UNSHACKLING STUDENT SPEECH: HOW TO RETAIN DEFERENCE TO K-12 ADMINISTRATORS WITHOUT WRONGLY SUPPRESSING FREE SPEECH AS "HARASSMENT" UNDER TITLE IX

ABSTRACT

Are K-12 students in danger of becoming mindless minions for social propaganda? Unless schools foster freedom to differ over fear of causing offense, students may stop speaking against the politically correct norm for the rest of their lives. K-12 students have been particularly vulnerable to unchecked free speech violations ever since the U.S. Supreme Court adopted the deference model in the 1980s, which broadly defers to school officials' disciplinary decisions, including decisions affecting student speech. While subsidiarity, in loco parentis, and the realities of K-12 student development all support the deference model, undue deference subverts the remedy judicial review intends to offer all citizens, including young students. First, this Note defines the deference model and explains why the judiciary has applied it in student speech cases. Second, this Note illustrates how undue judicial deference allows school officials to unconstitutionally suppress student speech, tracing their misapplications of Title IX's sexual harassment standard and constitutional precedent. Lastly, this Note recommends ways the Supreme Court, K-12 administrators, and policymakers can retain the benefits of the deference model without suppressing merely offensive but constitutionally protected free speech, exhorting school officials to foster freedom to differ—not fear of speaking up—in their classrooms.

INTRODUCTION

Are K-12 students in danger of becoming mindless minions for social propaganda? Alarmingly, many K-12 public school students, once presumed innocent when asking questions or making observations about the world, are now learning in an environment where speech suppression abounds, and self-imposed speech censorship is encouraged to avoid committing the greatest sin—causing offense to another person.

In some schools, any adolescent who dares defy the politically correct norm will be censored and sent home,[1] not on constitutional grounds, but because the student simply uttered an honest, minority view. For example, in March of 2023, a middle school sent home a twelve-year-old student for wearing a T-shirt that stated, "there are only two genders," not based on constitutional speech restrictions such as disruption, lewdness, or advocacy to take illegal drugs,[2] but because the message allegedly caused some students to feel "unsafe."[3]

Under the deference model for K-12 administration,[4] the judiciary gives school administrators broad freedom to discipline student conduct. Some administrators unconstitutionally restrict student speech or help facilitate a learning environment that encourages student self-censorship of speech grounded in the fear of causing offense.[5] Rather than provide

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[1] Christina Zhao, *Connecticut Family Claims Student Was Expelled from Prep School for Having 'Politically Incorrect Views': Lawyer*, NEWSWEEK (Apr. 22, 2019, 8:49 PM), https://www.newsweek.com/connecticut-family-claims-student-was-expelled-prep-school-having-politically-1403163.

[2] *See infra* notes 204–206 and accompanying text.

[3] Snejana Farberov, *Student Claims He Was Sent Home Over Shirt That Said 'There Are Only Two Genders,'* N.Y. POST (May 1, 2023, 11:15 AM), https://nypost.com/2023/05/01/boy-says-he-was-sent-home-over-shirt-that-said-there-are-only-two-genders/.

[4] To my knowledge, the term "deference model" has not yet been used in academic literature in the context of describing the judiciary's treatment of public school officials. Nonetheless, deference is common to administrative law. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 469 (1986) ("Administrative law is dominated by the term *discretion*."). While the term "deference model" has not been explicitly used, judicial deference to school officials in student discipline cases has been extensively analyzed in academic literature, especially legal works discussing student speech suppression. *See, e.g.*, Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1149 (2018) (arguing that "students' ability to express controversial opinions" has been increasingly jeopardized by the Court through a "pattern of judicial deference to school administrators"); Erwin Chemerinsky, *The* Hazelwood*ing of the First Amendment: The Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 296 (2013) (positing that the Court has displayed "tremendous judicial deference to the authority of school officials" ever since Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), shifting to the "authoritarian model that Justice Black expressed in his dissent, not the speech-protective model that Justice Fortas took for the majority in *Tinker*"); Bernard James & Joanne E.K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights after* Board of Education v. Earls, 56 S.C. L. REV. 1, 11 (2004) (describing New Jersey v. T.L.O., 469 U.S. 325 (1985) as "the first of the Court's landmark decisions conferring wide deference to school officials acting to maintain campus safety, order, and discipline").

[5] *See The First Amendment in Schools*, NAT'L COAL. AGAINST CENSORSHIP (Aug. 9, 2021), https://ncac.org/resource/first-amendment-in-schools; *see, e.g.*, Jillian Atelsek, *Oakdale Middle School Student Faces Consequences in 'Hate Speech' Incident*, FREDERICK NEWS POST (Oct. 5, 2022), https://www.fredericknewspost.com/news/education/schools/public_k-12/middle/oakdale/oakdale-middle-school-student-faces-consequences-in-hate-speech-

clarity, the conflicting obligations of Title IX and constitutional precedent allow K-12 administrators to abuse their discretion and thereby infringe on student speech rights.[6]

The U.S. Supreme Court explained the problem with unclear legal standards in *Grayned v. City of Rockford* by stating, "[u]ncertain meanings inevitably lead citizens to 'steer far *wider* of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[7] At the K-12 level, uncertain legal standards based on the differing thresholds for speech regulation under Title IX's sexual harassment standard and constitutional student speech precedent cause far-reaching formal and informal suppression of constitutionally protected student speech.[8] Because school administrators adopt different school Title IX policies based on their interpretation of the Department of Education's Title IX law,[9] they attempt to fulfill their anti-harassment obligations by applying overinclusive student speech restrictions.[10] The resulting restriction of student speech is compounded by the deference model, through which courts accord high judicial deference to public school officials and thus permit potentially unconstitutional instances of student speech suppression to remain unquestioned.

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incident/article_229a757a-71af-5f44-8fd9-e085204f7245.html (describing a middle school's response invoking "school discipline as well as any related criminal charges" to punish an eighth grader for posting what the school determined to be "hate speech" on social media); *see also Tinker*, 393 U.S. at 507–09, 513-14 (distinguishing its rule permitting schools to silence substantially disruptive student speech from censoring students based on "fear or apprehension of disturbance" or "mere desire to avoid . . . an unpopular viewpoint").

[6] *See infra* CONFLICTING LEGAL OBLIGATIONS OF K-12 INSTITUTIONS.

[7] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (alteration in original) (emphasis added) (citations omitted).

[8] *See* Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 623–28 (2002) (reviewing cases in which, to the surprise of the collegiate and secondary-school administrators, courts struck down their school anti-harassment policies for being unconstitutionally overbroad, vague, or a means of viewpoint discrimination); JENNIFER C. BRACERAS & HEATHER MADDEN, INDEP. WOMEN'S L. CTR., TITLE IX ON A COLLISION COURSE WITH THE FIRST AMENDMENT 4–10 (2022) (tracing, from 2011–2022, how misperceptions about Title IX like "Title IX prohibits sexist speech and sexual jokes" and "[s]chools that punish 'offensive' and 'uncomfortable' speech are acting in the best interest of the students," has caused colleges and universities to increasingly misapply Title IX to punish students for uttering First Amendment speech that was *not* unlawful). Conflicting guidance issued to schools by the U.S. Department of Education has also contributed to the uncertainty and confusion. *See infra* notes 137–149 and accompanying text.

[9] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33487, 33489 (2024) (codified at 34 C.F.R. pt. 106) (granting schools broad discretion to implement Title IX compliance infrastructure and discipline students for Title IX violations per their "own policies and codes of conduct"). *But see id.* at 33506 (denying schools "open-ended" discretion to define what constitutes "hostile environment sex-based harassment" under Title IX).

[10] *See id.* at 33501 n.11 (collecting cases).

Formal student speech suppression can occur under two justifications. First, K-12 public school administrators, in their efforts to comply with the Title IX obligation to prohibit conduct that creates a hostile harassment environment,[11] may censor student speech they deem to be "hostile."[12] The heart of the issue in this aspect of speech suppression is whether purely verbal "conduct" can be censored because it offends another student by allegedly creating a hostile environment.[13] Second, even if there is a justification for censoring student speech statutorily under Title IX, the additional question arises of whether such censorship constitutionally complies with the First Amendment's Free Speech Clause.[14] Constitutional grounds for student speech suppression require that public school administrators find the speech meets the substantial disruption standard—that is, the speech "materially disrupts" or causes "substantial disorder" to the learning environment, or it "inva[des]" the rights of other students.[15]

The following hypotheticals describe instances of formal student speech suppression that could reasonably be justified by school officials as necessary for constitutional or Title IX compliance:

Constitution: Fifth grader Mia is assigned the following paper: "Write about a historical event. Apply persuasive writing

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[11] *Id.* at 33491 ("The final regulations hold a recipient accountable for responding to sex-based harassment, including quid pro quo harassment, *hostile environment harassment*, sexual assault, dating violence, domestic violence, and stalking, consistent with Title IX's broad prohibition on sex discrimination.") (emphasis added). Substantial concern over how the term "hostile environment" would impact schools' Title IX obligations led the Department of Education to address the issue multiple times. *E.g.*, *id.* at 33476 (undertaking to clarify what constitutes a hostile environment), 33492 (addressing the burden imposed on schools), 33493 (emphasizing that sexual harassment includes hostile environment), 33505–06 (dismissing the "ungrounded" fear it was suppressing free speech or "inappropriately" sweeping in "speech that [did] not actually create a hostile environment").

[12] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The hostile environment standard originated under Title VII of the Civil Rights Act of 1964. *Id.* Under Title VII, a hostile environment is created when the workplace is "permeated with 'discriminatory, intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank*, 477 U.S. at 65, 67). The hostile environment standard, originally intended only to regulate the adult workplace environment, has since been imputed into Title IX to cover the learning environment, including at the K-12 level. *See supra* note 11; *infra* notes 111–116 and accompanying text.

[13] *See supra* note 8; Todd E. Pettys, *Hostile Learning Environments, the First Amendment, and Public Higher Education*, 54 CONN. L. REV. 1, 36–37, 54–55 (2022) (raising the issue of whether speech that creates a hostile environment should be proscribed categorically under the First Amendment and proposing an alternative solution).

[14] U.S. CONST. amend. I; *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) (discussing how the Supreme Court has not protected students' constitutional right to free speech in K-12 schools despite its holding in *Tinker*).

[15] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969).

techniques and cite your sources in MLA format." Mia submits an outline and sources about the Hegira, a pivotal event in the Muslim faith in which the prophet Muhammed fled from Mecca to Medina to escape persecution. Mia's teacher tells her, "I'm sorry, Mia, but you can't write about a religious event. They aren't always historical, and this is an inappropriate school topic because it would force us to violate the separation of church and state." Obediently, Mia scraps her outline and writes about a secular topic instead.

Constitution: Connor is a studious high schooler who has never been disciplined for behavior issues. He receives permission to present some research he did on the influence of sexual orientation on parenting outcomes during the after-school free period. Several students attend. Some classmates become highly offended by his claim that the children of homosexual parents achieve better life outcomes than those of heterosexual parents and begin shouting that he is "a crazy, woke liberal" and scatter class materials all over the floor. Connor asks them to leave, but the students stay and start tipping over chairs. Consequently, the supervising teacher ends the event early. The next day, Connor is disciplined for "disrupting the school environment." The principal explains, "The other students will be disciplined, too. But we don't tolerate disruption during the school day here." Shamed, Connor stops talking about the topic for the rest of the school year to avoid being accused of causing a disruption.

Constitution: High school senior Ayanna is invited to make a valedictorian address at her commencement ceremony. She writes about how to have a good life and encourages her classmates to believe in Jesus based on the positive impact her Christian faith has had on her life. When reviewing her speech, the principal calls her into the office. "I'm sorry, Ayanna," the principal says. "But you can't speak about the Bible in your speech. I know it's important to you, and I personally agree with you, but talking about religion would make our school violate the separation of church and state." Without making a fuss, Ayanna deletes the parts of her speech that quote the Bible and ensures her speech is purely secular.

