#### NOTES

## A RELATIONAL APPROACH TO SCHOOLS' REGULATION OF YOUTH ONLINE SPEECH

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This Note examines the current doctrinal difficulties with student Internet speech. Student speech was traditionally protected from school authority when it was performed off campus—it received full First Amendment protection as opposed to the lower level of protection that on-campus speech received. However, the emergence of the Internet as a dominant form of communication has complicated this framework by blurring the line between off-campus and on-campus. As reflected in the Supreme Court jurisprudence, the question of the standard of protection to apply highlights the educational and constitutional issues at stake in student speech. While some courts seem willing to subject all youth speech to the lower constitutional standard, I propose a more nuanced approach. My approach, which I dub the "relational approach," reframes the debate by reference to the role schools play in our society. The relational approach forces judges to examine the context in which the speech takes place and determine whether society expects such context to be governed by institutional educational authority. By adopting my approach, a more honest and reasonable jurisprudence can emerge.

#### Introduction

In 2006, Aaron Wisniewski, a middle school student at Weedsport Middle School in upstate New York, logged onto his home computer after school hours and sent his friends instant messages that featured a small digital image commonly referred to as a "buddy icon." The image depicted a gun shooting a cartoon individual and bore the caption "Kill Mr. VanderMolen," a teacher at Wisniewski's school. The school, alerted to the icon, suspended Wisniewski. Wisniewski challenged his suspension in court, arguing that it violated his First Amendment right to free speech. The United States Court of

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<sup>&</sup>lt;sup>1</sup> Wisniewski v. Bd. of Educ., 494 F.3d 34, 35–36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008). A buddy icon is a small picture, personalized by the sender of an instant message, that appears in the recipient's instant message window. It is used, at least in part, to identify and represent the sender.

<sup>&</sup>lt;sup>2</sup> *Id*.

 $<sup>^3</sup>$  The Free Speech Clause of the First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

Appeals for the Second Circuit upheld the suspension, concluding that Wisniewski's speech could "foreseeably create a risk of substantial disruption" and therefore was punishable within the bounds of the First Amendment.<sup>4</sup> In a subsequent case, *Doninger ex rel. Doninger v.* Niehoff, the plaintiff alleged that a high school had violated her daughter's constitutional rights by preventing her from running for student government because she had used her blog to encourage students to make harassing phone calls to the principal following a disagreement over the scheduling of a school event.<sup>5</sup> The Second Circuit found in favor of the school, affirming the district court's denial of an injunction that would have voided the results of the student government election.<sup>6</sup> As in Wisniewski, the court found that the student's language and acts—including calling school administrators "douchebags" and encouraging readers to respond by calling or emailing the school<sup>7</sup>—"foreseeably create[d] a risk of substantial disruption within the school environment."8 The Second Circuit's rulings are the latest attempts to deal with so-called off-campus student speech, and both opinions articulate an expansive view of school authority over youths' lives. But the court's approach and rulings also illustrate lower courts' struggle to identify the central questions they must ask in evaluating off-campus speech.

The problem of off-campus student speech is not new; it has emerged sporadically since the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*. While the post-*Tinker* line of cases suggests that students receive some, but not all, First Amendment protection while in public schools, the Supreme Court has not said conclusively when young people receive these limited protections instead of full First Amendment protection while speaking. Traditionally, this was not a difficult problem; courts utilized a "geographical approach," applying the lower "student-speech" standard only when the student was engaged in speech while physically located on school property. Hard questions usually arose only when tangible forms of speech—such as student-written newslet-

<sup>4</sup> Wisniewski, 494 F.3d at 40.

<sup>&</sup>lt;sup>5</sup> Doninger ex rel. Doninger v. Niehoff, 527 F.3d 41, 43–47 (2d Cir. 2008).

<sup>&</sup>lt;sup>6</sup> *Id.* at 43.

<sup>&</sup>lt;sup>7</sup> Id. at 49.

<sup>&</sup>lt;sup>8</sup> Id. at 50 (quoting Wisniewski, 494 F.3d at 40).

<sup>9 393</sup> U.S. 503 (1969).

<sup>&</sup>lt;sup>10</sup> See Morse v. Frederick, 127 S. Ct. 2618, 2624 (2007) (noting uncertain boundaries governing when school-speech precedents apply).

<sup>&</sup>lt;sup>11</sup> See infra Part II.A (discussing geographical approach).

ters—were produced off campus but made their way on campus.<sup>12</sup> However, with the emergence of the Internet and the growing prevalence of mobile communication technology such as cell phones, the line between "off-campus" and "on-campus" is not nearly as clear as it once appeared to be.

The Internet poses two significant dilemmas for courts' traditional approach to off-campus speech. First, it is unclear whether or not Internet speech occurs off campus. Unlike tangible objects such as newspapers, the Internet does not easily conform to notions of place and physicality. Second, the Internet is increasingly integrated into students' personal lives. Thus, regulation of the Internet increasingly provides, as in the case of Aaron Wisniewski, an opportunity for schools to monitor and control student conduct in what were previously private or familial realms. Because of these difficulties, lower courts have struggled to find a coherent doctrine to determine when the lower student-speech standard applies to Internet speech and when young people receive full First Amendment protection online.

Many courts, trying to fit a new reality into an old doctrinal model, applied the less speech-protective standard only when the speech took place on campus, such as through the school's computers. But recently courts—such as the Second Circuit in *Wisniewski*—have declined even to ask this threshold question and have simply applied the less speech-protective standard to all youth speech. This lower standard permits schools to punish students for any speech that creates a foreseeable risk of substantial disruption within the school, regardless of the physical location of the students' speech. While in *Doninger*, the Second Circuit at least alluded to this threshold question, it reduced the preliminary inquiry simply to asking whether the speech would eventually reach the school, an extraordinarily weak threshold given the technological reach of the Internet.

I suggest that these courts have lost focus on the crucial values that underpin student-speech doctrine. The student-speech inquiry involves two distinct questions. First, which First Amendment standard applies, the lower student-speech standard or the stricter generally applicable standard? Second, if the lower standard applies, what is its substantive content? The first question—when to apply the student-speech standard—is difficult in the context of the Internet. When courts move to an approach that focuses solely on the disrup-

<sup>&</sup>lt;sup>12</sup> This scenario was the case in one of the first and most influential off-campus speech cases. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1045 (2d Cir. 1979).

<sup>&</sup>lt;sup>13</sup> *Doninger*, 527 F.3d at 50 ("[T]he record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property.").

tive effect of the speech, the first question is wrongly subsumed into the second substantive question.<sup>14</sup> The failure to address this first question obscures central considerations of the role of education in our society.

I argue that the question of when to apply the student-speech standard must be answered through what I term the "relational approach." This approach is derived from Supreme Court precedent and scholarly debate about the role of the school vis-à-vis the student and the appropriate nature of this relationship in democratic society. I argue that when a youth acts in the role of a student, and therefore within the student-school relationship, the less protective studentspeech test should apply. However, when a youth is outside that role, acting instead in the role of a citizen (albeit a minor), he or she should receive full First Amendment protection. This analysis, which looks to the relationship between the youth and the school to determine the level of constitutional protection afforded instead of looking to geographic boundaries or to the effects of the speech, provides a coherent method for addressing youth Internet speech. The approach I propose is not necessarily outcome-determinative; different theories of the role of schools will lead to different practical outcomes. However, the relational approach focuses on the proper inquiry—the extent to which the school should be involved in regulating youth behavior and thus brings to the fore the important educational and constitutional issues at stake.

This Note proceeds in four parts. Part I offers a summary and analysis of the Supreme Court's student-speech cases and provides a backdrop for subsequent lower court decisions. Part II examines the lower courts' approach to off-campus and on-campus speech. It demonstrates that, in response to the challenges of evaluating Internet speech, there has been a shift away from using the traditional geographical approach and toward an "impact" or "substantial disruption" approach, in which courts avoid the threshold question of whether school officials have authority to regulate the speech and simply allow schools to punish young people whose speech threatens to cause disruption in the school. After analyzing these cases, Part II argues that neither approach has been successful in fairly evaluating student speech. Part III briefly sketches the contours of the underlying theoretical debate over the role of schools in a democratic society. Part IV outlines the relational approach by attempting to

<sup>&</sup>lt;sup>14</sup> This issue should not be confused with school authority to address off-campus conduct in general. This Note is only concerned with determining when school officials may apply the lower student-speech First Amendment standard to youth speech; it does not address situations involving discipline for non-speech conduct.

refocus the student-speech inquiry onto the fundamental issue: the relationship between youths and schools as it applies to the role of schools in society. While it is beyond the scope of this Note to settle the greater philosophical debate over the role of schools in society, Part IV attempts to illuminate the questions courts must ask when evaluating the constitutionality of school officials' actions in suppressing student online speech.

# I THE SUPREME COURT'S LIMITED SCHOOL-SPEECH JURISPRUDENCE

Lower courts determining how much protection to afford youth speech have received little guidance from the Supreme Court, whose four decisions on the matter constitute a somewhat disjointed jurisprudence. All four decisions recognize that student speech receives less protection than speech by the general public. However, the extent of that protection is not obvious from these decisions. Additionally, the Court has never clearly articulated *when* the student-speech standard should be applied. Nevertheless, an overview of Supreme Court precedent provides necessary background for understanding the lower courts' attempts to address these issues. Moreover, as I show below, 15 the relational approach provides a helpful framework within which to understand these precedents.

In *Tinker v. Des Moines Independent Community School District*,<sup>16</sup> students suspended for wearing black armbands in protest of the Vietnam War challenged their suspensions as violative of the First Amendment.<sup>17</sup> The school argued that schools were "no place for demonstrations."<sup>18</sup> In rejecting this argument, the majority wrote that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>19</sup> The established rule is now well known: "[W]here there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."<sup>20</sup> Moreover, a finding that speech

<sup>15</sup> See infra Part IV.B.

<sup>&</sup>lt;sup>16</sup> 393 U.S. 503 (1969).

<sup>&</sup>lt;sup>17</sup> *Id.* at 504.

<sup>&</sup>lt;sup>18</sup> *Id.* at 509 n.3. The school argued that if "students 'didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools." *Id.* (quoting school authorities).

<sup>&</sup>lt;sup>19</sup> *Id.* at 506.

