Punishment & Student Speech: Straining the Reach of the First Amendment

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NOTE

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INTRODUCTION

On April 24, 2007, Avery Doninger referred to officials at her high school as “douchebags” on her private blog.¹ Finding little humor in the reference, the school officials responded by barsing Doninger’s run for a position on the student council.² Doninger challenged the school’s decision, alleging that the First Amendment protected her speech and limited the extent of her punishment.³ The U.S. District Court for the District of Connecticut rejected both claims after finding that the school could suppress her “uncivil and offensive” speech⁴ and that the “scope of . . . punishment lay within [the school’s] discretion.”⁵ In a panel opinion joined by then-Judge Sotomayor, the Second Circuit upheld the lower court’s ruling that the speech was unprotected but declined to address the scope of the school officials’ discretion to punish Doninger.⁶ Instead, the court noted that, “given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.”⁷

The “constitutional concerns” referenced in the Second Circuit’s opinion present novel questions about the First Amendment’s application to student speech. Although the Supreme Court has emphasized consistently that school officials deserve

² Id. at 207–08.
³ Id. at 211.
⁴ Id. at 216.
⁵ Id. at 215.
⁶ Doninger v. Niehoff, 527 F.3d 41, 49–50, 53 (2d Cir. 2008).
⁷ Id. at 53 (citing Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007)).
deference in regulating student speech, the Court has not decided whether deference extends to a school’s choice of punishment. Supreme Court cases evaluating student speech under the First Amendment have risen and fallen on the suppression issue; that is, the Court has ended its inquiry after determining whether the speech was protected or not. Recent Court of Appeals decisions, including Doninger, have gone beyond the Supreme Court’s precedent and created uncertainty about whether courts can use the First Amendment to limit the extent to which schools punish students for their unprotected speech. These cases not only signal an unprecedented level of judicial scrutiny, but also invite a reexamination of the degree of deference courts owe school officials.

Punishment implicates First Amendment values when it induces self-censorship. Unwanted deterrence of valid speech grows when the scope of First Amendment protection is unclear, as is often the case in school settings where the margin of protected speech is particularly blurred. Although the Supreme Court has not examined the issue of punishment in the

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8. See, e.g., Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)) (ruling that otherwise protected speech received abridged protections in a school setting); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988) (upholding principal’s decision to delete student articles from school newspaper because “school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner”).

9. See, e.g., Morse, 551 U.S. at 397 (concluding First Amendment analysis after determining that school could suppress student speech); Hazelwood, 484 U.S. at 273–74 (same); Fraser, 478 U.S. at 685 (same).

10. Doninger, 527 F.3d at 53; Wisniewski, 494 F.3d at 35 (reviewing disciplinary action against student for allegedly threatening speech); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001) (invalidating school discipline of student speech without specifying level of scrutiny).

11. Dissenting in Alexander v. United States, Justice Kennedy commented that “[t]here can be little doubt that regulation and punishment of certain classes of unprotected speech have implications for other speech that is close to the proscribed line, speech which is entitled to protections of the First Amendment.” 509 U.S. 544, 565 (1993) (Kennedy, J., dissenting).

context of student speech, it has engaged in analogous inquiries in two other areas of First Amendment jurisprudence: defamation and obscenity. In defamation actions, the Court has held that the First Amendment bars the imposition of punitive damages in some circumstances because an award of punitive damages may cause media self-censorship.13 In obscenity actions, however, the Court has declined to use the First Amendment to limit liability.14 It remains to be seen where the Court will place student speech between the divergent, yet not necessarily conflicting, strands of defamation and obscenity cases. This Note argues that courts should follow the Supreme Court’s reasoning in obscenity cases by refusing to scrutinize the extent of school punishment of unprotected speech.

Part I examines the two lines of cases—defamation and obscenity—in which courts have assessed whether the First Amendment limits the magnitude of punishment of unprotected speech. This Part then highlights recent lower court decisions that note the constitutional concerns associated with punishment of student speech. Part II considers whether courts should adopt intermediate scrutiny or a form of rational basis review in examining school disciplinary measures under the First Amendment. Finally, Part III argues that courts should not construe the First Amendment to limit the extent to which a school may punish unprotected student speech.

