The Emerging Dichotomy of the Educational Institution: Expression and Authority in Public Schools under Morse v. Frederick, 127 S. Ct. 2618 (2007)

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I. INTRODUCTION

Tension has emerged from the United States Supreme Court's review of student speech. This tension, between the importance of protecting the right of the student and the authoritative role of the educator, is emphasized in Morse v. Frederick. The examination of this conflict in light of First Amendment history in public schools is necessary to properly understand how future cases will be affected. The Court has noted that "education is perhaps the most important function of our local governments." The conflict of liberty and social order in education requires a delicate balance of interests. It is not necessarily the Court's role to determine what educational policies will be implemented at the state level; however, the Court must decide constitutional issues that arise in the school setting.

In Morse v. Frederick, the Supreme Court held that a school official's restriction of student speech reasonably interpreted as advocating illegal drug use was not a violation of the student's First Amendment right to free speech. Joseph Frederick, the student in Morse, was suspended by Principal Deborah Morse for holding up a banner that read "BONG HI$T 4 JESUS" at an off-campus school-sanctioned event: attending the Olympic Torch Relay. When the case reached the United States Supreme Court, the Court declined to strictly apply its established precedent, and instead created a new exception providing a school authority the power to censor speech reasonably regarded as encouraging the use of illegal drugs. Because the Court determined that the most reasonable interpretation of Frederick's speech fit into that exception, it did not qualify as protected speech and the school's disciplinary action was upheld.

Within student-speech jurisprudence the Court has upheld a dichotomy of interests, protecting both the interests of authority and expression. Morse furthers this dichotomy and will dictate interpretation of student expression in future cases. While policy and ideological concerns have emerged, the Supreme Court has yet to ex-

2. To assist in this examination, it is necessary to note the underlying ideologies that have implicitly guided the Court's interpretation of First Amendment rights in the school setting. See infra sections II.C, III.A.
4. Extended inquiry into the role of the judiciary within the public education system is far beyond the scope of this Note. For an analysis, see Michael A. Rebell, Overview: Education and the Law: Schools, Values, and the Courts, 7 YALE L. & POL'Y REV. 275 (1989).
6. Id. at 2622.
7. Id.
8. Id. at 2624.
9. Id. at 2622.
pressly articulate a test representative of these interests. In Morse, the Court took the opportunity to review the established principles of its student-speech jurisprudence and applied collective reasoning to create a fairly narrow rule. However, the Court never explicitly articulated the source of the underlying instructive principles upon which it relied.

Although limited to its specific facts, the Morse decision is significant because the Court identified and effectively balanced the competing interests of school authority and student expression. The identification of this tension is an invitation for lower courts to develop a balancing test by looking at prior case law for key factors that properly weigh the competing interests. Drawing on the contrasting ideology of cultural transmission and progressivism, this discussion will examine the future impact of the Morse decision as a recent addition to jurisprudence already rife with tension. Part II examines the history of Supreme Court student-speech jurisprudence and the pervasive educational ideologies in relation to the democratic institution of education. Further, this Note demonstrates the developing application of these competing ideologies throughout student-speech case law. Part III analyzes how these ideologies have shaped the student-speech jurisprudence so substantially that a test can be applied to future cases as a modification of the rule initially set forth in Tinker v. Des Moines Independent Community School District, to balance the rights of students and the duties of public school officials.

Tinker, Fraser v. Bethel School District, and Morse have set forth principles that can be consistently applied to future student-rights cases. However, the foregoing cases illustrate the need for a standard First Amendment policy for public education that encourages a productive public school system that still emphasizes the democratic social structure. As a step toward such policy, this Note suggests future courts should institute a balancing test—weighing the students' rights to freedom of expression against the necessary authority of public school officials—to determine what will constitute protected speech in the future.

10. See infra subsection II.C.1.
11. See infra subsection II.C.2.
12. 393 U.S. 503 (1969); see infra subsection II.A.1 (discussing facts and holding of Tinker).
13. 393 U.S. 503.
II. BACKGROUND

A. Student Speech: A Trilogy

1. Tinker v. Des Moines

Any attempt to discuss the judicial regulation of student expression requires first addressing the pivotal case of *Tinker v. Des Moines Independent Community School District*. This landmark decision declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In 1965, several students made a decision to wear black armbands at school to show their disapproval of the Vietnam War. After becoming aware of the students' intended display, the principals of the school implemented a policy prohibiting students from wearing armbands on school property. When several students proceeded to violate the policy, they were suspended by authorities and told not to return to school until they could do so without wearing the armbands. Consequently, the students sued the school district.

Deferring to the authority of school administrators, the district court found that the students' actions did not constitute protected speech. The Eighth Circuit affirmed. The United States Supreme Court reversed and adopted a test to determine whether student expression was protected speech under the First Amendment: the "substantial and material disruption" test. The Court deemed the students' acts "akin to 'pure speech.'" Because the simple act of...
wearing black cloth around one’s arm did not create a foreseeable risk of substantial disruption, the Court reasoned that school officials had no authority to regulate the communication of a political idea. Throughout the opinion, the Court addressed the students’ First Amendment rights in “light of the special characteristics of the school environment.”26 The Court held school officials could not restrict expression of a student’s viewpoint, even if controversial.27 The Court further articulated a test requiring clear, foreseeable, and substantial disruption to overcome the student’s right to expression.28 Thus, Tinker protects political speech within the school setting, so long as it does not cause a substantial disruption.