<sup>&</sup>lt;sup>20</sup> *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

would substantially disrupt school discipline cannot be based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>21</sup> Rather, it must be based on "the special characteristics of the school environment."<sup>22</sup>

While the Court did not address the issue of off-campus speech, the Court did not limit its rule to the classroom. In expansive terms, the Court stated: "A student's rights . . . do not embrace merely the classroom hours. . . . [W]e do not confine the permissible exercise of First Amendment rights . . . to supervised and ordained discussion in a school classroom." But "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder . . . [is] not immunized by the constitutional guarantee of freedom of speech." Because *Tinker* dealt explicitly with on-campus speech, the Court's decision provided little insight into whether and when this standard would apply if the speaker was physically off campus.

The Supreme Court's second student-speech holding, in Bethel School District No. 403 v. Fraser, 25 claimed to elaborate on the Tinker substantial disruption standard. The Supreme Court upheld the suspension of Matthew Fraser, a high school student, for delivering a student government campaign speech laden with sexual innuendo at a school assembly.<sup>26</sup> Though it affirmed the *Tinker* standard, the Court stated that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."27 Unlike the *Tinker* Court, the majority in Fraser expressly sanctioned the inculcation of "fundamental values necessary to the maintenance of a democratic political system," calling it "truly the work of the schools." 28 While it was clear that the Fraser majority considered civility in discourse to be one of these fundamental values, the full scope of permissible values that schools may inculcate, and the limits on when school authority could be invoked, were left undefined.

Subsequently, in *Hazelwood School District v. Kuhlmeier*,<sup>29</sup> the Court addressed school regulation of student newspapers produced in

<sup>&</sup>lt;sup>21</sup> *Id*.

<sup>&</sup>lt;sup>22</sup> Id. at 506.

<sup>&</sup>lt;sup>23</sup> Id. at 512-13.

<sup>&</sup>lt;sup>24</sup> *Id.* at 513.

<sup>&</sup>lt;sup>25</sup> 478 U.S. 675 (1986).

<sup>&</sup>lt;sup>26</sup> Id. at 677–80.

<sup>&</sup>lt;sup>27</sup> *Id.* at 681.

<sup>&</sup>lt;sup>28</sup> *Id.* at 683 (internal quotation marks omitted).

<sup>&</sup>lt;sup>29</sup> 484 U.S. 260 (1988).

conjunction with a journalism class. The Court's opinion, like Fraser, diverged from the strict substantial disruption test of *Tinker*. The students complained that the school violated their First Amendment rights when it excised two stories, one on pregnancy and another on divorce, from the school paper.<sup>30</sup> In rejecting their claim, the Court first found that the production of the newspaper was "part of the educational curriculum and a regular classroom activit[v]."31 Therefore, Tinker's limitation on school authority did not apply and there was no constitutional violation.<sup>32</sup> Additionally, the Court found that activities carrying the imprimatur of the school "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."33 Regulations of speech in this context are permissive as long as they are "reasonably related to legitimate pedagogical concerns."34

The most recent Supreme Court case in this line is *Morse v. Frederick*.<sup>35</sup> In that case, the school principal suspended Joseph Frederick for failing to take down a banner reading "BONG HiTS 4 JESUS" during a public viewing of the Olympic Torch relay in front of the school.<sup>36</sup> The Court upheld the suspension even though the controversial speech took place physically off campus.<sup>37</sup> Neither the Eighth Circuit nor the Supreme Court considered the off-campus issue a serious one in the case. The Court stated that while "[t]here is some uncertainty at the outer boundaries as to when courts should

<sup>&</sup>lt;sup>30</sup> *Id.* at 263–64.

<sup>&</sup>lt;sup>31</sup> Id. at 268 (internal quotation marks omitted).

<sup>&</sup>lt;sup>32</sup> Id. at 273.

<sup>&</sup>lt;sup>33</sup> *Id.* at 271. Some scholars have suggested that *Kuhlmeier* is limited to cases in which the student's speech may be attributed to the school. *See, e.g.*, Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. Rev. 253, 267–68 (1992) (emphasizing school-sponsorship elements of decision); Justin T. Peterson, Comment, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 2005 MICH. St. L. Rev. 931, 936–37 (arguing that *Kuhlmeier* stands for proposition that "students did not have a right to have the school sponsor their controversial speech"). I reject this view as it has led to general doctrinal confusion. Instead, I see *Kuhlmeier* as part of a greater student-speech jurisprudence based on the relationship between the student and the school. *Cf.* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. Rev. 1335, 1357–59 (2000) (linking *Kuhlmeier* to unified student-speech standard that privileges schools' academic function and grants school officials leeway to pursue curricular activites).

<sup>&</sup>lt;sup>34</sup> Kuhlmeier, 484 U.S. at 273.

<sup>35 127</sup> S. Ct. 2618 (2007).

<sup>&</sup>lt;sup>36</sup> *Id.* at 2622.

<sup>37</sup> Id.

apply school-speech precedents but not on these facts,"<sup>38</sup> Frederick could not "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."<sup>39</sup>

The Court again distinguished the facts from *Tinker*. Unlike the plaintiffs in *Tinker*, Frederick was not engaged in "political" speech, which is "at the heart of the First Amendment," but was merely advocating the use of illegal drugs. The Court clarified its distinction by stating that "[t]he concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." The majority argued that the prevention of drug use, like the inculcation of proper civic discourse in *Fraser*, was a central mission of the modern school. Although the Court claimed its holding was consistent with *Tinker*, many commentators objected to the apparent shift from *Tinker*'s more speech-protective substantial disruption approach and toward an approach that allows schools latitude to instill cultural norms in students through speech restrictions.

In *Fraser*, *Kuhlmeier*, and *Morse*, the Court appears to have established exceptions to the *Tinker* substantial disruption test without expressly overruling it, leaving a muddled and erratic doctrine. Yet the cases show that the Court has attempted, through a piecemeal approach, to develop permissible areas where schools have authority to inculcate normative values through speech restrictions. Unfortunately, the Court has provided almost no explicit guidance on how to define the outer limits of this power.

#### II

### LOWER COURTS' ATTEMPTS TO ADDRESS OFF-CAMPUS AND ONLINE YOUTH SPEECH

Given the paucity of Supreme Court jurisprudence on the matter, lower courts have struggled to articulate limits to school authority

<sup>&</sup>lt;sup>38</sup> Id. at 2624 (citation omitted).

<sup>&</sup>lt;sup>39</sup> *Id.* (internal quotation marks omitted).

<sup>40</sup> Id. at 2626.

<sup>&</sup>lt;sup>41</sup> *Id.* at 2625–26, 2628–29.

<sup>42</sup> Id. at 2629.

<sup>&</sup>lt;sup>43</sup> See id. at 2628 (citing studies and congressional statements indicating importance of fighting teen drug use in schools and schools' role in doing so). Indeed, Justice Alito's concurrence suggests drugs may be sui generis. He stated that his agreement with the majority "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and . . . provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . ." Id. at 2636 (Alito, J., concurring).

<sup>&</sup>lt;sup>44</sup> E.g., Mary-Rose Papandrea, Student Speech Rights in the Digital Age, 60 Fl.A. L. Rev. 1027, 1030 (2008) ("[Morse] continue[d] the trend of the Court to move away from the robust vision of student speech rights it embraced in Tinker.").

over student speech. Early attempts seem to focus on the geographical boundaries of the school yard. Speech taking place away from the physical campus was afforded full constitutional protection, but speech taking place on school property could be restricted if it could foreseeably cause a substantial disruption at the school.<sup>45</sup> However, this facially simple distinction has been complicated by the emergence of the Internet, leading courts to apply the more speech-restrictive standard more broadly.

#### A. The Geographical Approach

In *Tinker*, the Supreme Court stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Using this spatial metaphor as a point of departure, some courts have looked to the school's physical space to determine whether speech by a minor is subject to the school-speech doctrine, an approach which I will refer to as the "geographical approach."

The Second Circuit largely adopted a geographical approach in *Thomas v. Board of Education*,<sup>48</sup> one of the first cases to address off-campus speech after *Tinker*. The plaintiffs, several high school students, sold a paper modeled after the *National Lampoon* at a local store.<sup>49</sup> The paper—self-described as "uncensored, vulgar, [and] immoral"<sup>50</sup>—was largely written and distributed outside of the school.<sup>51</sup> However, a student brought a copy of the publication on campus and administrators discovered it.<sup>52</sup> In response, the school suspended the students who published the paper.<sup>53</sup>

<sup>&</sup>lt;sup>45</sup> Mary-Rose Papandrea offers a similar breakdown and critique of the current lower court jurisprudence. *See id.* at 1056–64. However, her conclusion—that "schools have little authority under the First Amendment to punish digital student speech"—differs sharply from mine. *Id.* at 1098. As explained below, *infra* Part IV, I argue that the jurisprudence provides guidance as to when schools constitutionally may act, but does not deem unconstitutional all restrictions on student Internet speech.

<sup>&</sup>lt;sup>46</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

<sup>&</sup>lt;sup>47</sup> It should be noted that identification of the importance of physical space in First Amendment jurisprudence is nothing new. *See e.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. Rev. 1219, 1220 (1984) (noting importance of physical context in First Amendment jurisprudence).

<sup>&</sup>lt;sup>48</sup> 607 F.2d 1043 (2d Cir. 1979).

<sup>&</sup>lt;sup>49</sup> *Id.* at 1045.

<sup>&</sup>lt;sup>50</sup> Id. at 1045 n.3.

 $<sup>^{51}</sup>$  Though the students stored the paper in a teacher's closet and performed minor work on the paper in school, the court found that "[a]t best . . . any activity within the school itself was *de minimis*." *Id.* at 1050.

<sup>&</sup>lt;sup>52</sup> *Id.* at 1045.

<sup>53</sup> Id. at 1046.

The Second Circuit's opinion focused heavily on the location of the speech. Limiting the school's reach, the court stated: "Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."<sup>54</sup> In determining whether to apply the student-speech standard of *Tinker* or the normal First Amendment standard applicable outside of the school context, the court focused on the location of the speech: Only after the court determined the speech to be on campus would the court use the more limited student-speech standard.<sup>55</sup>

In *Porter v. Ascension Parish School Board*,<sup>56</sup> the Fifth Circuit also used a geographical analysis to determine what level of speech protection to apply. The case concerned a student who created a violent drawing at home that his younger brother brought to campus two years later (while the older brother was still a student).<sup>57</sup> Though the court found that the *Tinker* standard applies to speech engaged in by students while on campus, it held that off-campus speech was fully protected. Finding for the student, the court emphasized the speech's physical location, noting that the older brother's "drawing was completed in his home, stored for two years, and never intended by him to be brought to campus."<sup>58</sup>

Likewise, in *Klein v. Smith*,<sup>59</sup> a Maine federal district court invoked the First Amendment to reverse the suspension of a student who had given a teacher the middle finger in a restaurant parking lot.<sup>60</sup> As the speech had not been on campus, the traditional First Amendment doctrine applied.<sup>61</sup>

Courts have occasionally attempted to apply the geographical approach to the Internet. In *Mahaffey v. Aldrich*, <sup>62</sup> a Michigan district court ruled that a personal webpage (titled "Satan's web page") was not on school property and that school-speech precedent therefore did

<sup>&</sup>lt;sup>54</sup> *Id.* at 1050.

