

NOTES

THE CHILD PARADOX IN FIRST AMENDMENT DOCTRINE

YOTAM BARKAI*

Courts have increasingly scaled back children's First Amendment rights and deferred to schools' fear of disruption; today, children face discipline for even off-campus expression. Meanwhile, in the name of others' free speech rights, the Supreme Court has discounted the state's claimed interest in children's welfare and has repeatedly rejected restrictions on third parties' abilities to approach children with sexually explicit, commercial, and violent speech. These dueling trends have created a paradox: Although First Amendment principles indicate that children's ability to speak is more important than their access to others' speech, the doctrine errs in the wrong direction and protects speech to children more strongly than it protects children's own expression. Therefore, the Court should both allow for greater government restrictions on speech to children and more strongly protect children's speech rights, especially outside school. This modified doctrine would be more sensitive to the government's regulatory interest in children and to the principles behind the First Amendment.

INTRODUCTION	1415
I. THE DEVELOPMENT OF THE CHILD PARADOX	1417
A. <i>Rejecting Government Regulation of Speech to Children</i>	1417
1. <i>Sexually Explicit Expression</i>	1417
2. <i>Commercial Speech</i>	1420
3. <i>Violent Media</i>	1422
B. <i>Deferring to Schools and Suppressing Children's Speech</i>	1423
1. <i>Supreme Court Decisions</i>	1423
2. <i>Lower Court Decisions</i>	1426
II. THE CHILD PARADOX AND THE THEORIES OF THE FIRST AMENDMENT	1428
A. <i>The Search for Truth in the Marketplace of Ideas</i> ...	1429

* Copyright © 2012 by Yotam Barkai. J.D. Candidate, 2013, New York University School of Law; B.A., 2008, Yale University. I am grateful to Samuel Issacharoff for his guidance throughout the development of this Note. I also owe thanks to Barry Friedman and the members of the Furman Academic Scholars Program, especially Tommy Bennett, for their helpful comments; to Amy Adler and Daryl Levinson for their suggestions early in the writing process; to the editors of the *New York University Law Review*, especially Lori Day, for their thoughtful editing; and finally to Kaylan Connally for her support and encouragement.

- 1. *Speech by Children* 1430
- 2. *Speech to Children* 1432
- B. *Democratic Self-Government* 1435
 - 1. *Speech by Children* 1435
 - 2. *Speech to Children* 1438
- C. *Autonomy and Self-Fulfillment* 1440
 - 1. *Speech by Children* 1440
 - 2. *Speech to Children* 1441
- III. RETHINKING THE CHILD PARADOX 1444
 - A. *Deferring to Government Regulation of Speech to Children* 1444
 - B. *Upholding Stronger Children’s Speech Rights* 1447
- CONCLUSION 1450

INTRODUCTION

In theory, the First Amendment embodies lofty principles of truth, democracy, and self-determination. But the Supreme Court and lower courts have created a strange tension in First Amendment doctrine by increasingly scaling back children’s speech rights and deferring to the government as educator and to schools’ fear of disruption. Meanwhile, although the Court acknowledges the state’s regulatory interest in monitoring child safety and development, it grants no similar presumption of deference to the government for these purposes and has repeatedly struck down regulations of speech addressed to children. Thus, the Court now grants third parties greater rights to approach children than it grants to children’s own contributions, a result inconsistent with the theories underlying the First Amendment. I call this result the “child paradox” in First Amendment doctrine.

In the name of others’ free speech rights, the Court has repeatedly rejected restrictions on speakers’ ability to approach children with sexually explicit, commercial, and violent speech, while discounting the state’s claimed interest in child welfare. While the Court permitted limited restrictions to protect children in early cases like *Ginsberg v. New York*,¹ it remained keenly aware of speakers’ rights and wary of overregulation that could affect adults as well as children. Over time, the Court has gradually emphasized that spillover concern and viewed government regulation with increasing skepticism even when children’s welfare is at risk, and it has moved toward absolute protection of third parties’ rights to address children.

At the same time, the Court has increasingly rejected claims advanced by children in the name of their own free speech rights.

¹ 390 U.S. 629 (1968).

After first upholding students' rights to be heard in all but rare circumstances in *Tinker v. Des Moines Independent Community School District*,² the Court then deferred to schools' decisions to limit children's speech in a subsequent line of cases. Schools' claims that their disciplinary interests extend beyond the brick-and-mortar schoolhouse and into the home now receive favorable hearings, children's First Amendment claims notwithstanding. Today, with children increasingly likely to express themselves on the public forum of the Internet, they face school discipline for even off-campus expression.

These dueling trends have created a paradox: Although First Amendment principles indicate that children's speech is more important than their access to others' speech, the doctrine errs in the wrong direction and protects speech to children more strongly than it protects children's own expression.

This Note proceeds in three parts. Part I traces the development of the child paradox from *Ginsberg* and *Tinker* to the modern day. Part II then argues that this tension conflicts with the three main theories underlying the First Amendment: the search for truth in the marketplace of ideas, democratic self-government, and autonomy and self-fulfillment. Courts' deference to third parties' free speech claims and suppression of children's speech weaken children's ability to grow into effective participants in the marketplace of ideas, citizen-critics capable of democratic self-government, and autonomous adults.

Part III therefore argues that the Court should recalibrate its doctrine to value children's interests more robustly, without overly restricting adults' own First Amendment rights. First, the Court should not presumptively favor adults' rights to speak to children and should allow for greater government restrictions on children's commercial access to speech. Second, the Court should reverse its deference to school officials and more strongly protect children's speech, especially outside school. Unlike either completely unrestricted or completely suppressed speech, which some commentators have proposed as solutions to the current doctrinal contradiction,³ this middle ground would be more sensitive to both the government's regulatory interest in children and to the principles behind the First Amendment.

² 393 U.S. 503 (1969).

³ Compare, e.g., Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1101 (2008) (arguing that commonly offered justifications for restricting children's speech are insufficient "to warrant stripping young people of their free speech rights"), with KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 2* (2003) (arguing that the First Amendment should be "significantly weaker" where children are concerned).

I

THE DEVELOPMENT OF THE CHILD PARADOX

A. *Rejecting Government Regulation of Speech to Children*

The Supreme Court has rejected government regulation of three types of speech to children: sexually explicit expression and commercial speech, which have received increasing First Amendment protection despite being historically disfavored categories, and violence, which has remained fully protected speech.⁴

1. *Sexually Explicit Expression*

The Court has viewed obscenity as one of the traditional exceptions to constitutional protection, because it is “of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”⁵ If expression is “indecent” or sexually explicit but does not meet the three-part obscenity test,⁶ then the Court assumes that it is protected speech, though it has provided varying levels of protection to such speech.⁷ The Court has also recognized, at least superficially, the countervailing legitimate government interest in protecting juveniles.

In the leading case, *Ginsberg v. New York*, the Court upheld a New York restriction on the sale of “‘girlie’ magazines” to children.⁸ Justice Brennan noted that the state’s power over children “reaches

⁴ Traditionally, certain “categories” of speech have fallen outside the First Amendment’s scope as completely unprotected. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 12 (2d ed. 2003). Over time, the Supreme Court has provided “varying levels of protection to different kinds of speech,” rather than dismissing some categories as entirely unprotected. DANIEL A. FARBER, *THE FIRST AMENDMENT* 168 (2d ed. 2003).

⁵ *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The Court has also declared child pornography to be a new category of unprotected speech. *New York v. Ferber*, 458 U.S. 747, 763 (1982).

⁶ To meet the standard of obscenity, speech must “appeal[] to the prurient interest,” depict sexual conduct, and “lack[] serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

⁷ SULLIVAN & GUNTHER, *supra* note 4, at 138. Some forms of sexually explicit speech are fully protected, such as pornography accessed by adults. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985) (“‘[P]ornography’ is not low value speech . . .”), *aff’d mem.*, 475 U.S. 1001 (1986). In other cases, the Court has analyzed restrictions on sexual speech by balancing the burden on speech against the government’s interests. SULLIVAN & GUNTHER, *supra* note 4, at 139. The Court overturned sweeping regulations in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), but upheld more limited zoning ordinances in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976), because they targeted the “secondary effects” of expression rather than its content or viewpoint.

⁸ *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

beyond the scope of its authority over adults.”⁹ He acknowledged two state interests at stake: an interest in aiding parents in directing the upbringing of their children and an independent interest in “the well-being of its youth.”¹⁰ But the Court has also remained justifiably wary that protections geared toward children could, in *Butler v. Michigan*’s famous words, “reduce the adult population . . . to . . . only what is fit for children.”¹¹ Therefore, while the Court was willing to uphold certain limited “time, place, and manner” regulations of sexually explicit expression,¹² it rejected overly restrictive laws for being “sweeping[]” and “overbroad.”¹³

The Court’s broadcast media cases reflect similar trends toward skepticism of broad regulations to shield children and protection for indecent speech. In *FCC v. Pacifica Foundation* in 1978, the Court allowed the FCC to censure a public radio station for broadcasting George Carlin’s “Filthy Words” comedy routine.¹⁴ Though Justice Stevens’s “narrow[]” opinion was explicitly attuned to the “uniquely pervasive presence” of radio, which can enter a home without the listener’s intentional action, he also emphasized the state’s regulatory power rather than the offensive nature of the material.¹⁵ But that early deference to the government’s regulatory power in *Ginsberg* and *Pacifica* soon fell by the wayside,¹⁶ even though *Ginsberg* had seemingly called for “only the lightest touch” of judicial review for regulations of sexually explicit speech to minors.¹⁷ In *Sable Communications, Inc. v. FCC*, the Court unanimously rejected a ban on “dial-a-porn” services as overbroad, given the availability of

⁹ *Id.* at 638.

¹⁰ *Id.* at 640.

¹¹ *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

¹² *E.g.*, *Renton*, 475 U.S. at 46; *see also Young*, 427 U.S. at 72–73 (upholding zoning ordinances).

¹³ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975) (rejecting a Florida ordinance that prohibited drive-in movie theaters from showing nudity).

¹⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

¹⁵ *See id.* at 748, 750–51 (remarking that “the exercise of [the state’s] regulatory power does not depend on proof that the [material] is obscene”). Justice Stevens explained that the words Carlin used in his monologue might not ordinarily meet the *Miller* standard for obscenity. *See id.* at 746 (“Some uses of even the most offensive words are unquestionably protected.”). Nevertheless, Justice Stevens analyzed the context in which the FCC fined the *Pacifica* station and found the “pervasive” nature of broadcasting and its unique accessibility to children to be dispositive in upholding the FCC’s action. *Id.* at 748–49.

¹⁶ *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992) (“Our decisions since the 1960’s have narrowed the scope of the traditional categorical exception[] . . . for obscenity.”).