2. Bethel School District No. 403 v. Fraser

Seventeen years passed before the United States Supreme Court addressed student speech again in Bethel School District No. 403 v. Fraser.29 Matthew Fraser delivered a nomination speech at a voluntary assembly held during school hours that contained sexual innuendo. Students at the assembly responded by mimicking the sexual activities alluded to in the speech, including simulated masturbation.30 Both the district and appellate courts applied the Tinker test and found the speech protected.31 On appeal, the United States Supreme Court distinguished the case from Tinker and held the school district was well within its authority in disciplining Matthew Fraser.32 The court reasoned that certain types of expression are simply not appropriate for a school setting and held that, under the circumstances, deference must be given to the school board to protect students from exposure to highly vulgar language.33 In Fraser, Matthew Fraser’s “elaborate, graphic, and explicit sexual metaphor” was not rising to the level of pure speech. See Christopher M. Lavigne, Comment, Bloods, Crips, and Christians: Fighting Gangs or Fighting the First Amendment?, 51 BAYLOR L. REV. 389, 396 (1999).

26. Tinker, 393 U.S. at 505.
27. Id. at 508 (“In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).
28. Id.
30. Id. at 678.
32. Fraser, 478 U.S. at 685 (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”).
33. Id. at 683 (“Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’ The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” (citations omitted)).
protected speech in the school setting. Thus, the first exception to Tinker was born.


The second exception to Tinker was articulated in Hazelwood School District v. Kuhlmeier, which was decided just two years after Fraser. Students brought suit against school officials after a principal deleted two pages from a school publication that disclosed the names of pregnant students and students of divorced parents. The Court relied heavily on the reasoning that the paper was school-sponsored material, and thus categorically outside the scope of Tinker. The Court therefore held that this type of speech was not protected. Again recognizing that students do not shed their rights within the school setting, the Court reiterated that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" The Court granted school authorities the ability to censor school-sponsored student publications and productions "so long as their actions are reasonably related to legitimate pedagogical concerns." Thus, because the school officials' actions were reasonably related to legitimate pedagogical concerns, the Court held that no First Amendment violation occurred. It was the two foregoing exceptions to Tinker that existed when Morse v. Frederick reached the United States Supreme Court in 2007.

B. Morse Facts and Holding

1. Facts and Procedural History

In 2002, Salt Lake City played host to the Winter Olympics. Part of the events leading to the Games was the torch relay, which was to

34. Id. at 675.
36. Id. at 263.
37. Id. at 272–73.
38. Id.
39. Id. at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). Chief Justice Roberts also analyzed the rights of students through this lens, initiating the majority opinion with the preceding qualification. Morse v. Frederick, 127 S. Ct. 2618, 2623 (2007).
41. Id. at 276 ("[Principal] Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and the legal, moral, and ethical restrictions imposed upon journalists within [a] school community that includes adolescent subjects and readers." (internal quotations omitted)).
42. 127 S. Ct. 2618.
pass through Juneau, Alaska. Juneau District High School hosted an event that allowed the students to attend a portion of the relay ceremony during school hours.43 Joseph Frederick arrived late to school that day, and joined his friends who had already lined up along the street to watch the passing torch.44 As the cameras passed, Frederick saw an opportunity and, along with his friends, unveiled a fourteen-foot banner that read, "BONG HITS 4 JESUS."45 Principal Deborah Morse demanded the banner be removed; Frederick alone refused, and after reporting to Principal Morse's office, was summarily suspended for ten days.46 After an unsuccessful appeal to the Juneau School District Superintendent,47 Frederick brought a claim against the school board and Principal Morse under 42 U.S.C. § 1983, alleging a violation of his First Amendment rights.48 He sought declaratory and injunctive relief, general and compensatory damages, and attorney's fees.49

The district court granted summary judgment for the school board, determining that Principal Morse acted within her authority.50 In accordance with Fraser, the district court reasoned that the message conveyed in the banner was in direct conflict with the educational policies in place to prevent drug abuse among students, and thus contrary to the "educational mission" of the public school.51 Conversely, upon appeal the Ninth Circuit applied Tinker and reversed.52 The Ninth Circuit found that Frederick's speech did not cause a substantial and material disruption because the incident did not take place inside a classroom or at some other educational event.53 The Ninth Circuit noted the dichotomous limits on student speech: while Tinker stood to protect student expression, Fraser stood to protect the school's authority to further a school's "basic educational mission."54

43. Id. at 2624.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
52. Frederick v. Morse, 439 F.3d 1114, 1123 (9th Cir. 2006).
53. Id. (noting the banner was "displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials").
54. Id. at 1120 (citing Fraser, 478 U.S. at 685). Kuhimeier did not apply as Frederick's speech was not school-sponsored. Morse, 127 S. Ct. at 2627 (although
The United States Supreme Court granted certiorari to review whether Principal Morse violated Frederick's First Amendment right to free speech. The majority opinion quickly dismissed any question of whether Frederick's speech qualified as school speech or public speech, noting that the school-sanctioned event occurred during normal school hours, was under the supervision of school officials, and Frederick displayed the banner in the direction of the school and the majority of students. Because the banner could reasonably be interpreted to advocate illegal drug use the Court concluded Frederick's speech was not protected, and thus Morse acted within her authority. Perhaps foreseeing possible criticism, the opinion quashed any argument that Frederick's speech constituted political or religious speech, and upheld Morse's action as disciplinary—not an exercise in viewpoint discrimination. Carving out a third exception to Tinker, the Court articulated the rule that a public school official may censor speech which advocates illegal drug use.

Tinker remains in place, but the analysis set forth therein is not absolute.

“Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur,” nevertheless, the Court found the underlying principles of the case to be instructive. Thus, the Supreme Court has created three exceptions to Tinker, all of which attempt to address the principle issues addressed in this Note.

55. Morse v. Frederick, 127 S. Ct. 722 (2006) (the court also granted certiorari on the question of qualified immunity, but resolving the first question against Frederick, declined to review the second). Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Morse, 127 S. Ct. at 2622.