Title IX: Freshman Luis is a committed atheist whose parents are renowned geneticists. Based on his understanding of biology, Luis sincerely believes there are only two genders: male and female. For a school project, Luis is paired with Sam, a classmate who identifies as genderfluid and uses they/them pronouns.

> During the project, Luis continuously refers to Sam by their name instead of using their pronouns. Eventually, Sam gets irritated at the distracting cadence of Luis' speech and says, "Luis, you *know* I use they/them pronouns. Please start using them." Luis ignores the request. That night, Sam angrily emails their teacher, telling the teacher that Luis "can't even show me basic human respect by using my preferred pronouns." During the next class, the teacher instructs Luis to stop creating a hostile learning environment, stop "being stubborn," and start using Sam's pronouns or else visit the principal. Despite feeling misunderstood about his beliefs, mischaracterized about his intent, and still disagreeing about the social idea of gender fluidity, Luis decides the fight is not worth it and uses Sam's preferred pronouns whenever he sees them in the future.

While far from providing an exhaustive list, these illustrations depict that student speech suppression at the K-12 level may occur in formal or informal ways and have enduring effects on the way students perceive their free speech rights. School officials have numerous facially sound justifications for censoring student speech.[16] Further, these situations rarely rise to the level of parental notice and intervention, much less judicial review.[17] As a result, administrative justifications for student speech suppression remain unchecked, students' speech rights remain unvindicated, and how students understand and attempt to exercise their free speech rights are forever altered for the worse.

Informal student speech suppression may also occur at the K-12 level when students self-censor their speech, despite their speech being protected under the Constitution, to comply with prevailing definitions of what constitutes "appropriate" speech fostered by their school's culture.[18]

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[16] *See* Chemerinsky, *supra* note 14, at 538, 540–41, 544 (explaining the circuit courts' usage of the "rational basis test," where a limitation on student speech is constitutional if it is "reasonably related to legitimate 'pedagogical concerns'").

[17] Brooke Grona, *School Discipline: What Process is Due? What Process is Deserved?*, 27 AM. J. CRIM. L. 233, 233–34, 244 (2000) (describing how, despite provisions for parental notice, many schools do not give parents "meaningful notice" nor a "chance to participate in the informal hearing that occurs before a student is disciplined"); *see* Bo Malin-Mayor, *Proceduralize Student Speech*, 131 YALE L.J. 1880, 1924–25 (2022) (explaining that current judicial review consists of "extreme" deference to school officials in which "courts entirely defer to educational judgment on the fit between process and purpose, [permitting] all discipline . . . regardless of how well it conforms to best practices.").

[18] KNIGHT FOUND., FUTURE OF THE FIRST AMENDMENT 2022: HIGH SCHOOLER VIEWS ON SPEECH OVER TIME 16 (2022) (showing that forty-four percent of high school students do not feel comfortable voicing disagreement with teachers); *Using Appropriate Language*, ROCORI MIDDLE SCH., https://www.rocori.k12.mn.us/rocori-middle-school-home/student/a-team/using-appropriate-language (last visited Oct. 22, 2023) (explaining what language is

For example, K-12 students are introduced to common civic values in elementary school through pedagogical tools such as the "Four B's" slogan: "Be safe. Be responsible. Be respectful. Be kind."[19]

The hypothetical below illustrates the power of school administrations to foster an illiberal culture of speech suppression and self-censorship rather than one of democratic flourishing through the exchange of speech and ideas based on the proper civic values extant in the Four B's:

> ***School Culture***: A few weeks into the school year, a first grader named Aiden sees his friend Matthew wearing a pink dress and a small hair bow. "Matthew!" Aiden exclaims, "Why are you dressed like a girl today?" Before his classmate can respond, the teacher chides, "Aiden! What are our values?" He responds, "Be safe, be responsible, be respectful, and be kind." The teacher replies, in a chastening tone, "That's correct. Now, do you think Matthew felt safe or respected by your comment just now?" Picking up on the nonverbal cues, Aiden replies, "No, I guess not." The teacher says, "That's right. Respect and kindness are key to being friends. Even if you don't understand something, you can't be mean, and it was mean to ask why Matthew decided to wear a dress today. That's his personal choice." Chastened, Aiden apologizes to Matthew, and the class continues. From then on, Aiden does not comment on or inquire about Matthew's clothes.

Like the constitutional and Title IX illustrations, the above hypothetical demonstrates that the informal school culture fostered by local administration highly influences how students comprehend their free speech rights and their willingness to exercise those rights in public discourse. Therefore, student speech suppression can be facially justified in numerous ways by school officials and may occur formally or informally to the detriment of the students, who cannot exercise or refrain from exercising their expressive rights pursuant to the example of teachers, personal discipline or discipline of their peers, and informal school culture.

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considered appropriate); *cf.* John K. Wilson, *The Inevitable Problem of Self-Censorship*, INSIDE HIGHER ED (Jan. 10, 2022), https://www.insidehighered.com/views/2022/01/11/student-self-censorship-fact-not-rampant-campuses-opinion (defining self-censorship as "reluct[ance] to speak" and describing the "dire" and "sharp increase" in college student self-censorship in two years from sixty percent in 2020 to eighty-three percent in 2022).

[19] This slogan is known in elementary school education as the "four B's." *See, e.g.*, Casey's Classroom, *Four B's Posters - Be Safe, Be Responsible, Be Respectful, Be Kind*, TCHRS. PAY TCHRS., https://www.teacherspayteachers.com/Product/Four-Bs-Posters-Be-Safe-Be-Responsible-Be-Respectful-Be-Kind-2833782 (last visited Sept. 4, 2023).

This Note proceeds in three parts. Part I defines the deference model, explaining why the judiciary applies the model and how the model allows schools to unconstitutionally suppress student speech. Part II describes the apparent conflict K-12 institutions face between their legal obligations under Title IX and the Constitution, arguing that the differing standards also allow schools to suppress protected student speech. Lastly, Part III recommends ways that the Supreme Court, K-12 administrators, and policymakers can retain the benefits of the deference model to guard against legitimate sexual harassment without infringing on free speech, encouraging them to foster a pro-speech K-12 educational environment.

I. THE DEFERENCE MODEL IN K-12 ADMINISTRATION

While American free speech jurisprudence consistently affirms that students have free speech rights, schools may reasonably restrict student expression in some circumstances.[20] The rationale that results in this tension is demonstrated by the Supreme Court majority in *Tinker v. Des Moines Independent Community School District*, in which the Court sought to balance the "scrupulous protection of Constitutional freedoms of the individual . . . [so as] not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes"[21] with "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[22]

Based on those policy considerations, the Court has upheld restrictions on student speech when it substantially disrupts the learning environment.[23] One justification for this allowance is that the purpose of public education is not to host a free speech forum[24] but rather to achieve

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[20] *See, e.g.*, *Tinker*, 393 U.S. at 508 (disruptive speech); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (lewd speech); Morse v. Frederick, 551 U.S. 292, 403 (2007) (pro-drug speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (school-sponsored speech); *see also* Malin-Mayor, *supra* note 17, at 1883 (explaining that those categories were "later exceptions" to the post-*Tinker* rule that distinguished disruptive—therefore punishable—student speech from nondisruptive—not punishable—student speech).

[21] *Tinker*, 393 U.S. at 507 (internal quotations omitted).

[22] *Id.*

[23] *Id.* at 513.

[24] The purpose of an educational environment is uncontestably pedagogical, thus necessitating limits on speech in order to obtain its objectives during the allotted time. *See id.* at 523–24 (Black, J., dissenting) ("[P]ublic schools . . . are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic' speech."). While beyond the scope of this Note, there is debate on whether a "forum analysis" should apply to free speech in schools, primarily concerning whether *Tinker* is consistent with that analysis. *Compare* Frank D. LoMonte, *Shrinking Tinker: Students Are "Persons" Under Our*

pedagogical objectives independent of free expression, such as disseminating knowledge and developing a "good" citizenry.[25] While the balance sought by the *Tinker* Court was reasonable, its decision nevertheless opened the door for administrative abuse of discretion.[26] As American legal scholar Erwin Chemerinsky cautions:

> School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech. Yet, subsequent cases [post-*Tinker*] rarely follow this approach. Instead, they proclaim the need for deference to the authority and expertise of school officials.[27]

The implementation of Chemerinsky's word of caution must begin with understanding the deference model and why it is used in education, particularly at the K-12 level.[28] The answers to these inquiries will provide the foundation to address whether the benefits of the deference

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Constitution-Except When They Aren't, 58 AM. U. L. REV. 1323, 1327 (2009) (explaining that courts have sought to reconcile *Tinker* with the public forum doctrine despite that the Supreme Court "never fully embraced forum analysis in the student speech setting" and that "*Tinker* itself strongly suggest[ed] [the doctrine] [wa]s inapplicable"), *and* Tsesis, *supra* note 4, at 1190–91 (arguing that K-12 schools "cannot be treated as traditional public forums" per their unique pedagogical goals and that they should be "treated similarly to nonpublic forums" in better conformity with *Tinker*), *with* Noah C. Chauvin, *Replacing Tinker*, 56 U. RICH. L. REV. 1135, 1138, 1151, 1156 (2022) (advocating to replace *Tinker* with "something similar to the public forum doctrine" but noting that courts have not applied that analysis and "generally reject" the notion that schools are traditional or limited public forums).

[25] *See* Clinton B. Allison, *Purposes of Education: What Are Public Schools for Anyway?*, 6 COUNTERPOINTS 1, 5, 20 (1995) (explaining that the most common goal of American public education was to develop "good" citizens and that the social aims of public education historically were premised on the belief that public order was best achieved when citizens had similar internalized values rather than through a police state). According to Horace Mann, known as the "father of American education," the purpose of Common Schools was to prepare future citizens for adulthood through physical, intellectual, and political education. David Carleton, *Horace Mann*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/horace-mann/; *see generally* HORACE MANN, THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN (Lawrence A. Cremin ed., 1957). Physically, Common Schools were to instruct students on the general laws of health and sanitation, overall increasing the healthy habits of the American people. HORACE MANN, *supra* note 25, at 83. Intellectually, public education was to be a "great equalizer" by providing individuals with the "independence and the means" to engage in social mobility. *Id.* at 87. Politically, public education prepared students for civic duties by helping them "understand something of the true nature and functions of the government under which they live." *Id.* at 92.

[26] *See* Chemerinsky, *supra* note 14, at 532–35, 539–40.

[27] *Id.* at 546.

[28] *Id.*; *see, e.g.*, James & Larson, *supra* note 4, at 9–11.

model are worth preserving—and if so, how to preserve them without unconstitutionally violating K-12 student speech rights.

A. What is the Deference Model?

The deference model provides school administrators wide latitude in and with respect to their managerial decisions.[29] It has been recognized in many academic fields, including policy and the law.[30] Throughout this Note, the term "deference model" will be used to denote the judiciary's payment of respect to the decisions of school administrators by according weight to their decisions and its allocation of authority to school officials to make binding decisions in student disciplinary procedures.[31] While the deference model is efficient and practical, it inherently allows for the possibility of abuse of discretion.[32] Moreover, *undue* judicial deference to school officials pursuant to the deference model subverts the remedy the justice system was designed to provide.[33]

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[29] Nelda Cambron-McCabe, *Balancing Students' Constitutional Rights*, 90 PHI DELTA KAPPAN 709, 710, 712 (2009). As previously mentioned, the term "deference model" will be used throughout this Note to describe the judicial deference accorded by the Supreme Court to the disciplinary decisions of school officials. *See supra* notes 4–5; *see also* Mark Chesler et al., *Organizational Context of School Discipline: Analytic Models and Policy Opinions*, 11 EDUC. & URB. SOC'Y 496, 497 (1979) ("Discipline policy is implemented by teachers and administrative officials, usually with a great deal of discretion. The discretion educators exercise is not just individual in nature, it is socially patterned discretion.").

