

DEMOLISHING THE SCHOOLHOUSE GATE: TINKERING WITH THE CONSTITUTIONAL BOUNDARIES OF PUNISHING OFF-CAMPUS STUDENT SPEECH

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Given the increasing ubiquity of social media, school officials' scrutiny of student communications has expanded into the online realm. In fact, news reports reveal that many school districts have punished students for their online actions and communications. Schools argue that monitoring online speech protects students from bullying, suicidal threats, and vulgarity. Contrarily, students and activist groups allege that these monitoring activities invade students' First Amendment free speech rights.

This Note asks whether school officials can punish students for their communications that take place beyond the traditional "school-house gate." As a result of the Supreme Court's failure to address the constitutional boundaries of off-campus student speech, the U.S. Circuit Courts of Appeals have crafted myriad, often conflicting, approaches to apply the Supreme Court's traditional First Amendment jurisprudence to this issue. This Note discusses the Supreme Court's precedent regarding First Amendment protections for student speech, including the landmark Tinker decision that first established students' First Amendment protections, and examines how federal courts have tackled off-campus student speech. This Note recommends that the Supreme Court analyze almost all student speech cases under a heightened version of a two-pronged Tinker test that focuses on the speech and the intent of the speaker rather than the physical location of the speaker. This "Tinker plus" test honors the philosophical role of the freedom of speech as a prerequisite to democracy, recognizes the evolving forms of interpersonal communication, and respects practical concerns of cyberbullying and electronic harassment.

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I. INTRODUCTION

A school district in Los Angeles made national news in 2013 when it spent over \$40,000 to hire a private firm to investigate the public postings of its students on social media websites.¹ The mission of this investigation was to “search[] for possible violence, drug use, bullying, truancy and suicidal threats.”² Thus far, the school district has not punished any of its students for their online communications and interactions, but the superintendent noted that he could imagine “a situation in which discipline would follow.”³ While the aims of the school district seem laudable to some, others are concerned about the implications of this policy for students’ free speech rights under the First Amendment.⁴ For example, Lee Tien, an attorney for the Electronic Frontier Foundation, noted that this policy “crosses a line,” because it is not the case that school officials accidentally “stumbl[e] into students” in a chance encounter.⁵ Rather, “[t]his is the school sending someone to watch them.”⁶

Many other school districts, even when they have merely “stumbl[ed] into students” online (as opposed to actively monitoring their behavior), have punished those students as a result of their online communications.⁷ One school district suspended *thirty-one* high school students after a YouTube video of them was discovered.⁸ In the video, the students were “twerking,” or dancing by “twisting and thrusting their

1. Michael Martinez, *California School District Hires Firm to Monitor Students’ Social Media*, CNN (Sept. 18, 2013, 10:40 AM), <http://www.cnn.com/2013/09/14/us/california-schools-monitor-social-media/index.html>.

2. *Id.*

3. *Id.* (internal quotation marks omitted).

4. *Id.*

5. *Id.* (internal quotation marks omitted).

6. *Id.* (internal quotation marks omitted). There are also concerns with the discriminatory targeting and punishment of students. For example, “Huntsville City Schools paid a security firm . . . \$157,000 . . . to oversee . . . the investigation of social media activity of public school students,” and this led to the expulsion of fourteen students, twelve of whom were African-American. Challen Stephens, *Huntsville Schools Paid \$157,000 for Former FBI Agent, Social Media Monitoring Led To 14 Expulsions*, AL.COM (Nov. 7, 2014, 12:17 PM), http://www.al.com/news/huntsville/index.ssf/2014/11/huntsville_schools_paid_157100.html. This obviously led to concerns regarding racial discrimination in the administration of the program. *Id.*

7. See, e.g., Adam Cohen, *Can Schools Punish Students for Posting Racy Photos Online?*, TIME, Aug. 22, 2011, <http://content.time.com/time/nation/article/0,8599,2089729,00.html>; Tony Perry, *ACLU Calls Twerking Suspensions “Illegal and Ill-Advised,”* L.A. TIMES, May 16, 2013, <http://www.latimes.com/local/lanow/la-me-ln-aclu-twerking20130516,0,7209062.story>.