¹⁷ David G. Post, *Sex, Lies, and Videogames: Brown v. Entertainment Merchants Association*, 2011 CATO SUP. CT. REV. 27, 53.

alternative means to protect minors.¹⁸ In the closer case of *Denver Area Educational Telecommunications Consortium v. FCC*, the Justices disagreed—in six separate opinions and no majority—on how carefully to scrutinize regulations of indecent programming on cable.¹⁹ In *United States v. Playboy Entertainment Group* in 2000, however, Justice Kennedy, writing for a five-Justice majority, rejected the law in question and held that strict scrutiny would thereafter apply to content-based regulations of television programming.²⁰ Such strict scrutiny is unforgiving: It tends toward a “nearly categorical prohibition against infringements” of free speech.²¹

Strict scrutiny applies to limitations on sexually explicit speech on the Internet as well. In *Reno v. ACLU*, which invalidated parts of the 1996 Communications Decency Act,²² the Court expressly rejected the government’s invitation to analyze the Act’s provisions as zoning laws updated for the Internet.²³ Instead, the majority opinion by Justice Stevens found the risk of children “encountering indecent material by accident” to be “remote,” at least by comparison to radio broadcasts.²⁴ But children who spend significant amounts of time online may well accidentally encounter sexually explicit material,

¹⁸ *Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115, 118 (1989).

¹⁹ *Compare* *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 784 (1996) (Kennedy, J., concurring in part and dissenting in part) (suggesting the use of “strict scrutiny”), *with id.* at 763 (Breyer, J., plurality opinion) (applying a balancing test).

²⁰ *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813–15 (2000); *see* SULLIVAN & GUNTHER, *supra* note 4, at 161 (calling *Playboy* “the first time” the Court used strict scrutiny to reject such a law). Strict scrutiny requires the government to show that its regulation is “narrowly tailored to promote a compelling Government interest,” and that no “less restrictive alternative would serve the Government’s purpose.” *Playboy*, 529 U.S. at 813. In general, the government is allowed substantial room to regulate expression in lower-tier categories of speech. FARBER, *supra* note 4, at 31. Outside these categories, however, content-based regulations receive strict scrutiny, whereas content-neutral regulations receive a lower form of scrutiny. *Id.* at 21.

²¹ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1302–04 (2007); *see also* Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 351 (2011) (observing that government regulation of free speech survived strict scrutiny in only twenty-two percent of First Amendment cases from 1990 to 2003). There has also been criticism of the Court’s implementation of strict scrutiny. *See, e.g., Playboy*, 529 U.S. at 845 (Breyer, J., dissenting) (arguing that the majority’s proposed alternatives would not be “similarly effective in achieving the legitimate goals that the statute was enacted to serve”); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 195 (arguing that “the Court has fudged the facts,” though to reach the right results).

²² 47 U.S.C. § 223(a), (d) (Supp. II 1997).

²³ *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (arguing that because the Act “applies broadly to the entire universe of cyberspace,” it is a “blanket restriction on speech” rather than a “time, place, and manner regulation” (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986))).

²⁴ *Id.* at 867.

much as they could have accidentally heard Carlin's monologue on the radio in a past era.

The Court's recent decision in *FCC v. Fox Television Stations, Inc.*,²⁵ is consistent with this trend. The Court, in an opinion by Justice Kennedy, left *Pacifica* in place but found the FCC's ban on fleeting expletives to be invalid for failing to provide fair notice to broadcasters under the Due Process Clause.²⁶ Admittedly, because it decided the case on due process grounds, the Court did not go so far as to overrule *Pacifica* or to declare the FCC's policies to be unconstitutional under the First Amendment²⁷—although at least Justice Ginsburg indicated her willingness to reconsider *Pacifica*.²⁸ However, as Justice Alito commented at oral argument, broadcast television is “living on borrowed time,”²⁹ such that even upholding the FCC standards as constitutional under the First Amendment would not greatly affect children's access to the “proliferation of other media.”³⁰ Therefore, even if the Court does not overrule *Pacifica* in the long term, the Court has nonetheless steadily dismissed the government's regulatory interest in children and protected strong rights for third parties to speak to children.

2. Commercial Speech

The Supreme Court has shown the same support for unrestricted speech to children in the area of commercial speech. The Supreme Court once treated commercial speech, which is advertising or speech that “proposes a commercial transaction,” as an unprotected category.³¹ Since 1976, however, the Court has held that commercial speech receives intermediate constitutional protection and therefore an intermediate form of scrutiny.³²

²⁵ 132 S. Ct. 2307, 2320 (2012).

²⁶ *Id.* (“In light of the Court's holding that the Commission's policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.”).

²⁷ *Id.* (“[B]ecause the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy.”).

²⁸ *See id.* at 2321 (Ginsburg, J., concurring in the judgment) (explaining why, in her view, “*Pacifica* bears reconsideration”).

²⁹ Transcript of Oral Argument at 28, *Fox Television Stations*, 132 S. Ct. 2307 (No. 10-1293).

³⁰ *Id.* at 33.

³¹ SULLIVAN & GUNTHER, *supra* note 4, at 177; *see* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”), *overruled by* *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

³² SULLIVAN & GUNTHER, *supra* note 4, at 177; *see Va. State Pharmacy Bd.*, 425 U.S. at 770 (holding that commercial speech is protected, but accepting that “[s]ome forms of commercial speech regulation are surely permissible”).

In 2001, the Court further protected commercial speech, this time at the cost of the government's interest in regulating children's health. In *Lorillard Tobacco Co. v. Reilly*, the Court invalidated a Massachusetts ban on outdoor advertising of cigarettes, cigars, and smokeless tobacco within one thousand feet of a school or public playground.³³ The Court acknowledged the government's interest in preventing minors' tobacco use, but found that the regulation would "constitute nearly a complete ban" on tobacco advertising—far too broad a limitation to meet the Court's *Central Hudson* test for commercial speech.³⁴ Even if supported by a compelling interest, Massachusetts could not effect a "broad suppression of speech addressed to adults."³⁵

Although commercial speech theoretically receives only intermediate protection, the Court's approach in *Lorillard Tobacco* was strict and inflexible, even in a context that seemed ideal for child advocates.³⁶ Three Justices would have remanded Massachusetts's one thousand-foot ban to the district court for more "reliable statistical information as to [its] scope," because the evidence before the Court related to Massachusetts's three largest cities, while the impact of the regulation in other areas of the state was in dispute.³⁷ But the majority found that the law did not merit a remand, because "additional evidence would not alter the nature of the scheme."³⁸

³³ 533 U.S. 525, 534–36, 556, 561 (2001). The Court held that the cigarette restrictions were preempted by federal law and proceeded to analyze the cigar and smokeless tobacco regulations under the First Amendment. *Id.* at 551, 553.

³⁴ *Id.* at 562. The *Central Hudson* test has four factors. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). As a threshold matter, for commercial speech to be protected, it "must concern lawful activity and not be misleading." *Id.* The test then asks whether the governmental interest is "substantial," whether the regulation "directly advances" the governmental interest, and whether the regulation is "more extensive than is necessary to serve that interest." *Id.* Only the last two factors of the test were at issue in *Lorillard Tobacco*. *Lorillard Tobacco*, 533 U.S. at 555. The Court found that the regulations passed the third step of *Central Hudson* because of the demonstrated link between advertising and children's use of tobacco products. *Id.* at 556–61. But the regulations did not satisfy the fourth step, because Massachusetts failed to show that they were "not more extensive than necessary" to advance the governmental interest. *Id.* at 565.

³⁵ *Lorillard Tobacco*, 533 U.S. at 564 (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

³⁶ See SAUNDERS, *supra* note 3, at 218 (arguing that the facts of *Lorillard Tobacco* "seemed the best possible for child advocates").

³⁷ *Lorillard Tobacco*, 533 U.S. at 602 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

³⁸ *Id.* at 564–65; see also *id.* at 572 (Thomas, J., concurring in part and concurring in the judgment) (agreeing that the Massachusetts law failed even intermediate scrutiny, but arguing that the Court should subject commercial speech to true strict scrutiny rather than the intermediate scrutiny of *Central Hudson*).

3. *Violent Media*

The Supreme Court has curtailed the state's regulatory interest in one final area: violent video games. Because violent expression is not a lower-tier category like obscenity or commercial speech, it receives full constitutional protection.³⁹ A content-based regulation of violent media is therefore presumptively invalid unless it "passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."⁴⁰

Applying strict scrutiny, courts have consistently rejected regulations of children's access to violent video games.⁴¹ For example, the Seventh Circuit, speaking through Judge Posner, upheld video game manufacturers' free speech rights in strong terms, calling violence "a central interest of humankind and a recurrent, even obsessive theme of culture."⁴² The court dismissed the government's interest in regulating access to arcade games because "studies do not find that video games have ever caused anyone to commit a violent act."⁴³

The Supreme Court affirmed that violent video games are fully protected speech in *Brown v. Entertainment Merchants Association*.⁴⁴ Writing for the Court, Justice Scalia analyzed the California law under strict scrutiny. The state's interest was not compelling, because it had based its law on "ambiguous" psychological evidence, with no "direct causal link between violent video games and harm to minors."⁴⁵ Furthermore, the law was "wildly underinclusive" because it "declined to restrict Saturday morning cartoons," "games rated for young children," or "pictures of guns"—all of which were also correlated with increased aggression in children.⁴⁶ The law was also "vastly overinclusive," because it forbade *all* children from purchasing violent video games, whether or not their parents were opposed to them.⁴⁷

Justice Scalia's opinion—deferring to video game manufacturers' interest in speech and dismissing the government's regulatory interest in children—confirms that "something important and strange has

³⁹ See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (2011) ("[V]iolence is not part of the obscenity that the Constitution permits to be regulated.").

⁴⁰ *Id.* at 2738; see *supra* note 20 and accompanying text (explaining that content-based regulations of protected speech receive strict scrutiny).

⁴¹ Renee Newman Knake, *From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations*, 63 SMU L. REV. 1197, 1199 (2010).

⁴² *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

⁴³ *Id.* at 578.

⁴⁴ *Brown*, 131 S. Ct. at 2733–34.

⁴⁵ *Id.* at 2738–39.

⁴⁶ *Id.* at 2738–40.