[30] Nora M. Findlay, *Discretion in Student Discipline: Insight Into Elementary Principals' Decision Making*, 51 EDUC. ADMIN. Q. 472, 473 (2015) (explaining that the exercise of administrative discretion in an organization's decision making is "well established"); *e.g.*, Chesler et al., *supra* note 29; *see* C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 394 (1989) (contrasting how the Court has reviewed administrative decisions—based on differing responses to administrative discretion—in student speech cases such as *Bethel School District v. Fraser* and *Hazelwood School District v. Kuhlmeier*).

[31] *See* PAUL DALY, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION, AND SCOPE 7–8 (2012) (describing how the Court relied on doctrinal and epistemic deference to hold that school officials could suppress student speech "reasonably viewed as promoting illegal drug use" in *Morse v. Frederick*).

[32] *See* Malin-Mayor, *supra* note 17, at 1925–26; *see also* Chemerinsky, *supra* note 14, at 546.

[33] *See* William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, 5 BELMONT L. REV. 27, 57 (2018) (arguing that judicial deference to higher education school officials "must end" because such deference allows them to uniquely violate constitutional norms where other constitutional actors would be held accountable); Dienes & Connolly, *supra* note 30, at 373 (positing that the invocation of rational basis review in post-*Tinker* Supreme Court decisions constitutes "essentially no judicial review of the government's conduct" and violates the Court's own precedent recognizing the "need to review regulations of school authorities" in W. Va. Bd. Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

Judicial review and proactive administrative action are two checks that guard against administrative abuse of discretion.[34] First, the judiciary uniquely checks administrative power by subjecting the managerial decisions of government agents like school officials to judicial review.[35] Judicial review "guard[s] the Constitution and the rights of individuals" from "legislative encroachments" by ensuring that laws conform to the Constitution, which collectively binds the people unless otherwise "annulled or changed."[36] Contrary to robust and independent judicial review, since the 1980s, the Supreme Court has highly deferred to school officials "when they punish student speech."[37] In developing its student speech jurisprudence, the Court has so deferred to the disciplinary decisions of school administrators that the judicial function is limited "to watching for evidence of anomaly and abuse of authority,"[38] and the burden now rests on the complainant to overcome the presumption that school officials suppressed his or her speech based on "'legitimate school concern.'"[39] While the provision of wide latitude toward administrative decision-making is "attractive,"[40] the Court's "concern with administrative discretion and flexibility must not be exalted to the point that substantive judicial review becomes a meaningless ritual."[41]

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[34] *See* Chemerinsky, *supra* note 14, at 529, 533 (discussing the *Tinker* majority's emphasis on "the need for careful judicial review" to ensure schools met their burden to justify "punishing" student speech); LoMonte, *supra* note 24, at 1325, 1346 n.135 (arguing for the need to "invigorate[]" *Tinker* and subject school speech regulations "to meaningful review" since schools have begun asserting authority to regulate "entirely off-campus speech" and based on due process concerns); *see also infra* text accompanying note 42; *Importance of Understanding School Law as an Administrator*, E. WASH. UNIV. (Jan. 16, 2020), https://online.ewu.edu/degrees/education/med/educational-leadership-principal-certificate/understanding-school-law-as-an-administrator/ (recommending that, to protect their schools, administrators take measures to understand school law and learn about "court decisions and statutory law relating to the[ir] duties and powers" as school officials).

[35] *See* Alvin B. Rubin, *Judicial Review in the United States*, 40 LA. L. REV. 67, 71–72 (1979) (describing popular American acceptance of judicial review as rooted in "historic distrust, embodied in the Constitution itself, of the legislature and of the executive," and summarizing the basis for its public support as "the [C]ourt [being] institutionally better equipped than is the executive or the legislature[] to fulfill the role of supreme arbiter of the Constitution . . . [It] is not merely countermajoritarian, it is also insulated from democratic impulse").

[36] THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[37] Chemerinsky, *supra* note 4, at 293.

[38] James & Larson, *supra* note 4, at 90.

[39] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting)); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–68 (1988) (affirming the deference-based principle that "school officials may impose *reasonable* restrictions on the speech of students, teachers, and other members of the school community" in a nonpublic forum, such as a school-sponsored publication) (emphasis added).

[40] Dienes & Connolly, *supra* note 30, at 388.

[41] *Id.* at 394.

Besides judicial review, a second check against the abuse of administrative discretion is achieved through proactive action in which administrators increase their awareness of the law and review student speech accordingly. Formal education initially increases an administrator's awareness of applicable laws and connects administrators to legal information and guidance resources for future needs, primarily to help them avoid liability for issues such as violating a student's free speech rights.[42] Where formal education ends, the necessity of informal upkeep begins. As the legal standard to protect the rights of students and parents continually develops, administrators must adopt habits and implement systems that enable them to keep up with current case law to ensure they render lawful policies and decisions.[43] Whenever the Supreme Court releases new cases concerning students' rights—including free speech rights or search and seizure protections—school officials must promptly reevaluate their policies to avoid making decisions that comply with Title IX but violate the Constitution.[44]

B. Why is the Deference Model Used?

The paradigmatic use of the deference model in administrative law and its acknowledgment by the Supreme Court suggest that there are beneficial reasons why judicial deference is accorded to managerial decisions.[45] Not only do legal doctrines such as the subsidiarity principle and *in loco parentis* support this practice, but the unique stage of

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[42] *See Importance of Understanding School Law as an Administrator*, *supra* note 34.

[43] *What Do Principals Need to Know About School Law?*, S. ILL. UNIV. EDWARDSVILLE (Aug. 23, 2023), https://online.siue.edu/degrees/education/msed/principal-preparation/principals-about-school-law/; *cf.* Findlay, *supra* note 30, at 472–73 (recommending that Canadian elementary school principals increase their understanding of applicable laws to avoid rendering unlawful decisions).

[44] *See What Do Principals Need to Know About School Law?*, *supra* note 43; Cambron-McCabe, *supra* note 29, at 712 (listing guidelines for school officials based on current Supreme Court case law implicating student speech rights or search and seizure protections).

[45] *See supra* notes 30–33 and their accompanying text; Chemerinsky, *supra* note 4, at 300 (arguing that the Roberts Court provided a "major exception" to free speech protection by applying rational basis scrutiny when it regarded one party as an "authoritarian institution," such as schools in *Morse v. Frederick* and *Hazelwood Sch. Dist. v. Kuhlmeier*, in which "the protective free speech Court vanishe[d]. Instead, . . . [the Court] professe[d] the need for great deference to the authority of the government"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting) (arguing that the Court should defer to educational institutions to "determine for themselves to what extent free expression should be allowed in its schools" similar to the Court's freedom of assembly precedent in school settings); *id.* at 526 (Harlan, J., dissenting) ("[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions."); *Hazlewood Sch. Dist.*, 484 U.S. at 273 n.7.

development of K-12 students also accounts for the acceptance of the deference model in K-12 administrative policy.[46]

1. The Subsidiarity Principle

One reason the deference model is used in K-12 education is based on the subsidiarity principle, which holds that decisions are best made locally.[47] The subsidiarity principle originated in the 1991 Maastricht Treaty in the European Union.[48] It has been reflected in a "myriad" of federal statutes and Supreme Court jurisprudence,[49] such as the Court's Commerce Clause jurisprudence.[50] For example, legal scholars have argued that the Commerce Clause power is a "concretization of the subsidiarity principle"[51] and that the rationale behind key Commerce Clause cases was to affirm subsidiarity—namely, the belief that States are better suited to legislate local matters than the federal government.[52]

As applied to the compulsory school setting, the subsidiarity principle encourages decisions to be made at the most local level possible.[53] Thus, superintendents and school boards run school districts rather than the State government. Within a district, a principal runs a school without unnecessary intervention by the superintendent. Within a school, a teacher runs her classroom without undue interference from the principal or other administrators.

The subsidiarity principle justifies upholding the deference model because local administration is closer than the Court to a situation

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[46] *See, e.g.*, Heather K. Lloyd, Note & Comment, *Injustice in Our Schools: Students' Free Speech Rights are Not Being Vigilantly Protected*, 21 N. ILL. U. L. REV. 265, 278 (2001); Dennis J. Christensen, Comment, *Democracy in the Classroom: Due Process and School Discipline*, 58 MARQ. L. REV. 705, 705–06 (1975); *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

[47] *See Subsidiarity*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/subsidiarity#:~:text=s%C9%99b%2D%CB%8Csi%2D,to%20a%20dominant%20central%20organization (last visited Nov. 7, 2023) (defining subsidiarity as a principle "holding that functions which are performed effectively by subordinate or local organizations belong more properly to them than to a dominant central organization").

[48] Andreas Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 GLOB. CONSTITUTIONALISM 37, 37 (2013).

[49] Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 105 (2001).

[50] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567–68 (1995); United States v. Morrison, 529 U.S. 598, 662–63 (2000) (Breyer, J., dissenting) (noting that law commentators have argued for limits on the Commerce Clause based on subsidiarity).

[51] David P. Currie, *Subsidiarity*, 1 GREEN BAG 2D 359, 360–61 (1998).

[52] *See* Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, 55 NOMOS: AM. SOC'Y POL. & LEGAL PHIL. 123, 140–41 (2014) (explaining how the *Lopez* Court affirmed the principle of subsidiarity by recognizing that the State was better suited to legislate than the federal government).

[53] *See* Vischer, *supra* note 49, at 142 ("[S]ubsidiarity, at its core, envisions a society in which problems are solved and decisions made from the bottom up.").

allegedly invoking a student's rights violation.[54] For example, in *Endrew F. v. Douglas Country School District*, an Individuals with Disabilities Act ("IDEA") suit contesting the adequacy of a child's individualized education program ("IEP"), the Court declined the invitation to substitute its own "notions of sound educational policy for those of the school authorities" but explained that school officials were "fairly expect[ed] . . . to be able to offer a cogent and responsive explanation for their decisions."[55] Consistent with the subsidiarity principle, the Court has also upheld the deference model to maintain "flexibility in school disciplinary procedures" and "preserv[e] the informality of the student-teacher relationship."[56] Because teachers are the ones present to student conduct and perceive in real-time its effect on the learning environment, the Court has generally interpreted *Tinker* as establishing a rule of broad deference to school officials to determine whether student conduct is substantially disruptive.[57]

2. *In Loco Parentis*

A second reason why the deference model is used in K-12 education arises from the doctrine of *in loco parentis*, which holds that school administrators act "in the place of a parent" when they supervise students during school hours.[58] Under this doctrine, school officials are legally responsible "for maintaining [student] discipline, health, and safety"[59] and should therefore be "afforded deference to their decisions even when examining certain constitutional issues."[60]

Pursuant to *in loco parentis*, the Supreme Court has deferred to a school's administrative decisions regarding student discipline.[61] *In loco parentis* was a key rationale for Justice Black's dissent in *Tinker v. Des*

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[54] *See id.* at 116; New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).

[55] Endrew F. v. Douglas Cnty. Sch., No. 15-827, slip op. at 16 (U.S. Mar. 22, 2017) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)). The Court explained that its "deference is *based on* the application of expertise and the exercise of judgment by school authorities" and therefore held that school officials were reasonably required to offer a rationale for their decisions. *Id.* (emphasis added).

[56] *T.L.O.*, 469 U.S. at 339–40.

[57] *See id.* at 342 n.9.

[58] James L. Edwards, *In Loco Parentis: Definition, Application, and Implication*, 23 S.C. L. Rev. 114, 114 (1971); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995) ("When parents place minor children in . . . schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.").

[59] Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002).

[60] Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 802 (11th Cir. 2022) (surveying past instances of deference); *cf. Vernonia Sch. Dist.*, 515 U.S. at 665–66 (Fourth Amendment); Morse v. Frederick, 551 U.S. 393, 403–08 (2007) (First Amendment); Ingraham v. Wright, 430 U.S. 651, 671 (1977) (Eighth Amendment).