I. THE FIRST AMENDMENT FRAMEWORK FOR PUNISHMENT

A. Defamation

The Supreme Court has used the First Amendment to limit punishment of unprotected speech in defamation actions. Defamation precedent for much of the last two centuries permitted awards of punitive damages.15 In the 1971 decision

13. See infra Part I.A.
14. See infra Part I.B.
Rosenbloom v. Metromedia, Inc., however, the Supreme Court began to shift its approach to damages.16 There, the Court considered whether the evidentiary standard announced in New York Times v. Sullivan17 should extend to private individuals involved in matters of public concern.18 A majority refused to extend the New York Times standard, and the Court splintered on the issue of standards of proof required for “public figures.”19 This divergence prompted debate over the extent of damages available in defamation actions. Justices Stewart and Marshall urged the Court to adopt a negligence standard for actual damages proved, but to bar punitive damages entirely.20 Justice Harlan disagreed, deeming punitive damages constitutionally permissible to the extent they had a “reasonable and purposeful relationship” to the “actual harm done.”21

Three years after Rosenbloom, the Supreme Court decided Gertz v. Welch and changed the contours of permissible defamation damages, adopting Justices Stewart and Marshall’s view disallowing punitive damages.22 In Gertz, the Court considered the damages available to a private individual in a defamation suit against a magazine publisher. Because the heightened evidentiary standard of New York Times did not apply to private plaintiffs, the Court cautioned against the discretionary power of juries “selectively to punish expressions of unpopular views.”23 The Court stressed that such punishment would lead to media self-censorship, and held that, on a showing of negligence alone, a private plaintiff could recover compensatory damages but not punitive damages.24 The Gertz ban on punitive damages in some

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18. Rosenbloom, 403 U.S. at 43–44.
19. Id. at 29.
20. Id. at 82–86 (Marshall, J., dissenting).
21. Id. at 77 (Harlan, J., dissenting).
23. Id. at 350.
24. Id. at 347–49.
circumstances remains binding today, although the Court later limited it to matters involving a public concern.

B. Obscenity

By contrast, the Supreme Court has consistently declined to limit the extent of punishment for obscene materials. In Alexander v. United States, for example, the Court considered whether stiff punishment of obscenity under the Racketeer Influenced and Corrupt Practices Act (RICO) implicated the First Amendment. The Court acknowledged that RICO’s large forfeiture provision may lead “cautious booksellers to . . . remove marginally protected materials from their shelves out of fear that those materials could be found obscene and thus subject them to forfeiture.” But the Court rejected the First Amendment chilling argument, ruling that the legitimate goal of curtailing obscenity prevailed over its incidental self-censorship effects.

The punishment of obscenity, however, has not escaped controversy on the Court. Justice Kennedy dissented in Alexander to argue that RICO’s forfeiture provision violated the First Amendment. Noting that “the government must use measures that are sensitive to First Amendment concerns in . . . punishing speech,” Justice Kennedy took issue with RICO’s forfeiture provision because it authorized the government to shut down bookstores that sold otherwise protected speech after finding a single obscene article. In his view, the severity of RICO’s penalties induced the “evils” of state censorship and self-censorship beyond constitutionally permissible levels. Justice Kennedy concluded that the

29. Id. at 555–56.
30. Id. at 556.
31. Id. at 574 (Kennedy, J., dissenting) (citations omitted).
32. Id. at 572.
“censorial cast” of the forfeiture provision amounted in substance to a prior restraint that violated the First Amendment.\(^3\)

Sixteen years before Alexander, Justice Stevens twice departed from Supreme Court precedent to argue that the First Amendment should limit the punishment of obscenity. In Marks v. United States, the Court held that the three-part Miller v. California\(^3\) test for obscenity could not be applied retroactively to the detriment of the defendant.\(^3\) Justice Stevens issued a separate opinion expressing his view that criminal prosecution of obscenity impermissibly conflicts with First Amendment values.\(^3\) He dissented from a criminal conviction on similar grounds in a contemporaneous obscenity case, Smith v. United States.\(^3\) Citing the numerous problems inherent in defining obscenity, Justice Stevens argued again that sexually explicit content should be civilly—not criminally—regulated.\(^3\) Justice Stevens failed, however, to persuade a majority of Justices. The Court affirmed the criminal punishment of obscene speech,\(^3\) a standard that remains in effect.\(^3\)

C. School Speech

Without any controlling Supreme Court precedent, lower federal courts have drawn their own conclusions about the extent to which the First Amendment limits punishment of student speech. In Ponce v. Socorro Independent District, the Fifth Circuit heard a student’s First Amendment challenge to his high school’s decision to expel him because he had written in his journal about his plans for a “Columbine-style” attack against the school.\(^3\) The court held that the writings qualified as threatening speech unprotected by the First Amendment

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33. Id. at 566, 575.
34. 413 U.S. 15, 24 (1973).
36. Id. at 198 (Stevens, J., concurring in part and dissenting in part).
38. Id.
39. Id. at 309 (majority opinion).
41. 508 F.3d 765, 766 (5th Cir. 2007).
and declined to consider whether the punishment was excessive.\footnote{42} Rather, the court reasoned:

Because we conclude that no constitutional violation has occurred, our inquiry ends here. Our role is to enforce constitutional rights, not “to set aside decisions of school administrators which [we] may view as lacking a basis in wisdom or compassion.” Because the journal’s threatening language is not protected by the First Amendment, [the school district’s] disciplinary action against [the student] violated no protected right.\footnote{43}

The Eighth Circuit followed a similar rationale in \textit{Doe v. Pulaski County Special School District}.\footnote{44} There, a middle school student who made vulgar comments expressing a desire to “molest, rape, and murder” his ex-girlfriend challenged his expulsion on First Amendment grounds.\footnote{45} As in \textit{Ponce}, the court held that this language constituted a true threat, and that the school’s disciplinary action did not violate the student’s First Amendment rights.\footnote{46} The court also noted that the expulsion appeared “unnecessarily harsh.”\footnote{47} Nevertheless, the court declined to review the school’s decision, explaining that the court lacked authority to assess the “wisdom” of a particular punishment.\footnote{48}

Recent appellate cases have raised new questions about the extent of punishment the First Amendment allows. The Second Circuit’s decision in \textit{Doninger v. Niehoff} marks the latest example. To support the dicta that punishment of student speech may raise “constitutional concerns,” \textit{Doninger} cited a 2007 decision from the same circuit, \textit{Wisniewski v. Board of Education of the Weedsport Central School District}.\footnote{49} Like \textit{Doninger}, \textit{Wisniewski} involved school discipline in response to a student’s off-campus expression. The school district suspended Martin Wisniewski after he displayed an instant message icon to other students that contained threats against a teacher,\footnote{50} and the Second Cir-
cuit upheld the school’s punishment.\textsuperscript{51} Wisniewski added that, because the student’s parents failed to challenge the extent of the school’s punishment specifically, the court “need not determine whether such a challenge would have to be grounded on the First Amendment itself or the substantive component of the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{52}

In LaVine v. Blaine School District, a student specifically challenged the extent his school punished him for his unprotected speech—the kind of challenge that was never pled in Wisniewski—and the Ninth Circuit Court of Appeals invalidated part of the school’s punishment.\textsuperscript{53} After James LaVine gave a violent poem to a teacher, LaVine’s high school expelled him temporarily and documented the expulsion with a letter in his school file. LaVine claimed his school’s expulsion and documentation decisions violated his First Amendment rights.\textsuperscript{54} The Ninth Circuit ruled that the First Amendment permitted the expulsion because the school acted with sufficient grounds to avert perceived potential harm.\textsuperscript{55} But the Ninth Circuit found no similar grounds for the placement of the letter in LaVine’s file and, with sparse reasoning, held that “it went beyond the school’s legitimate documentation needs.”\textsuperscript{56} The court did not, however, specify the level of scrutiny it applied to the school’s disciplinary decision.

Doninger, Wisniewski, and LaVine raise striking questions. They suggest that the extent to which a school punishes a student for his unprotected speech may raise constitutional concerns under the First and Fourteenth Amendments. The remainder of this Note explores how these constitutional guarantees should be applied to student speech.

II. ILL-FITTING LEVELS OF SCRUTINY: INTERMEDIATE SCRUTINY AND RATIONAL BASIS

Questions about the extent of punishment enter a First Amendment analysis only in particular settings. The relevant

\textsuperscript{51} Id. at 35.
\textsuperscript{52} Id. at 40.
\textsuperscript{53} 257 F.3d 981 (9th Cir. 2001).
\textsuperscript{54} Id. at 986.
\textsuperscript{55} Id. at 990–91.
\textsuperscript{56} Id. at 992.
speech must be unprotected because protected speech cannot be punished.\textsuperscript{57} Courts confronted with a challenge to punishment of unprotected student speech have several potential constitutional tools to evaluate the claim. The First Amendment itself is one of these potential tools, as courts may apply the First Amendment to punishment of student speech through intermediate scrutiny or a form of rational basis review.\textsuperscript{58} This Part explores both of these levels of scrutiny and concludes that neither provides a satisfactory means to assess punishment of unprotected student speech.\textsuperscript{59}