⁴⁷ *Id.* at 2741.

happened to the First Amendment.”⁴⁸ The Court has struck down restrictions protecting children from sexually explicit and commercial speech, and continually granted full protection to violent media.⁴⁹ Concurring in the judgment in *Brown*, Justice Alito noted the oddity: “As a result of today’s decision, a State may prohibit the sale to minors of what *Ginsberg* described as ‘girlie magazines,’ but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.”⁵⁰

B. Deferring to Schools and Suppressing Children’s Speech

While generally distrusting government regulation of speakers’ access to a child audience,⁵¹ the Supreme Court and lower courts have placed enormous trust in the government as educator and have increasingly upheld school officials’ decisions to suppress or punish students’ speech. The Court initially held that children’s speech was protected even on campus and during school hours unless it threatened a “substantial disruption,”⁵² but today the Court grants wide discretion to officials to suppress speech if it is school-sponsored, lewd, or ambiguously promotes illegality. Some lower courts have applied these tests even to children’s speech that occurs outside school.⁵³

1. Supreme Court Decisions

Historically, the Court viewed parents as the key institutional figures in children’s lives and assumed that minors were entitled to nearly full constitutional rights, even while at school.⁵⁴ Today, however, courts defer to schools’ institutional interests and view the

⁴⁸ Cf. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 258 (1992) (explaining that whereas the earliest First Amendment suits were brought by “political protestors and dissidents,” modern cases involve claims by “commercial advertisers,” “pornographers,” “businesses,” and “large broadcasters”).

⁴⁹ See *id.* at 259 (explaining that First Amendment protection “extends equally to sexually explicit speech, music, art, and commercial speech”).

⁵⁰ *Brown*, 131 S. Ct. at 2747 (Alito, J., concurring in the judgment); see also *id.* at 2771 (Breyer, J., dissenting) (“What kind of First Amendment would permit the government to protect children by restricting sales of [an] extremely violent video game *only* when [a] woman—bound, gagged, tortured, and killed—is also topless?”).

⁵¹ See Sunstein, *supra* note 48, at 258–59 (arguing that the “dominant position” in First Amendment doctrine holds that “the government is the enemy of freedom of speech”).

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

⁵³ See *infra* notes 59–81 and accompanying text (showing how Supreme Court and lower court decisions since *Tinker* have expanded schools’ right to regulate students’ speech).

⁵⁴ Papandrea, *supra* note 3, at 1038 (citing *Tinker*, 393 U.S. 503, and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

classroom as “a place of structured dialogue bounded by teacher authority and rules of decorum.”⁵⁵

The leading case on students’ speech is *Tinker v. Des Moines Independent Community School District*, which vindicated students’ rights to wear black armbands to school to protest the Vietnam War.⁵⁶ In the opinion’s most famous passage, Justice Fortas wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁷ Instead, the Court created a “substantial disruption” test, holding that student speech is protected unless it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”⁵⁸

But the Court soon began cutting back on children’s initially sweeping speech rights. In *Bethel School District No. 403 v. Fraser*, the first such case, the Court upheld a school’s punishment of a student who made a speech full of sexual double entendres at a student assembly.⁵⁹ Chief Justice Burger’s opinion was, as Chief Justice Roberts later acknowledged, “not entirely clear.”⁶⁰ Chief Justice Roberts distilled *Fraser* to two flexible principles favoring the school’s expansive rights. First, children’s speech rights are subservient to “the special characteristics of the school environment.”⁶¹ Second, “the mode of analysis set forth in *Tinker* is not absolute.”⁶²

*Hazelwood School District v. Kuhlmeier*⁶³ further curtailed children’s free speech rights. In that case, the Court allowed a high school to censor school newspaper articles about teenage pregnancy and divorce because the newspaper was “school-sponsored.”⁶⁴ Again

⁵⁵ SULLIVAN & GUNTHER, *supra* note 4, at 308–09.

⁵⁶ *Tinker*, 393 U.S. at 504, 514.

⁵⁷ *Id.* at 506.

⁵⁸ *Id.* at 513–14.

⁵⁹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

⁶⁰ *Morse v. Frederick*, 551 U.S. 393, 404 (2007). The Court was concerned that the speech was lewd, *see Fraser*, 478 U.S. at 680, though, as Justice Brennan suggested, the respondent’s speech was “no more ‘obscene,’ ‘lewd,’ or ‘sexually explicit’ than the bulk of programs currently appearing on prime time television or in the local cinema.” *Id.* at 689 n.2 (Brennan, J., concurring in the judgment); *see also* 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, 1423–25 (2011) (calling the opinion “ill-explained”).

⁶¹ *Morse*, 551 U.S. at 405 (quoting *Tinker*, 393 U.S. at 506); *see also Fraser*, 478 U.S. at 681, 685 (explaining the school’s “basic educational mission” to instill “fundamental values of habits and manners of civility”) (citation and internal quotation marks omitted).

⁶² *Morse*, 551 U.S. at 405.

⁶³ 484 U.S. 260 (1988).

⁶⁴ *Id.* at 273; *see also* C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL’Y REV. 343, 373

straying from the *Tinker* substantial disruption test, Justice White held school officials to a deferential standard: Censorship or punishment of student speech that relates to “school-sponsored . . . activities” must simply be “reasonably related to legitimate pedagogical concerns.”⁶⁵

Finally, in *Morse v. Frederick*, the Court held that school officials may restrain students’ speech at school outings, even when the speech is not school-sponsored, if it can be “reasonably viewed as promoting illegal drug use.”⁶⁶ Although Frederick displayed a banner reading “BONG HiTS FOR JESUS” among the public, he did so across the street from his school during a class trip to see the Olympic Torch Relay parade.⁶⁷ Again distinguishing the Court’s precedents, Chief Justice Roberts declared a new rule that centered on the school’s “‘important—indeed, perhaps compelling’ interest” in deterring drug use by students⁶⁸ and Principal Morse’s “reasonable” interpretation of the banner as “promoting illegal drug use.”⁶⁹

As of *Morse*, schools can restrict children’s speech not only when it threatens a *Tinker* “substantial disruption,” but also whenever it is “reasonable” for the school to think it promotes unlawful behavior.⁷⁰ Whereas the Court viewed the government’s claims suspiciously in *Playboy* and *Brown*, the *Morse* Court instead readily accepted the principal’s conclusion that a message the majority itself called “cryptic” could harm other children.⁷¹ In deferring to school officials, then, the Court has embraced “schools’ institutional distinctness and control needs—arguments that failed in *Tinker*.”⁷² The Court has also increasingly dismissed students’ free speech interests. This is unfortu-

(1989) (arguing that this “forum analysis” method of reasoning further eroded *Tinker*’s categorical approach).

⁶⁵ *Kuhlmeier*, 484 U.S. at 272–73. *But see* DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 107–08 (1989) (suggesting that a school newspaper “provide[s] students with important educational opportunities” that are lost when a school censors controversial subject matter).

⁶⁶ *Morse*, 551 U.S. at 403.

⁶⁷ *Id.* at 397, 400–01.

⁶⁸ *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

⁶⁹ *Id.* at 408. *But see* Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (“[T]here was no claim that [the banner] was disruptive and certainly no evidence that it increased the likelihood of drug use.”).

⁷⁰ *See Morse*, 551 U.S. at 446 (Stevens, J., dissenting) (criticizing the Court for allowing “the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message”); Papandrea, *supra* note 3, at 1055 (arguing that the Court now defers to a school’s interpretation of the “meaning and likely effect of student speech”).

⁷¹ *Morse*, 551 U.S. at 401.

⁷² Moss, *supra* note 60, at 1427; *see also* Papandrea, *supra* note 3, at 1030 (arguing that *Morse* was driven by a concern for “the need for courts to defer to the decisions of school officials”).

nate: Because school provides the backdrop for the social and intellectual issues most important to children, their experiences with institutional authority in school can deeply affect their lives, either encouraging them to develop critical and confident opinions later in life or crushing those same voices at the age of greatest vulnerability.⁷³

2. *Lower Court Decisions*

Technology and the Internet have made children's speech more open and accessible than in past generations. What students do through cell phones and Facebook is not "that much different from what prior generations did without technology": They discuss "their teachers, the school administrators, their fellow students, and the events of their daily lives."⁷⁴ But whether children bring cell phones to school or school principals log on to MySpace from their offices, "adults can see what minors are saying much more easily" and can accordingly punish children for off-campus speech that would have escaped notice years ago.⁷⁵ In turn, technology has rendered courts' prior attention to physical perimeters of the school grounds a quaint relic.

In most cases, *Tinker* provides the doctrinal justification for this shift. Traditionally, courts viewed children's off-campus speech as fully protected.⁷⁶ But lately, some lower courts have applied the *Tinker* test even to off-campus speech.⁷⁷ For example, the Second Circuit recently sustained the suspension of a student who had created an instant message icon depicting his English teacher being shot in the head by a gun,⁷⁸ and of another student who had referred to administrators as "douchebags in central office" in a blog post.⁷⁹ In both cases, the court reasoned that the students had targeted their school

⁷³ See SAUNDERS, *supra* note 3, at 228 (noting the importance of children's "experiences in school" to "their psychological development").

⁷⁴ Papandrea, *supra* note 3, at 1036.

⁷⁵ *Id.* at 1037.

⁷⁶ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979) (accepting students' First Amendment claim where they created and distributed a newspaper primarily outside school); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972) (same where students created and distributed a newspaper entirely off-campus and not during school hours). *But see Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (en banc) (rejecting a student's First Amendment claim where a letter he wrote was brought onto school grounds, though not by his affirmative), and *LaVine ex rel. LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (same where a student brought a poem to school and showed it to his friends and English teacher).

⁷⁷ JESULON S.R. GIBBS, *STUDENT SPEECH ON THE INTERNET: THE ROLE OF FIRST AMENDMENT PROTECTIONS* 70, 158 (2010); Papandrea, *supra* note 3, at 1056.

⁷⁸ *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007).

⁷⁹ *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008).

communities and that officials thus foresaw a “risk of substantial disruption” in school.⁸⁰ The Fourth Circuit similarly held in *Kowalski v. Berkeley County Schools* that a school could discipline a student who created a harassing MySpace page under *Tinker* because she had “orchestrated a targeted attack on a classmate.”⁸¹

Wisniewski, Doninger, and Kowalski’s language was certainly inappropriate; perhaps it was also harmful or even dangerous. Nevertheless, the Court’s precedents do not, but should, invite a careful consideration of the child’s interests at stake. For example, Fraser may not have expressed what the Court recognized as a “political” viewpoint, but disciplining him for his admittedly crude participation in a school election nonetheless implicated democratic values.⁸² Doninger’s blog post, which expressed rebellious thoughts and questioned authority, also related to core First Amendment concerns. Instead, courts have mostly deferred to schools’ own identification of disruption and concern for school discipline.⁸³ Thus, children now “must weigh their [speech] against the haunting threat of possible disciplinary consequences at their school.”⁸⁴

⁸⁰ See *Wisniewski*, 494 F.3d at 39 (“[O]ff-campus conduct can create a foreseeable risk of substantial disruption within a school”); *Doninger*, 527 F.3d at 50 (arguing that Doninger’s intent “was specifically to encourage her fellow students to read and respond,” and citing *Wisniewski* for the proposition that Doninger’s posting “foreseeably create[d] a risk of substantial disruption within the school environment”) (internal quotation marks omitted). Judge Livingston also emphasized in *Doninger* that the punishment was merely “disqualification from student office”; the court had “no occasion to consider whether a different, more serious consequence . . . would raise constitutional concerns.” *Doninger*, 527 F.3d at 53.