[61] *Morse*, 551 U.S. at 413–14.

Moines.[62] Subsequently, in *Bethel School District v. Fraser*, the Court emphasized that, like parents, "school authorities acting *in loco parentis*" have an "obvious concern" to protect children from sexually explicit speech at school functions.[63] It therefore held that school officials could ban "sexually explicit, indecent, or lewd" student speech made during compulsory school activities.[64] Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court held that school officials do not violate the First Amendment when they control student speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns,"[65] and it justified its holding by stating, "[t]his standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[66] As recently as 2021, in *Mahanoy Area School District v. B.L.*, the Supreme Court has described the underlying rationale of much of its student speech jurisprudence as pursuant to *in loco parentis*.[67] In that case, the Court applied the doctrine in conjunction with its precedent to hold that school administrators could even regulate off-campus student speech when it fell into one of the student speech categories subject to school regulation—indecent, lewd, or vulgar speech; pro-drug speech; or speech reasonably perceived to bear the school's imprimatur.[68]

The use of *in loco parentis* to justify judicial deference has caused mixed reactions.[69] On the one hand, some argue that *in loco parentis* has allowed school administrators to enact restrictions that violate students' First Amendment rights.[70] Accordingly, proponents of this view argue that the doctrine is ineffective "because it takes the burden off courts from

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[62] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 521–24 (Black, J., dissenting) (likening school discipline to parental discipline as a justification for judicial deference to school officials in cases of student discipline that allegedly invoke a First Amendment rights violation).

[63] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986).

[64] *See id.* at 684–85.

[65] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[66] *Id.*

[67] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them.").

[68] *Id.* at 2045 (citing *Fraser*, 478 U.S. at 685, Morse v. Frederick, 551 U.S. 393, 409 (2007), and *Hazelwood Sch. Dist.*, 484 U.S. at 271).

[69] *Compare* Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 969–70 (2010), *with* S. Ernie Walton, *In Loco Parentis, the First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 TEX. TECH L. REV. 461, 500 (2023).

[70] *See, e.g.*, Stuart, *supra* note 69, at 969–71 (arguing that *in loco parentis* could not evolve with the evolution of the common school tradition in the United States and therefore should be abandoned).

questioning the discretion of school board decisions."[71] On the other hand, others assert that *in loco parentis* can protect both the constitutional rights of students and parents in public schools.[72] Per this position, *in loco parentis* can empower school officials to fulfill their educational mission, but the Court should not presume that parents have delegated administrators the authority to "punish children over religious speech or acts" because that presumption violates the fundamental right of parents to direct the moral formation and upbringing of their children.[73]

Additionally, a key reason why *in loco parentis* supports the deference model is the safety rationale. The safety rationale acknowledges that, like parents, school officials are responsible for the safety of students under their care.[74] Under *in loco parentis*, because schools owe a parent-like duty of care to students under their supervision, administrators may restrict student expression to ensure student safety.[75] Deference to educators in this context presumes that school policies "represent a good faith attempt to maintain safety and discipline and are thus valid when certain factors are at work."[76]

There are philosophical differences regarding how legal experts view the relationship between student safety and judicial deference to school officials.[77] Some argue that safety itself is a sufficient rationale for deference to school officials without regard to *in loco parentis*.[78] For example, in *Morse v. Frederick*, Justice Alito rejected *in loco parentis* as a proper justification for restricting student speech in violation of First Amendment standards but stated that the "special characteristic" of the threat to students' physical safety was sufficient alone to uphold the

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[71] *Id.* at 984. Stuart further argues that the Blackstone-based rationale for adopting *in loco parentis* is unjustified because it misrepresents his understanding of the concept. *Id.* In Stuart's view, using Blackstonian *in loco parentis* to justify administrative discipline of students invokes Blackstone incompletely, as he likely viewed *in loco parentis* as a delegation of both "welfare and tutelary responsibilities, not just disciplinary duties." *Id.* at 990.

[72] *See* Walton, *supra* note 69.

[73] *Id.* at 493–94 (discussing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).

[74] Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences if They Do Not*, 28 AKRON L. REV. 187, 216–17 (1995) (explaining that, under *in loco parentis*, or the "special relationship" theory of Section 1983, schools are liable to provide student safety and prevent harassment).

[75] *Id.* at 189–90, 216–17.

[76] James & Larson, *supra* note 4, at 8.

[77] *See, e.g.*, Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 5 (2008) (arguing that appellate misapplications of *Morse* are used to uphold censoring student speech based on potential threats to physical safety).

[78] New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (rejecting the need to use *in loco parentis* as a justification for judicial deference in decisions made to protect student safety because school officials act "as representatives of the State, not merely as surrogates for the parents").

school's restriction of a student's pro-drug speech.[79] On the other hand, the *Morse* majority discussed the safety rationale as a subset of *in loco parentis*.[80] Regardless of whether safety is a subset of *in loco parentis* or sufficient in itself to justify deference to school officials, the safety rationale justifies the use of the deference model in student discipline cases allegedly invoking a constitutional rights violation.

3. K-12 Student Development

Lastly, another reason that the judiciary applies the deference model is the developmental rationale. Under the developmental rationale, the developmental and legal dependency of K-12 students means they require supervision by a legally liable adult decision-maker.[81] Thus, when a student alleges that her school administration impermissibly suppressed her speech, the Court presumptively agrees with the school officials in a student-administration dispute, similar to how parents, after returning home from a night out, would presumptively agree with their babysitter in a child-caretaker dispute. Per the developmental rationale, courts provide de facto deference to school officials based on their status and experience as the *adults* in the situation under review.[82]

The developmental rationale is supported by the general characteristics of minors recognized in other areas of the law. For example, courts have historically accounted for the unique needs of juvenile defendants by appointing a guardian ad litem to advocate for their best interests during court proceedings.[83] Courts have likewise treated delinquent minors differently than delinquent adults in juvenile delinquency cases because of their distinguishable age and development.[84]

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[79] Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring). Justice Alito went on to explain that the "special features of the school environment" required that school officials have "greater authority to intervene before speech leads to violence." *Id.* at 425. He then affirmed that the "substantial disruption" standard in *Tinker* permitted school officials to intervene prior to actual violence arising from student speech. *Id.*

[80] *See id.* at 408, 410; Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring) (explaining that the responsibility of public schools to ensure a safe learning environment has been recognized under the doctrine of *in loco parentis*).

[81] *See* Bellotti v. Baird, 443 U.S. 622, 636–37, 637 n.15 (1979) (explaining that the State has "considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice").

[82] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting) (arguing for presumptive judicial deference to school officials based on "[t]he original idea of schools, . . . that children ha[ve] not yet reached the point of experience and wisdom which enable[s] them to teach all of their elders").

[83] Bridget Kearns, *A Warm Heart but a Cool Head: Why a Dual Guardian Ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 WIS. L. REV. 699, 705–06 ("Historically, minors under the age of eighteen were assigned GALs [guardians ad litem] when they were named as the defendant in a case.").

[84] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568–69 (2005).

As the Court discussed in *Roper v. Simmons*, minors possess a "lack of maturity" and an "underdeveloped sense of responsibility" compared to adults.[85] Consequently, they are held less culpable than adults despite committing the same criminal act.[86]

Another way in which the law has recognized the underdeveloped nature of children occurs in forensic interviewing.[87] Evidence of a child's limited "linguistic, communicative, social, and memorial capacities and tendencies" has influenced the techniques used to interview child abuse victims.[88] For example, when "recall memory is probed using open-ended prompts," [89] the interviewer is advised to move on to more focused questions if necessary, such as "who, what, where, when, and how," to obtain more details about the situation that the child would otherwise have failed to provide.[90] Simultaneously, because children "do not know the significance of the information sought or because they are reluctant to divulge certain information," [91] interviewers are advised to "allow for silence or hesitation" [92] before moving on from open-ended prompts to focused questions and are warned that a hasty transition may "elicit potentially erroneous responses if the child feels compelled to reach beyond his or her stored memory."[93]

As applied to K-12 students, the developmental rationale supports the deference model because generally recognized characteristics of students as minors justify judicial deference to school officials as the adults in a student-administration dispute over student discipline.[94] As the American Psychological Association has stated, adolescents at the compulsory school-age level are simultaneously "intelligent *and* irrational." [95] Students are often *intelligent* in that they have abstract reasoning abilities and can articulate knowledge that they have learned.[96]

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[85] *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[86] *See id.* at 568.

[87] Michael E. Lamb, *Child Development and the Law*, *in* 6 HANDBOOK OF PSYCHOLOGY: DEVELOPMENTAL PSYCHOLOGY 559, 563 (Richard M. Lerner et al. eds., 2003).

[88] *Id.*

[89] *Id.*

[90] CHRIS NEWLIN ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, CHILD FORENSIC INTERVIEWING: BEST PRACTICES 7 (2015).

[91] *Id.* at 7.

[92] *Id.* at 9.

[93] *Id.* at 1.

[94] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting) (arguing for the deference model based on children's lack of "experience and wisdom" and based on the principle that children are sent to school "to learn, not teach").

[95] Keith E. Stanovich et al., *Judgment and Decision Making in Adolescence: Separating Intelligence from Rationality*, *in* THE ADOLESCENT BRAIN: LEARNING, REASONING, AND DECISION MAKING 337, 338 (Valerie F. Reyna et al. eds., 2012).

[96] *See id.* at 341 (defining intelligence as reflecting the ability to reason and declare knowledge learned).

But they are simultaneously *irrational* when their beliefs do not align with reality or they act contrary to their behavioral goals.[97] The realities of K-12 students' developmental capabilities, or lack thereof, support the deference model,[98] which presumes that school officials make reasonable decisions even when the student does not understand the rationale.[99] As a result, the Court is predisposed to defer to the decisions of school officials over the objection of a student.[100]

II. CONFLICTING LEGAL OBLIGATIONS OF K-12 INSTITUTIONS

While the deference model is understandably recognized and upheld by the judiciary, when school officials abuse their discretion to suppress protected student speech, it is often based on perceived legal obligations.[101] The seemingly conflicting standards of Title IX and constitutional precedent illustrate the justifications K-12 school officials may use to impermissibly suppress student speech.[102] On the one hand, the sexual harassment provisions of Title IX imply that schools are liable for allowing

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[97] *Id.* at 344 (defining rationality as having beliefs that align with reality and acting consistently with those beliefs to achieve goals).

[98] *See, e.g.*, *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

[99] *See id.*; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1393 (3d Cir. 1990).

[100] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 329–30, 332 (1985) (deferring to the school's decision to search a student's purse for cigarettes because the decision was reasonable); *see also, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686 (1986) (deferring to the school's decision to discipline a student for using lewd language in his school assembly speech over his objection that he could not have known the speech would be objectionable).

[101] For example, the conflict between Title IX and constitutional student speech precedent is illustrated in the efforts of higher education institutions to use anti-discrimination and anti-harassment speech codes to suppress speech, which are consistently struck down as unconstitutionally "overbroad, vague, or both." Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390 (2009). As Azhar Majeed explains, these institutions apply their anti-harassment policies to "target protected speech merely *because* the expression in question is alleged to be sexist, prejudicial, or demeaning" despite that much speech within the policy's description, such as feminist speech advocating for women's rights, "are all important matters of public concern . . . . [that] should not be suppressed merely to avoid offense" based on First Amendment jurisprudence. *Id.* at 397 (emphasis added); *see* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 755–56 (2017) (noting, despite that "[f]ederal courts have overturned *every* college speech code or rule" that penalized speech because it was "'demeaning,' 'derogatory,' [or] 'stigmatizing,'" the continual efforts of colleges and universities to apply overbroad speech codes demonstrates they have not yet "learned much about the constitutionality of . . . speech codes," including the "complexity of applying codes without trampling rights").