\section*{A. Intermediate Scrutiny}

Courts may apply intermediate scrutiny to punishment of student speech. Under intermediate scrutiny, a court will uphold a law if it advances some important government interest and is reasonably well tailored to that interest.\textsuperscript{60} Beginning in the 1980s, federal courts gravitated toward intermediate scrutiny as the default level of scrutiny for various strands of First Amendment protections.\textsuperscript{61}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{57} Punishment of speech is distinct from suppression of speech. See Emily Gold Waldman, \textit{Regulating Student Speech: Suppression Versus Punishment}, 85 IND. L.J. 1 (forthcoming 2010). Speech suppression enjoins the speech as expressed, whereas punishment of speech occurs after the speech has occurred. For instance, an injunction prohibits speech itself ex ante, and thus constitutes a suppression of speech. See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 258, 266–67 (1988) (upholding school officials’ decision to cut “vulgar and offensive terms” from a school newspaper before it was published). When a speaker violates an injunction or engages in unprotected speech, however, the question of punishment arises.
\item \textsuperscript{58} The two other First Amendment levels of scrutiny—ad hoc balancing and strict scrutiny—can be immediately rejected for parallel reasons. A balancing test would be inappropriate because it grants judges too much authority to second-guess the expertise and discretion of school officials. Moreover, as ad hoc balancing tests involve the weighing of interests in particular cases, strong public opinion may determine the outcome of the test. See, e.g., Dennis v. United States, 341 U.S. 494, 509–10 (1951) (applying ad hoc balancing test to uphold defendants’ convictions for trying to organize a communist political party). Strict scrutiny is similarly inappropriate because it would forbid the government from restricting speech that it has the constitutional prerogative to restrict. Thus, a balancing test and strict scrutiny are not plausible.
\item \textsuperscript{59} Although these levels of scrutiny developed in Equal Protection cases, the Supreme Court has incorporated each of them into the First Amendment arena. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 661–62 (1994) (remanding for lower court to apply intermediate scrutiny to content-neutral television programming regulations); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (applying rational basis review to nude dancing restrictions).
\item \textsuperscript{60} Ashutosh Bhagwat, \textit{The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence}, 2007 U. ILL. L. REV. 783, 801.
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Amendment claims. And in Gertz v. Welch, concerns about self-censorship led the Supreme Court to examine defamation awards with heightened scrutiny. There, the Court interpreted the First Amendment to require that “state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.” The Court thus indicated that some level of scrutiny less deferential than strict scrutiny, but more rigorous than rational basis review, can be applied to punishment of unprotected speech.

But intermediate scrutiny remains ill-suited to review the extent of school discipline under the First Amendment. Courts have neither explicitly nor consistently extended intermediate scrutiny beyond restrictions on protected forms of speech. Applying intermediate scrutiny to the punishment of unprotected student speech—by definition, speech of less constitutional value—would thus be inconsistent with the entire thrust of First Amendment jurisprudence.

Further, applying intermediate scrutiny to the punishment of unprotected speech would create an unmanageable standard. Lower courts have shirked the Supreme Court’s guidance in applying intermediate scrutiny. Professor Ashutosh Bhagwat has reported, for example, that although no challenge to regulation of a sexually oriented business has succeeded in the Supreme Court, 35.3% of such challenges succeed in the courts of appeals. The most plausible explanation for the divergence of lower courts from the Supreme Court’s guidance is that intermediate scrutiny implicitly forces courts to balance the asserted policy against constitutional interests. Balancing tests breed disorder among courts because of their inherent uncertainty and because lower courts have shown a “systematic inability to

61. Id. at 801–02 (citing Turner, 512 U.S. 622; Barnes, 501 U.S. at 566; Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–55 (1986)).
63. Id. at 349.
64. See Bhagwat, supra note 60, at 818. Professor Bhagwat also documented divergence between the lower courts and the Supreme Court in symbolic speech and in time, place, and manner cases. Id.
calibrate their constitutional analysis to the relative strengths of the speech and regulatory interests involved.”

The application of intermediate scrutiny to the discipline of unprotected student speech will produce a similar host of difficult and opaque questions of application. School officials will have to account for the uncertainty of whether their disciplinary decisions involving student speech “substantially relate” to their goal. Given the evolving forms of student speech and the expertise of school officials in meting out discipline to advance school goals, the discrepancies among federal courts will likely multiply. In short, applying intermediate scrutiny to the extent school officials punish unprotected student speech runs counter to the Supreme Court’s guidance and would undermine any coherence imparted by such a level of scrutiny.

B. Rational Basis Review

Rational basis review affords another means to review the extent of punishment. Professor Emily Gold Waldman has argued in favor of implementing a First Amendment “reasonableness” backstop against excessive punishment of student speech. Other scholars have advocated applying rational basis review to “minimally valued speech.” A reasonableness standard would likely resemble rational basis review in the Equal Protection arena. The rational basis standard is immensely deferential, requiring only that the governmental action be “rationally related” to a “legitimate” government interest.