⁸¹ *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011). *But see* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (affirming a student’s First Amendment right to post a fake MySpace profile of her school principal while off-campus); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc) (same).

⁸² Compare *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (“[T]he penalties imposed in this case were unrelated to any political viewpoint.”), with *MOSHMAN*, *supra* note 65, at 105 (arguing that Fraser’s speech had a “political purpose” because “[i]t was intended to get people to feel positively disposed toward, and thus vote for, the candidate Fraser favored”).

⁸³ Judge Livingston explained that Doninger’s post was “plainly offensive” and “potentially disruptive.” *Doninger*, 527 F.3d at 50–51 (emphasis added); see also Papandrea, *supra* note 3, at 1100 (arguing that lower courts instinctively suppress speech that “contains even the slightest reference to or depiction of violence, even when law enforcement has declared it innocuous”).

⁸⁴ Philip T.K. Daniel & Scott Greytak, *A Need To Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21, 25 (2011).

II

THE CHILD PARADOX AND THE THEORIES OF THE
FIRST AMENDMENT

In the name of the First Amendment, an emerging set of judicial doctrines has dramatically curtailed the government's interest in regulating adult speakers' access to children, while simultaneously reducing children's ability to express themselves, even when outside school. This Part argues that stronger protection for speech to children than for speech by children themselves undermines the three main rationales behind the Amendment: the search for truth, democratic self-government, and autonomy.

The particular concerns involving children push the boundaries of formal First Amendment categories. Nothing in the Amendment's text or original understanding addresses itself to the child paradox. The text—"Congress shall make no law . . . abridging the freedom of speech"—makes no distinctions among speakers and audiences,⁸⁵ and could easily apply to all speakers equally, whether to video game manufacturers selling violent games to children or students creating crude MySpace parodies of their principals.

But evidence of the Amendment's original understanding suggests that the Framers would have found this extreme permissiveness odd, or at least would have found some supervision of speech to children to be natural. As Justice Thomas explained in his *Brown* dissent, the Framers' original understanding of the Constitution did not include "a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."⁸⁶ Though this is a closer question, the Framers probably did not have occasion to consider speech by children as a pressing concern. Admittedly, the Framers developed the First Amendment with the goal of protecting adult expression, not children's interests.⁸⁷ But the lack of public schooling of children, and particularly the absence of federal involvement in education at a time when the Amendment had not been incorporated and applied only to the federal government, meant that the Framers did not confront the conflict between the control of children and children's free speech rights.⁸⁸

⁸⁵ U.S. CONST. amend. I; see MOSHMAN, *supra* note 65, at 25 ("[The First Amendment] makes no distinction between children and adults.").

⁸⁶ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting).

⁸⁷ See Dienes & Connolly, *supra* note 64, at 349 & n.20 (noting the Framers' focus on the importance of adult speech). *But see* MOSHMAN, *supra* note 65, at 25–26 (observing that although the Framers wrote the Bill of Rights with White males in mind, the Court has held it to apply to women and other races).

⁸⁸ Dienes & Connolly, *supra* note 64, at 349.

Because the text and original understanding are inconclusive, in the remainder of Part II, I analyze the child paradox under the three prevailing theories of the Amendment:⁸⁹ advancing truth in the marketplace of ideas, facilitating democratic self-government, and promoting autonomy, self-fulfillment, and self-realization.⁹⁰ I also refer to relevant psychological and developmental research. While First Amendment doctrine prioritizes constitutional principles over empirics,⁹¹ the Court does consider empirical evidence, both as the “background factual assumptions about the nature of the world” that justify its doctrinal rules⁹² and when evaluating the government’s justifications for its regulations under the compelling interest prong of strict scrutiny.⁹³ Ultimately, this Part argues that current doctrine, which overprotects speech to children and undervalues children’s speech, is inconsistent with the three theories of the Amendment.

A. *The Search for Truth in the Marketplace of Ideas*

The primary First Amendment theory is the advancement of knowledge and truth in the “marketplace of ideas.”⁹⁴ This idea originates with John Stuart Mill’s notion that a “true” opinion “may

⁸⁹ The Supreme Court has not elucidated one single rationale for the Amendment, instead generating an “elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication.” John Paul Stevens, Address, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993); see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) (“There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression. . . . Commentators, by contrast, have been eager to elaborate upon their unified theories of the value of free speech.”) (citation omitted).

⁹⁰ SULLIVAN & GUNTHER, *supra* note 4, at 4. Because the text is inherently unhelpful and the original understanding of free speech has limited utility, judges and scholars have generally referred to these three theories in analyzing First Amendment problems. See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 1–2 (2011) (describing scholars’ attempts to explain and harmonize First Amendment doctrine).

⁹¹ Compare Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 51 (2002) (explaining that, traditionally, “the law value[s] established constitutional rights over empirical data”), with Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL’Y 1, 3 (2004) (suggesting that constitutional law is increasingly influenced by empirical evidence, though less so with respect to the First Amendment).

⁹² Frederick Schauer, *Free Speech and the Demise of the Soapbox*, 84 COLUM. L. REV. 558, 558 (1984) (book review) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954)); see also *id.* (“To the extent that the assumptions underlying legal principles reflect a false picture of the world, the value of the principles is reduced in direct proportion.”).

⁹³ See Bunker & Perry, *supra* note 91, at 11 (discussing the use of “social scientific studies” in establishing a compelling interest under strict scrutiny).

⁹⁴ FARBER, *supra* note 4, at 4; SULLIVAN & GUNTHER, *supra* note 4, at 4.

be extinguished once, twice, or many times,” but in the end will “withstand all subsequent attempts to suppress it.”⁹⁵ In the words of Justice Holmes, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁹⁶ The Supreme Court has relied on this theory of free speech throughout its jurisprudence, including in cases dealing specifically with children.⁹⁷

1. *Speech by Children*

Commentators often discount the value of children’s speech in the marketplace of ideas based on the view that because children have not yet become rational adults, they provide no worthwhile contributions to the marketplace that others should consider in the pursuit of truth.⁹⁸

Nevertheless, the Court has found children’s speech to be worth protecting. As Justice Brennan explained, “[t]he classroom is peculiarly the ‘marketplace of ideas.’”⁹⁹ Admittedly, it seems unlikely that most children’s opinions would add to the marketplace as envisioned by Mill and Holmes, in part because their views tend to be heavily influenced by adults rather than vice-versa.¹⁰⁰ But some particularly astute children may provide opinions sufficiently valuable for adults to consider them in the search for truth.¹⁰¹ More importantly, children’s speech may be instrumentally valuable even if it is not inherently

⁹⁵ JOHN STUART MILL, *ON LIBERTY* 97–98 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

⁹⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁹⁷ *See, e.g.*, *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (discussing the “marketplace of ideas” (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)) (internal quotation marks omitted)); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (Stevens, J.) (“[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” (citation omitted)); *see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 & n.2 (citing examples of the Court’s use of this theory).

⁹⁸ Dienes & Connolly, *supra* note 64, at 349–50.

⁹⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas . . .”).

¹⁰⁰ *See* John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 344 (1979) (noting the unlikelihood of children’s speech serving any “immediate social purpose”).

¹⁰¹ *See* MOSHMAN, *supra* note 65, at 28 (“[O]lder children and adolescents may indeed be sufficiently rational for there to be social value in protecting their freedoms of belief and expression.”).

useful.¹⁰² A doctrine that routinely silences children, both in the classroom and outside school, is likely to breed silence; children may therefore lack practice developing and vocalizing their thoughts, persuading others of new or controversial opinions, and weighing their thoughts against others so as to determine which ones are “true.”¹⁰³ Thus, children whose opinions are suppressed are less likely to grow into effective adult participants in the marketplace of ideas.

Some psychological evidence confirms that children’s expression confers developmental benefits relevant to the marketplace of ideas, including promoting intellectual development and enhancing critical thinking skills.¹⁰⁴ Researchers also claim that children’s maturity and self-confidence, including their willingness to take initiative, are linked to the degree of free will they exercise.¹⁰⁵ By contrast, children who feel they lack influence over matters that affect them may develop “learned helplessness.”¹⁰⁶ Furthermore, studies suggest that disciplining children for their expression could hurt their confidence and critical thinking capabilities as adults.¹⁰⁷ The potential harm to the marketplace of ideas is twofold: Children who lack self-confidence may fear contributing ideas to the marketplace, and children who lack critical thinking abilities may be unable to distinguish truthful ideas within that marketplace.

¹⁰² See Garvey, *supra* note 100, at 344 (arguing that children’s free speech rights cannot “be secured by sheltering the child until he is ready to join the adult community”).

¹⁰³ Dienes & Connolly, *supra* note 64, at 351.

¹⁰⁴ See MOSHMAN, *supra* note 65, at 104 (“[T]here is much evidence that intellectual development is facilitated by the opportunity to form and express one’s own views . . .”). For example, Jean Piaget’s “theory of equilibration” holds that intellectual development occurs as a child interacts with his or her physical and social environment. *Id.* at 86–87. Moreover, although much online speech seems trivial, even online interactions may be important to children’s development. Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 *DRAKE L. REV.* 97, 172 (2010).

¹⁰⁵ Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 *VILL. L. REV.* 1705, 1765 (1992).

¹⁰⁶ *Id.* at 1765–66 (explaining psychologist Martin Seligman’s finding that a lack of self-determination may lead to “helplessness, hopelessness, passivity, and depression”).

¹⁰⁷ MOSHMAN, *supra* note 65, at 50–51. Because the Court has often justified its limits on children’s decisionmaking based on their lesser analytical abilities, it has also recognized the importance of children’s developing critical thinking skills. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion) (“Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (discussing children’s “inability to make critical decisions”); Anne C. Dailey, *Children’s Constitutional Rights*, 95 *MINN. L. REV.* 2099, 2145 (2011) (explaining that “Supreme Court decisions . . . emphasize critical thinking”).

Of course, children's speech rights cannot be unlimited, particularly within school, given the state's important countervailing interests in classroom discipline and education of children. But at least under the marketplace of ideas theory, adults should be able to tolerate some offensive and inappropriate speech from children.¹⁰⁸ In fact, because under this theory the purpose of free speech is to help reveal the most valuable ideas from among a mass of opinions, the theory recognizes that some low-value thoughts will naturally be present in the marketplace.