8. Perry, *supra* note 7.

hips and buttocks,” at various locations on the school’s campus.⁹ The sanction was defended on the grounds that it was a form of “sexual harassment and gender victimization.”¹⁰ Others saw the punishment as a different form of victimization in which all students were victims of draconian policies that deprived them of their rights to free expression under the First Amendment. The ACLU deemed the punishment to be both “illegal and ill-advised.”¹¹

The conflicting sentiments expressed in these examples may seem anecdotal, but they reflect a deep tension also exhibited in various decisions of the U.S. Circuit Courts of Appeals, which have adopted a wide variety of approaches in applying Supreme Court precedent regarding the First Amendment rights of students to situations where the student speech has taken place off campus (and oftentimes online).¹² Obviously, the First Amendment protects individuals’ “freedom of speech,”¹³ but this smattering of precedent exists due to the Supreme Court’s failure to address the First Amendment implications involved in the punishment of student speech occurring off campus. The question remains: to what extent, if any, may school officials punish student communications that occur outside the traditional “schoolhouse gate”?¹⁴

In this Note, I argue that the Supreme Court should resolve this circuit split by changing its course of contemplating student speech according to physical geography and instead analyzing *all* student speech under the same framework. More specifically, when barraged with controversial student speech cases, the Supreme Court should deploy a heightened version of a two-pronged *Tinker*¹⁵ analysis that encompasses the carved-out exception to *Tinker* expressed in *Fraser*.¹⁶ The only exceptions to this understanding where the Court *would* consider physical location is where the facts are analogous to *Kuhlmeier*, where the Court emphasized that the speech had the “imprimatur of the school,”¹⁷ or *Morse*, where the Court explicitly recognized that the exception would not have applied if the student was “not at school.”¹⁸ This approach uniquely conceptualizes

9. *Id.* Here the students’ actions were physically on campus, but it was not until the online video of them was discovered that school officials instituted punishments. As such, it is a useful illustration of the layer of complexity that online communications add to the general debate about student speech.

10. *See id.*

11. *See id.*

12. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); J. S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

13. U.S. CONST. amend. I. The protection from the federal government’s intrusion upon one’s “freedom of speech” has also been applied to the states via the Fourteenth Amendment. *See* U.S. CONST. amend. XIV; *see also* Gitlow v. New York, 268 U.S. 652 (1925).

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

15. *Id.*

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

17. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

18. *Morse v. Frederick*, 551 U.S. 393, 393 (2007) (citation omitted).

Tinker in a manner that does not improperly inhibit student speech in a changed world of interpersonal communication while respecting the philosophical and practical concerns expressed by the Court in the more traditional classroom setting.

It is imperative for the Supreme Court to address this issue because the technological, social, and legal environment in this country has changed dramatically since the Court created its framework for analyzing student speech cases. As explained more fully below, technology is increasingly impacting the media chosen for interpersonal communication, but also its reach and permanence, which has led to greater public awareness of dangerous cyberbullying activities among students.¹⁹ This technological shift impacts not only the form of communication, but also its reach and permanence, which has led to greater public awareness of dangerous cyberbullying activities among students.²⁰ This social trend, in turn, has permeated many state legislatures, spurring legislation prohibiting cyberbullying and electronic harassment.²¹

Additionally, the Court must clarify the law in order to prevent school officials from skirting accountability on the basis of “qualified immunity” for what in fact may be First Amendment violations.²² Otherwise, the muddiness of the law will lead to school officials who courts deem to be unconstitutionally infringing student speech nevertheless being immune from damages; as a result, any potential deterrence effects will never emerge.²³

Part II of this Note unpacks the history of Supreme Court jurisprudence regarding the First Amendment protections of student speech, from the landmark *Tinker* decision²⁴ to the Court’s various exceptions to the *Tinker* rule that allow greater restriction of student speech.²⁵ Part III explains and analyzes the various approaches that federal courts have taken, not only in applying the *Tinker* doctrine to off-campus and/or

19. See Mary Madden et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CTR., (May 21, 2013), <http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/>.

20. See, e.g., *Cyberbullying*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying> (last visited Mar. 16, 2015).

21. See generally Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CTR. (July 14, 2014), <http://cyberbullying.us/state-cyberbullying-laws-a-brief-review-of-state-cyberbullying-laws-and-policies/> (cataloguing various state statutes and proposals regarding bullying, cyberbullying, and electronic harassment and specifically assessing whether they “[i]nclude off campus behaviors”).

22. See, e.g., *Doninger v. Niehoff*, 642 F.3d 334, 345–46 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated on other grounds* by *Pearson v. Callahan*, 555 U.S. 223 (2009)).