66. Bhagwat, supra note 60, at 820.
68. Waldman, supra note 57 (manuscript at 34). Professor Waldman argues that courts should apply a reasonableness standard to “rectify any abuses of discretion.” Id. (manuscript at 35).
69. See Edward J. Eberle, The Architecture of First Amendment Free Speech 9 (Roger Williams Univ. Sch. of Law Faculty Papers, Paper 14, 2007). Unprotected speech has no necessary “minimal” value. Yet, Justice Scalia has asserted that even unprotected speech implicates First Amendment interests, writing that “constitutionally proscribable content [does not comprise] categories of speech entirely invisible to the Constitution, so that they may be made vehicles for content discrimination.” R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (emphasis added) (citations omitted). Hence, a state actor’s treatment of unprotected speech may warrant some degree of judicial scrutiny.
rational basis is appealing in that it provides a baseline of scrutiny that courts have experience applying.\textsuperscript{71}

Despite its benefits, rational basis review of the extent of school punishment would have fatal drawbacks. The standard provides less clarity in application than its plain language suggests.\textsuperscript{72} Laws subject to rational basis review under the Equal Protection Clause of the Fourteenth Amendment will almost certainly be upheld.\textsuperscript{73} But courts have increasingly taken license to strike down laws that should easily survive the standard form of rational basis review.\textsuperscript{74} Some of these laws may have

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\textsuperscript{71} Rational basis review has found some support in First Amendment cases reviewing the extent of punishment of unprotected speech. Gertz declared punitive damages invalid under the First Amendment because “punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.” Gertz v. Welch, 418 U.S. 323, 350 (1974). In the school speech context, the Ninth Circuit upheld an emergency expulsion against First Amendment challenge because it was a “reasonable” response to the student’s threatening speech. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 990 (9th Cir. 2001). Hence, in both examples, the courts required a baseline level of scrutiny that resembled rational basis review.

\textsuperscript{72} In his majority opinion in \textit{U.S. Railroad Retirement Board v. Fritz}, Justice Rehnquist concluded that even

> [t]he most arrogant legal scholar would not claim that all . . . cases applied a uniform or consistent [rational basis] test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion . . . in any of the other cases referred to in this opinion and in the dissenting opinion.

449 U.S. 166, 176 n.10 (1980). Clark Neily has characterized rational basis review as “nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor.” Clark Neily, \textit{No Such Thing: Litigating Under the Rational Basis Test}, 1 N.Y.U. J.L. & LIBERTY 897, 897 (2008). Neily indict rational basis review further in reference to the “Supreme Court’s record of blatantly misapplying it in order to achieve preferred outcomes.” Id. at 909.

\textsuperscript{73} See Note, \textit{Rational Reviews, Irrational Results}, 84 TEX. L. REV. 801, 802 (2006) (stating that the “government’s interests will almost always prevail over the individual’s” in rational basis review).

\textsuperscript{74} See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (rational basis review applied to invalidate ordinance that prevented operation of a center for the mentally disabled); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618–23 (1985) (invalidating New Mexico tax preference that differentiated between short-term and long-term residents); Williams v. Vermont, 472 U.S. 14, 27 (1985) (rejecting a tax burdening out-of-state car buyers); Met. Life Ins. Co. v. Ward, 470 U.S. 869, 882–83 (1985) (condemning state law under rational basis review that tried to prompt growth of in-state insurance industry with lower tax rates than those imposed on out-of-state companies); U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating under rational basis review federal law that restricted food stamps to
been unwise or deserving of stricter review. Courts, however, have cloaked these rulings in rational basis language such that ample uncertainty exists as to whether a law will receive ultra-deferential rational basis review or the so-called rational basis review “with bite.”

The danger of an unclear or “discretionary” level of scrutiny is heightened when applied to the punishment of unprotected student speech. Rational basis review would not guard against school officials’ abuse of disciplinary discretion. By definition, schools will always have a “legitimate government interest” in punishing unprotected speech. The only remaining legal question would be whether the degree of punishment bears a “rational relationship” to preventing the speech. But in rational basis review, courts permit over- and under-inclusive means. Thus, excessive punishment would always satisfy this standard because it would deter the speech at issue, even if the punishment deterred protected speech as well.


76. In U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980), the Supreme Court explained that any conceivable legitimate purpose qualifies under rational basis review. The Court stated: “Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’ . . . .” Id. (citations omitted). It follows that when student speech is unprotected because it jeopardizes the educational or protective mission of schools, school officials have at least one “conceivable legitimate purpose” for punishing the offending student.

77. See Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that a state law, if it possesses a reasonable basis, is not unconstitutional “simply because the [law] ‘is not made with mathematical nicety or because in practice it results in some inequality’”); see also Vance v. Bradley, 440 U.S. 93, 106–09 (1979) (applying rational basis and upholding federal law mandating retirement at age sixty for Foreign Service Retirement System participants even though the scheme would be both overinclusive and underinclusive, in part because “it is in turn related to the secondary objective of legislative convenience”).
Additionally, rational basis review would not generate useful precedent. The degree that punishment relates to a goal fundamentally differs from the means-ends equal protection inquiry. In equal protection cases, the particular type of restraint must bear a rational relationship with the action’s goal. In evaluating school discipline, however, a court will instead engage in the more arbitrary task of assessing the degree of punishment. For, whatever precedential import rational basis review supplies, it does not supply a meaningful metric to evaluate whether a particular punishment was too heavy, too light, or just right.\textsuperscript{78} What rational basis does provide is cover for a court to insert itself into school officials’ decision making processes by manipulating an ambiguous level of scrutiny.