Id. at 2624. But see Erwin Chemerinsky, How Will Morse v. Frederick Be Applied?, 12 LEWIS & CLARK L. REV. 17 (2008) (arguing that the Court incorrectly reviewed this case as a student speech case, as a public sidewalk is the "quintessential public forum" and as a result the Court extended school speech to student speech outside of school).

Id. at 2625 (in attempting to discern the meaning behind Frederick's speech, the Court offered several interpretations: "[take] bong hits," "bong hits [are a good thing]," or "[we take] bong hits").

Id. at 2625. Indeed, Frederick did not even argue that his speech constituted a viewpoint, explaining only "that the words were just nonsense meant to attract television cameras." Frederick, 439 F.3d at 1117–18.

Morse, 127 S. Ct. at 2626–27, 2641 (the majority stated the previous exceptions did not govern because this did not involve lewd or vulgar speech or school-sponsored speech, and reasoned the Tinker test must "guide the inquiry").
2. Majority and Concurring Opinions

In the majority opinion, Chief Justice Roberts focused on the role of the public school, positing that "part of a school's job is educating students about the dangers of illegal drug use." The majority opinion reiterated that the government had an interest in deterring drug use among children and teenagers. Thus, the Court made it constitutionally permissible for school officials to restrict speech that contradicts the message of drug prevention. The Court refused the school board's request that Fraser be interpreted to allow the restriction of all student speech deemed offensive, thus limiting the rule therein. Finally, the Court placed emphasis on the difficult and important role of school officials in the public education system, particularly in educating students about the dangers of illegal drug use: "the First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."

Justice Thomas wrote a concurring opinion arguing Tinker should be overturned as it lacked a constitutional basis. Thomas outlined the history of public education, and observed that the First Amendment was not originally understood to extend to student speech in public school. Invoking the oft criticized doctrine of in loco parentis, Thomas emphasized the teacher's role of maintaining discipline and order in the classroom to foster a learning environment where "teachers taught, and students listened.

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64. Morse, 127 S. Ct. at 2628.

65. Id. at 2629 (placing a similar limit on the rule articulated in Kuhlmeier, determining Frederick's speech did not fall within the scope as it did not constitute school-sponsored speech).

66. Id.

67. Id. at 2630 (Thomas, J., concurring).

68. Id.

69. A school official acts in loco parentis when he assumes the duties and responsibilities of the parent and, in the school setting, is interpreted to give the official the right to discipline the child in a parental capacity. See Anne Proffitt Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49 (1996); Brian Jackson, The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform, 44 VAND. L. REV. 1135 (1991).

70. Morse, 127 S. Ct. at 2630 (Thomas, J., concurring) (commenting on the decline of public education, Justice Thomas, citing R. Freeman Butts & Lawrence A. Cre-
torical notion of speech as a disorderly and insubordinate act, and reasoned that *Tinker* limited teachers' ability to control their classrooms, thus inhibiting the effectiveness of public education. Thomas concurred in the judgment in *Morse* based on his understanding that the holding, because the Court created another exception, further scaled back *Tinker*'s standard, "or rather set the standard aside on an ad hoc basis." Justice Alito, joined by Justice Kennedy, concurred in the Court's opinion on the understanding that "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 it provides no basis for school officials to restrict speech constituting political or social commentary or opinion. In his concurrence, Justice Alito cautioned the allowance of restricting speech that interferes with a public schools proffered "educational mission." However, noting the unique exposure that public school students face, the concurrence deferred authority to school officials to impose necessary restrictions on any threat to students' physical safety. For Justices Alito and Kennedy, it was this special characteristic of public schools, and not the doctrine of *in loco parentis*, that gave school authorities the right to regulate this particular form of student speech.

Justice Breyer also issued a separate opinion, concurring in the judgment in part and dissenting in part, stating the Court should have declined to review the First Amendment issue. Rather, the opinion argued, the case should have been decided on the basis of qualified immunity, which Justice Breyer determined should have applied to Principal Morse. Justice Breyer's concurrence is not dis-

71. Id. (Justice Thomas relied on reasoning set forth in *Lander v. Seaver*, 32 Vt. 114, 115 (1859), in which the Vermont Supreme Court upheld corporal punishment of a student after a student called his teacher "Old Jack Seaver").
72. Id. at 2634.
73. Id. at 2636 (Alito, J., concurring).
74. Id. Justice Alito argued that giving public school officials the authority to determine what lays within the educational mission of the school may result in manipulation in order to indoctrinate students with certain political and social views. Id. at 2637. For example, if this test had been employed in *Tinker*, the school board would only have had to demonstrate solidarity with the war effort as part of the educational mission of public schools, which would allow the prohibition of any political speech to the contrary. Id. Justice Alito thus directly connected the establishment of an educational mission with the individual First Amendment rights of students.
75. Id. at 2638.
76. Id.
77. Id. at 2638–2640 (Breyer, J., concurring in part and dissenting in part).
78. Id.
cussed in this Note, but it should be noted that he did rule with the Court.

3. **Dissenting Opinion**

Justice Stevens authored the dissent in which Justices Ginsberg and Souter joined. The dissent placed emphasis on the nonsensical nature of Frederick's speech, and argued that it was not reasonable to view the banner as advocating illegal drug use. Even if interpreted as such, Justice Stevens stated the applicable standard was that of "incitement to imminent, lawless action," to which he believed this message did not rise. The dissent interpreted the two foundational principals of *Tinker*, and warned that the majority trivialized the decision. First, that content-based censorship based on the viewpoint of the speaker must be subject to rigorous justification. Second, that it is unconstitutional to punish someone for advocating illegal conduct unless that advocacy rises to a level likely to provoke the harm the government seeks to avoid. Justice Stevens compared *Tinker* to Frederick's speech, noting the harsh criticism and "moral fervor" of anti-war speech during the early stage of the Vietnam War, and made a comparison to the current war on drugs. The dissent concluded by suggesting that "[i]n the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment."