23. See *id.* One scholar frames the goal of the “qualified immunity” doctrine as distinguishing between (1) police conduct that may violate private constitutional rights but is overall socially beneficial and (2) police conduct that is so egregious that courts “recognize [it] as being devoid of social utility.” Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 849–50 (2001). On the other hand, the deterrence to which I refer comes from the perspective of the individual plaintiff, namely that a definitive statement of students’ constitutional rights outside the traditional “schoolhouse gate” from the Supreme Court will “deter official misconduct and compensate plaintiffs whose constitutional rights have been deprived by government officials . . .” Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 662 (2004).

24. See *infra* Part II.A.

25. See *infra* Part II.B.

electronic student speech,²⁶ but also in understanding the basic framework of the *Tinker* rule.²⁷ Part IV proffers a unique approach that conceptualizes *Tinker* as a two-pronged analysis that can be applied to almost all student speech regardless of location once both prongs are strengthened in light of the concerns expressed by the Court in its carve-outs to *Tinker*.²⁸ Part IV also describes the two narrow exceptions to this new “*Tinker* plus” rule that are required in light of the Court’s holdings that were conditioned upon the student being effectively “at school.”²⁹ This approach successfully balances the need to respect Supreme Court precedent allowing school officials to maintain orderly learning environments with the concurrent need to protect students’ free exchange of ideas in the modern technological, social, and legal environment.³⁰

II. BACKGROUND: SUPREME COURT JURISPRUDENCE REGARDING STUDENT SPEECH

The First Amendment mandates that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”³¹ Benjamin Franklin described this protection in poignant terms: “[i]n those wretched [c]ountries where a [m]an cannot call his [t]ongue his own, he can scarce call anything his own. Whoever would overthrow the [l]iberty of a [n]ation must begin by subduing the freeness of speech”³² Scholars have also long considered the protection of free speech as not only a mechanism to protect one’s words and conscience from government intrusion, but also as a vehicle to foster vibrant debate in the “marketplace of ideas” of a representative democracy.³³ Importantly, the First Amendment extends not only to protect unpopular minority views but also to protect the holders of the true “majority” view among the people from a distant and unrepresentative government.³⁴ The freedom of speech is therefore the lifeblood of a self-governing people.

The Supreme Court has squarely addressed the First Amendment’s implications for student speech in four major cases. After creating the

26. See *infra* Part III.A.

27. See *infra* Part III.B.

28. See *infra* Part IV.

29. *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

30. See *infra* Part IV.

31. U.S. CONST. amend. I.

32. Letter to the Editor, *Silence Dogood No. 8*, NEW-ENGLAND COURANT, July 9, 1722.

33. See, e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 51–89 (1960); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24 (2008).

34. AKHIL REED AMAR, THE BILL OF RIGHTS 21 (1998) (“Thus, although the First Amendment’s text is broad enough to protect the rights of unpopular minorities (like Jehovah’s Witnesses and Communists), the Amendment’s historical and structural core was to safeguard the rights of popular majorities (like the Republicans of the late 1790s) against a possibly unrepresentative and self-interested Congress.” (citations omitted)).

overall framework for student speech cases in *Tinker*,³⁵ the Court has carved-out specific exceptions to the general rule over the years.³⁶

A. *The Tinker Standard*

The Supreme Court first systematically addressed the First Amendment rights of students in the landmark 1969 decision *Tinker v. Des Moines Independent Community School District*.³⁷ The case involved two high school students and one junior high school student who decided to communicate their opposition to the Vietnam War by wearing black armbands to school.³⁸ Upon learning of this intention, the principals of the respective schools met and “adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”³⁹ Despite being aware of the newly enacted policy, the three students wore their armbands to school.⁴⁰ Each student was suspended and told that he or she could not return to school wearing the armband.⁴¹

The students sued the school district and its officers and sought an injunction prohibiting the officials from punishing the students.⁴² The Court, holding that the punishment unconstitutionally infringed the students’ First Amendment freedom of speech rights, famously observed that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴³ Interestingly, the students prevailed even though the armbands did cause some disruptions of the learning environment.⁴⁴ Although the participating students did not yell or use profanity, the armbands elicited comments from other students and even caused one math lesson to be “wrecked.”⁴⁵

Yet, the Court also recognized that “special characteristics” of the educational environment necessitate qualifying considerations in understanding the free speech rights of students.⁴⁶ The Court recognized that in a democracy, where the role of the educational institution is to ultimately produce informed, socialized citizens, school officials require some flexi-

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

36. *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

37. 393 U.S. 503 (1969).