Professor Waldman has argued that courts should distinguish between speech that is entirely unprotected by the First Amendment and student speech that schools can only suppress under the ratcheted-down First Amendment guarantees afforded to students in schools.\textsuperscript{79} According to this view, courts should add a distinct layer of scrutiny to punishment of speech that would otherwise be protected outside of schools.\textsuperscript{80} This argument is problematic for a few reasons. First, federal and state law narrowly circumscribes school officials’ disciplinary discretion.\textsuperscript{81} A compensatory First Amendment standard thus constitutes a cure in search of a disease. Worse, compensating for the added deference schools have to suppress speech with less deference to school disciplinary measures undermines the grant of deference altogether. Instead, it will push courts down the treacherous path of using the First Amendment to limit school officials’ discretion to punish expression that the First Amendment simply does not protect.\textsuperscript{82}

\textsuperscript{78} The Fifth Circuit commented on the fundamental arbitrariness of such review, stating that, “[w]e think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks.” Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990) (citations omitted).

\textsuperscript{79} Waldman, supra note 57 (manuscript at 38).

\textsuperscript{80} Id.

\textsuperscript{81} See infra Part III.

\textsuperscript{82} Professor Waldman relies on the idea that some properly suppressed student speech is protected outside of the school setting. Waldman, supra note 57 (manuscript at 38). This argument glosses over the Supreme Court’s efforts to craft setting-specific First Amendment precedent. The First Amendment does not
III. TAKING THE FIRST AMENDMENT OUT OF THE PICTURE

To be sure, students deserve legal recourse from truly excessive punishment. But this concern does not justify erroneously construing the First Amendment to review the degree to which school officials discipline students for engaging in unprotected speech. The deference courts traditionally grant to school officials’ speech suppression suggests that an analysis of discipline based on the First Amendment will be unworkable. As the obscenity line of cases demonstrates, concerns with self-censorship are not sufficiently compelling to upset deference to disciplinary authorities. Moreover, existing procedural constraints and state law provide sufficient limits on the extent to which a school can punish students, thus obviating the need to create a novel level of scrutiny under the First Amendment.

A. Deference Affirmed

Although the Supreme Court has not declared the extent to which schools can punish student speech, the Court has clearly indicated that school officials’ decisions deserve ample deference. School administrators have both the expertise and duty to protect students from abuse and to maintain a hospitable educational environment. Recognizing this deference, the Supreme Court has directed that “[i]t is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”

The deference owed to school officials calls into question the propriety of First Amendment review of school discipline. The Supreme Court has denied that it has authority to review the ex-

afford identical protections in a courtroom, a city street, on network television, or in schools. That some speech is protected in one setting but not another is a product of responsive judicial interpretation and does not justify overextending the First Amendment to compensate for these differences.

83. See supra Part II.
85. See Waldman, supra note 57 (manuscript at 10) (noting that “all of the Court’s recognized rationales for reducing students’ free speech rights” come down to “protection and education”).
86. Wood, 420 U.S. at 326.
tent of punishment in criminal obscenity cases, in which the punishment was far harsher than that available to school officials.\textsuperscript{87} Furthermore, the First Amendment rights of adults engaged in pornographic speech are, in theory, co-extensive with the rights of adults engaged in fully valued forms of speech.\textsuperscript{88} Hence, in the school context, where school officials deserve added deference but can only impose less severe forms of discipline, the case for declining to review the extent of discipline under the First Amendment is even stronger than in the obscenity context.

Federal courts have affirmed the deference owed to school officials by wisely ending the First Amendment inquiry after determining that the speech was unprotected.\textsuperscript{89} And a district court declined to extend the Wisniewski dicta to limit discipline of unprotected student speech because the court in Wisniewski found “no support for the proposition that [the student’s] suspension was unconstitutionally severe.”\textsuperscript{90} Indeed, Wisniewski, Doninger, and the First Amendment provide no support for judicial scrutiny of the extent to which school officials punish unprotected student speech.

\textsuperscript{87} See Alexander v. United States, 509 U.S. 544, 556 (1993) (holding that the “chilling” effect of harsh punishment of obscene materials does not violate the First Amendment).