<sup>&</sup>lt;sup>55</sup> *Id*.

<sup>&</sup>lt;sup>56</sup> 393 F.3d 608 (5th Cir. 2004).

<sup>&</sup>lt;sup>57</sup> *Id.* at 611.

<sup>&</sup>lt;sup>58</sup> *Id.* at 615.

<sup>&</sup>lt;sup>59</sup> 635 F. Supp. 1440 (D. Me. 1986).

<sup>&</sup>lt;sup>60</sup> *Id.* at 1441 ("The conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher.").

<sup>61</sup> Id. at 1442.

<sup>62 236</sup> F. Supp. 2d 779 (E.D. Mich. 2002).

not apply.<sup>63</sup> The court rejected the school's asserted authority to discipline the student, stating that "the evidence simply does not establish that any of the complained of conduct occurred on [school] property."<sup>64</sup>

Not all courts adopting a geographical approach have protected the student's online speech. For instance, the Pennsylvania Supreme Court found that the fact that students and administrators viewed a website in school was sufficient to designate the speech "oncampus."65 J.S., an eighth grade student at Nitschmann Middle School, had created the webpage at his home after school hours.<sup>66</sup> Moreover, the website contained a disclaimer purporting to bar school employees from viewing the site and requiring that visitors not inform school district employees of the site.<sup>67</sup> While the court looked to the intended audience (i.e., by taking into account the subjective intent of the speaker), it did so only to determine whether it was foreseeable that students or school officials would eventually access the website on campus. Finding that "it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property,"68 the court applied the Tinker standard.69

Commentators—especially those advocating for limitations on school authority—have urged future courts to adopt the geographical approach to analyze the permissibility of school regulations of student Internet speech.<sup>70</sup> One author stated that he would treat Fraser's

<sup>&</sup>lt;sup>63</sup> *Id.* at 781–82, 786 ("Defendants' regulation of Plaintiff's speech on the website without . . . on campus activity in the creation of the website was a violation of Plaintiff's First Amendment rights.").

<sup>64</sup> Id. at 784.

<sup>65</sup> J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

<sup>&</sup>lt;sup>66</sup> *Id.* at 850.

<sup>&</sup>lt;sup>67</sup> The website included degrading comments about numerous members of the school. It also argued that a certain teacher should die, inviting viewers to "[t]ake a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman." *Id.* at 851.

<sup>&</sup>lt;sup>68</sup> Id. at 865 (emphasis added).

<sup>&</sup>lt;sup>69</sup> *Id.* at 861–62 (stating *Tinker* standard); *id.* at 868–69 (finding "actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*")

<sup>&</sup>lt;sup>70</sup> E.g., Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U. J. Sci. & Tech. L. 243, 285 (2001) (arguing for school authority only when Internet speech is clearly brought physically on campus); Aaron H. Caplan, Public School Discipline for Creating Uncensored Anonymous Internet Forums, 39 Willamette L. Rev. 93, 140–43 (2003) (arguing that Tinker applies to speech on school's physical campus only); Richard Salgado, Comment, Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment, 2005 BYU L. Rev. 1371, 1376 (advocating presumption that off-campus speech is fully protected by First Amendment). Additionally, other commentators have emphasized a geographical approach to the Court's

campaign speech as off campus if it had been posted on the Internet, even if he had composed the entire text on a school computer.<sup>71</sup> The author suggested that the Internet "tak[es] students out of" the school,<sup>72</sup> noting that "[w]e speak of 'cyberspace' or 'surfing the net,' analogizing digital expression to a physical place, separate from one's real-world surroundings."<sup>73</sup> The author likened the Internet to a "window" allowing students to look outside school at the external world.<sup>74</sup> Under this analogy, the school should have no more power to censor what a student says or does on the Internet than it would have to censor what a student says in a public park in a public protest.

#### B. The "Impact" or "Substantial Disruption" Approach

Many courts have recognized the limitations of a hard-line geographical approach. Though this approach is generally clear and easy to apply, the *Thomas* court foresaw difficulties: "We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale." Courts confronted with difficult cases have thus taken a cue from the Second Circuit and moved away from strict geographical tests, applying the substantial disruption test without engaging the threshold question that the geographical approach attempts to answer—whether at the time of speaking the speaker was subject to the disciplinary reach of the school.

What I will refer to as the "impact" or "substantial disruption" approach is derived from the *Tinker* Court's student-speech standard. The *Tinker* Court held that student speech that "materially disrupts class work or involves substantial disorder or invasion of the rights of

jurisprudence more generally. See, e.g., Brannon P. Denning & Molly C. Taylor, Morse v. Frederick and the Regulation of Student Cyberspeech, 35 HASTINGS CONST. L.Q. 835, 837 (2008) (applying Tinker test to cyberspeech only if student publicized speech at school or encouraged others to access speech at school); Justin P. Markey, Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard To Protect Off-Campus Student Internet Speech, 36 Cap. U. L. Rev. 129, 150 (2007) (arguing that off-campus speech is not subject to school regulation unless student intentionally or recklessly caused speech to be distributed on campus); Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 Tex. L. Rev. 1129, 1159 (1999) ("Public schools are yet another context in which location-specific constitutional nonuniformity in the aid of community has been adopted."); Timothy Zick, Space, Place, and Speech: The Expressive Topography, 74 Geo. Wash. L. Rev. 439, 441 (2006) (interpreting current speech jurisprudence in terms of space).

<sup>71</sup> Caplan, *supra* note 70, at 152.

<sup>&</sup>lt;sup>72</sup> *Id.* at 159.

<sup>&</sup>lt;sup>73</sup> Id. See also Zick, supra note 70, at 481 (describing "cyber-places" as "separate, bounded spaces and at least potential places").

<sup>&</sup>lt;sup>74</sup> Caplan, *supra* note 70, at 160.

<sup>75</sup> Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979).

others is, of course, not immunized by the constitutional guarantee of freedom of speech."<sup>76</sup> While courts originally used the test in a restrictive manner to prevent the school from punishing certain disfavored speech, courts have increasingly used it to provide schools with greater authority to regulate student Internet use. Applying this approach to student Internet speech is problematic because it focuses on the effect of the speech without regard to whether the school was empowered to punish the speaker at the moment of speaking.

In *Beussink v. Woodland R-IV School District*,<sup>77</sup> a Missouri federal district court held that a school could not suspend a student for the content on his personal webpage, which was shown to school administrators by a classmate. Without addressing whether the school had authority to punish such speech, the court jumped straight to the question of whether the speech was likely to cause a substantial disruption and applied the *Tinker* standard.<sup>78</sup> That is, the court simply assumed that the student-speech standard applied without first inquiring whether the school had authority to punish the student for activity outside of the school.

This approach was mirrored by a Pennsylvania federal district court in *Killion v. Franklin Regional School District*.<sup>79</sup> The student, Zachariah Paul, sent an email message disparaging his school's athletic director to a number of his friends from school.<sup>80</sup> He neither printed out the message nor brought it to school.<sup>81</sup> However, another student reformatted the email and brought it on campus.<sup>82</sup> Paul was subsequently suspended.<sup>83</sup> The court found that the suspension violated Paul's First Amendment rights. The court recognized that some courts had found that a higher standard of protection applied to off-campus speech,<sup>84</sup> but it declined to follow those cases, stating that "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*."<sup>85</sup> Applying *Tinker*'s substantial disruption standard, the court found that there was no evidence of a substantial disruption on campus.<sup>86</sup>

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<sup>76</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
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<sup>&</sup>lt;sup>77</sup> 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

<sup>&</sup>lt;sup>78</sup> *Id.* at 1180.

<sup>&</sup>lt;sup>79</sup> 136 F. Supp. 2d 446 (W.D. Pa. 2001).

<sup>&</sup>lt;sup>80</sup> Id. at 448.

<sup>81</sup> *Id*.

<sup>82</sup> Id. at 448-49.

<sup>83</sup> Id.

<sup>&</sup>lt;sup>84</sup> Id. at 454 (citing Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998); J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000)).

<sup>85</sup> Killion, 136 F. Supp. 2d at 455.

<sup>86</sup> Id.

Various commentators have suggested that the substantial disruption test is the appropriate one. A number of scholars would simply apply this test to all youth Internet speech, regardless of whether it was created in school or even related to school.<sup>87</sup> Others would apply some modified form of the substantial disruption test to all such speech.<sup>88</sup> While these commentators disagree about how strict the test should be, they all focus on the danger that student speech could pose to individuals' safety.<sup>89</sup> For instance, in arguing in favor of the substantial disruption test, one commentator states that "it is both broad and flexible enough to balance the needs of a student's right to self-expression and the school's need to maintain an orderly and safe educational environment."<sup>90</sup> Often the commentators worry that a more nuanced approach would be too difficult for school administrators to implement: Unsure of their authority, they would refrain from acting, at the expense of student and teacher safety.<sup>91</sup>

<sup>87</sup> See Leora Harpaz, Internet Speech and the First Amendment Rights of Public School Students, 2000 BYU Educ. & L.J. 123, 162 (2000) (suggesting that Tinker test should apply when students access Internet at school); Sandy S. Li, Note, The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech, 26 Loy. L.A. Ent. L. Rev. 65, 99 (2005) (arguing that courts should apply Tinker standard even in Internet-related student speech cases that do not involve school-sponsored events or activities); Lisa M. Pisciotta, Comment, Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek To Punish Student Threats, 30 Seton Hall L. Rev. 635, 665 (2000) (arguing that substantial disruption justifies disciplinary action and citing Tinker); Jennifer Kathleen Swartz, Note, Beyond the Schoolhouse Gates: Do Students Shed Their Constitutional Rights When Communicating to a Cyber-Audience?, 48 Drake L. Rev. 587, 602 (2000) (suggesting that substantial disruption test should apply to Internet speech that "arises in the school" but leaving unclear what would constitute such "arising").