38. *Id.* at 504.

39. *Id.*

40. *Id.* Two students wore the armbands on December 16, 1965. The other student wore his armband the following day. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 506.

44. *Id.* at 517 (Black, J., dissenting).

45. *Id.*

46. *Id.* at 506–07.

bility in maintaining a certain degree of order and discipline in the classroom.⁴⁷

Ultimately the Court created a framework in an attempt to balance these competing interests. The Court deemed it an unconstitutional restriction of students' fundamental rights for school officials to punish students unless the school officials have "reason to anticipate" that the speech "would substantially interfere with the work of the school" or "impinge upon the rights of other students."⁴⁸ Known as the *Tinker* doctrine, this rule has been the working constitutional framework for analyzing student speech cases.⁴⁹

B. Carve-outs from the Tinker Standard That Permit Schools to Further Restrict Student Speech

Over the years the Supreme Court has identified three major exceptions to the *Tinker* doctrine. Undoubtedly, each exception was in some ways a reaction to the particular facts at hand. Yet, the exceptions are united in the Court's overarching rationale in linking the freedom of speech to self-government. Students exist within institutions that are designed to mold them into respectful self-governing citizens in the future. The following cases exemplify when the Court must acknowledge that the content and context of certain communications are simply not within the purview of an Amendment designed to protect self-governance when they are made by students on their way to becoming future self-governors.⁵⁰

1. "Offensively Lewd and Indecent" Speech

The Court created the first exception to the *Tinker* rule in 1986 with *Bethel School District No. 403 v. Fraser*, where the court considered the suspension of Matthew Fraser, a high school student who sprinkled several artful double entendres into his speech nominating a fellow student for a position in student government.⁵¹ One illustrative quote stemmed from Fraser acknowledging the nominee's work ethic: "Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue

47. *Id.* at 507.

48. *Id.* at 509.

49. Nevertheless, not all Justices were pleased with this result and would have preferred a rule that favored the interest in maintaining order more explicitly. *See id.* at 526 (Harlan, J., dissenting) ("I would . . . cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view . . .").

50. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 413–14 (2007) (Thomas, J., concurring) (quoting another source) (noting that under the common law doctrine of *in loco parentis* where "[t]he teacher is the substitute of the parent[.]" the traditional responsibilities of parents "to train up and qualify their children[] for becoming useful and virtuous members of society" are imparted to teachers).

51. 478 U.S. 675, 677–78 (1986). Fraser only actually served two days of the suspension, but he was also prohibited from speaking at his graduation ceremony. *Id.* at 678–79.

and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.”⁵²

Focusing not only on the special characteristics of the educational environment, but also on the commanding interest in protecting children from sexually explicit and/or vulgar speech, the Court did not explicitly use the *Tinker* framework.⁵³ Instead, asserting that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” the majority functionally created an exception to the *Tinker* rule under which schools may constitutionally punish students for “offensively lewd and indecent” speech.⁵⁴

Justice Marshall made this clear in his dissent, in which he chastised the Court for upholding the school district's sanction despite its failure to demonstrate any disruption of the learning environment, as required by *Tinker*.⁵⁵ This critique is accurate. Although the majority noted that several students were hollering and making sexually suggestive gestures during the speech,⁵⁶ Justice Stevens, in his famed “I don't give a damn” dissent, noted that “the evidence in the record, as interpreted by the District Court and the Court of Appeals,” clearly established that the speech did not substantially interfere with the educational environment.⁵⁷

2. *Speech in a “School-Sponsored Expression”*

Just two years after *Fraser*, the Supreme Court, in *Hazelwood School District v. Kuhlmeier*, had a chance to decide a case that addressed a novel mode of controlling student speech: rather than punishing an autonomous student *post hoc* for his or her speech, the school district antecedently prevented the publication of student speech in the school newspaper.⁵⁸ In *Kuhlmeier*, a high school principal forbade the publication of student-written news articles about students' experiences with divorce and teenage pregnancy due to his concerns that the article did not respect the privacy rights of the subjects of the articles.⁵⁹ In holding that the principal's decision to excise the implicated pages did not violate the First Amendment free speech rights of the student authors, the Court explicitly rejected the argument that the students were entitled to

52. *Id.* at 687 (Brennan, J., concurring) (internal quotation marks omitted).

53. *Id.* at 683–85.

54. *Id.* at 682–85; *see also Morse*, 551 U.S. at 405 (“Whatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.”) (citations omitted).

