure that it was in fact harmful enough to warrant the school's reaction. Similarly, although our citizen might find that some of *Tinker*'s disruptive speech creates safety concerns, he or she might demand that the disruption pose real risks of physical harm.

Although our citizen might allow a school to protect its own interests, he or she might also choose to weigh these interests against the political nature of the student's statement. Indeed, any reasonable democratic citizen might be suspicious when the government attempts to stamp out political expression, and he or she might be all the more wary when it stifles such speech in a place where its young citizens are taught to question government action.[233]

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230. All of this strikes a compromise between those courts that require affirmative endorsement and those that assume most student speech is school sponsored. These courts are discussed *supra* note 130. The important consideration here is not whether a student's speech can be properly labeled as "school sponsored," but whether it actually undermines the school's ability to convey its own image free of student distortion.

231. *See e.g. Boroff*, 220 F.3d at 470 (holding that the school could punish a student for wearing a shirt promoting a heavy-metal musician).

232. This is to avoid allowing a school to silence speech merely because it believes the speech might have some ill-defined and attenuated impact on the student body in general.

233. *See* Bentley, *supra* n. 63, at 7 (arguing that the law should protect political student speech); Dickler, *supra* n. 60, at 383 (noting that the Court has prioritized political speech

In short, although our new rule would replace the Court's current categorical approach to student speech cases, it would do so without overruling all the categorical approach has to offer. Instead, our rule uses the categories as guideposts, indicating those situations when a student's speech might undermine one of the school's interests. In this way, our rule takes the best from the categorical approach and leaves the rest behind.

B. Patching Up the Cracks: Strengths of the New Standard

Our new rule avoids many of the shortcomings with the categorical approach. First, it should produce results that are more consistent because it does not require courts to categorize particular types of student speech in any particular way. Whether a student's statement is disruptive, ugly, school sponsored, or drug-promoting, the only thing with which our citizen is concerned is whether the statement actually undermines one of the school's interests. Thus, the reasonable democratic citizen no longer needs to determine whether *Tinker* acts as an alternative category of unprotected speech or as a protective general rule. Our citizen no longer needs to decide how egregious a particular type of speech has to be within each category, and it no longer matters that he or she might apply one category to a type of speech more properly governed by another. Regardless of how he or she might label a particular student's statement, our citizen is only concerned with how the statement actually affects the school's ability to teach, convey its own image, or protect its students.

Perhaps more importantly, we can feel better about our results. We saw how the Court's former categories ignored important questions regarding the content, context, and consequences of a student's statement.[234] For this reason, courts have allowed a school to suspend a kindergartner for playing cops and robbers with his friends,[235] but they protected another student's right to wear a button displaying dozens of young Nazis in uniform.[236] Our rule is different. Our citizen cannot determine how a student's

on the student speech hierarchy); Gutmann, *supra* n. 200, at 527 (acknowledging that *Tinker* supports criticism of government action).

234. *Supra* pt. III(B).

235. *Sayreville*, 333 F.3d at 423.

236. *DePinto*, 514 F. Supp. 2d at 650.

statement might undermine one of the school's interests without considering what the student said, to whom and under what circumstances he or she said it, and how the thing he or she said actually affected the school that is attempting to keep him or her from saying it. For this reason, courts will be more likely to reach decisions that are more consistent and well reasoned.

At the same time, while our rule admittedly limits the discretion a court may use in deciding whether a school may stifle a student's speech, the rule's reasonable democratic citizen standard still leaves the court the flexibility it needs to decide such fact-specific cases. A school may limit speech that only a reasonable democratic citizen would believe undermines one of the school's interests, but courts and commentators have room to argue what those interests are and whether the reasonable citizen would believe any given student's speech implicates them. This Article will contribute to the argument.

VI. CONCLUSION

The Court's categorical approach to student speech fails to provide an adequate framework under which to assess the many speech issues that students, teachers, and administrators must confront on a daily basis. Because the Court has refused to clarify how its categories should apply to any given set of facts, lower courts have been left to put together the pieces of a broken jurisprudence. Not surprisingly, they have chosen to put it together differently, and the ways in which they do so might explain how they reach the seemingly irreconcilable results that they do. It would be one thing if the Court were able to fix these problems, but the student speech categories are bound to continue producing illogical results.

For these reasons, the categorical approach should be abandoned in favor of a universal standard that can be applied to any student speech case. This standard should be one that recognizes both the unique concerns of the public school environment and the fact that it is a place where the state may act upon its young citizens in a way repugnant to the students' constitutional democracy. The reasonable democratic citizen may acknowledge that there are times when the school should be able to protect its own interests. At the same time, however, he or she recognizes that the school, as a microcosm of our government, has a responsibility

to encourage its young citizens to experiment with the rights that should be available in any democracy, large or small.

Such a rule would not only work to provide a sturdier framework for school speech law, but it would also produce results that we can tolerate. Our Constitution demands nothing less.