2. *Speech to Children*

Some commentators argue that children's exposure to a "robust exchange of ideas"¹⁰⁹ requires fully open discussion in both directions: Not only must children have a strong right to speak, but the government must not regulate speech addressed to children.¹¹⁰ Otherwise, "selective exposure" could change children's attitudes and "predispose [them] to accept certain established perspectives as adults."¹¹¹ Indeed, some empirical evidence does suggest the importance of outward exposure to others' views for this very reason.¹¹² Furthermore, as the Court has emphasized, video game manufacturers, tobacco advertisers, and purveyors of sexually explicit material all have First Amendment marketplace rights.¹¹³ A video game, like any other form

¹⁰⁸ Though I suggest that adults can generally tolerate children's speech, the effect of children's offensive speech on other children is a separate concern, and particularly troubling with respect to harassment and bullying. See *infra* notes 196–210 and accompanying text (further discussing the problem and exploring possible doctrinal solutions).

¹⁰⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹¹⁰ See, e.g., *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (rejecting an attempt to remove books from a school library and commenting that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers" (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)) (internal quotation marks omitted)).

¹¹¹ Ingber, *supra* note 97, at 30; see also Dienes & Connolly, *supra* note 64, at 351 ("Without childhood exposure to a variety of ideas and opinions, and without practice in sifting through competing views to determine what is 'true' . . . individuals, upon reaching majority, will be ill-equipped to participate in the marketplace.").

¹¹² See Catherine J. Ross, *An Emerging Right for Mature Minors To Receive Information*, 2 U. PA. J. CONST. L. 223, 245 (1999) ("According to the psychological sciences, looking outward and testing parental premises are an essential aspect of maturation during the teenage years.").

¹¹³ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (explaining that "video games qualify for First Amendment protection"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (upholding the First Amendment rights of tobacco advertisers); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (upholding the First Amendment rights of pornographers).

of expression, can offer “ideas” and “social messages” that deserve a hearing in the marketplace of ideas.¹¹⁴

But the marketplace of ideas theory does not support speakers’ rights to access children specifically. Instead, the central goal of the marketplace is to test ideas for their intellectual validity for the benefit of the general population. The theory thus assumes that “people can distinguish rationally between a message’s substance and the distortion caused by its form and focus” and identify truthful ideas from among false ones.¹¹⁵ But while adults are ideally able to evaluate an idea critically, children are impressionable and immature, and they are likely to test an idea’s “superficial attraction” rather than its “rational power.”¹¹⁶ Even conceding that many types of speech have value, then, the marketplace rationale does not adequately explain why speakers should have unfettered access to *children* as well as to adults. Accordingly, it does not provide sufficient reason to strike down government regulations of speech aimed directly at children.

Furthermore, social science research suggests that there are countervailing developmental costs to unrestricted speech that may outweigh any marketplace interests in reaching children. First, many studies have linked children’s exposure to cigarette advertising—which the Court upheld in *Lorillard Tobacco*—to increased tobacco use.¹¹⁷ Second, some researchers have expressed concern about children’s access to sexually explicit content and harassment online¹¹⁸ and have associated such exposure with changes in adolescent attitudes and behaviors.¹¹⁹ Finally, some researchers have found a connection

¹¹⁴ *Brown*, 131 S. Ct. at 2733.

¹¹⁵ Ingber, *supra* note 97, at 31.

¹¹⁶ SAUNDERS, *supra* note 3, at 40.

¹¹⁷ See, e.g., Gilbert J. Botvin et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REP. 217, 217 (1993) (“Adolescents with high exposure to cigarette advertising were significantly more likely to be smokers”); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1469 (1999) (finding that “many consumers would not have begun smoking” if not for “manufacturers’ successful and ubiquitous efforts to mislead”); Joe B. Tye et al., *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL’Y 492, 499 (1987) (showing “a causal relationship” between advertising and smoking by teenagers).

¹¹⁸ See, e.g., SAUNDERS, *supra* note 3, at 164; Lisa M. Jones et al., *Trends in Youth Internet Victimization: Findings from Three Youth Internet Safety Surveys 2000–2010*, 50 J. ADOLESCENT HEALTH 179, 182 (2012) (reporting trends in sexual solicitations, aggressive solicitations, online harassment, and unwanted exposure to pornography from 2000 to 2010).

¹¹⁹ Debra K. Braun-Courville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes and Behaviors*, 45 J. ADOLESCENT HEALTH 156, 161 (2009).

between media violence and real-world aggression.¹²⁰ These studies illustrate some potential costs of the strong protection the Court affords speech delivered to children.

This empirical evidence also suggests that government regulation could prove a useful corrective to “communicative market failures.”¹²¹ Participants in the marketplace of ideas must be intelligent and rational in order to contribute and recognize sound ideas, but strong protection for advertisers and online predators could stunt one’s development from impressionable child to intelligent adult. Though the psychological studies are doubtlessly “ambiguous, disparate, and modest in their results,”¹²² the state’s legitimate concern for children’s intellectual development, combined with the importance of that development under the marketplace theory, suffices to make desirable a relaxed regulatory space for Congress. Instead, the Court’s increasingly strict doctrine has disabled government regulation in a prototypical legislative area: determining the validity of empirical evidence and making policy judgments.¹²³

The current doctrine is inconsistent with the marketplace of ideas theory. Reasonable regulation of speech aimed at children will permit their development into adult marketplace participants without materially affecting speakers’ marketplace rights, because the task of testing ideas in the marketplace should generally fall to adults. By contrast, children’s speech should be encouraged, within tolerable limits, because even immature speech is instrumentally important to encouraging children’s future participation in the marketplace.

¹²⁰ See, e.g., Craig A. Anderson et al., *Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-analytic Review*, 136 *PSYCHOL. BULL.* 151, 152 (2010); Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Psychological Arousal, and Prosocial Behavior*, 12 *PSYCHOL. SCI.* 353, 357 (2001). But see, e.g., MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH* 251 (2001) (arguing that there is “no real-world behavioral impact from TV violence”); Knake, *supra* note 41, at 1201 (reporting that some view these findings as “supported by flawed research or inconclusive results”).

¹²¹ See Ingber, *supra* note 97, at 5 (explaining that critics of the “market model” of free speech “conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures”).

¹²² HEINS, *supra* note 120, at 242.

¹²³ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (arguing that “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here” (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985))).

B. Democratic Self-Government

The second rationale for the First Amendment, often associated with Alexander Meiklejohn, holds that free speech is necessary to achieve democratic and representative self-government.¹²⁴ Meiklejohn stated the need for an “unlimited guarantee of the freedom of public discussion.”¹²⁵ As Justice Brennan explained, the “protection of the public requires not merely discussion, but information,”¹²⁶ and therefore “debate on public issues should be uninhibited, robust, and wide-open.”¹²⁷ On this view, freedom of speech enables citizens to criticize government policies and vote in an informed way, ensuring that government remains accountable to the public and improving the quality of policymaking.¹²⁸ Free speech also increases the state’s legitimacy by guaranteeing the expressive rights of the governed.¹²⁹

1. Speech by Children

Some scholars justify restrictions on children’s speech by arguing that, because they are too young to vote, their views are irrelevant to democratic government.¹³⁰ Nevertheless, political issues often affect children, and some mature minors may effectively participate in public debate or even check official misconduct.¹³¹ Indeed, minors have historically made their voices heard on public matters like the Vietnam War, curricular choices in public schools, and state budgets.¹³²

The Supreme Court recognized that “speech assists the young in preparing to participate in democratic self-government” in *Tinker*.¹³³ On this view, the First Amendment should encourage children to

¹²⁴ FARBER, *supra* note 4, at 5; SULLIVAN & GUNTHER, *supra* note 4, at 6.

¹²⁵ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27, 39 (1948).

¹²⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)) (internal quotation marks omitted).

¹²⁷ *Id.* at 270.

¹²⁸ FARBER, *supra* note 4, at 5.

¹²⁹ See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2367–68 (2000) (discussing a “participatory” self-government theory).

¹³⁰ *E.g.*, SAUNDERS, *supra* note 3, at 38.

¹³¹ Dienes & Connolly, *supra* note 64, at 352.

¹³² Tomain, *supra* note 104, at 170–71.

¹³³ *Garvey, supra* note 100, at 338; see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (finding that free speech is instrumental in training “leaders” and securing “the Nation’s future” (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks omitted)); *id.* at 526 (Black, J., dissenting) (suggesting that the majority would permit “teachers, parents, and elected school officials to surrender control of the American public school system to public school students”).

speak and validate their commentary before they turn eighteen. When minors receive positive feedback for political participation, they will become more likely to engage in public life as adults and contribute to a more robust democratic self-government.¹³⁴ The connection between childhood speech and adult political participation holds for controversial speech as well: Effective self-government depends on citizens' willingness to criticize government policies and to vote out ineffective leaders, traits that can be learned as children.

Psychological studies on children's development further suggest the importance of free speech to promoting effective democracy. Protecting and validating children's expression has been found to build critical thinking, inquisitiveness, maturity, and self-confidence.¹³⁵ These characteristics are likely to promote effective government, both by creating a skeptical populace prepared to critique policies and vote out leaders and by ensuring that adults are prepared to enter public life and run for political office. Empirical literature indicates that free speech is likely to increase children's "inquisitiveness, distrust of authority, willingness to take initiative, and . . . courage to confront evil"—all traits crucial to building a functioning democratic government.¹³⁶

By contrast, a censored child is more likely to experience "learned helplessness"¹³⁷ and less likely to become an interested and active "citizen-critic" who is properly skeptical of leadership and committed to political participation.¹³⁸ Instead, disciplining children's speech can hurt their confidence and encourage them to avoid such risks in the future. The Court recognized this possibility in *West Virginia State Board of Education v. Barnette*, which stated that quashing children's speech can "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."¹³⁹ These words ring particularly true when schools punish students for expression arguably related to political speech and democratic values, such as participation in a school

¹³⁴ See Garvey, *supra* note 100, at 348 (arguing that an instrumental function of speech is the ability to show children "the potential of speech to accomplish good or bad results").

¹³⁵ See *supra* notes 104–07 and accompanying text (summarizing studies on the benefits of children's expression).

¹³⁶ Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 61, 62 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

¹³⁷ See *supra* note 106 and accompanying text (explaining the concept of "learned helplessness").

¹³⁸ Dienes & Connolly, *supra* note 64, at 347.