<sup>88</sup> See Christi Cassel, Note, Keep Out of MySpace!: Protecting Students from Unconstitutional Suspensions and Expulsions, 49 Wm. & Mary L. Rev. 643, 674 (2007) (proposing presumption that if Internet activity is off campus, punishment is unconstitutional unless school satisfies three-part test related to procedural protections, possibility of on-campus disruption, and balancing of interests); Sarah O. Cronan, Note, Grounding Cyberspeech: Public Schools' Authority To Discipline Students for Internet Activity, 97 Ky. L.J. 149, 152–53 (2008) (arguing for school authority to combat Internet speech with "harmful effects . . . within schools"); Renee L. Servance, Comment, Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment, 2003 Wis. L. Rev. 1213, 1216 ("[S]chools and courts should assess the negative impact of off-campus cyber-speech on the targeted individual and determine whether the impact interferes with the school's educational mission.").

<sup>&</sup>lt;sup>89</sup> One commentator even went so far as to state that "traditional constitutional rights may not apply to the Internet to the degree that they may in traditional media." Louis John Seminski, Jr., Note, *Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 182 (2001). The author proceeded to argue that courts need to "prioritize the effect of conduct over the related violation of protective rights." *Id.* at 183.

<sup>&</sup>lt;sup>90</sup> Li, *supra* note 87, at 102.

<sup>&</sup>lt;sup>91</sup> See, e.g., Seminski, supra note 89, at 167–68 (worrying about "[u]nclear precedents, misapplications of law, and inconsistent standards").

Yet the concern with this approach is that it ignores any independent rights of youths outside the school. Expanding school authority to include anything that creates a substantial disruption gives the school license to monitor and discipline all aspects of a student's life—an outcome that has been firmly rejected by the Supreme Court.<sup>92</sup>

The curtailment of student rights through the use of the substantial disruption test is perhaps most evident in the recent Second Circuit case Wisniewski v. Board of Education of Weedsport Central School District.<sup>93</sup> Wisniewski never sent the "Kill Mr. VanderMolen" icon to a school official, nor did he ever view it or send it while physically on school grounds.94 However, the court found that this disconnect from school property was immaterial. Relying on footnote 17 in the Thomas opinion, the court found that "[t]he fact that Aaron's creation and transmission of the [instant message] icon occurred away from school property does not necessarily insulate him from school discipline. We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school . . . . "95 The court agreed that it was reasonably foreseeable that the school would be alerted to the icon<sup>96</sup> and that "there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."97 Importantly, the court stated that "[t]hese conse-

<sup>&</sup>lt;sup>92</sup> See Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." (citations omitted)); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized . . . ."). District courts have also rejected this outcome. For a particularly relevant example, see *Klein v. Smith*, 635 F. Supp. 1440, 1441–42 (D. Me. 1986), where a court reversed a suspension on First Amendment grounds of a student who had given a teacher the middle finger in a restaurant parking lot because the student was not "associated in any way with school premises or his role as a student." *Id.* at 1441.

<sup>&</sup>lt;sup>93</sup> 494 F.3d 34 (2d Cir. 2007), cert. denied, 128 S. Ct. 1741 (2008); see supra notes 1–3 and accompanying text.

<sup>&</sup>lt;sup>94</sup> Wisniewski, 494 F.3d at 35–36.

<sup>&</sup>lt;sup>95</sup> *Id.* at 39 (footnote omitted) (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979)). The requirement of "foreseeable risk" seems to be an application of *Tinker*'s requirement that there be enough facts for school officials to "forecast substantial disruption." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969). In *Wisniewski*, the Second Circuit did not articulate the threshold of risk that permits regulation. 494 F.3d at 39. Presumably, a less than one percent chance would be too low, whereas ninety-nine percent would be sufficient. Obviously, the placement of the threshold is of immense importance to the outcome of the analysis; setting the standard too low would eviscerate the *Tinker* requirement.

<sup>&</sup>lt;sup>96</sup> Wisniewski, 494 F.3d at 39.

<sup>&</sup>lt;sup>97</sup> *Id.* at 40.

quences permit school discipline, whether or not Aaron intended his [instant message] icon to be communicated to school authorities or, if communicated, to cause a substantial disruption."98 Under this approach, it is unclear what, if any, speech is beyond the reach of school officials.

The Second Circuit's subsequent ruling in *Doninger*<sup>99</sup> seems to acknowledge the potential expansiveness of the approach in *Wisniewski*. The court there addressed a motion for a preliminary injunction by a student whose school had prohibited her from running for school government. Previously, the student had used her personal blog to lambast the school administration over a disagreement regarding the scheduling of a school event, urging parents and other students to call and email the school to register their disagreement.<sup>100</sup> Her blog post called the school administration "douchebags" and the student later testified that she encouraged other students to email in order to "piss [the school superintendent] off more."<sup>101</sup>

The Second Circuit acknowledged the issue of off-campus speech and stated, "We are acutely attentive in this context to the need to draw a clear line between student activity that affects matter of legitimate concern to the school community, and activity that does not." 102 But though it made overtures to limit the school's reach, the court again collapsed the tests, failing to inquire whether the school had any place regulating the speaker in this context. The court found that since "it was reasonably foreseeable that other . . . students would view the blog and that school administrators would become aware of it," the school was free to apply the less protective substantial disruption standard. 103

The problem with this approach is that students in their everyday lives, both in and out of school, usually direct their speech to other students. And, mirroring the problem with the *Wisniewski* test, all Internet speech has the potential to reach other students and school administrators; that is the nature of the Internet. We can only hope that the Second Circuit actually meant more than it said and that the driving force behind its decision was not the reach of the speech, but the context in which it was spoken—in the course of a debate about

 $<sup>^{98}</sup>$  *Id.* For the use of this test by a district court in another circuit, see, for example, *O.Z. v. Board of Trustees*, No. CV 08-5671 ODW (AJWx), 2008 WL 4396895, at \*1–4 (C.D. Cal. Sept. 9, 2008), in which the court upheld the disciplinary school transfer of a youth after she posted an online video of herself acting out the death of her teacher.

<sup>&</sup>lt;sup>99</sup> Doninger ex rel. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

<sup>100</sup> *Id.* at 44–45.

<sup>&</sup>lt;sup>101</sup> *Id.* at 45.

<sup>&</sup>lt;sup>102</sup> *Id.* at 48 (internal quotation marks omitted).

<sup>&</sup>lt;sup>103</sup> *Id.* at 50 (internal quotation marks omitted).

school government and events. This focus on context is the core of the relational approach. $^{104}$ 

#### C. The Internet's Complications

The Internet complicates the student-speech analysis in part because the Internet can be seen in a number of different and—for the purposes of law—contradictory dimensions. Orin Kerr states that the Internet can be "seen from the viewpoint of physical reality or virtual reality. . . . [N]either perspective holds an a priori claim to greater legitimacy." From the viewpoint of virtual reality, the Internet is a wholly separate space, governed by a wholly separate set of legal rules. From the viewpoint of physical reality, the Internet is a means of communication (a highly technological one) that can connect people in one physical location to those in another. The problem, and Kerr's insight, is that both are simultaneously correct. The Internet can be described as a separate place but also simply as a means of communication.

The dual dimensions of the Internet are especially evident in the context of young people. Youths do not merely approach the Internet as a realm that is separate and distinct from the rest of their lives. While many adults approach communication over the Internet as separate from the rest of their actions, most youths, having grown up with such technology, have completely integrated the Internet into their everyday interactions. Angela Thomas, in her study of how youths approach the Internet, states that "[f]or children, there is no such dichotomy of online and off-line, or virtual and real—the digital is so much intertwined into their lives and psyche that the one is entirely

<sup>&</sup>lt;sup>104</sup> See infra Part IV (discussing relational approach).

<sup>&</sup>lt;sup>105</sup> Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 Geo. L.J. 357, 357 (2003).

<sup>106</sup> Lawrence Lessig takes this point of view. See Lawrence Lessig, Commentary, The Law of the Horse: What Cyberlaw Might Teach, 113 HARV. L. REV. 501, 502 (1999) (arguing that cyberlaw must be viewed separately from other areas of law); see also Lawrence Lessig, Code and Other Laws of Cyberspace 217 (1999) (referring to Internet as "the most significant new jurisdiction since the Louisiana Purchase"). Mark Lemley, on the other hand, forcefully disagrees with the notion that cyberspace is an actual place. Mark A. Lemley, Place and Cyberspace, 91 Cal. L. Rev. 521, 523–24 (2003). Whether or not this analogy holds is not particularly important to this Note; no court has adopted the idea that any communication online is beyond school authority because it is in a separate physical space in the cyber universe, and it is highly unlikely that a court would consider such an argument acceptable. See Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007), cert. denied, 128 S. Ct. 1741 (2008) (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979)) (rejecting idea that physical space is determinative).

<sup>&</sup>lt;sup>107</sup> Kerr, *supra* note 105, at 360.

enmeshed with the other."<sup>108</sup> There is no real separation between the way youths approach interactions through traditional methods of communication (including face-to-face) and those that occur through Internet technology.

Furthermore, by expanding the potential reach of communication, the Internet makes it far more likely that a court will view student speech as posing a threat of substantial disruption. What once would have been a message passed from one person to another is now an Internet posting available to a worldwide audience. From a court's perspective, because Internet speech can so easily be forwarded from person to person, and thus can potentially reach a large audience, it has greater potential to create a disruption on the scale necessary to permit school discipline.

The complexities of the Internet explain many of the courts' difficulties. Proponents of the geographical approach struggle to define the specific location of the speech, when the speech could rationally be viewed as taking place in multiple physical locations at once. Proponents of the substantial disruption approach, on the other hand, throw up their hands and potentially regulate everything, but by so doing allow the Internet to expand the reach of schools into areas traditionally considered outside of their authority. In order to move beyond these two failed approaches, we must return to the original rationales for heightened school authority.

#### III

#### THE ROLE OF SCHOOLS IN A DEMOCRATIC SOCIETY

The debate surrounding student speech reflects a fundamental question regarding the role of schools in a democratic society. How far does a school's authority to inculcate social values run?

Education poses a deep challenge for liberal societies, requiring them to balance freedom of thought with civic and societal values. 109 Liberal societies must confront the question of whether schools should be institutions that foster creative and independent thinking by supporting freedom of speech or institutions that promote democratic, civic, or other values by inculcating these values in their students,

<sup>&</sup>lt;sup>108</sup> ANGELA THOMAS, YOUTH ONLINE: IDENTITY AND LITERACY IN THE DIGITAL AGE 163 (2007). For an interesting overview of the use of digital media by adolescents, see Papandrea, *supra* note 44, at 1032–37.