[102] *See infra* note 148. K-12 schools, for example, may justify speech restrictions under the Title IX harassment standard of unwelcome verbal conduct that creates a hostile environment despite that constitutional precedent interpreting Title IX at the K-12 level does give schools license to restrict gender-based "teasing and name-calling." Ross, *supra* note 101, at 759–60 (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 653 (1999)).

unwelcome verbal conduct of a sexual nature.[103] On the other hand, the First Amendment requires robust protection of free speech and demands tolerance of diverse speech from all students "regardless of age, grade, or sophistication."[104] While both Title IX and free speech precedent further legitimate interests, upholding Title IX at the expense of the Constitution problematically allows K-12 school officials to abuse their discretion and restrict constitutionally protected student speech.

A. What Are K-12 Schools' Obligations to Prevent Harassing Speech Under Title IX?

Title IX of the Civil Rights Act was passed as part of the Education Amendments of 1972 in response to feminist campaigners who raised awareness about the prevalence of sex discrimination in educational employment.[105] Title IX conditioned federal funding to "any educational program or activity" on the recipient's agreement that it would not engage in sex-based discrimination.[106] The portion of Title IX relevant to student speech suppression concerns its sexual harassment provisions, which may oblige funding recipients—like public schools—to suppress unwelcome verbal conduct that creates a "hostile environment."[107] While hostile environment language was not originally included in Title IX,[108] a hostile environment analysis has been "indirectly applied to Title IX claims."[109] Further, "[i]n almost every Title IX case brought against an educational institution, plaintiffs are looking [for courts] to hold that educational institution liable under a modified hostile environment theory."[110]

Application of the hostile environment standard under Title IX to suppress allegedly harassing speech has been controversial because the standard originated under Title VII to regulate adult workplace conduct—

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[103] *See infra* note 111 and accompanying text; Majeed, *supra* note 101, at 406.

[104] Ross, *supra* note 101, at 739, 763 (explaining that free speech principles place "heavy demands[] on students" and that expression some students may consider assaultive or offensive is nonetheless protected by the First Amendment's free speech guarantee).

[105] AM. ASS'N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 69–70 (2016).

[106] *Id.* at 71; *cf.* 20 U.S.C. § 1681 (explaining that Title IX prohibits sex-based discrimination in education programs or activities receiving federal financial assistance).

[107] *See FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to Its Title IX Regulations*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf (last visited Oct. 20, 2023) (proposing to expand Title IX coverage to "all" forms of sexual harassment, including unwelcome conduct that creates a hostile environment).

[108] Jacob R. Goodman, Note, *Deliberately Indifferent: Institutional Liability for Further Harassment in Student-on-Student Title IX Cases*, 75 VAND. L. REV. 1273, 1279 (2022) (noting that Title IX did not originally combat sexual harassment, including issues pertaining to a hostile environment, until decades after its passage).

[109] *Id.* at 1296.

[110] *Id.* at 1296–97.

not student speech in the learning environment.[111] How did schools come to adopt the policy that the hostile environment standard is implicated under their Title IX obligations? The answer comes from the continually varying guidelines promulgated by the U.S. Department of Education.[112]

1. The Adoption of the Hostile Environment Standard

Current Title IX sexual harassment jurisprudence is informed by the interpretative framework for workplace sexual harassment under Title VII.[113] While the original regulation of Title IX solely involved "sex discrimination," additional liability for "sexual harassment" was established in 1981 following the recognition of sexual harassment as a form of workplace sex discrimination under Title VII.[114] In 1980, the Equal Employment Opportunity Commission ("EEOC") issued guidelines that recognized sexual harassment as a violation of Title VII, including in its sexual harassment definition "verbal or physical conduct of a sexual nature."[115] A year later, the Office for Civil Rights ("OCR") in the U.S. Department of Education released a memorandum applying a Title VII-inspired definition of sexual harassment to Title IX that likewise encompassed "verbal or physical conduct of a sexual nature" as conduct for which recipient institutions could be held liable.[116]

2. The Restriction of Verbal Conduct as Sexual Harassment

Besides the regulatory agencies, the Supreme Court has also imputed the Title VII sexual harassment standard to Title IX cases.[117] The practice originated in the teacher-on-student harassment case of *Franklin v.*

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[111] *See id.* (conceding that hostile environment originated in Title VII, not Title IX); *see also* Majeed, *supra* note 101, at 461–62 (arguing that schools misapply the hostile environment standard since it was intended to regulate only adult workplace misconduct).

[112] Sherer, *infra* note 114, at 2125–26 (defining sexual harassment as "verbal or physical conduct of a sexual nature"); *infra* note 129. *Compare infra* notes 138, 144–145, *with infra* note 143.

[113] *See Title IX Legal Manual*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/title-ix (last visited Sept. 20, 2023).

[114] 20 U.S.C.S. § 1681(a); *see* Bundy v. Jackson, 641 F.2d 934, 943–44 (D.C. Cir. 1981) (finding that Title VII workplace sex discrimination included sexual harassment); *see also* Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2125 (1993).

[115] Sherer, *supra* note 114; 29 C.F.R. § 1604.11(a) (1999).

[116] Sherer, *supra* note 114, at 2126 (quoting OCR of the U.S. Department of Education Memorandum, Aug. 1981); *see also* OFF. FOR C.R., U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (quoting OCR of the U.S. Department of Education Memorandum, Aug. 1981).

[117] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992).

Gwinnett County Public Schools, in which the Court fatally stated that the "same rule" of sex discrimination under Title VII should apply to public schools.[118] Consequently, "many courts have, under an erroneous reading of *Franklin*, broadly construed the relevance of Title VII law for Title IX . . . cases."[119] For example, to avoid sexual harassment liability under Title IX, schools have attempted to restrict merely offensive but constitutionally protected free speech via student speech codes.[120]

But attempts by schools to suppress free speech under an anti-harassment rationale fail every time. Courts have unanimously struck down such policies for being unconstitutionally vague and overbroad speech restrictions.[121] While the impact of broadly construing Title VII's relevance to Title IX peer harassment cases has been addressed at the University level,[122] there is a gap in addressing this issue at the K-12 level. This gap likely exists due to the prevailing deference model, which resolves potential student speech cases without formal adjudication.

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[118] *Id.* (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)). The Court made the following statement:

> Title IX . . . [imposes] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates' on the basis of sex." . . . We believe the same rule should apply when a teacher sexually harasses . . . a student.

Id.

[119] Majeed, *supra* note 101, at 445.

[120] Lower courts have struck high school speech codes as overbroad when they regulate mere verbal conduct. *See*, *e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (overturning a high school anti-harassment code as overbroad because "[t]here is no categorical 'harassment exception' to the First Amendment[]"). Likewise, courts have overturned similar university speech codes as vague and overbroad. *See* Booher v. Bd. of Regents, N. Ky. Univ., No. 2:96–CV–135, 1998 WL 35867183, at *9 (E.D. Ky. July 22, 1998) (striking a policy that prohibited "speech of a sexual nature that [was] merely offensive"); UWM Post v. Bd. of Regents of Univ. of Wis., 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (striking a speech code prohibiting speech that created an "intimidating, hostile or demeaning environment"); DeJohn v. Temple Univ., 537 F.3d 301, 318–20 (3d Cir. 2008) (striking a speech code because the terms "hostile," "offensive," and "gender-motivated" lacked limitation and could suppress merely offensive student speech).

[121] *See Saxe*, 240 F.3d at 204; *see also Booher*, 1998 WL 35867183, at *9; *UWM Post*, 774 F. Supp. at 1180; *DeJohn*, 537 F.3d at 320.

[122] *See, e.g.*, Timothy E. Di Domenico, Silva v. University of New Hampshire*: The Precarious Balance Between Student Hostile Environment Claims and Academic Freedom*, 69 ST. JOHN'S L. REV. 609, 613–14 (1995); Alexis Snyder, *Damned If You Don't . . . Damned If You Do? Creating Effective, Constitutionally Permissible University Sexual Harassment Policies*, 114 DICK. L. REV. 367, 385 (2009); Pettys, *supra* note 13, at 13–15; Keeley B. Gogul, *The Title IX Pendulum: Taking Student Survivors Along for the Ride*, 90 U. CIN. L. REV. 994, 1002–03 (2022); Katherine Knott, *New Title IX Rules Get 235,000 Comments*, INSIDE HIGHER ED (Sept. 13, 2022), https://www.insidehighered.com/news/2022/09/14/thousands-weigh-new-title-ix-rules (reporting concerns that an "expanded definition of sexual harassment and other changes to the Title IX regulations could chill free speech on college campuses").

3. The *Davis* Standard for Sexual Harassment Under Title IX

The Supreme Court did, however, address the issue of Title IX peer harassment in *Davis v. Monroe County Board of Education*,[123] a 1999 case concerning two fifth-grade students.[124] In that case, the Court provided a limiting principle for implementing Title VII standards into Title IX peer harassment cases, holding that actionable peer sexual harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[125] Thus, the Court articulated a severe *and* pervasive standard[126] distinguishable from the Title VII standard of "severe *or* pervasive."[127]

The *Davis* Court took pains to preclude a construction of its holding in which merely offensive but constitutionally protected free speech could create a hostile environment invoking Title IX liability.[128] In fact, the Court expressly stated that its intention was *not* to criminalize merely offensive verbal conduct in the following summary of its holding:

> [S]chools are unlike the adult workplace and . . . children may regularly interact in a manner that would be unacceptable among adults. . . . [S]tudents are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.[129]

Further, what the Court meant by its "so" severe and pervasive standard is illustrated by the facts of the case, in which the perpetrator

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[123] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999).

[124] *Id.* at 632.

[125] *Id.* at 633.

[126] *Id.*

[127] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (emphasis added).

[128] *See Davis*, 526 U.S. at 633; Ross, *supra* note 101, at 759 ("A divided Court held that the Davis family could sue her school for 'deliberate indifference' in failing to respond to this harassment, but *only because* the bully engaged in assaultive physical conduct as well as verbal assaults.").

[129] *Davis*, 526 U.S. at 651–52.

engaged in both verbal and physical harassment conduct. Verbally, the student-perpetrator stated, "I want to get in bed with you" and "I want to feel your boobs."[130] Physically, the perpetrator attempted to assault the victim's breast and genital areas.[131] By distinguishing its own holding in favor of the victim from mere "teasing" and "upsetting" gender-based harassment,[132] the *Davis* Court thus held that there was *actionable* peer sexual harassment under Title IX when the "constellation of surrounding circumstances"[133] in the case revealed that the harassment was "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit."[134] Only after meeting the *Davis* standard could a plaintiff recover based on Title IX's anti-harassment guarantees.[135]

4. Post-*Davis* Title IX Regulations

Despite *Davis*'s clear standard, fourteen years later, the OCR[136] counterintuitively indicated that Title IX liability *could* include merely offensive but not unlawfully harassing verbal conduct.[137] In 2013, the Obama Administration's OCR notified schools that they risked incurring Title IX liability when a student was subjected to unwelcome verbal conduct *regardless* of whether it created a hostile environment and if the harassment was either severe *or* pervasive.[138] The OCR thus regressed to the prior conflation of Title IX's "severe, pervasive, and objectively offensive" standard with Title VII's "severe or pervasive" standard that the *Davis* Court had taken great lengths to distinguish.[139]

Subsequent presidential administrations have invoked *Davis* to expand or diminish the scope of Title IX to allow or prohibit merely offensive but constitutionally protected free speech.[140] In 2016, the Obama

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[130] *Id.* at 633.

[131] *Id.*

[132] *Id.* at 651–52.

[133] *Id.* at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

[134] *Id.* at 633.

[135] *Davis*, 526 U.S. at 633.

[136] The "OCR" refers to the Office of Civil Rights in the U.S. Department of Education.