C. **Pervasive Theories of Educational Ideology**

Philosopher John Dewey was one of the first American thinkers to advance the concept of the education system as a mode of social progression, but this model was advanced long after "streams of educational ideology" had pervaded the modern American school.

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79. *Id.* at 2643 (Stevens, J., dissenting).
80. *Id.* at 2646 (reasoning that, at most, Frederick's speech was an "obscure message with a drug theme" that did not rise to the level of advocacy).
81. "Punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid." *Id.* at 2644-45 (citing *Brandenburg* v. Ohio, 395 U.S. 444, 449 (1969)). Justice Stevens would have applied the *Brandenburg* standard in light of the *Tinker* test. Under both tests, and in conjunction, the speech would be protected.
82. *Id.* at 2645 ("The Court's test invites stark viewpoint discrimination.").
83. *Id.* at 2650-51.
84. *Id.* at 2651.
85. See generally John Dewey, Democracy and Education 92 (1916).
86. William B. Senhauser, Note, Education and the Court: The Supreme Court's Education Ideology, 40 Vand. L. Rev. 939 (1987). Many articles, books, and treatises have addressed the social function of educational ideology. This Note largely applies the streams of ideology articulated by Senhauser as originally advanced by Lawrence Kohlberg and Rochelle Mayer in Development as the Aim of Education, 42 Harv. Educ. Rev. 449 (1972) (coining the term "philosophical-developmental-
Historically, three ideologies form the principal ideologies that have served to interpret the proper function of education: the cultural transmission ideology, the romantic ideology, and the progressivist ideology.87

1. Cultural Transmission

Under the cultural transmission ideology, the inculcation of values and morals is valued above all else.88 The theory is grounded in the historical development of education, originating as a part of religious institutions during the colonial period.89 Defining education as the transmission of knowledge, morals, and social skills—and implemented through a rewards-based system—a child is taken through an educational process that "reinforces desirable responses and eliminates undesirable ones."90 Public educators may choose to implement a process emphasizing cultural transmission because it places the child in a passive mode, whose primary role is to accept information and conform to accepted social values. Under this concept, discipline and order are the primary concern of school authorities. The Court has struggled with the positive and negative implications of the cultural transmission ideology in the school setting,91 but over recent years cases have embraced the concept of education as a means of inculcating accepted societal values.92 Such an ideology markedly reduces the child's expression—and by extension, First Amendment rights—as the child is not expected to actively engage in the educa-

87. Senhauser, supra note 86, at 943.
88. For an in-depth analysis of values inculcation, see Susan H. Bitensky, A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools, 70 Notre Dame L. Rev. 769, 772 n.18 (1995) ("Values inculcation . . . literally means the teaching and impressing of values upon students by frequent repetitions or admonitions."). See also Bruce C. Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L.J. 663, 673 (1987) (noting in a democratic system, values inculcation is generally left to the parent).
89. See generally Butts, supra note 70. See also Rebell, supra note 4, at 279 (noting early incorporation of religious values into public school curriculum was met with some criticism).
90. Senhauser, supra note 86, at 943 (citing Kohlberg & Mayer, supra note 86, at 456). For a fictional example of the extreme implementation of cultural transmission see Aldous Huxley, Brave New World (1932).
92. Senhauser, supra note 86, at 941.
tional process. Rather, emphasis is placed on passive and orderly reception of morals, knowledge, and values. The implementation of a cultural transmission ideology advances a great support of community preservation over personal liberty.

2. Romanticism

In contrast, the romantic ideology attempts to support the natural development of the child and places the educator in a role meant to enable this freedom and support the emergence of the child’s innate, inner self. Romantics believe that the child's inner social virtues will emerge if given the appropriate environment. Under this theory, care should be taken to develop healthy, whole individuals so student expression is permitted as part of the freedom of development. Inculcation does not play a part under the romantic view.

3. Progressivism

Dewey's progressivist model offers a balance of the foregoing theories. This ideology places great emphasis on personal growth achieved through interaction and engagement in discourse. Progressive education is a participatory method, placing heavy emphasis on the individual thought processes of the child. This idea, advanced by Dewey, posits a child will learn more skills more quickly through discourse than if he were to be fed information and asked to regurgitate it. Active stimulation is employed and expression is encouraged through a somewhat adversarial system in which the child not only gains knowledge, but also learns to resolve conflicts to become a fully functional individual. The progressivist educator serves more as a moderator than as an authority, and dissent and diversity are en-

93. Id. at 944.
95. This Note does not focus largely on the romantic ideology, as it is quite scarce in Supreme Court jurisprudence. However, it is useful as a direct contrast to excessive inculcation that may result from the implementation of the cultural transmission. See generally Senhauser, supra note 86, at 946 (presenting Wisconsin v. Yoder, 406 U.S. 205 (1972), as the one exemplary case of the romantic ideology).
97. Senhauser, supra note 86, at 946.
98. See generally Dewey, supra note 85.
100. Dewey, supra note 85, at 50–53.
101. Senhauser, supra note 86, at 947 (citing Kohlberg & Mayer, supra note 86, at 457) (naming the ultimate goal under progressivism is a highly developed psychological state).
couraged as part of the learning process.\textsuperscript{102} Through this process, school is a means to develop broader social responsibility among citizens—a place of "social and political regeneration."\textsuperscript{103}

Choosing which of the aforementioned theories should consistently be followed is outside the scope of the judiciary's authority. This Note does not suggest that the Court should implement one particular theory over another in an effort to achieve uniformity. However, theories of education and student-speech rights are inherently linked due to the special circumstances of the public education system. Student speech does not exist within a vacuum and it is counterproductive to analyze rights of expression in the school setting without considering the implications and interests of the institution of education. Students' rights are indeed shaped by their setting. For this reason, the identification and analysis of how competing educational ideologies have shaped student-speech jurisprudence is necessary to understand how future cases will be affected.