<sup>&</sup>lt;sup>109</sup> Martin H. Redish & Kevin Finnerty, What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox, 88 Cornell L. Rev. 62, 64–65 (2002) ("[T]he educational process that serves as a vital catalyst for the vibrant functioning of American democracy is itself inherently and intentionally undemocratic.").

potentially at the cost of limiting students' freedom to speak.<sup>110</sup> Commentators tend to subscribe to one of two basic theoretical approaches to education: Some believe the best way to instill democratic norms is through robust freedom of speech within the schools,<sup>111</sup> while others believe that norms must be instilled through tailored education and regulation of speech.<sup>112</sup>

110 Numerous scholars have identified and taken various positions in this debate. Many scholars consider this question fundamental. See generally Kenneth L. Karst, Law, Cultural Conflicts, and the Socialization of Children, 91 Cal. L. Rev. 969, 992–1002 (2003) (detailing conflicts over teaching of religious, family, sexual, and ethically pluralistic values); Salomone, supra note 33, at 255 (noting "inherent tension between students' constitutional rights to freedom of expression . . . and the authority of local school officials to make curricular decisions that reflect the preferences and values of the community majority").

<sup>111</sup> These scholars generally reject an extensive values-inculcation role for schools. *See* Erwin Chemerinsky, The Constitution in Authoritarian Institutions, 32 Suffolk U. L. Rev. 441, 441 (1999) [hereinafter Chemerinsky, Authoritarian Institutions] (arguing that courts should give less deference to school decisions limiting student speech); C. Thomas Dienes & Annemargaret Connolly, When Students Speak: Judicial Review in the Academic Marketplace, 7 YALE L. & POL'Y REV. 343, 381-85, 389-93 (1989) (arguing that schools' duty to inculcate values should be reconciled with students' freedom of speech through judicial balancing with presumption in favor of free speech); Betsy Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 YALE L.J. 1647, 1653-54 (1986) (discussing tension between democratic values and value inculcation and suggesting value-inculcation model has perverse effect of suppressing democratic ideals); Redish & Finnerty, supra note 109, at 102-09 (arguing for "anti-indoctrination" model of First Amendment that would curb efforts of schools to influence future political, social, or economic views of students); Richard L. Roe, Valuing Student Speech: The Work of the Schools as Conceptual Development, 79 CAL. L. Rev. 1269, 1276 (1991) ("[C]onceptual development, rather than inculcation . . . better describes the work of the schools."); Tyll van Geel, The Search for Constitutional Limits on Governmental Authority To Inculcate Youth, 62 Tex. L. Rev. 197, 203 (1983) ("[C]ourts have inadequately protected the interests of students in freedom of belief and have granted too much weight to government's claimed interest in inculcating and indoctrinating youth."); William B. Senhauser, Note, Education and the Court: The Supreme Court's Educational Ideology, 40 VAND. L. REV. 939, 941-42 (1987) (criticizing Supreme Court for moving away from Tinker analysis toward focus on school's function as inculcator of values).

David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 487–510 (1981) (arguing against judicial intervention in school disciplinary decisions on basis of nature of education); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 50, 54–56 (1996) (arguing that Court's emphasis on protecting student freedom of speech at expense of school order has contributed to decline of values and respect among youth); Bruce C. Hafen, Comment, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 Duke L.J. 685, 699–705 (arguing that courts should show deference to school policies out of recognition that schools play vital role in instilling First Amendment values); Kay S. Hymowitz, Tinker *and the Lessons from the Slippery Slope*, 48 Drake L. Rev. 547, 551–57 (2000) (arguing against "anticulturalism," saying that institutions must shape students into democratic citizens); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 132 (1995) (arguing that republican values must be instilled through education for competent citizenry); Tracy M.

Many free speech advocates support broad free speech rights for students because they worry that authoritarian institutions controlled by the state will shape the beliefs of individuals. Some free speech advocates also reject authoritarian schools on long-term pragmatic grounds: They accept that children need to be instilled with democratic or independent values, but reject the possibility that these values can be instilled through authoritarian institutions, which they believe stifle critical thinking skills. In their view, authoritarian schools instill in students antidemocratic values that persist beyond school years into adulthood.

On the other side of the debate are those who believe that greater control within the schools is acceptable. These theorists emphasize that democratic values and civic virtues do not develop naturally; they must be fostered by proper and disciplined educa-

Lorenz, Note, *Value Training: Education or Indoctrination? A Constitutional Analysis*, 34 ARIZ. L. REV. 593, 594 (1992) (arguing that tailored curricula designed to teach values pass constitutional muster).

Commentators have noted that the Supreme Court's position on this question has changed in recent decades toward favoring the value-inculcation model. See generally Erwin Chemerinsky, Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?, 48 Drake L. Rev. 527 (2000) (describing competing libertarian and authoritarian approaches in school cases and suggesting that authoritarian approach now dominates). But see Ryan, supra note 33, at 1354 (qualifying this view by arguing that Court has "not in fact privileged the inculcation of values as a goal in and of itself" but has only "recognized that schools must be allowed to inculcate values" when doing so is necessary to "the academic exercises themselves").

113 See, e.g., Chemerinsky, Authoritarian Institutions, supra note 111, at 455–56 (arguing that restriction of expression within schools is contrary to schools' function of teaching importance of constitutional principles, such as freedom of speech); van Geel, supra note 111, at 237 ("[M]erely because government claims an important interest in indoctrinating youth does not mean that the interest is sufficiently important to warrant infringement of rights to freedom of belief and speech."). Cf. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

<sup>114</sup> See, e.g., Dienes & Connolly, supra note 111, at 384 (accepting that schools may inculcate selected values, but arguing that those values are best imparted by exposing students to variety of opinions and ideas).

115 See, e.g., Levin, supra note 111, at 1679 (arguing that by suppressing ideas to maintain order or inculcate values, "schools may be imparting values unacceptable to a democratic society"); Redish & Finnerty, supra note 109, at 65 ("It is naive to believe that the content of students' education will have little or no effect on the perspectives those students will bring to their choices as citizens within the democratic framework."); Roe, supra note 111, at 1314 ("[I]nculcative education is essentially antithetical to democratic education because it does not provide students with the capabilities for critical deliberation that are necessary in a democratic society."); Nadine Strossen, Students' Rights and How They Are Wronged, 32 U. Rich. L. Rev. 457, 458 (1998) ("[I]f other people do not respect the rights of young people, then young people are less likely to grow up respecting the rights of other people.").

tion.<sup>116</sup> Thus schools, while not necessarily able to demand certain beliefs, should be able to attempt to inculcate certain virtues in their pupils. This argument is sometimes framed in communitarian terms: School administrators and teachers are integral to instilling the values of the community into youths.<sup>117</sup> However, even the more expansive theories recognize boundaries to school authority and preserve a place for families to teach young people values and ethics.<sup>118</sup>

It is not yet clear how these arguments apply to the Internet, which has become an important tool for youths to learn how to interact with others and discover who they are. For youths, the Internet is a mode of social interaction that teaches appropriate behavior and socially acceptable norms in the same way that more conventional interactions do.<sup>119</sup> Danah Boyd, in her examination of the website MySpace.com, states that "[b]y looking at others' profiles, teens get a sense of what types of presentations are socially appropriate; others' profiles provide critical cues about what to present on their own profile."<sup>120</sup> There is a legitimate debate over whether schools should be involved in shaping this environment, which has

<sup>&</sup>lt;sup>116</sup> See, e.g., Hymowitz, supra note 112, at 555 ("The responsible and vigorous exercise of free and independent speech does not come to individuals naturally—it must be taught."); Sherry, supra note 112, at 187 (arguing that for democratic society to function, "schools should teach cultural literacy, critical thinking, and moral character").

<sup>&</sup>lt;sup>117</sup> See, e.g., Diamond, supra note 112, at 528 ("[N]ecessary pedagogical judgments concerning students . . . should be left to school authorities, who represent the judgment of parents and local communities.").

<sup>&</sup>lt;sup>118</sup> See, e.g., Dupre, supra note 112, at 101–04 (arguing that "public schools . . . must be allowed to keep order" but acknowledging that "[s]urely school officials do not have" power coterminous with parental power). Indeed, the right of parents to raise their children as they see fit has been recognized and protected by the Supreme Court. See Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972) (holding State's interest in universal education must yield to Amish parents' interest in religious upbringing). It is also worth noting that the post-Tinker Court has never justified speech restrictions by assuming the State takes on the role of parent in the context of public schools (i.e., in loco parentis authority). Justice Thomas urged a return to recognizing in loco parentis power in his concurrence in Morse. See Morse v. Frederick, 127 S. Ct. 2618, 2631-36 (2007) (Thomas, J., concurring) (arguing for reversal of *Tinker* and return to doctrine of *in loco parentis*). However, no other Justice has supported this move. It was explicitly rejected by Justices Kennedy and Alito, who wrote that "when public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents." Id. at 2637 (Alito, J., concurring). Thus, although many argue that the schools have a significant role to play in inculcating values in students, these conceptions do not allow schools to act in place of parents in monitoring and shaping students' social and moral development.

<sup>&</sup>lt;sup>119</sup> See Danah Boyd, Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life, in Youth, Identity, and Digital Media 119, 129 (David Buckingham ed., 2008) (discussing how social network sites like MySpace.com allow teens to "express salient aspects of their identity for others to see and interpret").

<sup>&</sup>lt;sup>120</sup> Id. at 127.

become integral to youths' formation of their social and political identities.

Forcing students to conform their Internet activity and expression to that which is acceptable for school restricts students' ability to engage in identity experimentation. Of course, social and familial repercussions, such as social rebuke or parental grounding for racist or sexually charged remarks, may ensue. It is through this pattern social interaction, freedom to experiment, and social sanction for inappropriate speech—that youths learn who they are and how they should behave. But school supervision changes this process. Youths, as all people do, interact differently in different contexts. Inside jokes and expressions of frustration or anger all must be limited or altered if school officials are allowed to use their coercive power to censor these interactions according to school rules.<sup>121</sup> Traditionally, these social interactions would take place at a student's home or in a public place outside of school; but because so much socializing has now migrated to the Internet, school officials police a much wider range of student behavior. This authority curtails the ability of students to engage in social development and experimentation.

Though heavily publicized incidents of school violence and the traditional role of schools in shaping student values and personalities substantiate school authorities' concern over the content of student Internet speech, ultimately their censorship enlarges schools' policing of the social and personal spheres of students' lives. In order to determine whether this expansion is appropriate, courts must openly integrate the question of what role schools should play in a democratic society into their determination of whether schools may constitutionally restrict student speech.