\textsuperscript{88} See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (holding that content-based regulations are presumptively invalid). Despite the presumption against content-based regulations, the Supreme Court has granted greater latitude to the regulation of sexually oriented speech that falls below the Miller obscenity threshold and is therefore protected by the First Amendment. See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding Indiana ban on nude dancing); Young v. American Mini-Theaters, Inc., 427 U.S. 50, 70–71 (1976) (upholding city ordinance excluding adult theaters from operating in certain areas). These opinions, however, emphasize the secondary effects of sexually oriented speech and the Court has not deferred to regulation of sexually oriented speech nearly to the extent it defers to the regulation of student speech. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 207 (1975) (holding ordinance unconstitutional that barred drive-in movie theaters from showing motion pictures containing uncovered “buttocks . . . or breasts”).

\textsuperscript{89} See, e.g., Ponce v. Socorro Indep. Dist., 508 F.3d 765, 772 (5th Cir. 2007); Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 626–27 (8th Cir. 2002).

\textsuperscript{90} Cuff v. Valley Cent. Sch. Dist., 559 F. Supp. 2d 415, 422–23 (S.D.N.Y. 2008). On review, the Second Circuit vacated the district court’s grant of summary judgment for the school because the court could not find that “it was reasonable as a matter of law to foresee a material and substantial disruption to the school environment.” Cuff v. Valley Cent. Sch. Dist., 341 Fed. App’x 692, 693 (2d Cir. 2009).
B. Self-Censorship in Context

The principal First Amendment danger of harsh punishment is self-censorship.91 Yet, as in Alexander v. United States, the Court has brooked self-censorship resulting from harsh sanctions of expressive content when the government has a legitimate interest in punishment. School officials have a legitimate interest in maintaining a protective and educational environment and can punish unprotected student speech to cultivate such an environment. The chilling argument thus does not justify review of school discipline under the First Amendment.

Obscenity and student speech also can be distinguished from the Supreme Court’s defamation precedent barring punitive damages. Defamation is a tort action involving “private” wrongs; obscenity and unprotected student speech constitute “public” wrongs.92 This structural distinction affects the nature of punishment for legally liable speech: State actors punish obscenity and student speech by imposing sanctions, while private defamation plaintiffs receive awards of priced speech.93 Through tort law’s remedies jurisprudence, courts can meaningfully review whether an award of damages exceeded a reasonable price for the plaintiff’s losses. Courts have no comparable metric to measure whether punishment of obscenity and unprotected student speech constituted appropriate sanctions.94 Thus, courts have rejected use of the First Amendment to limit the extent of obscenity punishment,95 as they should with unprotected student speech.

92. Gertz expressly allowed punitive damages when a plaintiff met the evidentiary requisites established by New York Times v. Sullivan up to the amount of the injury caused by the plaintiff, but found punitive damages problematic to the extent “they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” Gertz, 418 U.S. at 350 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)). Although individuals suffer from obscenity and disruptive student speech, punishment in these contexts is not imposed by or on behalf of a private victim.
94. Criminal law also uses a proportionality principle, such that punishment ideally should be proportionate to the culpability of the defendant and the seriousness of his “public” wrong. See Kenneth W. Simons, The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives, 17 WIDENER L.J. 719, 720–21 (2008).
C. Due Process Limits on Disciplinary Discretion

Courts have been willing to grant school disciplinary decisions wide deference partly because students retain due process protections that limit the extent schools can punish unprotected student speech.

1. Procedural Due Process Protections

Although not as thorough as the due process protections afforded to criminal defendants, students have procedural due process rights under the Fourteenth Amendment. The procedural due process guarantee encompasses the right of students to have fair warning of prohibited conduct. Moreover, the Supreme Court has interpreted the Due Process Clause to afford students facing temporary suspensions the right to receive oral or written notice of the charges against them and, if the student denies the charges, an explanation of the evidence held by the school officials as well as an opportunity to present their side of the story. For suspensions of longer than ten days or expulsions, students are entitled to more formal procedures. Depending on the state and court, these procedures can be as extensive as a full adversarial hearing. Finally, due process requires that school officials adhere to their own disciplinary codes, thus decreasing the likelihood that abuse of disciplinary authority will lack legal remedy.

98. Id. at 584.
100. See C.J. v. Sch. Bd. of Broward County, 438 So. 2d 87 (Fla. App. 1983) (invalidating exclusion from summer session for student having knife at bus stop because knife was not a “weapon” as defined in school rule); Shuman v. Univ. of Minn. Law Sch., 451 N.W.2d 71 (Minn. App. 1990) (upholding school discipline because students “were given the procedures provided for in the honor code”); Rauer v. State Univ. of N.Y., Albany, 552 N.Y.S.2d 983, 984 (N.Y. App. Div. 1990) (upholding long-term suspension because school followed rules pertaining to academic dishonesty); Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 582 (Pa. Super. 1990) (upholding long-term suspension from private university because school “followed its Code of Rights punctiliously and . . . the disciplinary proceeding complied with due process and [was] fundamentally fair”); Galveston Indep. Sch. Dist. v. Boothe, 590 S.W.2d 553, 556–57 (Tex. Civ. App.
2. Substantive Due Process Protections