III. ANALYSIS

It is well accepted that students have First Amendment rights, under which the student-citizen enjoys protection against the State and "all of its creatures—Boards of Education not excepted."\textsuperscript{104} It is also understood that, as an extension of government, school officials have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."\textsuperscript{105} Complete freedom of expression, therefore, is contrary to the institution of education, which undoubtedly requires some degree

\begin{itemize}
\item \textsuperscript{102} Id. at 948 (citing Lawrence Kohlberg, \textit{The Cognitive-Developmental Approach to Moral Education}, 56 \textit{Phi Delta Kappan} 670, 674 (1975) (stating the educator's opinion only enters the process as one alternative in an entire discourse of ideas)). \textit{See also Dewey supra} note 85, at 53 (placing the role of the educator as a presenter of ideas rather than an instrument used to reach an ultimate goal or understanding).
\item \textsuperscript{103} Hafen, \textit{supra} note 88, at 676 (internal quotation marks and citations omitted) ("As a result, the educational emphasis in the schools shifted from traditional intellectual goals toward social adjustment for students in the larger name of social utility.").
\item \textsuperscript{104} W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding school officials could not constitutionally compel students to salute the American flag). For further discussion of the historical and ideological implications of \textit{Barnette}, see Senhauser, \textit{supra} note 86, at 948 (stating the \textit{Barnette} court differentiated between "acceptable encouragement and unacceptable coercion," but declined to establish a test by which this could be measured).
\item \textsuperscript{105} \textit{Barnett}, 319 U.S. at 637 ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").
\end{itemize}
of order and discipline. However, there is a fine line between supporting the inherent discretion to maintain discipline for the purpose of fostering a productive educational setting, and the government institutionalization of expression. When Constitutional issues arise, the judiciary is required to regulate this continuum of power. In this limited circumstance, courts must ultimately regulate the struggle through which the young people of our country are prepared to be contributing members of our democratic society. Historically, the Court has developed limitations on expression and authority through inconsistent application of the cultural transmission and progressivist ideologies.

A. The Historical Battle Between Inculcation and Discourse

_Tinker_ came down just five years after the passage of the Civil Rights Act of 1964, during the Vietnam War, and the summer of love—a time of political and social unrest, a time for protest and dissent, a time for change. Indeed, beginning fifteen years prior with _Brown v. Board of Education_, the school setting had become an important venue for cultural interrogation and social change. Dissent, discourse, and sometimes violence developed on the higher education level; this unrest slowly made its way to secondary education.

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106. See Dupre, _supra_ note 69; Betsy Levin, _Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School_, 95 Yale L.J. 1647 (1986). This requirement of social order and the First Amendment are not necessarily mutually exclusive. See Bitensky, _supra_ note 88, at 820–21 (arguing that, when tied to legitimate pedagogical concerns, the inculcation of values of social order should survive a First Amendment challenge).

107. See Dupre, _supra_ note 69, at 59–64 (describing the struggle between protecting students’ First and Fourth Amendment rights and the responsibilities of educators as existing on a continuum).

108. For the narrow purposes of this Note, the most notable ideological implementation occurred in _Tinker_, and subsequent student-rights case law has been slowly shifting towards cultural transmission. See Senhauser, _supra_ note 86, at 960–77 (examining the Court’s “rough accommodation” between inculcation and individualism); see also Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (holding school boards have the authority to regulate curriculum, and therefore remove inappropriate books from school library); Plyler v. Doe, 457 U.S. 202 (1982) (upholding right of undocumented persons to attend public school); Ambach v. Norwich, 441 U.S. 68 (1979) (denying equal protection challenge to law requiring citizenship for public school teachers); Goss v. Lopez, 419 U.S. 565 (1975) (extending due process to school suspension decisions).

109. For examples of the unique issues surrounding this cultural shift in schools see J. Michael Brown, _Hair, the Constitution and the Public Schools_, 1 J.L. & Educ. 371 (1972).


111. See Dupre, _supra_ note 69, at 75 (analyzing _Tinker_ as an implementation of social reconstruction beginning at the school level).
schools. Tinker aligns with John Dewey's progressive ideology through its implicit embrace of the education-through-discourse model. The Court also emphasized the educator's role as moderator, explaining that schools must "accommodate" students during class time for the purpose of "certain types of activities. Among those activities is personal intercommunication among the students."113

The Tinker majority relied on Meyer v. Nebraska114 to compare the educational aim of the United States to that of Sparta. The Court reiterated a repudiation of the "principle that a State might so conduct its schools as to foster a homogenous people,"115 rejecting the inculcation of common social values.116 Adhering to the progressivist ideology, the decision resisted absolute authority of school officials, maintaining that a democratic institution must not be an "enclave of totalitarianism."117 Through this application of progressivism, the court bridged the gap between higher and secondary education,118 and emphasized the value of discourse over the efficacy of order.119 This value, meant to lead students to an engagement with a "marketplace of ideas" rather than a prescribed or transmitted curricular of knowledge, is a natural consequence of progressivism.120 The majority in Tinker balanced competing interests and placed limitations on the exercise of school authority while protecting student expression. For the pur-