<sup>121</sup> An additional concern for free speech advocates is how restrictions on speech shape students' understanding of the Internet itself. Students who become accustomed to government censorship will believe that it is appropriate for the government to censor their communications later in life. One study on students' attitudes toward the First Amendment is particularly disturbing. It found that "49 percent of students thought that newspapers should need government approval for their stories" and that "[h]alf believed the government could censor the Internet." Alex Koppelman, *MySpace or OurSpace*?, Salon.com, June 8, 2006, http://www.salon.com/mwt/feature/2006/06/08/my\_space/ (describing study conducted by researchers at University of Connecticut).

#### IV

### A New Methodological Framework: The Relational Approach

#### A. Overview of the Approach

The relational approach I propose in this Note recognizes that the social role of schools lies at the heart of the student-speech doctrinal inquiry. The relational approach clarifies the distinction between the two questions at issue in the student-speech problem: First, should the student-speech standard apply? Second, if the student-speech standard applies, what is the substance of that standard? The relational approach responds to the first question by looking to whether the youth was speaking in the role of a student. If the youth was speaking as a student, the student-speech standard—the doctrinal tests developed by the Court in the *Tinker* line of cases—applies and answers the second question. If, however, the youth was speaking outside that role and instead was speaking as a general citizen, then the full First Amendment protections apply.<sup>122</sup>

This approach is a frame for analysis, not an outcome-determinative test. Different understandings of the role of schools will lead to different end results in practice. My argument, therefore, has two parts. First, and most centrally, I make a methodological argument: Courts should look initially to the relationship between the youth and the school to determine the school's power to punish speech, as opposed to first examining the speaker's location or jumping straight to an assessment of the speech's effect. Second, I argue that any generally accepted theory of the relationship between school and student can establish the boundaries of the school's authority to punish speech. There could be a wide range of substantive positions within the second argument, mirroring the variety of educational theories discussed above. 124 The importance of the relational approach is that

<sup>122</sup> This idea is arguably similar to that proposed in *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (holding that First Amendment does not "shield[] from discipline the expressions employees make pursuant to their professional duties"). *See, e.g.*, Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?*: Garcetti v. Ceballos *and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 St. Louis U. L.J. 589, 603–05 (2008) (highlighting citizen/employee distinction made in *Garcetti*).

<sup>&</sup>lt;sup>123</sup> I assume that it is possible for an individual to act as a student in one context and simply as a youth in another. This assumption is reflected in the Supreme Court's student-speech cases. *See infra* Part IV.B (arguing that relational approach is reflected in Supreme Court case law).

<sup>&</sup>lt;sup>124</sup> See supra Part III (discussing debate over role of schools in democratic society). It should be noted that in this sense the relational approach comes in at both steps of the inquiry. The first step is whether the speech occurs in a student-school relationship. The second step looks to the substantive nature of that relationship to inform which restrictions

it focuses a court's inquiry on the substantive question at the heart of the problem: the role of schools in a democratic society.<sup>125</sup>

The relational approach offers a number of advantages over the current approaches. First, this approach accounts for the Internet's lack of spatial determinancy. By not trying arbitrarily to place Internet speech within a geographic category—on campus or off campus—the relational approach avoids emphasizing a distinction that youths themselves might not make. This is important if the distinction between regulable and nonregulable speech will be more than short-lived. A distinction that is incoherent to those whom it affects the most will eventually become obsolete (especially as the current generation matures and new understandings of electronic communication emerge).

Second, the relational approach supports the socialization of the very free speech norms that the First Amendment protects. The relational approach focuses on the particular relationship between students and their schools, and therefore will terminate upon the student's graduation. It thus emphasizes the unique and limited nature of school regulation of speech. In contrast, applying the substantial disruption approach without asking whether the school has authority to discipline the conduct at issue focuses attention on the supposed need for order in government institutions without regard for appropriate limitations on school authority. Therefore, the relational approach better reflects the societal value of open discourse than do existing frameworks.

Lastly, the relational approach imposes boundaries on the power of school authorities. When the substantial disruption test is applied without regard for the context of the speech, schools gain enormous control over every aspect of young people's lives. Even if the youth is

are acceptable. For example, in *Fraser*, the Court recognized a student-school relationship and then established an exception to *Tinker* based on the nature of that relationship in a school-government assembly setting. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682–85 (1986).

<sup>125</sup> In this sense, the relational approach is not a simple "minimum contacts" test. See Kyle W. Brenton, Note, BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction, 92 Minn. L. Rev. 1206, 1233–39 (2008) (suggesting application of personal jurisdiction test to determine boundaries of school authority). The relational approach is more substantive and qualitative than simply counting contacts. Moreover, given the expansive nature of personal jurisdiction and the ability of courts to find contacts between the school and Internet activity, I am doubtful of the ability of such an approach to spur meaningful analysis by the courts.

<sup>126</sup> See Thomas, supra note 108, at 163 (noting that youths do not see distinction between online and offline worlds).

<sup>&</sup>lt;sup>127</sup> See supra notes 113–15 and accompanying text (discussing how First Amendment law as applied to schools shapes students' understanding of democracy).

not creating a substantial disruption, the approach gives schools the authority to monitor youths' lives on the theory that things they are saying may cause a substantial disruption in the future. In contrast, the relational approach demands that schools stay out of young people's lives unless the youths are acting in the role of students—if they are not, full First Amendment protections apply. Even if one takes an expansive view of the student-school relationship, the relational approach at least forces courts to tackle publicly the critical issue—the extent of the school's jurisdiction to punish young people—rather than assuming the power to be unlimited.<sup>128</sup>

Of course, it should be remembered that the relational approach does not turn youths loose upon the world, free to create havoc as long as they are not in the role of students. Parents and police still maintain substantial authority over youths' actions. Often the desire to suppress children's speech stems from a belief that parents are not fulfilling their duty to discipline their children. Yet parents largely have the right to raise their children as they see fit. And of course, when the conduct is criminal, the police can get involved.

#### B. Derivation of the Relational Approach from Supreme Court Jurisprudence

The framework proposed in Section IV.A supports and is supported by the Supreme Court's school-speech jurisprudence. Thus, the relational approach offers not only a framework in which Internet speech may be appropriately addressed, but also a way to conform online-student-speech doctrine to Supreme Court jurisprudence.

When applying Supreme Court student-speech jurisprudence to other student-speech contexts, it is important to recognize that this jurisprudence is grounded in the student-school relationship. The *Tinker* decision was premised on the principle that because students have a special relationship with school administrators, school administrators are not bound by the strict confines of the First Amendment as

<sup>&</sup>lt;sup>128</sup> As I argued above, few American theorists embrace such an expansive role for schools in society. *See supra* note 118 and accompanying text.

<sup>129</sup> See supra note 118.

<sup>130</sup> This is particularly important to remember considering the issue of threats. School officials often find certain comments or expressions threatening, such as the *Wisniewski* buddy icon. Police (and, for that matter, school officials) may get involved if the speech constitutes a true threat under generally applicable free speech doctrine. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34, 37–38 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008) (noting that true threats may be criminally prosecuted). See also *infra* notes 166–69 and accompanying text for a discussion of the implications of student-speech jurisprudence for school safety.

it applies generally, but are still held to a high standard.<sup>131</sup> The student-school relationship is essential to this analysis—it is this relationship that permits a lower standard of constitutional protection.<sup>132</sup> Thus *Fraser*, *Kuhlmeier*, and *Morse* merely expand on this basic premise. All three focus on particular aspects of the student-school relationship: teaching values of self-governance at school assemblies, teaching journalism and journalistic ethics, and dealing with the special problems of drugs and the health and safety of students. Each of these cases deals with students acting in the role of students and the responsibilities that schools have to them.

In *Tinker*, the Court stated that "conduct by the student, in class or out of it, . . . [is] not immunized by the constitutional guarantee of freedom of speech." The important language, I argue, is not "in class or out of it," but rather "student." In fact, these words that seem to expand the school's authority also act as a limitation: In and out of class, permissible conduct is defined by what is proper conduct of students *qua* students. The Court's decision only regulated the student-school relationship. It limited the state's educational authority by applying the standard of "substantial disruption" only to students engaged in legitimate educational activities. Emphasizing this point, the Court stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," thereby rejecting the idea that schools are "enclaves of totalitarianism." A close reading reveals an assumption that youths

<sup>&</sup>lt;sup>131</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (finding that student speech that disrupts classwork or social order or invades others' rights is properly regulable by schools, but warning that such regulation must be limited to "carefully restricted circumstances").

<sup>132</sup> It hardly needs to be mentioned that the restrictions upheld in *Fraser*, *Kuhlmeier*, and *Morse* would not be valid against nonstudent speakers. *Compare* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (upholding prior restraint against student paper), *with* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (striking down prior restraints against newspaper, stating "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))). Courts have upheld lower constitutional protection for students in other contexts as well. *See*, *e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("[T]he school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject [under the Fourth Amendment].").

<sup>133</sup> Tinker, 393 U.S. at 513.

 $<sup>^{134}</sup>$  For a discussion of various approaches to defining legitimate educational activities, see supra notes 109-12 and accompanying text.

<sup>&</sup>lt;sup>135</sup> *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

<sup>&</sup>lt;sup>136</sup> *Id.* at 511. The Court even went so far as to compare the Des Moines school's regulation to those imposed by the military schools of Sparta. *Id.* at 512.

are not students all the time; sometimes they are citizens, who deserve the same constitutional protections afforded to nonstudents.<sup>137</sup>

In Fraser, the Court held that the school is a specific setting where certain levels of decorum are required in order to inculcate important values.<sup>138</sup> The Court focused on the long-standing and deeply-rooted position of the "habits and manners of civility" 139 in the American democratic and deliberative traditions<sup>140</sup> and highlighted the differences between the armbands worn by the students in Tinker and the campaign speech by the student in Fraser.<sup>141</sup> The objectionable aspects of Fraser's speech at the school assembly were sexual, not political, as in *Tinker*.<sup>142</sup> The case turned on the school's specific relationship with students, its duty to instruct the students on civil discourse, and its responsibility to protect students from profane speech. The Court stated that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."143 The prohibition thus was not upheld on the basis of the need for order (though it certainly was a factor) but rather on the basis of the unique relationship between student and educa-

<sup>137</sup> It is important not to confuse the "material and substantial disruption" test used in *Tinker* with the test used in the nonstudent setting. In *Grayned v. City of Rockford*, the Court stated that activity on a public sidewalk near a school may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 408 U.S. 104, 118 (1972) (quoting *Tinker*, 393 U.S. at 513). However, the Court specifically held that such prohibition could only be based on content-neutral restrictions, *id.* at 120, while the Court has clearly held that certain content-based restrictions may be valid against students in the school environment, *see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (permitting regulation of lewd speech).