¹³⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

election,¹⁴⁰ reporting on matters of public concern,¹⁴¹ and criticism of an authority's decisionmaking.¹⁴²

Even when children's speech is less valuable than core political speech or irrelevant to democratic values, the doctrine should default in favor of protecting children's speech to prevent a chilling effect. If the doctrine defaults to underprotection, or if the level of protection extended to children's speech is unclear, children may choose not to exercise their right to even constitutionally protected speech out of fear of punishment.¹⁴³ For example, high school principals have relied on *Kuhlmeier* to censor student newspaper articles on issues of public concern.¹⁴⁴ These and similar actions likely encourage children to become complacent and to fear authority, rather than to expose and discuss political and public issues.¹⁴⁵ Such responses could also undermine children's commitment to constitutional rights and the values of political participation more broadly.¹⁴⁶ Surveys suggest that children who exercise greater freedom of speech, even online, show a higher level of commitment to First Amendment principles.¹⁴⁷

Two recent trends exacerbate this chilling effect. First, courts have increasingly deferred to administrators' opinions on whether speech is harmful, disruptive, or inappropriate for school. For

¹⁴⁰ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986) (discussing the suspension of a student for delivering an “obscene” speech nominating a fellow student for student elective office).

¹⁴¹ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988) (explaining that the censored newspaper articles related to “students’ experiences with pregnancy” and “the impact of divorce on students at the school”).

¹⁴² See *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008) (explaining that the plaintiff's complaint related to “the supposed cancellation of an upcoming school event”).

¹⁴³ See *Recent Case, First Amendment—Student Speech—Third Circuit Applies Tinker to Off-campus Student Speech—J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (*en banc*), 125 HARV. L. REV. 1064, 1069–70 (2012) (“As the Court explained in *Gooding v. Wilson*, ‘persons whose expression is constitutionally protected may well refrain from exercising their rights’ out of fear of punishment when the law governing their speech is unclear or too broad.” (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972))).

¹⁴⁴ See Joel Kaplan, *The Hazelwood Decision Has Resulted in Censorship, in CENSORSHIP: OPPOSING VIEWPOINTS* 98, 99–101 (Byron L. Stay ed., 1997) (describing censorship of articles about a teacher's arrest for drug possession, a tennis coach who pocketed students' money, and the arrest of a high school football coach, as well as an editorial criticizing a teacher's decision not to release student election results).

¹⁴⁵ *Id.*

¹⁴⁶ See Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 59 (2009) (discussing the “lessons learned by the student litigants and future students who experience censorship”).

¹⁴⁷ See KENNETH DAUTRICH ET AL., *THE FUTURE OF THE FIRST AMENDMENT: THE DIGITAL MEDIA, CIVIC EDUCATION, AND FREE EXPRESSION RIGHTS IN AMERICA'S HIGH SCHOOLS* 116–17 (2008).

example, while *Tinker* indicated that children's speech rights were presumptively sweeping, subject to limited exceptions, *Morse* reversed the presumption in favor of schools, such that controversial student commentary is punishable if officials interpret it as endorsing illegal activity.¹⁴⁸ Furthermore, disciplining children for online communication that adults would never have seen in a previous era exacerbates the chilling problem, by subjecting far more speech to school regulation.

The democratic self-government theory thus demonstrates the importance of protecting children's speech within reasonable limits in order to encourage them to take risks that benefit democratic values. Tolerance of even seemingly valueless speech ensures that students' core political speech remains secure.

2. *Speech to Children*

Some argue that the self-government rationale requires unrestricted speech to children as well. Judge Posner, for example, has argued that children "must be allowed to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise."¹⁴⁹ It is true that children "are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."¹⁵⁰ Critical political participation requires not just intellectual development and rationality but also exposure to diverse viewpoints.

But the fear that limited regulations of the type at issue in *Kendrick* or *Brown* will undermine democratic self-government is exaggerated, for two reasons. First, the regulations that I suggest should receive lessened scrutiny are restricted to children's commercial access and provide a bypass using parental supervision.¹⁵¹ The

¹⁴⁸ See *Morse v. Frederick*, 551 U.S. 393, 445–46 (2007) (Stevens, J., dissenting) ("[H]igh school students everywhere could be forgiven for zipping their mouths about drugs at school lest some 'reasonable' observer censor and then punish them for promoting drugs."); Daniel & Greytak, *supra* note 84, at 24–25 ("*Morse v. Frederick* has effectively created an implicit presumption that student commentary on highly controversial national topics (such as the War on Drugs) may be subject to regulation." (internal citation omitted)). *But see Morse*, 551 U.S. at 422 (Alito, J., concurring) ("I join the opinion of the Court on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . .").

¹⁴⁹ *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

¹⁵⁰ *Id.*

¹⁵¹ See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011) (explaining that a California law allowed children to purchase video games as long as they had an adult's permission); *Am. Amusement Mach. Ass'n*, 244 F.3d at 573 (explaining that an Indianapolis ordinance allowed minors accompanied by a guardian to play violent video games). Even

material is still available for adults and for minors who gain adult permission to purchase it, so it does not implicate democratic values for the population at large. Furthermore, even if there were concerns of government overreaching, adults can guard against government indoctrination both as parents and as judges reviewing these laws.

Second, empirical research suggests that unfettered speech to children is in fact inconsistent with the democratic values underlying this theory. Studies on violent video games, for example, claim that they cause greater aggression in children.¹⁵² Whereas clear-headed rationality and critical thinking serve democratic ends, impulsive or ill-considered aggression is counterproductive for democratic values and functioning government. Admittedly, these studies were sufficiently ambiguous that the government's reliance on them failed strict scrutiny in *Brown*, in part because their real-world effects were deemed "minuscule."¹⁵³ Still, because overseeing speech addressed directly to children would not likely cause an "intellectual bubble" that conflicts with democratic self-government, the Court should allow a relaxed regulatory space for government decisionmaking in this prototypically legislative field.¹⁵⁴

Protecting children's expressive rights is more important for promoting democratic values than protecting speech to children. Though commentators correctly argue that complete censorship would undermine democratic self-government, that fear is overstated with respect to limited government regulations addressed solely to children's access.

the advertising regulation at issue in *Lorillard Tobacco*, which was extremely restrictive in Massachusetts's three largest cities, did not block tobacco advertising entirely in other parts of the state and through other means. See *supra* notes 33–38 and accompanying text (discussing *Lorillard Tobacco*).

¹⁵² See *supra* note 120 and accompanying text (summarizing studies on the effects of violent media on children). Craig A. Anderson and Karen E. Dill, two prominent video game researchers, assigned study participants to play either a violent or a nonviolent video game, and then measured the participants' aggression as they performed a competitive task involving pushing a button and sending a noise blast to an opponent. They found that participants who had played the violent game "delivered significantly longer noise blasts" than those who had played the nonviolent game, and concluded that "playing a violent video game appears to affect aggression by priming aggressive thoughts." Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772, 786, 788 (2000).

¹⁵³ *Brown*, 131 S. Ct. at 2739–42 (2011). Attempts to expand laboratory findings to more natural settings and larger populations in field, correlational, and longitudinal studies have yielded more ambiguous and controversial results. See HEINS, *supra* note 120, at 244–51.

¹⁵⁴ Cf. *supra* notes 121–23 and accompanying text (advancing a similar argument under the marketplace of ideas theory).

C. *Autonomy and Self-Fulfillment*

The third theory of the First Amendment focuses on the role of free speech in promoting individual autonomy, self-fulfillment, and self-realization.¹⁵⁵ Whereas the marketplace of ideas and democratic self-government rationales emphasize the instrumental benefits of free speech, this theory highlights the intrinsic value of speech “both as an end and as a means”¹⁵⁶ and underscores people’s rights to “develop their faculties.”¹⁵⁷ The autonomy principle animates the Supreme Court’s jurisprudence on free speech and children’s rights.¹⁵⁸ In Justice Harlan’s words, the right of free expression “comport[s] with the premise of individual dignity and choice upon which our political system rests.”¹⁵⁹

1. *Speech by Children*

The autonomy theory encompasses at least two related elements, both relevant to children’s free speech rights: the development of an individual’s faculties and the individual’s ability to control her destiny and reach her potential.¹⁶⁰

First, strong speech rights for children enable their intellectual development and therefore further their autonomy interests.¹⁶¹ As John Stuart Mill explained, “The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are . . . improved only by being used.”¹⁶² Psychological research has generally corroborated Mill’s assumptions by showing that exercising active free will and making decisions enable intellectual development and boost maturity and self-confidence.¹⁶³

¹⁵⁵ See FARBER, *supra* note 4, at 3–4 (explaining the basis of the self-realization theory).

¹⁵⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹⁵⁷ *Id.*

¹⁵⁸ *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1944); see also Garvey, *supra* note 100, at 347 (explaining the “*Tinker* Court’s emphasis on the importance of individuality” and “*Barnette*’s rejection of ‘national unity’ as a justification” (footnotes omitted)).

¹⁵⁹ *Cohen v. California*, 403 U.S. 15, 24 (1971); see also *Procurier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (“To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.”), *overruled in part* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

¹⁶⁰ Redish, *supra* note 89, at 593.

¹⁶¹ See Garvey, *supra* note 100, at 347 (arguing that the right to free speech “plays a vital role in the process of becoming an autonomous individual”).

¹⁶² MILL, *supra* note 95, at 105; see Winick, *supra* note 105, at 1764 (“An additional psychological benefit of choice is that, in general, having and making choices is developmentally beneficial.”).

¹⁶³ See *supra* notes 104–07 and accompanying text (summarizing studies on the benefits of children’s expression).

Second, due in part to these developmental benefits, protecting children's viewpoints and opinions enables them to reach their goals and respects their dignity. Creating and pursuing a plan, Mill suggested, requires that a person "employs all his faculties," including "observation to see, reasoning and judgment to foresee, activity to gather materials for decision," and "discrimination to decide."¹⁶⁴ By contrast, constraining what children can say by punishing them for their opinions, even childish ones, is likely to insult their dignity, inhibit them from reaching their goals, and betray society's "implicit belief in the worth of the individual."¹⁶⁵

Furthermore, by wounding children's sense of self-worth, suppression of speech implicates the legitimacy of government: When "the state cuts off particular citizens from participation in public discourse," it "negates its claim to democratic legitimacy with respect to such citizens."¹⁶⁶ A government that suppresses children's speech is likely to breed suspicion, resentment, and alienation, all of which run counter to autonomy and self-fulfillment. In turn, schools should generally protect even valueless children's speech; otherwise, even children's protected speech may be chilled, with implications for their individual self-fulfillment.¹⁶⁷

2. *Speech to Children*

Under the autonomy theory, there are at least two arguments to be made for allowing unrestricted speech to children, but the autonomy-related costs of such speech outweigh its benefits.