[137] *See* Letter from U.S. Dep't of Just. C.R. Div. and U.S. Dep't of Educ. Off. for C.R. to President Royce Engstrom of the Univ. of Mont. (May 9, 2013) at 9, https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaletter.pdf (indicating that not objectively offensive conduct could still constitute sexual harassment).

[138] *Id.* at 1, 4–5 (emphasis added); Ross, *supra* note 101, at 761.

[139] *Compare Davis*, 526 U.S. at 633, *with* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

[140] *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30161–64 (2020) (codified at 24 C.F.R. pt. 106) (requiring schools to evaluate "harassment in the form of speech and

Administration's OCR released another letter reiterating that "regardless of whether it causes a hostile environment," unwelcome sexual conduct—including "verbal" conduct—constitutes sexual harassment in violation of Title IX. [141] During the Trump Administration, the Department of Education rescinded Obama-era guidance and reverted to the pure *Davis* standard,[142] explaining the relevant change as follows:

> The [Title IX] Final Rule uses the Supreme Court's *Davis* definition (severe *and* pervasive *and* objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom.
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> The Final Rule uses the Supreme Court's Title IX-specific definition rather than the Supreme Court's Title VII workplace standard (severe *or* pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.[143]

In 2022, the Biden Administration announced its intention to reinstate the severe *or* pervasive standard reminiscent of Obama-era

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expression" under a pure *Davis* standard—objectively offensive, severe *and* pervasive—to balance free speech rights with anti-harassment concerns), *with* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33498–500 (evaluating harassment under a *Davis* plus *Gebser* (Title VII case) standard—subjectively *and* objectively severe *or* pervasive—to reduce the "high barrier" of Title IX and "ensure access to education" based on "the Department's experience enforcing Title IX with regard to harassment"), *and* Letter from Catherine E. Lhamon, Assistant Sec'y, Off. of Civ. Rts., U.S. Dep't of Educ., to Colleague (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (advising schools to "treat" students consistent with their gender identity or else risk creating "a hostile environment in violation of Title IX").

[141] Letter from U.S. Dep't of Just. C.R. Div., Educ. Opportunities Section to Robert G. Frank, President, Univ. of N.M., *supra* note 140.

[142] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30507–08.

[143] U.S. DEP'T OF EDUC., SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION'S TITLE IX FINAL RULE 1 (2020).

guidance in its Title IX Final Rule.[144] On April 29, 2024, the Biden Administration did so.[145] These revisions effectively guarantee that actionable harassment under Title IX includes merely offensive but constitutionally protected free speech.[146]

In summary, a school's Title IX liability for sexual harassment continually expands or diminishes based on the goals of each presidential administration.[147] Each Title IX revision may or may not restrict merely offensive but constitutionally protected free speech.[148] Given the dictates of Title IX regulations, can schools fulfill their legal obligations to curtail "harassing" student speech without violating students' expressive rights?[149] To answer that question, it is essential to clarify what constitutional free speech rights students possess.

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[144] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41410 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

[145] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33500 ("[T]he conduct in question must be (1) unwelcome, (2) sex-based, (3) subjectively and objectively offensive, as well as (4) so severe or pervasive (5) that it results in a limitation or denial of a person's ability to participate in or benefit from the recipient's education program or activity.")

[146] The Department of Education repeatedly dismissed "speculative" concerns that its Title IX law would chill free speech. *E.g.*, *id.* at 33502, 33506–07. The Department stated, "[Our] definition is aimed at discriminatory conduct . . . that has an impact far greater than being bothersome or merely offensive. Moreover, even when a rule aimed at offensive conduct sweeps in speech, the rule does not necessarily become vague or overbroad." *Id.* at 33494.

[147] *See* Gogul, *supra* note 122, at 995–96 (illustrating Title IX's "pendulum swing" by comparing Title IX revisions under the Trump and Biden Administrations).

[148] Again, these differences often arise from erroneously conflating Title IX and VII definitions of actionable sexual harassment. *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30037 (declining to adopt the "same" definition under Title VII and Title IX because doing so would "equate workplaces with educational environments" contrary to the Supreme Court and Congress, which "noted the unique nature and purpose of educational environments"), *with* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41415 (defining "hostile environment" under Title IX identically to "courts and the EEOC under Title VII"), *and* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33510 (justifying the *subjectively* offensive element the Department added to Title IX because "the complainant's perspective is likewise part of the Title VII standard").

[149] *See* Ross, *supra* note 101, at 762 ("The school may be legally obliged to curtail the speech of the male graduate students, but can it do so without violating their expressive rights? Only if the speech amounts to harassment under the law.").

B. What Are K-12 Schools' Obligations to Protect Student Speech Under the Constitution?

Public schools, as government institutions, are bound by the Constitution.[150] As school officials seek to fulfill their Title IX anti-harassment obligations, they cannot violate students' rights under the Free Speech and Free Exercise Clauses. The Free Speech Clause of the First Amendment prohibits the government from "abridging the freedom of speech."[151] Religious speech is "doubly" protected by the "overlapping protection" of the Free Exercise Clause.[152] As the Court explained in its 2022 decision of *Kennedy v. Bremerton School District*, the "Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[153]

As the interpreter of the Constitution, the Supreme Court is obligated to affirm the constitutional guarantee of freedom of intellect and spirituality by protecting the right of all citizens—including students—to disseminate their views without fear.[154] The reasons for robust protection of the freedom of speech are multifaceted. As the Court has explained,

> [f]ree speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.[155]

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[150] *See* Cooper v. Aaron, 358 U.S. 1, 19 (1958); *see also* Calhoun v. Latimer, 321 F.2d 302, 311–12 (5th Cir. 1963).

[151] U.S. CONST. amend. I.

[152] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022).

[153] *Id.*

[154] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (holding that requiring students to salute the American flag was unconstitutional because it "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

[155] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2464 (2018) (internal citations omitted). Forty-seven years earlier, the Court articulated the rationale for robust freedom of speech in *Cohen v. California*:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with

As a result, the Court has protected not only profane speech[156] but arguably even more harmful speech, such as racist speech,[157] anti-LGBTQ rhetoric,[158] and offensive expressive conduct, such as burning the American flag.[159]

1. The Establishment Clause and Student Speech

The Establishment Clause forbids the government from making a law "respecting an establishment of religion."[160] While it is beyond the scope of this Note to analyze extensively all the Establishment Clause arguments raised by school officials to justify their suppression of student speech, it is important to briefly discuss the interplay between their alleged Establishment Clause obligations and student speech rights.

In *Kennedy*, the Court abandoned the *Lemon* test and "its endorsement test offshoot," which had prevailed since the 1970s as the standard for analyzing Establishment Clause violations.[161] The replacement test for Establishment Clause cases is now a historical one, based on "'historical practices and understandings"[162] and focusing on the "original meaning and history" of the Establishment Clause.[163] Prior to

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> the premise of individual dignity and choice upon which our political system rests.
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> Cohen v. California, 403 U.S. 15, 24 (1971).

[156] *Cohen*, 403 U.S. at 16, 26 (protecting the private display of the "expletive" stating "f[***] the draft").

[157] R.A.V. v. St. Paul, 505 U.S. 377, 391–92 (1992) (protecting "bias-motivated" hate speech such as "odious racial epithets"); Matal v. Tam, 582 U.S. 218, 247 (2017) (protecting the registration of racially disparaging trademarks).

[158] Snyder v. Phelps, 562 U.S. 443, 456, 458 (2011) (protecting the "hurtful" anti-LGBTQ speech directed at a soldier's funeral because the speech was "at a public place on a matter of public concern").

[159] Texas v. Johnson, 491 U.S. 397, 419–20 (1989) (protecting flag burning as symbolic free speech).

[160] U.S. CONST. amend. I.

[161] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022). Under the Lemon Test, a statute violated the Establishment Clause unless it (1) had a secular legislative purpose, (2) its principal or primary effect neither advanced nor inhibited religion, and (3) the statute did not foster "an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The Endorsement Test originated in Justice O'Connor's concurrence in a subsequent Establishment Clause case in which she suggested "a clarification" to the Court's approach under *Lemon*. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). Justice O'Connor later clarified her own clarification in *Capitol Square Review and Advisory Board v. Pinette* by explaining that the Endorsement Test inquires whether a "reasonable observer" would believe the government is endorsing religion or simply allowing religious speech to take place in an open forum. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779, 782 (1995) (O'Connor, J., concurring in part).

[162] *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[163] *Id.*

Kennedy, the Court held that public schools were prohibited from mandating religious practices like school prayer,[164] daily Bible reading,[165] and state-sponsored prayer at a high school commencement ceremony.[166] The *Kennedy* decision may affect these holdings because the original meaning of "respecting" religion did not require pure secularism or religious "neutrality" in public institutions but rather left the issue of establishing religion to the States.[167]

Even under the neutrality viewpoint,[168] the U.S. Department of Education has clarified that current Establishment Clause jurisprudence does not change the substantial disruption standard for regulating student speech under *Tinker*.[169] Thus, students are free to utter religious speech in public school so long as their speech is not substantially disruptive.[170] In a letter introducing the 2023 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools,[171] U.S. Secretary of Education Miguel A. Cardona described the dual duties the First Amendment imposes on public schools as "*prohibiting* any governmental establishment of religion and *protecting* the free exercise of faith."[172] The Secretary continued,

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[164] Engel v. Vitale, 370 U.S. 421, 424–25 (1962).

[165] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

[166] Lee v. Weisman, 505 U.S. 577, 596–97 (1992).

[167] *See* Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26, 27, 32–33 (2021).

[168] *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. DEP'T OF EDUC. (May 15, 2023) [hereinafter *Guidance on Constitutionally Protected Prayer and Religious Expression*], https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html ("Schools must also maintain neutrality among faiths rather than preferring one or more religions over others.").

[169] *See id.* (noting that the school's interest in regulating disruptive speech under *Tinker* and its obligations under Establishment Clause precedent do not warrant censorship of religious remarks simply because a student delivers them "in a public setting or to a public audience" and emphasizing that "the Constitution mandates neutrality toward privately initiated religious expression"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 513 (1969).

[170] RESTATEMENT OF THE L.: CHILD. & THE L. § 9.10 cmt. b (AM. L. INST., Tentative Draft No. 3, 2021) ("Like other private student speech, student prayer and speech expressing religious views can be prevented or regulated by the school if it disrupts the work of the school or interferes with the rights of others."); *First Amendment Lesson Plan: Religion in Public Schools*, FREE SPEECH CTR., https://web.archive.org/web/20230609153725/https://mtsu.edu/first-amendment/page/religion-public-schools (last visited Nov. 7, 2023) ("[P]ublic schools may not prevent students from expressing or sharing religious beliefs, as long as their doing so does not disrupt the school.").

[171] *Key Policy Letters Signed by the Education Secretary or Deputy Secretary: Letter from Secretary Cardona on Updated Guidance Regarding Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. DEPT. OF EDUC. (May 15, 2023), https://www2.ed.gov/policy/gen/guid/secletter/230515.html.

[172] *Id.* (emphasis added).

"[g]uaranteeing religious freedom in and outside of public schools has been and continues to be vital to the strength of our country and our democracy."[173]

As the summary list below indicates,[174] the 2023 guidelines advised schools to uphold students' free speech and free exercise rights broadly:

1. Schools must provide student groups meeting to engage in religious expression equal access to noncurricular advertisement spaces.[175]

2. Schools must allow students to distribute religious literature to their classmates to the extent they allow other students to distribute nonreligious materials to the same.

3. Schools must permit students to pray privately during a school-sponsored "moment of silence."

4. Schools must permit students to privately bow their heads and pray before taking exams when they allow other students to engage in other private expression at that time.

5. Student speakers have the right to voluntarily pray at a school assembly or noncurricular activity when selected to speak based on "genuinely content-neutral, evenhanded criteria, and the school does not determine or control the content of the student's speech."

6. Student speakers for "graduation" have the right to include religious content in their speech when selected under the same circumstances.