Students have substantive due process rights as well. Substantive due process protects a student’s individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them."\(^{101}\) Students have had limited success in identifying specific liberty or property interests protected by the Fourteenth Amendment.\(^{102}\) Some courts, however, have allowed students to base substantive due process claims on school "zero tolerance" policies.\(^{103}\) Courts have also found substantive due process violations when school officials imposed grossly excessive physical punishment or punishment intended to inflict injury.\(^{104}\) The substantive due process rights enjoyed by students should not be overstated: Careless, unwise, or merely painful actions by school officials will not find remedy in substantive due process, which functions only as the ultimate safety net for individual rights.\(^{105}\) But substantive due process rights form one layer of the many constraints on the extent to which school officials can punish students.

D. A Better Limitation on Punishment: State Law

First Amendment review of punishment of unprotected student speech would also threaten to subvert federalism principles. Student disciplinary decisions are matters of state and lo-
cal policy. Justice Kennedy voiced the need for deference to state law in light of America’s federalist framework when he wrote that “federal control of the discipline of our Nation’s schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools.” Accordingly, federal courts should be wary to assert control over the day-to-day decisions of school officials, especially when this control displaces the authority of state courts and policymakers.

The constraints state laws place on school discipline further render First Amendment review unnecessary. State tort and criminal remedies have long protected students against excessive punishment. Where states take affirmative steps to protect students from overzealous disciplinarians, federal courts have declined constitutional warrant to review school officials’ disciplinary decisions. In Ingraham v. Wright, for example, the Supreme Court refused to evaluate a student’s claims that corporal punishment violated the Fourteenth Amendment because “the traditional common-law remedies are fully adequate to afford due process.” Although the First Amendment protects interests distinct from those covered by the Fourteenth Amendment, the presence of state common law diminishes the concern that arbitrary and excessive discipline by school officials will lack sufficient legal remedy.

Even if state tort or criminal law provided inadequate protection against unreasonable punishment, state constitutions afford independent speech guarantees. Every state constitution

106. Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990).
109. See Ingraham v. Wright, 430 U.S. 651, 672 (1977); Fee, 900 F.2d at 808.
110. Ingraham, 430 U.S. at 672.
Court protects speech in language comparable to the First Amendment. But states have additional explicit and implicit restraints on the degree to which state actors can punish unprotected speech. Ten states have constitutions that require proportionate penalties. Seventeen other state constitutions bar “cruel or unusual” penalties and another six state constitutions prohibit “cruel punishment.” A plurality of state constitutions—twenty-two—mirror the Eighth Amendment’s ban on “cruel and unusual punishment.

The Eighth Amendment does not apply to noncriminal punishment and states with constitutions containing identical language have been reluctant to extend this language beyond federal standards. Yet state courts have authority to go beyond the federal minimum standards on individual rights. Justice Brennan emphasized this authority by warning that “our liberties cannot survive if the states betray the trust the Court has put in them.” And state courts have affirmatively answered Justice Brennan’s call by departing from federal precedent to limit punishments they consider excessive.

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113. Id.
114. Id.
116. See SULLIVAN & FRASE, supra note 112, at 155 (explaining that state courts are surprisingly reluctant to grant broader protection against excessive penalties under state constitutions than the federal constitution provides).
117. See Kelso v. City of New London, 545 U.S. 469, 489 (2005) (emphasizing that state constitutions may have stronger restrictions on the exercise of eminent domain power than the federal constitution); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) (stating that states may lower legal restrictions on sexually oriented speech below federally permissible levels). The Federal Bill of Rights provides a minimum level of protection of individual rights which states may exceed, but not reject. Robert Force, State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance, 3 VAL. U. L. REV. 125, 129 (1969).
119. See, e.g., In re Rodriguez, 537 P.2d 384, 394 (Cal. 1975) (ruling that under California’s cruel-or-unusual clause “the measure of the constitutionality of punishment for crime is individual culpability in the law of this state”); Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993) (holding that Indiana’s proportionate punishment clause affords more protection than the Eighth Amendment); State v.
cause many state constitutions have broader language restricting punishment than the federal constitution, and state courts have license to take broader interpretations of speech rights than the Supreme Court, state law provides a more textually plausible means to limit punishment of unprotected speech.

CONCLUSION

School officials have no easy task in managing student behavior. Unlike federal judges, public school teachers and administrators continuously develop and implement disciplinary practices as an essential part of their profession. In First Amendment actions, the Supreme Court has wisely deferred to school officials’ expertise to regulate the educational environment. Courts should not undermine this deference by construing the First Amendment to require an unnecessary and unprecedented level of scrutiny of school officials’ decisions to punish unprotected speech.

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