<sup>138</sup> Fraser, 478 U.S. at 683.

<sup>&</sup>lt;sup>139</sup> *Id.* at 681.

<sup>&</sup>lt;sup>140</sup> Whether or not this historical portrayal is accurate or overly idealistic, the Court's point remains the same: It is the role of a school to inculcate certain values in its youth. *See supra* note 110 (discussing shift of Supreme Court toward favoring inculcation of values by schools).

<sup>141</sup> Fraser, 478 U.S. at 685.

<sup>&</sup>lt;sup>142</sup> The Court found that, as there was no prohibition on a particular political viewpoint, but rather on speech with sexual content, greater deference could be given to the school's decision to sanction speech. *Id.* The Court pointed to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Ginsberg v. New York*, 390 U.S. 629 (1968), to demonstrate that lower protection is accorded to lewd and profane speech when the audience includes children. *Fraser*, 478 U.S. at 684. This Note is not concerned with whether this is a correct valuation (i.e., whether *Fraser* was rightly decided), but rather with the proper focus of the Court's inquiry.

<sup>&</sup>lt;sup>143</sup> Fraser, 478 U.S. at 683. Justice Brennan, in his concurrence, suggested that had the countervailing educational interests been less weighty, the student's speech might have been permitted. *Id.* at 689 (Brennan, J., concurring).

tional institution.<sup>144</sup> Therefore, rather than granting a broad license to schools to monitor student conduct in all settings, *Fraser* merely follows *Tinker* in holding that schools may have special standing in some cases with respect to students. In such cases, schools are allowed to limit students' constitutional rights in order to promote other educational values.<sup>145</sup>

In *Kuhlmeier*, the Court focused on the educational purpose of the school newspaper, allowing regulations on speech if they were "reasonably related to legitimate pedagogical concerns." The focus on educational purpose as a basis for the authority to restrict speech is important. The standard requiring a *legitimate* pedagogical concern highlights the fundamental limitation: The school cannot restrict speech merely on the basis of disagreement or pretextual mission. The school is a government institution within the greater constitutional structure; while some restrictions are valid, they may be used only as necessary for the school to fulfill its responsibilities toward its students. He

The Court in *Morse* applied an analysis similar to that used in *Kuhlmeier*. It focused on the educational mission of the school, <sup>149</sup> but as in *Tinker*, *Fraser*, and *Kuhlmeier*, limited the circumstances in which speech restrictions were permissible. Only those educational priorities that are constitutionally legitimate, such as school safety and drug prevention, justify the suppression of speech. Again, however,

 $<sup>^{144}</sup>$  See supra notes 109–12 and accompanying text for a discussion of the debate over this relationship.

<sup>&</sup>lt;sup>145</sup> See Fraser, 478 U.S. at 683 (calling this inculcation "work of the schools" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969))).

<sup>&</sup>lt;sup>146</sup> Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

<sup>147</sup> A number of scholars have highlighted this characteristic in different manners. See Chemerinsky, Authoritarian Institutions, supra note 111, at 441–42 (discussing how nature of authority in institutions shapes judicial review); Bruce C. Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L.J. 663, 695–712 (1987) (arguing that schools act as mediating institutions instilling larger First Amendment values in students); Frederick Schauer, Comment, Principles, Institutions and the First Amendment, 112 Harv. L. Rev. 84, 86–87 (1999) (arguing for greater distinction in First Amendment jurisprudence among institutions, including schools).

<sup>&</sup>lt;sup>148</sup> Justice Brennan, dissenting in *Kuhlmeier*, did not deviate substantially from this underlying rationale. He took a hard-line approach in determining which restrictions were legitimate for pedagogical purposes, stating that "[m]anifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that 'is designed to teach' something . . . ." *Kuhlmeier*, 484 U.S. at 283 (Brennan, J., dissenting) (quoting *id.* at 271 (majority opinion)).

<sup>&</sup>lt;sup>149</sup> See Morse v. Frederick, 127 S. Ct. 2618, 2628–29 (2007) (discussing role of schools in deterring drug use through student education); *Kuhlmeier*, 484 U.S. at 271–72 (discussing schools' authority to censor student speech disseminated by school to fulfill role of preparing students for professional training and functioning in civilized society).

the Court relied on the educational context in which the restrictions took place as justification for the lower standard of protection.

Thus the Court, in each of its four decisions, relied on a framework resembling the relational approach in determining whether the student's speech was protected from school discipline. In doing so, the Court articulated a theory of education that, while still in flux, contained clear limitations on school authority—a school can only punish students for their speech when doing so is necessary to the educational role of the school. It is this general framework and method of inquiry that lower courts must apply in order to develop a coherent student-speech jurisprudence.

#### C. The Relational Approach in Practice

In order to understand fully the value of the relational approach, it may be useful to explore how this approach might operate in practice. The examples below demonstrate how the relational approach would avoid producing conflicting outcomes between speech in the "real" world and online speech. This distinction, as discussed above, is increasingly blurry.<sup>150</sup> It is most important in these examples to pay attention to the method—the questions asked—instead of the outcome, which may be unclear in hard cases.

#### 1. Private Speech

The easiest application of the relational approach arises in a scenario such as the one in *Porter v. Ascension Parish School Board*, <sup>151</sup> in which the regulated speech was a drawing made at the student's home. The geographical and substantial disruption approaches would probably prevent the school from disciplining the artist for the drawing; it is not foreseeable that a drawing made at home and not intended for public viewing would cause a substantial disruption at school. The relational approach likely would yield the same result, although through critically different reasoning. Under virtually any theory of education, schools should not regulate a youth's creative activities within the home; this is clearly the responsibility of parents. While the scenario changes slightly once the drawing is brought into the school community, the implications for permitting such regulation become clear: Allowing the school authority to discipline a student for this activity would grant the school significant control over activities within the home that have little connection to school life.

<sup>150</sup> See supra Part II.C.

<sup>151 393</sup> F.3d 608 (5th Cir. 2004); see also supra notes 56-58 and accompanying text.

#### 2. Public Forums

The fact patterns at issue in Beussink, 152 J.S. v. Bethlehem Area School District, 153 and Mahaffey 154 highlight the differences between the relational approach and the current approaches in the context of public online forums, such as webpages. In all three cases the youths had posted derogatory messages regarding the school, school officials, or other students online. The courts' responses were varied, but in none of the cases did the court adopt a relational approach. The relational approach would look to the nature of the message board as a whole and not to the individual comment. On the one hand, a board that was largely dedicated to student topics and concerns, and solely accessible to students, might suggest that youths using the board are acting in their student capacity. On the other hand, a board accessible to and used by the general public is much more akin to a public square than a school playground. The question might thus be framed this way: Does the board operate as an alternative to schoolyard or classroom interaction, or as an alternative to general social interaction? The former suggests that the youths are interacting as students, while the latter suggests interaction simply as citizens.

Using the relational approach, the result in *Doninger*,<sup>155</sup> upholding a school's sanction of a member of student government for using an online forum to harass and insult school officials over actions taken by the school administration and student government, makes perfect sense. The court seemed motivated by the fact that the entire issue was one of student governance; the Internet was only being used as a means to mobilize the student body.<sup>156</sup> The relational approach focuses on the general context of the forum itself, ignoring the rather arbitrary questions (and probably fortuitous answers) of whether the webpage was accessed on school grounds or whether it would foreseeably make its way to school. These are questions that, as described above,<sup>157</sup> increasingly fail to shed light on the nature of students' Internet communication. What is useful about the relational

<sup>&</sup>lt;sup>152</sup> Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998); see also supra notes 77–78 and accompanying text.

<sup>153 807</sup> A.2d 847, 850 (Pa. 2002); see also supra notes 65-69 and accompanying text.

<sup>&</sup>lt;sup>154</sup> Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *see also supra* notes 62–64 and accompanying text.

<sup>&</sup>lt;sup>155</sup> Doninger ex rel. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

<sup>156</sup> *Id.* at 50 ("The blog posting directly pertained to events at [Lewis Mills High School] ...."). The court noted that the student's conduct risked "frustration of the proper operation of [Lewis Mills High School]'s student government and undermining of the values that student government, as an extracurricular activity, is designed to promote." *Id.* at 52.

<sup>157</sup> See supra Part II.C.

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approach is that it attempts to bring the analysis of online speech in line with the general approach to offline speech.

If courts were to apply the substantial disruption test to speech in a traditional, offline public forum (such as a park) without first applying the relational approach, the result would be an enormous extension of schools' ability to regulate student speech.<sup>158</sup> One could certainly argue that inflammatory speech in a public forum would disrupt a school's operations when students or faculty learn of the remarks. And it becomes even more difficult if the student were, for example, to provide an interview to a reporter for the school newspaper covering the public event. Under the substantial disruption approach, the speech is not only foreseeably likely to make it into the school community—it is almost certain to.

The relational approach avoids this problem by looking to the role of the speaker. When speaking in a public forum, the speaker, though a student, is acting in his capacity as a public citizen, voicing his views in public. His interaction with a student newspaper in no way makes him a *student* at this point; he has merely granted an interview as any other citizen might have. The school would have no right to punish him using the less protective substantial disruption test.<sup>159</sup>

<sup>&</sup>lt;sup>158</sup> Indeed, traditional free speech doctrine would only allow content-neutral restrictions. *Compare* Police Dep't v. Mosley, 408 U.S. 92 (1972) (striking down ordinance barring labor picketing but permitting other forms of picketing), *with* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance prohibiting noise or diversions disrupting school).

<sup>&</sup>lt;sup>159</sup> The emphasis here is on punishing. There may be a different standard for actions taken in the interests of a student's mental health. Such issues are beyond the scope of this Note. However, there are a few unique situations that complicate the analysis above, but which fit within the relational approach. In the context of an academic project completed outside of school—for instance, a speech written as part of an assignment (on hardcopy or online) or speech between members of an academic group project—it is clear that the speaker is in the role of student. Likewise, a field trip or other unconventional educational setting (such as the school-sanctioned participation in the Olympic Torch Relay in Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007)) would easily be considered regulable under the relational approach for the same reason. The simple act of leaving the school grounds would pose problems for the geographical approach, but not for the relational approach. As Fraser points out, the Supreme Court has not limited school authority to regulating classroom speech. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class . . . . "). Thus, when nonacademic, school-related speech takes place off campus, it should still be regulable. See, e.g., Doninger, 527 F.3d 41 (upholding school discipline of student for school-related blog post). However, the mere fact that the issue involves school politics does not give the school free rein to regulate the student's speech. If the speech is intended for a greater audience, for instance, by attempting to raise a concern within the public as a whole, the school cannot regulate the speech. There, the youth has shifted from being a student to being a citizen who happens to be a student. Thus, a statement of a student at a rally would not be subject to greater regulation simply because the student was also a student representative on the school

Of course, this determination will not always be easy. There will be scenarios that seem to blur the line, such as a private message board created by students, teachers, or school administrators for students to use in a class. But the important point is that the relational approach focuses the court on the nature of the forum itself, before addressing the inflammatory nature of the content.