First, perhaps children's intellectual development and respect for their dignity require access even to controversial material. On this view, restricting children's rights to receive information can lead to obstinacy and unhappiness, damaging their dignity and self-esteem.¹⁶⁸ But the autonomy theory is more closely tied to what children have to say than what they see and hear, because it emphasizes practicing and improving an individual's developmental abilities and accepting that individual's opinions for their intrinsic worth. Furthermore, even if some supervision of children's access might implicate their self-respect, children are more likely to trust decisions made by the state

¹⁶⁴ MILL, *supra* note 95, at 106.

¹⁶⁵ Redish, *supra* note 89, at 601.

¹⁶⁶ Post, *supra* note 129, at 2368.

¹⁶⁷ See *supra* notes 143–47 and accompanying text (explaining the chilling effect in the context of the democratic self-government theory).

¹⁶⁸ See FARBER, *supra* note 4, at 3–4 (suggesting that "access to a wide range of ideas" helps people imagine "the full range of possibilities in their lives" and "express their perspectives").

on their behalf if they feel that their views count toward government decisionmaking.¹⁶⁹

Second, perhaps government regulation implicates the First Amendment autonomy interests of speakers like tobacco advertisers and video game manufacturers. Admittedly, widespread or complete censorship would indeed offend speakers' dignity and the intrinsic value of their ideas, even when expressed through media like advertisements or video games. But the limited regulations at issue in these cases pose a lesser problem under the self-fulfillment theory: Speakers' autonomy interests do not require a specific audience of children and would not be significantly impaired if speakers had to self-censor to some extent to avoid reaching children.¹⁷⁰

A relevant analogy can be found in the public forum doctrine, which splits government property into "quintessential" public forums, limited public forums, and nonpublic forums.¹⁷¹ In nonpublic forums and on private property, the Court uses a relaxed form of scrutiny for government regulation of speech, despite those speakers' general free speech interests.¹⁷² Thus, "the First Amendment does not guarantee one individual the right to press his views upon another individual who is unwilling to receive them."¹⁷³ Analogously, the limited

¹⁶⁹ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1971) ("[P]eople are more ready to accept decisions that go against them if they have a part in the decision-making process."); FARBER, *supra* note 4, at 6 (arguing that tolerance for people's opinions constitutes a "safety valve" that engenders political stability).

¹⁷⁰ See SAUNDERS, *supra* note 3, at 42 (arguing that speakers' autonomy interests do not require that they are able to "affect the lives of other people's children").

¹⁷¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). In quintessential public forums, "places which by long tradition or by government fiat have been devoted to assembly and debate," such as public streets and parks, the government faces the high burden of showing "that [any content-based] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 45. Reasonable content-neutral time, place, and manner regulations are also permitted. *Id.* The same standards apply to a limited public forum—public property designated by the state as a place for expressive activity—though the state may choose to close the forum rather than abide by such standards. *Id.* at 45–46. Finally, in nonpublic forums, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

¹⁷² See *Perry*, 460 U.S. at 53 (upholding an exclusive access policy in school mail facilities after finding them to be a nonpublic forum); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (finding no First Amendment right to picket in a privately owned shopping center); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("This Court has never held that a trespasser . . . may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.").

¹⁷³ Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 262 (citation omitted).

supervision of speech addressed to children through commercial avenues should not trigger strict scrutiny, because such regulations are sufficiently narrow to permit speakers to access most of the population.

More importantly, studies indicate that unsupervised speech to children may have costs relevant to children's autonomous decision-making that outweigh speakers' autonomy interests.¹⁷⁴ For example, the FDA found that tobacco companies intentionally increased the appeal of their advertisements to youth.¹⁷⁵ As a result, numerous researchers have found a link between tobacco advertising and children's cigarette use;¹⁷⁶ one famous 1991 study found that children as young as six almost universally recognized the Joe Camel logo.¹⁷⁷ Because children are so susceptible to media effects, reasonable government regulation of advertising where children are the audience would bolster rather than impair children's autonomous decision-making. A doctrine that allowed such regulation would reach results more aligned with the autonomy theory than did the *Central Hudson* test as implemented in *Lorillard Tobacco*.¹⁷⁸ Similarly, the possibility of sexual solicitations and sexual harassment online impedes children's ability to feel confident and secure as well as their ability to make decisions for themselves.¹⁷⁹

Current doctrine is inconsistent with the autonomy theory. Because of the importance of children's speech for their intellectual development and independent decisionmaking, and the potential dangers of unrestricted speech to children's autonomy and self-fulfillment, the Court should allow greater flexibility for children's speech than for speech to children.

¹⁷⁴ See *supra* notes 117–20 and accompanying text (summarizing studies on the effects of tobacco advertising, sexually explicit material, and violent media and video games on children).

¹⁷⁵ See SAUNDERS, *supra* note 3, at 213–14 (discussing the results of an FDA study).

¹⁷⁶ See *supra* note 117 and accompanying text (summarizing studies on the relationship between tobacco advertising and children's cigarette use).

¹⁷⁷ SAUNDERS, *supra* note 3, at 213–14.

¹⁷⁸ See *supra* notes 36–38 and accompanying text (explaining that the majority found that a Massachusetts regulation could not meet the *Central Hudson* test, even in light of further evidence).

¹⁷⁹ See *supra* notes 118–19 and accompanying text (summarizing studies that have found unwanted exposure to sexual content online to be associated with changes in adolescent attitudes and behaviors).

III

RETHINKING THE CHILD PARADOX

The concerns underlying the child paradox in First Amendment doctrine are reasonable. The Supreme Court wants to preserve parties' legitimate free speech rights, including those of advertisers and commercial vendors, and is concerned that widespread government censorship could reduce the adult population to what is fit for children. The Court also recognizes that children must have a safe learning environment in the classroom. Nevertheless, the Court overvalues adults' speech interests at the cost of the government's reasonable concerns about children's development, while discounting the value of children's own expression. Paradoxically, therefore, First Amendment doctrine risks thwarting children's growth into autonomous adults who are competent to participate in the marketplace and engage in democratic government.

Part III.A argues that when evaluating government regulation of speech aimed at children, the Court should grant greater deference to laws that regulate children's commercial access without affecting adults' access. Part III.B then argues that the Court should uphold stronger speech rights for children; specifically, the Court should interpret the *Tinker* substantial disruption test to apply more narrowly to speech on campus or speech targeting school grounds. In both cases, I argue that the Court should err on the side of children's interests, and that this doctrine would be more consistent with First Amendment values.

A. Deferring to Government Regulation of Speech to Children

First, the Supreme Court should recalibrate its doctrine around the legitimate state concern in children's development and recognize the importance of that development to the First Amendment. The Court currently applies intermediate scrutiny to laws targeting commercial speech but strict scrutiny to fully protected speech, regardless of the intended beneficiary of the law.¹⁸⁰ Instead, the Court should analyze narrow commercial restrictions regulating speech to children (like those at issue in *Brown*) using an intermediate, though still demanding, level of scrutiny, whether the speech qualifies as "commercial speech" or whether it is fully protected traditional speech. By contrast, expansive regulations that alter availability for adults who want to purchase the material, even if the laws aim to benefit children, should be subject to typical strict scrutiny.

¹⁸⁰ See *supra* note 34 and accompanying text (explaining the level of scrutiny applied to commercial speech).

In theory, even under strict scrutiny, the government could restrict speech to children if it could demonstrate a valid compelling purpose of protecting children. But strict scrutiny as applied by the Court is a nearly impossible burden for the government to meet. In *Brown*, the government argued that it could show a compelling interest by making “a predictive judgment that . . . a link [between violent video games and harm to minors] exists, based on competing psychological studies.”¹⁸¹ In dissent, Justice Breyer explained that he would have granted the government’s request.¹⁸² But, as Justice Scalia responded, this evidence was contested and inconclusive, and Justice Breyer’s approach therefore conflicted with typical strict scrutiny, which requires definitive rather than speculative evidence.¹⁸³ Indeed, part of the judiciary’s function is to check legislative excess and overreach. Courts cannot adequately perform this function if they defer to the legislature across the board.

But children are different. Because they are vulnerable and impressionable, the government often assumes a custodial and supervisory role in their lives.¹⁸⁴ Accordingly, First Amendment doctrine should also acknowledge the state’s concern for children’s health and development. Therefore, scrutiny should be relaxed when the legislature places a restriction on the commercial distribution of media directly to children, as in *Brown*. In such cases, the stakes are high: children’s development into functioning adults and full First Amendment participants. By contrast, regulating speech channeled directly to children is “no more than a modest restriction on expression.”¹⁸⁵ Such laws do not “*substantially* prevent[] the message from being communicated” and are “limited in scope, restricting expression in only narrowly defined circumstances.”¹⁸⁶ Even when the empirical evidence has not yet fully developed, relaxed scrutiny should let the govern-

¹⁸¹ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

¹⁸² See *id.* at 2770 (Breyer, J., dissenting) (explaining that he “would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children”).

¹⁸³ *Id.* at 2739 n.8 (arguing that strict scrutiny is not satisfied if it is unclear whether studies are “right or wrong”).

¹⁸⁴ See Dailey, *supra* note 107, at 2105 (“The state has long employed its *parens patriae* power to require that students attend school, to regulate their labor, to compel vaccinations, to impose curfews, and a host of other laws.”).

¹⁸⁵ *Brown*, 131 S. Ct. at 2766 (Breyer, J., dissenting) (noting that the law “prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help”).

¹⁸⁶ Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200 (1983) (arguing that one might expect the Court to “test these more modest viewpoint-based restrictions by less stringent standards”).

ment err on the side of protecting children from potentially harmful material, without unduly affecting the free speech rights of adult speakers.

The public forum doctrine, in which speakers' speech rights vary partially based on how their speech might affect their audience, provides precedent for an audience-based distinction in First Amendment law.¹⁸⁷ As the Supreme Court has explained, "no one has a right to press even 'good' ideas on an unwilling recipient."¹⁸⁸ The Court recognized the need to avoid "imposing upon a captive audience" when it upheld a municipal policy refusing "controversial" political advertising on a city transit system in *Lehman v. City of Shaker Heights*.¹⁸⁹ That logic also supports limiting children's access to controversial speech, given their impressionability.¹⁹⁰ As the empirical evidence on tobacco advertising shows, children's still-developing minds are likely to be particularly susceptible to media influence.¹⁹¹

Precedent for a child-based distinction can also be found elsewhere in the Court's jurisprudence. The Court has long recognized the state's custodial role in "children's socialization" and has allowed the government to require students to attend school and to compel them to receive vaccinations, among other limitations.¹⁹² Young women's abortion rights are limited, children have limited rights to firearm possession, and state action that might not violate the Establishment Clause for an adult audience might do so for children.¹⁹³ These restrictions are often justified by children's "special vulnerability."¹⁹⁴ My

¹⁸⁷ See *supra* notes 171–73 and accompanying text (explaining that speakers' rights vary depending on the type of forum in question).