7. Schools should consult with their attorneys when drafting dress codes and excused absence policies to avoid religious discrimination and substantially burdening the religious exercise of their students.

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[173] *Id.*

[174] *Guidance on Constitutionally Protected Prayer and Religious Expression*, *supra* note 168. For a helpful summary of the 2023 Guidance provisions as they affect student expression, see Sherry Culves et. al., *Navigating the Intersection of Religion and Public Schools*, J.D. SUPRA (Sept. 25, 2023), https://www.jdsupra.com/legalnews/navigating-the-intersection-of-religion-4014909/.

[175] *Guidance on Constitutionally Protected Prayer and Religious Expression*, *supra* note 168 ("[F]or example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets.").

Accordingly, in response to the hypothetical scenarios posed in the Introduction of this Note,[176] schools do not violate the Establishment Clause by allowing students to voluntarily express their faith during school hours, on school property, and at school events.[177] If other students can integrate their secular beliefs into a neutral writing assignment, Mia can integrate her religious beliefs into the same.[178] Having been selected by the school to give a commencement address per neutral qualifications, valedictorian Ayanna can explicitly discuss her faith in the speech.[179]

2. Constitutional Limitations on Student Speech

The *Tinker* Court explained that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[180] Simultaneously, it created the substantial disorder standard that allowed school officials to restrict student expression if the speech would reasonably, substantially, and materially disrupt the educational environment.[181] Unlike its free speech jurisprudence for non-student citizens beholden to the "bedrock principle" that speech could not be censored simply because society found it "offensive or disagreeable,"[182] the *Tinker* Court uniquely allowed administrators to regulate student speech based on the *effects* the speech had on other students and the learning environment.[183]

In the 1980s, the Court's student speech jurisprudence took on a pro-censorship turn for the worse.[184] First, in *Bethel School District v. Fraser*, the Court carved out an area of speech in which school officials did not need to satisfy *Tinker*'s substantial disruption standard by holding that

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[176] *See supra* INTRODUCTION.

[177] *See generally Guidance on Constitutionally Protected Prayer and Religious Expression*, *supra* note 168.

[178] *Supra* INTRODUCTION at Establishment Clause #1; s*ee Guidance on Constitutionally Protected Prayer and Religious Expression*, *supra* note 168 ("Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions.").

[179] *Supra* INTRODUCTION at Establishment Clause #2; *see Guidance on Constitutionally Protected Prayer and Religious Expression*, *supra* note 168 (explaining that a student or guest speaker's graduation speech "may not be restricted because of its religious content . . . and may include prayer").

[180] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[181] *Id.* at 513.

[182] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[183] Chauvin, *supra* note 24, at 1164 ("[B]y leaving in place *Tinker*'s effects-based test for permissible censorship, the Court muddies the First Amendment waters by maintaining a standard that differs fundamentally from the way restrictions on speech are typically analyzed.").

[184] *See* Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—For the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1411–12 (2011).

school officials could restrict lewd, vulgar, indecent, or "plainly offensive" speech during compulsory student activities.[185] In that case, the Court upheld a school's restriction of a student's speech given at a school assembly that was replete with sexual innuendos.[186] The Court also clarified that its "plainly offensive" rule did not mean abstractly offensive but "offensively lewd."[187] Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court further empowered school administrators to restrict student speech if the restriction was "reasonably related to legitimate pedagogical concerns."[188] In that case, the Court held that a school could exercise "editorial control over the style and content of student speech in school-sponsored . . . activities"[189] by upholding the school's deletion of a student article about pregnant students in a school newspaper published as part of a journalism class.[190] The Court explained:

> [T]he First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," . . . and must be "applied in light of the special characteristics of the school environment." . . . 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.[191]

Thus, in *Fraser* and *Hazelwood,* the Court weakened the robust student speech protections it had initially created under *Tinker*'s rigorous substantial disruption standard by developing broad, discretionary exceptions under which school officials could suppress certain types of student speech with less hindrance.[192]

The 1980s shift to greater deference to school officials was solidified in the 2007 case of *Morse v. Frederick*, in which the Court held that school officials could restrict student speech that was "reasonably viewed as promoting illegal drug use."[193] In that case, the Court upheld the school's confiscation of a banner that read "BONG HiTS 4 JESUS" during a supervised event amidst school hours.[194] Besides the majority opinion, Justice Alito's concurring opinion in *Morse* would have a surprisingly far-

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[185] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).
[186] *Id.* at 678, 685.
[187] *See id.* at 683, 685.
[188] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
[189] *Id.*
[190] *Id.* at 274, 276.
[191] *Id.* at 266 (quoting *Fraser*, 478 U.S. at 682; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); and *Fraser*, 478 U.S. at 685).
[192] Lloyd, *supra* note 46, at 298–301.
[193] Morse v. Frederick, 551 U.S. 393, 403 (2007).
[194] *Id.* at 397.

reaching effect on censoring student speech.[195] Justice Alito caveated his concurrence to the majority's holding based on the following two principles:

> (1) it 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 (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any *political* or *social* issue.[196]

He then wrote that future alterations of the "usual free speech rules in public schools,"[197] namely, *Tinker*, *Fraser*, and *Hazelwood*, "must . . . be based on some special characteristic of the school setting . . . [such as] the threat to the physical safety of students."[198]

Despite the majority opinion's factual underpinnings and the caveats articulated by Justice Alito in his concurrence, lower courts have broadly interpreted *Morse* "to censor speech that has absolutely nothing to do with illegal drug use but that has everything to do with subjects such as violence and homophobic expression,"[199] restricting any student speech that threatens "physical violence" or causes "emotional injury."[200] By misapplying *Morse* to justify upholding broad censorship of student speech by school officials, these lower courts have categorized certain speech as "low-value" to bypass the "heightened scrutiny analysis" under *Tinker*, creating numerous problems.[201] Not only does this approach "provide[] significant disciplinary latitude to punish children for offensive communications,"[202] but it "expands the disciplinary reach of schools[] and allows for increased administrative censorship,"[203] both of which far exceed the scope of *Morse* that the Supreme Court intended.

3. The Regulation of "Offensive" Student Speech

While the binding precedent above indicates that school officials may restrict student speech when it is substantially disruptive,[204] "reasonably related to legitimate pedagogical concerns,"[205] and lewd, vulgar, indecent,

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[195] *See* Calvert, *supra* note 77, at 3.
[196] *Morse*, 551 U.S. at 422 (Alito, J., concurring) (emphases added).
[197] *Id.* at 424.
[198] *Id.*; *see also* Tsesis, *supra* note 4, at 1150–52, 1158–59, 1170.
[199] Calvert, *supra* note 77, at 3.
[200] *Id.* at 24.
[201] Tsesis, *supra* note 4, at 1170.
[202] *Id.*
[203] *Id.*
[204] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
[205] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

or "plainly offensive" speech made during compulsory student activities,[206] one question remains: Can school officials restrict student speech simply because it *offends* others? The answer is no! Yet, as illustrated in the hijacking of *Morse* to censor student speech based on emotional injury, the problem of restricting potentially offensive but not unlawful speech continues to be an issue that students face in public schools.[207]

Besides the expansive application of *Morse*, other binding precedent provides the same temptation for lower courts to justify upholding overbroad student speech restrictions. For example, lower courts may be tempted to engage in this practice based on the Court's holding in *Fraser*, in which the Court upheld a school's discipline of a student's lewd speech because the "pervasive sexual innuendo in [his] speech was *plainly offensive* to both teachers and students."[208] Pursuant to *in loco parentis*, the Court explained that the school officials had an "obvious concern . . . to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."[209] Similar to *Morse*, a shallow reading of *Fraser* could tempt lower courts to uphold unlawful student speech restrictions based on the speech's effect of mere offense. However, it is erroneous to read *Fraser* to justify censoring speech that is merely offensive but not unlawful. Rather, the *Fraser* Court articulated a narrow rule simply to clarify that categorical restrictions on obscene speech—meaning sexually profane expression—applied with a heightened concern in student speech scenarios.[210]

Due to the rise of social media and internet-based curricula, courts have had to determine the scope of a school's authority to censor off-campus student speech that may affect students during school hours.[211] Recently, in the 2021 case of *Mahanoy Area School District v. B.L.*, the Court analyzed whether *Tinker* empowered school officials to regulate off-

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[206] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

[207] Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657, 658–59, 706–07 (2009).

[208] *Fraser*, 478 U.S. at 678–79, 683 (emphasis added).

[209] *Id.* at 684.

[210] *Id.* Indeed, the *Fraser* Court's rationale for its holding was its obscene speech jurisprudence. *Id.* at 682–86. Specifically, the Court distinguished its protection of the "F*** the draft" expletive in *Cohen* by stating, "[i]t does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." *Id.* at 682; Cohen v. California, 403 U.S. 15, 16 (1971). Categorical restrictions on obscene speech have been consistently upheld by the Court. Miller v. California, 413 U.S. 15, 23 (1973). In *Cohen*, the Court protected the "F*** the draft" expletive by explaining that, unlike unprotected obscenity, the F-word in that case was not used to express an "erotic" message. *Cohen*, 403 U.S. at 16, 20.

[211] Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 719–22 (2018).

campus speech they deemed to violate the substantial disorder standard.[212] The Court held that the case-specific answer was no and that the public high school had violated a student's free speech rights when school officials suspended her from cheerleading based on profane social media posts.[213]

While declining to establish a bright line rule, the *Mahanoy* Court further held that there are "special characteristics that give schools additional license to regulate student speech [which] remain significant in some off-campus circumstances" such as bullying or harassment, threats, enforcing curricular standards, and computer or other online school-related activities.[214] But the Court provided three reasons why schools would likely have a diminished interest in regulating off-campus student speech: (1) the *in loco parentis* doctrine does not usually apply because off-campus student speech typically falls "within the zone of parental, rather than school-related, responsibility";[215] (2) courts will be more skeptical about expanding the school's regulatory power to off-campus speech because the additional power would allow schools to regulate all student speech "utter[ed] during the full 24-hour day";[216] and (3) the school "has an interest in protecting a student's unpopular expression, especially when [it] takes place off campus."[217] Thus, the Court clarified that administrators cannot arbitrarily restrict offensive speech under the substantial disorder standard and explicitly affirmed the "bedrock" free speech principle in the K-12 student speech context, namely, that "the government may not prohibit the expression of an idea simply because society finds the *idea* itself offensive or disagreeable."[218]

In summary, Part II of this Note has shown that the differing standards for student speech suppression under Title IX's sexual harassment provisions and constitutional student speech precedent allow school administrators to censor student speech that is potentially offensive but not unlawfully harassing. While affirming that students maintain their speech rights in schools, [219] the *Tinker* Court simultaneously granted school officials "First Amendment leeway" to restrict student expression that would reasonably, materially, and substantially disrupt the learning environment. [220] The Court later expanded this leeway to allow administrators to ban "offensive" student

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[212] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021).
[213] *Id.* at 2048.
[214] *Id.* at 2045.
[215] *Id.* at 2046.
[216] *Id.*
[217] *Id.*
[218] Texas v. Johnson, 491 U.S. 397, 414 (1989) (emphasis added); *Mahanoy*, 141 S. Ct. at 2045, 2048.
[219] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
[220] *Mahanoy*, 141 S. Ct. at 2046; *see also Tinker*, 393 U.S. at 513.

speech *because* it was obscene,[221] but not because it was political[222] or profane. [223] Compared to the nebulous sexual harassment liability standard under Title IX, the Constitution more clearly and robustly protects student speech.[224]

III. RECOMMENDATIONS

Can courts retain the benefits of the deference model without restricting constitutionally protected student speech? Subsidiarity, *in loco parentis*, and the realities of K-12 student development all justify some level of deference to school officials.[225] The benefits of the deference model include maintaining the functionality, efficiency, and locality of the public school system.[226]

Despite its benefits, the deference model allows for administrator abuse of discretion. The problem is not that the judiciary affords *some* deference to school administrators but rather that *undue* deference enables school officials to suppress potentially offensive but not unlawful speech. [227] Much potentially offensive speech is constitutionally protected.[228] When courts afford schools undue First Amendment leeway, judicial review becomes a "meaningless ritual,"[229] and courts abdicate their duty to keep other branches in check. Unduly deferential rulings sweep significant, constitutionally protected, K-12 student speech under the rug for lack of meaningful judicial review.[230]

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[221] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684–85 (1986).