112. See Goss v. Lopez, 419 U.S. 565, 569 (1975) (describing a period of "widespread student unrest" in which six students were suspended for disobedient behavior).
114. 262 U.S. 390 (1923) (striking down state statute prohibiting the instruction of foreign languages to children below the eighth grade level).
115. Tinker, 393 U.S. at 511 (internal quotations omitted).
116. Id. at 511-12 ("In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." (citing Meyer, 262 U.S. at 402)).
117. Id. at 511.
118. Senhauser, supra note 86, at 956 (asserting the alleged immaturity of secondary students had historically supported inculcation as an approach to education).
119. Tinker, 393 U.S. at 508-09.
120. The concept of a "marketplace of ideas" in school was set forth in Keyishian v. Bd. of Regents, 382 U.S. 589 (1967), in which the Court declared a requirement that university professors take an oath they would not teach subversive ideas to students. See also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting and joined by Brandeis, J.) (first use of metaphor). For an advancement of this concept in the school setting see Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (ruling that school officials could not be permitted to remove profane or sexual literary materials if the purpose was to limit access to content with which authorities disagreed, but holding that books could be removed in order to protect students from materials inappropriate to their age and maturity levels).
poses of this analysis, the decision remains to serve as the touchstone for the progressive ideology within student-related First Amendment jurisprudence. However, even within the Tinker court, the inherent struggle between discourse and discipline was apparent.121

This struggle re-emerged when the Court distinguished Tinker in Fraser,122 and the cultural transmission ideology was revitalized.123 The reasoning and ultimate deference to school authority rested on the necessary work of schools: inculcation of values.124 According to the Court, this "work of schools"125 consisted of the indoctrination of "habits and manners of civility."126 In accordance with this concept, the Court famously stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and drew a line between public discourse as it should be available to adults and adolescents.127 Implicitly rejecting progressivism, Fraser encouraged school authorities to regulate the school marketplace of ideas to maintain a level of appropriateness. Indeed, the interpretation went so far as to declare the prohibition of "vulgar and offensive terms" as a role of public education.128 Thus, the educational mission of schools was held to be inculcation, and discipline was touted as a necessary means to accomplish a valued end.

Fraser represented a departure from progressivism. However, it should be noted that Matthew Fraser's speech and Mary Beth Tinker's speech are hardly comparable. Fraser was making a joke, not attempting to communicate a political viewpoint or dissent.129 Under these circumstances, it hardly seems rash that the Court reverted to an assumption that secondary students lack the maturity to freely en-

121. Two separate dissents were issued in Tinker, 393 U.S. at 522 (Black, J., dissenting) ("[Students] need to learn, not teach."); id. at 526 (Harlan, J., dissenting) ("[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions."). Additionally, it would stand to reason the "material and substantial disruption" test put reasonable limits on the students' expression in accordance with a cultural transmission theory that embraces order.
124. Fraser, 478 U.S. at 681.
125. This "work of schools" concept was first introduced in Tinker. See Tinker, 393 U.S. at 508.
126. Fraser, 478 U.S. at 681 (citing CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
127. Fraser, 478 U.S. at 682–83.
128. Id. at 683.
129. Tinker, 393 U.S. at 508 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [students."])."
gage in a marketplace of ideas without some degree of regulation. If productive participation in the democratic system is one goal of education, perhaps intolerance of unproductive expression is required to further such an aim.  

Student rights of expression and the authority of school officials continued to conflict, but the Court reaffirmed its support of value inculcation with the *Kuhlmeier* decision. In order to balance these conflicting rights, the decision again examined the concept of public discourse, or "public forum." The school newspaper did not qualify under the public forum doctrine, and thus authorities retained their right to impose reasonable restrictions upon the content of the paper. Under an implicit cultural transmission theory, *Kuhlmeier* protected the school board's interest in implementing and regulating appropriate curriculum over the student's right to freedom of expression. The Court ultimately articulated a rule that rested on whether or not the content of the speech was school-sponsored; however, the decision has farther reaching implications.

Two ideologies interacted in *Kuhlmeier*: cultural transmission in the authoritative maintenance of the newspaper and progressivism in the students' participation. This is a commonly recurring incident in the school setting: authorities may dictate procedure/curriculum, but student contribution creates a progressive environment. When school-prescribed curriculum interacts with student expression, the two parties share vested interests that should be considered under First Amendment analysis. The *Kuhlmeier* Court drew a line between these competing interests based upon "legitimate pedagogical concerns" and its opinion serves to show how a court can effectively

130. See Dupre, supra note 69, at 51-54. But see Levin, supra note 106, at 1679 (noting constitutional limits must be placed on the constraints of authority to protect minority viewpoints, even at the secondary education level).


132. Id. at 260 ("School facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public." (citing Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983))). See also Salomone, supra note 94, at 315 (arguing the *Kuhlmeier* Court turned away from the substantial disruption test to apply a "reasonableness" standard as applied in the public forum context).

133. See Hafen, supra note 88, at 712-28 (recognizing student-speech jurisprudence has placed greater restriction on curricular-based expression than on extracurricular-based expression—Court's have offered broad discretion to school authorities in matters implicating traditional curriculum).


135. Id.
balance expression and authority. Kuhlmeier exemplifies two competing spheres of the public education experience: limits must necessarily be placed on the inculcative role of educators and similar limits are needed on the expressive engagement of students. Morse further presents a clear reflection of the tensions that have shaped the Court’s interpretation of student expression in the school setting.