#### 3. Youth Publications

The situation in *Thomas*, in which an independent publication was produced predominantly off campus, provides another wrinkle for the relational approach. The relational approach does not necessarily provide as much protection for off-campus newspapers as the geographical approach adopted in *Thomas* might. While a broad reading of *Thomas*, like that advanced in *Wisniewski*, would probably allow school administrators the leeway to examine most off-campus newspapers that could foreseeably cause a disruption on campus, the *Thomas* court noted that "the heart of the First Amendment is the ineluctable relationship between the free flow of information and self-governing people." This observation suggests that the *Thomas* court would not be prepared to take its decision to its logical extreme.

The relational approach, building on the recognition in *Kuhlmeier* and *Fraser* that schools play some role in inculcating values, <sup>162</sup> may not be as protective. On one hand, a paper with little or no connection to the school, and thus much like a normal newspaper, would almost certainly be protected even though it was written by a youth. On the other hand, if the paper was intended to be an alternative to the on-campus student paper, the school's interest in teaching discourse and legitimate journalism increases. <sup>163</sup> A narrow understanding of the school's purpose would probably require the independent paper to be left alone. However, even a moderately expansive understanding of the school's social role, one that focuses on teaching appropriate journalism and community standards (whatever those might be), might see any student-produced paper

council, even though this might increase the speech's likelihood of causing a "substantial disruption" at the school. Rather, because the speech was given to a public audience, it should be protected as any speech in a public forum would.

<sup>160</sup> Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979).

<sup>&</sup>lt;sup>161</sup> Id. at 1047.

<sup>&</sup>lt;sup>162</sup> Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988); Fraser, 478 U.S. at 681.

<sup>&</sup>lt;sup>163</sup> See Kuhlmeier, 484 U.S. at 272, 276 (discussing school's interest in teaching discourse and legitimate journalism).

whose subject was the school and whose audience was composed of students as a valid subject of speech regulation.<sup>164</sup>

Additionally, an online paper or a youth's website, like an online message board, highlights the fact that the medium through which one speaks is not determinative of the speech standard under the relational approach. Thus, while the fact that the paper is online—and therefore more likely to be accessible to large numbers of students or to cause a ruckus on campus—would make it more likely to be subject to regulation under either the geographical or substantial disruption tests, the relational approach would view an online newspaper no differently than it would a tangible newspaper.

The above discussion highlights the debate that should take place under the relational approach. Accepting a narrow role for schools, the speech should be protected; it would be up to the school community to voice its displeasure in other ways. The young person is not clearly speaking in the role of a student—there is no traditional academic or educational interest at stake here. That said, a more expansive understanding of the school's role might view the student as targeting his or her peers in their capacity as students, or see the speech as academic work, and therefore allow regulation of the speech.

Ultimately, the core issue is the role of schools in our society. If we entrust our educators with monitoring most, if not all, of our youths' speech in order to educate them on socially acceptable behavior and speech, then most regulation would be appropriate. If a more limited role for government officials is accepted, then even though the speech involves references to school, it is not significantly different from making nasty comments in a public supermarket within earshot of faculty or staff of the school. We may not approve, but not all undesirable actions of society's youth are illegal.

#### 4. Student Instant Messages, Text Messages, or Emails

The treatment of instant messages, emails, and perhaps even text messages poses another challenge for the relational approach, as seen in the *Wisniewski* case.<sup>165</sup> Like a profile on a social networking website, a youth's instant messages, text messages, or emails to another youth are very likely to be seen under the relational approach as merely interpersonal communication between individuals rather than

<sup>&</sup>lt;sup>164</sup> See id. (upholding school power to restrict speech, including ability to remove inappropriate articles from school newspaper, in order to teach journalism).

<sup>&</sup>lt;sup>165</sup> Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007), cert. denied, 128 S. Ct. 1741 (2008); see supra notes 93–98.

students. Even broad theories of a school's mission likely would not allow schools to monitor all interpersonal communication between youths. Even the facts of the *Wisniewski* case, where the image accompanying the speaker's messages referred to a teacher at school, are not enough to change the private nature of the youth's speech.

As demonstrated by the *Wisniewski* case, any online conversation may be printed out and brought to class, creating the potential for substantial disruption. To ignore the context and roles of the speakers and simply focus on the effects or facial subject matter of the speech is to collapse all personal conversations into conversations under school authority. While allowing this regulation in and of itself is cause for concern because of the expansive authority it gives to school officials, it also has the effect of deputizing every student as a private spy for the school. And unlike standard oral conversations, instant messages and emails produce a physical record, whose context and even content can be manipulated. Students thus have the substantial ability to subject their peers to discipline.

Real-time conversations during class stand in contrast to these online conversations. When the speech is intended to substitute for conversations that would have otherwise taken place within the academic setting, and thus simply represents an attempt to avoid the teacher's gaze, the speaker clearly understands himself or herself to be operating within the school setting and should be recognized as doing so by the courts.

I think that most commentators would agree that online interpersonal conversation between students at their homes should be beyond the reach of school discipline. The relational approach prevents over-reaching into students' lives.

### D. Limitations and Difficulties Surrounding the Relational Approach

There are at least two possible criticisms of the relational approach that will be addressed in this Note. First, one might ask if the approach is workable—that is, would using such a method actually be practicable for courts? Second, a number of courts and commentators contend that schools need increased authority to address security issues.

As to the first criticism, I think there are two important reasons why the relational test is accessible to lower courts. First, as I argued in Part IV.B, *supra*, the Supreme Court has already taken a similar approach toward school speech by outlining a general doctrine based on theories of the purpose of schools and the relationship between

students and schools. Lower courts thus would merely be following the Supreme Court's lead in this respect. While the test would not necessarily provide a "bright line," neither do the existing approaches (as the confusion of the lower courts amply demonstrates). Furthermore, the traditional approaches have the additional disadvantage of leading to vast overexpansion of school authority, in disregard of the underlying theories justifying increased regulation of student speech. The relational approach thus forces courts to ask the question that the Supreme Court would ask were it addressing the same case. While specific multifactored "tests" could evolve to help clarify this approach, they would not be necessary.

Further, this approach is *more* accessible than current doctrine to teachers and school administrators. Teachers are not lawyers. Thus, obscure legal tests may be difficult for them to adopt. But the relational approach is not obscure or case law–dependent. Rather, it asks teachers and administrators to look at the nature of their own relationships to students. By focusing the legal test on whether a young person is acting in the role of a student, a distinction that is based on a common sense, everyday understanding of their role as educators, school officials will be better able to understand the legal test. Moreover, when the teachers or administrators get it wrong, a court ruling will serve to clarify the boundaries for the profession as a whole. The relational test, by relying on an area of expertise of school officials, will be easier to implement than existing doctrine.

The second criticism, and one that is certainly timely, focuses on whether schools need increased authority to address security concerns. This concern is clearly apparent in the court's decision in *Wisniewski*. While school safety is always of paramount importance, I make three points to show that the relational approach will not threaten school safety. First, if it is a true threat, the speech is unprotected even under standard nonstudent First Amendment jurisprudence, and the school can, of course, respond. This point highlights a second point that should not be overlooked: This safety concern exists *everywhere*; it is by no means unique to schools. Mall shootings, terrorist attacks, and other violent events have, unfortunately, become

<sup>&</sup>lt;sup>166</sup> Wisniewski, 494 F.3d at 36, 38–40 (describing threatening nature of buddy icon and appropriate standard for evaluating speech reasonably understood as violent conduct).

<sup>&</sup>lt;sup>167</sup> It is generally recognized that "true threats" are not protected by the First Amendment, though, admittedly, it is a high standard to meet. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941) (providing exception for threatening speech); Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (finding "wanted" posters with names and addresses of abortion providers to be "true threats" unprotected by First Amendment).

a part of American life. Yet we do not limit speech everywhere. In short, security is not a reason in itself to justify curtailment of speech in this context. Third, many commentators have argued that the supervision and discipline of this speech is not likely to lead to significant security benefits. The existence of troubling speech by students may alert parents and teachers to the need to intervene with that student; allowing school authorities to discipline the student is largely irrelevant to any threat to school security that the student may pose.

One final critique of the relational approach is that the existing approaches already examine the question of whether or not the youth is in a student-school relationship but simply define the relationship either in terms of geography (a youth is a student on school property) or impact (when a youth's actions substantially affect the school, the youth can be considered a student). This is certainly a plausible reading. However, my discussion in Part II, supra, reveals the problems with these interpretations. The geographical approach simply no longer makes sense in a digital world; the distinctions created are essentially arbitrary and do not accurately identify when the youth is acting as a student. The substantial disruption approach, applied alone, effectively amounts to a retreat from the field, ignoring whether school regulation of speech and conduct is appropriate in the particular context. This goes against Supreme Court precedent and also does not align with any generally accepted theory of the role of schools in American society, all of which recognize some limitation on schools' legitimate authority. Courts' approach to student speech must be based on something more substantive—a conscious acknowledgment of the role of schools in society.

<sup>168</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .").

<sup>&</sup>lt;sup>169</sup> See, e.g., Clay Calvert, Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector, 77 Denv. U. L. Rev. 739, 762–65 (2000) (arguing that schools routinely punish non-harmful student speech out of irrational fear rather than valid security concerns, contravening First Amendment doctrine, and citing research indicating that punishment may be ineffective corrective tool in this context).

#### Conclusion

This Note has examined the way lower courts have attempted to address the challenges posed by youth speech on the Internet and its impact on schools. The current approaches, one focusing on physical boundaries and the other focusing on the impact of the speech on the school, are unable to deal with the complexities and nuances of Internet speech. There are no easy distinctions, but some must be made if school authority is to be cabined. The relational approach provides a theoretically coherent framework with which to address off-campus speech and synthesizes the Supreme Court's disparate jurisprudence on the topic. By accepting the relational approach, lower courts will be forced to address the complicated constitutional values at issue head-on and, more importantly, will begin to form a coherent school-speech jurisprudence for the Internet age.