¹⁸⁸ *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970)).

¹⁸⁹ 418 U.S. 298, 304 (1974); see also *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (upholding an ordinance that prohibited abortion protesters from picketing an abortion doctor's home, because the doctor was a "captive" audience to "objectionable" speech (citing *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 (1980))).

¹⁹⁰ See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1405 (2001) (explaining that "the degree of audience captivity varies" in part based on "whether children are likely to be included").

¹⁹¹ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992) (observing that solicitation of the "vulnerable," including children, can present "an appropriate target of regulation"); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 500 (explaining that speech may be regulated "if it is addressed to a 'captive audience' unable to avoid assaultive messages" (citation omitted)). *Pacifica* can also be read as a "captive audience" case. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1834 & n.194 (1992).

¹⁹² Dailey, *supra* note 107, at 2105.

¹⁹³ SAUNDERS, *supra* note 3, at 106–19.

¹⁹⁴ Dailey, *supra* note 107, at 2137.

proposal in this Note would constitute another instance of differential treatment for children based on that vulnerability.

There are obvious counterarguments to this proposal. The speech in question might not harm children, as Justice Scalia found in *Brown*; it might even benefit them, as Judge Posner argued in *Kendrick*; or speakers' countervailing speech rights might be more significant than protecting children's development. But the adjustment proposed here would address only regulations in which speech infringements are minimal, as compared with the state's substantial regulatory interests in free speech values and children's development. In such circumstances, First Amendment formalism should yield to rational conduct by the state.

B. Upholding Stronger Children's Speech Rights

The Supreme Court should also recalibrate its doctrine to ensure that children have greater free speech rights, because their self-expression has been found to be linked to their intellectual development and thus to First Amendment values. As explained in Part I, courts have stretched the student speech doctrine beyond the need for proper classroom decorum, as captured by the *Tinker* substantial disruption test. Courts have also upheld broad exercises of power by school officials over digital off-campus speech and in circumstances not meriting their alarm. But, as Justice Fortas recognized in upholding the *Tinker* protestors' "fundamental rights,"¹⁹⁵ strong speech rights are central to children's growth into effective participants in the marketplace of ideas, citizen-critics capable of democratic self-government, and autonomous and confident adults with a strong commitment to free speech and constitutional rights.

Nevertheless, children's expression can cause harm. Children can destroy teachers' reputations and can emotionally harass other children, particularly through the recent, concerning trend of "cyberbullying."¹⁹⁶ At their worst, even without intending to, children can even induce others to commit suicide.¹⁹⁷ "Poking fun at teachers and harassing other students" may not be "new conduct,"¹⁹⁸ but may simply be more public and accessible to adults than in the past. How-

¹⁹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹⁹⁶ See Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 51 (2005) (explaining that "cyberbullies" can be "offensive, boorish, and cruel" and can "disrupt classes, cause tension on campus, and interfere with our educational mission"); Papandrea, *supra* note 3, at 1037 (describing the problems of "cyber-bullying," "electronic aggression," "malicious rumors," and "humiliating or threatening speech").

¹⁹⁷ Dickerson, *supra* note 196, at 60–61 (describing the effects of cyberbullying on victims).

¹⁹⁸ Papandrea, *supra* note 3, at 1037.

ever, now that society recognizes the harmful potential of such speech, the Court's doctrine should not endorse it. The state often constrains children's decisionmaking in order to limit their ability to affect others. As an obvious example, children cannot vote. On this view, the government as educator similarly maintains a legitimate custodial interest in dissuading children's speech, like cyberbullying, that harms others.

But the Court recognized this problem as early as *Tinker*, and fashioned a test flexible enough to allow restriction of destructive speech, at least when it occurs on school grounds: Administrators may restrict students' speech when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,"¹⁹⁹ so long as they have a specific "reason to anticipate" a disturbance.²⁰⁰ On-campus bullying, by disturbing classmates and interrupting teachers' authority, substantially interferes with discipline. Moreover, although courts have historically ignored the second prong of *Tinker*—"invasion of the rights of others"²⁰¹—that prong has seen a recent revival in response to harassment within school.²⁰²

Importantly, the Court has consistently limited the *Tinker* line of cases to speech expressed on campus, because of the academic forum's unique need for decorum and teacher authority and because of children's ability to disrupt the learning environment.²⁰³ It would be a weak First Amendment that did not protect children's speech off campus given the benefits of self-expression, even granting the concomitant possibility of harassment.

The difficult question, then, is how to address digital speech that originates off campus but causes effects within school. One possible test would allow schools to regulate speech when its author has intentionally targeted his or her school,²⁰⁴ similar to the regulation of stu-

¹⁹⁹ *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 513.

²⁰² See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006) (holding constitutional a school's prohibition of T-shirts reading "HOMOSEXUALITY IS SHAMEFUL"), *vacated and remanded as moot*, 549 U.S. 1262 (2007). For further discussion of the alternative prong of *Tinker*, see Papandrea, *supra* note 3, at 1042–44.

²⁰³ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979) ("[T]he student is free to speak his mind when the school day ends."); Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140 (2003) (arguing that *Tinker* "implied that [children] have the ordinary complement of First Amendment rights outside [the schoolhouse] gates").

²⁰⁴ Cf. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 265 (2001) (arguing that

dents in a previous era who used school equipment to produce underground newspapers or physically brought them onto campus.²⁰⁵ Schools would be able to discipline students who have, for example, encouraged on-campus action as in *Doninger*, or who have teased schoolmates or school officials online, perhaps implicitly encouraging friends to do likewise. Admittedly, an intentional targeting test seems archaic and could be difficult to implement. For example, bullying within an online community of members of a given school or class could be viewed as either a school or private forum. Therefore, for workability, courts likely must resort either to a test that permits full control of the school environment, even when the speech originates off campus, or to a test that protects all speech from administrators' reach as long as it is not "said" within the school.

Restricting *Tinker* to on-campus speech or speech targeting campus would fail to address some legitimate safety concerns over off-campus harassment and cyberbullying. Still, other doctrines provide at least partial solutions for addressing off-campus speech.²⁰⁶ First, the government may regulate "true threats," which occur "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."²⁰⁷ Cyberbullying, whose primary harm is emotional, may not amount to a true threat of "violence" per se. But the doctrine does not require that the threatened act is likely to occur or that the speaker actually intend to follow through with violence. Intimidation—intentionally causing a *fear* of harm—is sufficient for a statement to be a true threat.²⁰⁸ Second, children may occasionally be subject to defamation suits for spreading "false harmful assertions"

intentionally downloading or accessing online material in school would be "analogous to a student bringing onto campus an 'underground' newspaper").

²⁰⁵ See, e.g., *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972) (emphasizing that students authored, published, and distributed a newspaper entirely "during out-of-school hours, and without using any materials or facilities owned or operated by the school system"); *supra* note 76 and accompanying text (describing other cases that distinguished between speech that was physically brought on campus and speech that was not).

²⁰⁶ *Calvert*, *supra* note 204, at 281; see also *Papandrea*, *supra* note 3, at 1100–01 (describing alternatives to punishing student speech).

²⁰⁷ *Virginia v. Black*, 538 U.S. 343, 344 (2003); *Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002) (finding that a student's suspension did not violate the First Amendment because his letter was a "true threat"); see also Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 184–85 (2003) (explaining that children can be subject to liability under the true threat doctrine).

²⁰⁸ *Black*, 538 U.S. at 344 (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992)).

about others;²⁰⁹ teachers and administrators have already filed successful civil suits against students for defamation.²¹⁰

Admittedly, true threats are a limited exception and defamation is a limited remedy; neither would completely solve the problem of hurtful off-campus speech. But erring on the side of overprotection of hurtful speech is more consistent with free speech values than underprotection, because of the importance of children's expression under First Amendment theory. This solution also focuses on enabling schools to function effectively during the school day. Erring on the side of underprotection by allowing schools to control children off campus and after hours could lead to a slippery slope of suppression of speech by school officials and chilling of protected speech.

The Court should more strongly protect children's speech by default and narrowly confine *Tinker's* substantial disruption test to on-campus or school-targeted communication. Children's self-expression is crucially important to their participation in the marketplace of ideas and democratic self-government as well as to their autonomy interests. Unless children act within the school environment (including by harassing or bullying their classmates or teachers), those First Amendment interests outweigh the government's interest in regulating the school environment. Instead, administrators' efforts should focus on education, communication, and school culture, all of which are more likely than suspensions and expulsions to teach children how to be mature First Amendment thinkers.²¹¹

CONCLUSION

By overvaluing speech to children and undervaluing speech by children, the courts have created a child paradox in First Amendment doctrine. On the one hand, in cases like *Reno v. ACLU*, *Lorillard Tobacco*, and *Brown*, adult speakers' free speech rights have trumped concerns about children's development. On the other hand, as the

²⁰⁹ Martha McCarthy, *Cyberspeech Controversies in the Third Circuit*, 258 EDUC. L. REP. 1, 13 (2010).

²¹⁰ Tuneski, *supra* note 207, at 185 (noting that a civil suit resulted in a \$500,000 damages award to be paid by the student to his former math teacher in *J.S. ex rel. H.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002)).

²¹¹ See Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMENDMENT L. REV. 210, 248–49 (2009) (suggesting that schools contact parents or police when they have concerns about students' speech); Kathleen Conn, *The Third Circuit En Banc Decisions on Out-of-School Student Speech: Analysis and Recommendations*, 270 EDUC. L. REP. 389, 406–07 (2011) (recommending modifying school culture as "the most effective deterrent to student misconduct"); Papandrea, *supra* note 3, at 1100 (recommending counseling or contacting parents or police as appropriate solutions).

Court has enable schools to stretch their regulatory arm ever further in *Fraser*, *Kuhlmeier*, and *Morse*, children's own speech rights have fallen by the wayside. The First Amendment should protect children's autonomy interests and our democracy's vibrant future. Current doctrine, however, does the opposite: It infantilizes children by suppressing their speech, it threatens their welfare by enabling open access to them, and it potentially debilitates a future generation of citizen-critics.

But the doctrine is not beyond repair. The Supreme Court should make two adjustments that reflect the importance of children's development to the theories behind the Amendment: It should evaluate limited government regulations on children's commercial access with a lower level of scrutiny than more widespread restrictions, and it should more strongly protect children's speech, especially when expressed off campus. Taken together, these proposals would restore a sound balance to the doctrine. Children's expression is crucial to their development, and that development furthers the purposes of free speech. Their ability to understand and appreciate other views and opinions is also important; but until they reach the age of majority, the government may help shape a safe space in which they can learn, explore, and develop the characteristics needed to become mature and critical adult actors. This modified doctrine thus promises an approach to free speech more consistent with the purposes of the First Amendment.