B. Balancing Conflicting Ideologies in Morse

The 6-3 decision in Morse v. Frederick exemplifies continued conflicting ideologies among jurists. Chief Justice Roberts began his opinion by setting up three guiding principles of the relevant case law: (1) "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate';";137 (2) "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings";138 and (3) "the rights of students 'must be applied in light of the special characteristics of the school environment.'"139 In order to apply these principles to Frederick's speech, the Court moved away from the substantial disruption test advanced in Tinker. What resulted was the implicit application of two contradictory ideologies: cultural transmission and progressivism.

The majority, along with the dissent and Justice Alito's concurrence, focused on Frederick's intent to make a joke, to be funny, and to attract television cameras.140 This emphasis on the student's motive for expression falls in line with the progressive ideology. What motive would be protected under this application? Under the theory of progressivism, if Frederick had chosen to engage in political discourse, his speech would have a higher educational value than that of a joke. However, the majority dismisses the assertion that this is political speech,141 and Justice Alito's concurrence specifically states that he joins the majority on the understanding that the holding will not extend to political speech.142 In applying this reasoning—indeed, in ar-

136. In Morse, the Court stated that although Kuhlmeier did not control the case, it was instructive because of the principles advanced therein. Morse v. Frederick, 127 S. Ct 2618, 2627 (2007).
138. Id. (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
139. Id. (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).
140. Id. at 2625 (Chief Justice Roberts chose to focus on the meaning of Frederick's sign, explaining the undeniable reference to illegal drugs, but also noted that "the dissent similarly refers to the sign's message as curious, ambiguous nonsense, ridiculous, obscure, silly, quixotic, and stupid" (internal quotation marks and citations omitted)).
141. Id.
142. Id. at 2636–38 (Alito, J., concurring).
ticulating this distinction—the Court has drawn a very fine line between protected and prohibited speech.

In this particular instance, the prohibited speech is identified as that reasonably interpreted as advocating illegal drug use; however, the Court would likely not protect lewd or vulgar speech,\footnote{In accordance with \textit{Fraser}.} speech that poses a threat to student safety,\footnote{This is the most obvious extension of \textit{Morse} based on the student safety research and reasoning employed in the case. \textit{See Morse}, 127 S. Ct. at 2628.} or any other speech that substantially disrupts the work of the school.\footnote{In accordance with \textit{Tinker}.} This distinction places a premium on the child's active engagement with a marketplace of ideas, and the school official's regulation of unruly behavior or disruption for the sake of disruption (or just to get on television). The Court recognized that even the progressivist ideology advanced in \textit{Tinker} required limitations on student expression.\footnote{The dissent compared the "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" with the nature of Frederick's speech. \textit{Morse}, 127 S. Ct. at 2644 (citing \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 502, 508 (1969)).} This limitation, first espoused by \textit{Tinker} in terms of substantial and material disruption, is rooted in the inculcation of social values, or cultural transmission.\footnote{Another limitation upon which the Court relied was advanced in \textit{Vernonia Sch. Dist. 47J} v. \textit{Acton}, 515 U.S. 646, 655–56 (1995), a Fourth Amendment case, stating the nature of student rights is "what is appropriate for children in school." \textit{Morse}, 127 S. Ct. at 2621.}

The implicit test applied in \textit{Morse} is a dichotomy of limitations in an attempt to balance the rights of students against the authority of school officials. The Court's willingness to apply a balancing test is evidenced by the majority's refusal to adopt a broader rule that would extend \textit{Fraser} to include all speech deemed "offensive."\footnote{\textit{Id.} at 2629 ("Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive'. . . . We think this stretches \textit{Fraser} too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.").} Indeed, if such deference were given to school officials, then this would be an explicit endorsement of viewpoint discrimination.\footnote{In such a case, school officials would be able to restrict any and all speech they personally found offensive or inappropriate. This would embrace the very definition of viewpoint discrimination. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." \textit{Rosenberger} v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citing \textit{Perry Educ. Assn.} v. \textit{Perry Local Educators' Assn.}, 460 U.S. 37, 46 (1983)).} The decision does not extend this far. The majority took into account the difficult job of school administrators, principals and teachers, while considering the value of encouraging student expression.\footnote{\textit{Morse}, 127 S. Ct. at 2629.} Even though the
Court held Frederick’s speech was not protected, Morse rejected the bright-line application of cultural transmission and kept limitations on school authority firmly in place.\(^{151}\)

In his concurrence, Justice Thomas relied heavily on case law advocating the cultural transmission ideology, and observed that we used to be “a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, [but] we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools.”\(^{152}\) But even Thomas’ interpretation rested on the concept of the institutional mission of education. Justice Thomas examined the need for authority as a means to productive education, not as an end in and of itself.\(^{153}\) Although his views may exist on the conservative end of the spectrum, they uphold the idea that in order to be effective, school authorities must be given the authority to keep order within the school, with which even the staunchest Tinker supporter would agree.

Conversely, Justice Stevens’ dissent advances a highly progressive view of educational regulation and points out that “in the national debate about a serious issue,\(^{154}\) it is the expression of the minority’s viewpoint that most demands protection. . . . [A] full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.”\(^{155}\) The difference then rests upon Frederick’s neglect to enter into this debate rather than making a comment to get on television. The strictest application of progressivism thus cannot be applied because the purpose for which this theory is advanced does not exist when the student is not willing to engage in a marketplace of ideas, but instead insists on raising a ruckus.

Regarding the restriction of student speech on the pure basis of preventing disruption of the educational mission of public schools, Justice Alito stated:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The “educational mission” of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty . . . . [This] argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed.\(^{156}\)

\(^{151}\) Id.

\(^{152}\) Id. at 2636 (Thomas, J., concurring) (citing Dupre, supra note 69, at 50).

\(^{153}\) Though this is an admittedly broad reading of Justice Thomas’ concurrence, he does place great emphasis on the “administrative and pedagogical challenges” faced in schools today, and insists the history of education must be consulted in regulating student speech.