[222] *Tinker*, 393 U.S. at 510 (holding that school officials did not meet the substantially disruptive standard when they prohibited students from wearing Vietnam War protest armbands "based upon an urgent wish to avoid the controversy which might result from the expression"); Morse v. Frederick, 551 U.S. 393, 398 (2007) (noting that "[Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief."); *id.* at 422 (Alito, J., concurring) (concurring based on the understanding that the majority's holding "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue").

[223] *Mahanoy*, 141 S. Ct. at 2047–48.

[224] *Compare supra* text accompanying notes 113–116, *with supra* text accompanying notes 219–223.

[225] *See* James & Larson, *supra* note 4, at 25–26, 37–38, 90.

[226] Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1701, 1709, 1720–1721, 1723–24 (2009).

[227] *See* Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports*, 78 LA. L. REV. 145, 180–81, 187 (2017) (discussing how "expansive deference given to school authorities is problematic . . . because it fails to shield students from school authorities using their discretionary power to limit student speech simply because they disagree with the content of the message" and how "affording school authorities too much deference allows them to engage in viewpoint discrimination, which is prohibited by the First Amendment").

[228] *See supra* notes 156–159 and accompanying text.

[229] Dienes & Connolly, *supra* note 30, at 392, 394.

[230] Tsesis, *supra* note 4, at 1195, 1203.

Yet, there is hope through reformation. The judiciary, K-12 administrators, and policymakers can correct course and uphold constitutional standards for free speech. By fostering a learning environment focused on constitutional freedoms, these groups can teach their K-12 students to understand and live out American values.

A. The Judiciary

For the judiciary, the reformation consists of turning from a problematic model to a more perfect one. The Court should turn from the pro-censorship *broad* deference model adopted in the 1980s to the pro-speech *limited* deference model it originally articulated in *Tinker*. As the Court originally stated:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[231]

In particular, the Court should expressly state that its controlling presumption in student speech cases is not de facto deference to school administrators but that "[n]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[232] Further, the Court should reiterate that students are protected particularly when they engage in religious and political speech, even if some find the *ideas* about which the student speaks to be offensive[233] and that such speech is especially entitled to a presumption of robust protection per the Free Speech and the Free Exercise Clauses of the Constitution.[234]

B. K-12 Administrators

For K-12 school officials, including administrators, teachers, and other staff, the reformation consists of returning to the school's fundamental mission: a state entity imparting American values. In a constitutional republic like the United States of America, freedom of speech is "the most fundamental value in American democracy. A national

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[231] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[232] *Id.* at 506.

[233] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring); *see also supra* note 174 and accompanying text.

[234] *See supra* notes 151–166, 222.

commitment to uninhibited political speech is a crucial aspect of our country's culture."[235] Given the strong protection of the marketplace of ideas within the Constitution's text, schools run by the American government should strive to help young students understand these democratic ideals, appreciate their constitutional rights, and exercise their freedoms for the sake of their communities, which thrive through exposure to diverse viewpoints.

Like the judiciary, school officials should adopt the presumption that student speech is protected and foster the free exercise of constitutional rights.[236] Whether students will speak or be too afraid to speak their minds is highly influenced by their school's culture.[237] School officials wield tremendous power to shape how students exchange ideas without needing to censor speech content itself. As young learners, K-12 students are perfectly situated to learn the difference between animosity and curiosity. They can be taught the difference between respectfully sharing an unpopular opinion and maliciously targeting another student as a person for holding an opposing view.

Even if there is malice, free speech principles dictate that "[t]he best response to bad speech is more and better speech."[238] What a privilege for school officials to teach young children the value of combating poor and offensive rhetoric with better, more reasonable words!

Returning to the fundamental mission of the school means realizing the ideal public school setting. In this educational environment, "young Americans develop into citizens and become socialized to particular ideas, values, and civic norms. Attitudes toward democracy and disagreement are forged in these [places]."[239] To achieve these ends, it would behoove K-12 administrators, teachers, and staff to foster an environment where the

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[235] Laurence H. Silberman, *Free Speech Is the Most Fundamental American Value; Why I Oppose Both Ivy League Censorship and* New York Times v. Sullivan, WALL ST. J. (Sept. 30, 2022, 5:47 PM), https://www.wsj.com/articles/free-speech-is-the-most-fundamental-american-value-constitution-day-first-amendment-political-unity-communism-values-11664560788.

[236] The presumption of constitutional supremacy was recently reiterated by the Court in the 2023 compelled speech case of *303 Creative v. Elenis*, in which the Court upheld a business owner's free speech rights against the State's enforcement of an anti-discrimination statute to force her to speak an objected-to message as a public accommodation. 303 Creative v. Elenis, 143 S. Ct. 2298 (2023). Citing the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the Court declared, "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* at 2315. Similarly, K-12 administrators should presume constitutional supremacy in situations that implicate student speech rights. Put another way, when a school policy or state regulation collides with the Constitution, there should be no question which must prevail.

[237] *See* Samuel J. Abrams, *High School Students Value Free Speech But Feel Uncomfortable Speaking Up*, AM. ENTER. INST. (June 3, 2022), https://www.aei.org/op-eds/high-school-students-value-free-speech-but-feel-uncomfortable-speaking-up/.

[238] Ross, *supra* note 101, at 746.

[239] Abrams, *supra* note 237.

freedom to disagree and offend is protected while the freedom to exchange ideas and discuss deeply held convictions with respect is fostered. The means by which this objective may be achieved include creating overarching pro-speech school policies, vision-casting by leadership to teachers and students about the value of democratic principles, and applying constitutional standards to individual cases of student discipline or conflict.

C. Policymakers

Lastly, for policymakers, reformation consists of clarity, consistency, and constitutional subordination. The harassment provisions of Title IX and constitutional student speech precedent are merely one example of the conflict between regulatory standards and constitutional case law. Besides Title IX, many schools have speech codes or other anti-discrimination policies that are just as likely, if not more likely, to be used to justify suppressing protected student speech.[240]

Policymakers can engraft democratic principles and constitutional standards into their school policies in many ways. First, policymakers—including federal, state, district, or local school boards—must clarify what expression their policies affect. For example, drafters should expressly state what speech is *not* restricted and what speech *is* restricted. Drafters should avoid using overbroad terms. If the policies grant teachers, principals, or other staff the discretion to suppress student speech, such discretion should be limited by clear and objective standards.

Second, policymakers must ensure their policies are consistent with constitutional precedent on the issues their policies implicate. Drafters should carefully ensure that any effects-based regulations of student conduct do not infringe on protected speech. The "effect" that triggers speech suppression should thus not be another student feeling offended, but rather objective metrics like not being quiet during class, using an appropriate tone of voice, or listening to the teacher's instructions. Categorically, drafters must remember that school policies cannot censor student utterances of a religious or political nature that do not substantially disrupt the learning environment,[241] proliferate lewdness,[242] or reasonably promote illegal drug use.[243]

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[240] Greg Lukianoff et al., *Catching Up with 'Coddling' Part Thirteen: The Misuse of Title IX Still Threatens Free Speech on Campus*, FIRE (Mar. 19, 2021), https://www.thefire.org/news/blogs/eternally-radical-idea/catching-coddling-part-thirteen-misuse-title-ix-still-threatens.

[241] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–10, 514 (1969); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[242] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

[243] Morse v. Frederick, 551 U.S. 393, 403 (2007).

Third, policymakers should expressly subordinate their school policies to the Constitution.[244] Drafters should include clauses that expressly state, inasmuch as their policy conflicts with constitutional precedent, that the constitutional standard reigns supreme.[245] Thus, in situations in which a student's expression toes the line between actionable harassment under Title IX and constitutionally protected free speech, schools must err on the side of protecting student speech and upholding the First Amendment.

Policymakers should also adopt a free speech framework when drafting policies that may infringe on student expression. Unlike adults in the workplace, "students are still learning how to interact appropriately with their peers."[246] In light of the developmental realities of K-12 students and free speech principles central to the Constitution, policymakers who draft regulations that affect these young Americans should avoid making censorship the remedy for potentially harassing or offensive speech and offer pro-speech solutions instead. Facially harassing speech is distinguishable from unlawfully harassing speech.[247] Moreover, subjectively offensive speech is not necessarily harassment.[248] Whereas facially harassing or offensive speech may occur simply when the words used cause another person to feel bad and the speaker can utter such words without malice, unlawfully harassing speech is associated with invidious intent, in which a speaker utters harassing words solely to degrade another individual as a person.[249]

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[244] The presumption of constitutional supremacy accords with the Court's current speech jurisprudence and is also the disposition recommended for K-12 administrators in this Note. *See supra* note 236.

[245] *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41415 (noting that "nothing in the Title IX regulations requires a recipient to '[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.'") (quoting 34 C.F.R. 106.6(d)) (alteration in original); UNIV. OF VIRGINIA, HRM-041: POLICY ON SEXUAL AND GENDER-BASED HARASSMENT AND OTHER FORMS OF INTERPERSONAL VIOLENCE § IV(A)(2) (2022) ("When the alleged conduct [sexual harassment] is verbal or contains elements of speech or expression, the above standards are implemented consistent with the First Amendment.").

[246] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).

[247] Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, AM. BAR ASS'N (Oct. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/.

[248] Letter from Gerald A. Reynolds, Assistant Sec'y, Off. C.R., U.S. Dep't Educ., to Colleague (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html ("Some . . . interpret[] OCT's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.").

[249] *See id.*

K-12 policymakers have the opportunity to teach young students the power of their words and encourage them to choose truth with respect when speaking to their peers. Thus, K-12 anti-harassment or anti-discrimination policies should address potentially problematic student speech from a free speech framework that denies de facto censorship and instead encourages all voices to be heard, student-teacher discussions over the merits of the manner in which speech was uttered, and discipline based on speaker intent rather than speech effects. Moreover, policymakers should strive to draft regulations that stop bad speech with better speech rather than protect people from bad speech by broadly censoring any speech that could result in bad feelings.[250]

CONCLUSION

The "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[251] To exercise their freedom to differ, students cannot live in fear—the fear of causing offense from offering a different perspective. The Constitution prohibits school officials from fostering such fear. As agents of the State, administrators cannot censor student speech that is merely offensive but constitutionally protected.

While it would be easy to use Title IX law to erode students' free speech rights, school officials must exercise administrative restraint. Until the Court defines the "serious or severe"[252] harassing speech that schools can lawfully regulate or explicitly affirms that Title IX's sexual harassment standard includes suppressing free speech, schools must err on the side of robustly protecting First Amendment guarantees. K-12 students are vulnerable to never attempting to exercise their free speech rights if they are taught to live in fear of causing offense by uttering controversial ideas. But our nation was founded on freedom, not fear. Accordingly, K-12 public school officials should encourage, model, and teach their students the benefits of living out the democratic ideals protected by the Constitution.

Jaelyn R.M. Haile[*]

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[250] *See* Ross, *supra* note 101, at 746.

[251] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[252] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021).

[*] J.D. candidate, 2024, Regent University School of Law; B.A., 2021, Liberty University. Special thanks to Professor Sandra Alcaide for encouraging me to write on this topic dear to me in a manner that portrays my own voice. Additional thanks to my husband, Jonathan Haile, whose love and support quite literally sustained me during the revisions. All glory to God, who freely gave me salvation in His Son, Jesus Christ, and the opportunities to learn the law and write this Note.