\(^{154}\) Referring to a discussion about the war on drugs.

\(^{155}\) Morse, 127 S. Ct. at 2651 (Stevens, J., dissenting).

\(^{156}\) Id. at 2637 (Alito, J., concurring).
In articulating this apprehension, Justice Alito has most fully expressed the underlying fears in strictly applying either progressivism or cultural transmission as the sole lens through which the Court will interpret student rights. It is necessary, therefore, to weigh the student’s interests and the school officials’ interests in relation to one another.

C. Future Application

The application of educational theory advanced in Morse provides an implicit balancing test. Because of the incongruities in this decision, for purposes of future application, it would be most useful for the Court to adopt an explicit balancing test. Such a test would utilize a determined set of criteria and take into account the conflicting demands of authority and expression in public education. In the absence of such a test—and in light of the narrow holding in Morse—the identification of factors emphasized throughout the Supreme Court’s analysis is necessary to assist lower courts in balancing the foregoing competing interests. Morse’s narrow holding correctly balances these factors in light of the delicate interests at stake, limiting the unbridled discretion of school officials to restrict student speech while placing reasonable limitations on student expression in support of the mission of public education.

Application of the Tinker test will be the touchstone for future student-speech cases. This test, however, must be applied in light of subsequent case law. Within the competing ideologies which I have identified, implicit balancing factors have been employed which will assist lower courts in reaching decisions consistent with the changing trend of student expression under the First Amendment. It is useful to view these ideologies on a spectrum with cultural transmission/school authority on one end and progressivism/student expression on the other. The ultimate goal for future application is to apply a rule that sits at the center of the spectrum, equally balancing the interests of the educator/state and the student/individual. Under the umbrella of cultural transmission, it will be necessary to address the following factors in student-speech cases: location, audience, student safety, and substantial disruption—ultimately, the setting of the speech. Likewise, the umbrella of progressivism should classify the speech itself and the intent of the speaker. This is not to suggest that whether speech should be protected should depend on the content of the speech. Rather, in light of the school environment, it should be taken into account whether or not the student is engaging in productive discourse or otherwise. For example, when a student’s speech clearly qualifies as political, social, or religious commentary and poses no threat to student safety or disruption of the school setting, it should
clearly be classified as protected speech. This is an easy example,157 but as the factors contribute to the speech at issue, the test should move along the spectrum to place appropriate emphasis on expression or authority in line with the ideologies analyzed above.

What if Frederick had meant to engage in a serious national debate, and his banner had read “LEGALIZE MARIJUANA”? It is not entirely clear how the Court would have balanced the interests of students and school officials. Morse indicates that not all content-based restrictions will be automatically deemed unconstitutional. Further, the Court has extended the substantial disruption to include speech that poses a particular risk to student health or safety. Thus, restrictions on political or religious speech will likely be carefully scrutinized, and school officials will be given a higher degree of deference when speech poses a risk to student safety.

If this hypothetical is analyzed under the foregoing test, it is highly likely that the court would have held Principal Morse’s restriction of this speech a violation of Frederick’s First Amendment rights. Under the cultural transmission ideology, the court would likely consider the setting of the speech and any threat it might have posed to the educational mission of the school. Because the speech was presented during school hours, to a student audience, school authorities would be accorded a certain amount of deference. However, because the speech did not pose a threat to student safety, said deference would be given less weight. In this example, school authorities would likely argue that the banner posed a substantial or material disruption, but this argument would be given less weight when balanced against the political nature of the speech. The speech would be classified as political and the intent of the speaker as that of engaging in a productive discourse. This engagement should be given serious weight, and in light of the circumstances, the speech held protected.

This balancing test is advanced in the hope that, as time moves forward, policies concerning freedom of expression in public schools will be viewed in light of their educational value. It is a reality that public schools are institutions in which teachers are outnumbered and require a certain degree of order to accomplish the difficult task of educating our youth. Tinker has served as a foundation for the fostering of a marketplace of ideas in furtherance of the democratic ideal.158

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157. Likewise, Fraser serves as an easy example at the other end of the spectrum. Fraser’s speech was not political, nor did he have any intent other than to make a joke. Further, the school authorities had a legitimate interest in maintaining order at a student assembly and protecting students from exposure to especially lewd or outrageous conduct. Therefore, the balancing test in this case fell on the other side of the spectrum, in which the interests of the school officials far outweighed the interests of the student.

158. See supra notes 109–21 and accompanying text (discussing policies advanced by Tinker).
The principles behind Tinker still hold true and can be applied in light of subsequent cases, including Morse, to support a productive, diverse platform for democratic participation.

IV. CONCLUSION

The preceding discussion tracks the Supreme Court's shifting education ideology under the First Amendment. The Court should not serve as the ultimate platform for educational reform. This Note examined how the Court may properly balance the conflicting interests of students and school officials in order to advance the legitimate interests of both student expression and the educational institution. Finally, in anticipation of future disputes, this Note proposes the application of a balancing test, supported by conceptions of the competing ideologies of progressivism and cultural transmission. It is this application that will serve both student and teacher, encouraging democratic participation in school and beyond. This balance will shape the future constitutional interpretation of student expression.

A constructive marketplace of ideas must be encouraged, as active participation in social discourse is necessary to the democratic future of this country. However, the institution of education must be judicially supported in order to function effectively and productively. The reasoning employed in Morse protects this social arena of discourse, while protecting the necessary order of the school setting. Future First Amendment issues in the school setting must be faced in light of the delicate interests discussed above. We must protect these interests, foster democratic participation, and teach our children early that productive engagement is a necessary and valued part of this democratic ideal.