55. *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting).

56. *See id.* at 678.

57. *See id.* at 693–94 (Stevens, J., dissenting). Importantly, here Justice Stevens was analyzing whether the conduct violated a specific school policy, although the analysis is substantially similar to a traditional *Tinker* analysis in that it revolves around the actual disturbance of the learning process. *See id.* at 693–95.

58. 484 U.S. 260, 270–71 (1988) (“The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”).

59. *Id.* at 274.

the full, traditional free speech protection of adults because the newspaper was a “public forum.”⁶⁰

Again, the Court eschewed a traditional *Tinker* evaluation, even after the Eighth Circuit explicitly found a First Amendment violation under that analysis.⁶¹ Instead, the Court’s presupposition that the newspaper was the *school’s* forum informed its conclusion that the test for constitutionality hinged not on *Tinker* but on reasonableness.⁶² This overt recognition makes clear that the Court was carving out additional sanctioning flexibility for school officials above and beyond the *Tinker* standard when the publication of the student speech is “school-sponsored.”⁶³ In such instances, the restriction must merely be “reasonably related to legitimate pedagogical concerns.”⁶⁴

Again, the dissenting justices blasted the majority for its failure to faithfully apply *Tinker*. Justices Brennan, Marshall, and Blackmun repudiated the majority’s creation of a new category of speech (that had no basis in prior case law) to which *Tinker* does not apply.⁶⁵ Astutely, the dissenting Justices observed that the speech in *Fraser* also occurred at a “school-sponsored” assembly but that the Court did not draw this bright-line distinction in that case.⁶⁶

3. *On-Campus Speech “Promoting Illegal Drug Use”*

After almost thirty years of silence, the Court created the third major exception to the *Tinker* doctrine in 2007 in *Morse v. Frederick*.⁶⁷ This was the first case the Court considered in which the student was not technically on school property when the speech occurred.⁶⁸ In *Morse*, high school students were allowed to observe the passing of the Olympic Torch Relay during school hours along a street in front of their high

60. *Id.* at 268–70. Under the traditional “public forum” doctrine, a “speech-protective” doctrine, the Court “expresse[s] proper skepticism about the actual motives, or purposes, of government officials when they are attempt[ing] to regulate public areas which [a]re either traditionally or objectively available to the public for free speech.” David S. Day, *The Public Forum Doctrine’s “Government Intent Standard”: What Happened to Justice Kennedy?*, 2000 L. REV. MICH. ST. U. DET. C.L. 173, 175 (citing another source).

61. *Kuhlmeier*, 484 U.S. at 265 (internal quotation marks omitted) (noting that the Eighth Circuit, quoting *Tinker*, did not find that the censorship was required to avoid a “substantial interference with school work or discipline . . . or the rights of others”).

62. *See id.* at 270.

63. *Id.* at 273.

64. *Id.* (rejecting the notion that these limitations on speech must be manifested in a written policy). The Court found that the principal’s decision was reasonable in light of the privacy concerns inherent in the articles, particularly the potential for students to identify the particular pregnant students, as the pool of selection was so small. *Id.* at 264.

65. *Id.* at 280–82 (Brennan, J., dissenting); *see also Morse v. Frederick*, 551 U.S. 393, 406 (2007) (citations omitted) (“[L]ike *Fraser*, [*Kuhlmeier*] confirm[ed] that the rule of *Tinker* is not the only basis for restricting student speech.”).

66. *Kuhlmeier*, 484 U.S. at 280–82 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986)).

67. 551 U.S. 393 (2007).

68. *See id.* at 397.

school.⁶⁹ At the event, Joseph Frederick, along with some of his friends, unfurled a fourteen-foot banner that read “BONG HiTS 4 JESUS” while standing across the street from their school.⁷⁰ When the principal, Morse, asked the students to take down the banner, Frederick remained defiant.⁷¹ Consequently, Morse seized the banner, suspended Frederick for ten days, and defended the sanction as preventing speech that “advocates the use of substances that are illegal to minors” in accordance with the school’s well-established policy.⁷²

The Court was forced to address the issue of the location of student speech in its opinion. However, the Court easily dismissed this concern on these facts.⁷³ In the majority’s opinion, a student cannot possibly “claim he [or she] was not at school” when participating in a school-sanctioned and school-supervised event while school was in session.⁷⁴ This was still an ordinary student-speech case.⁷⁵ Notably, Justices Stevens, Souter, and Ginsburg disagreed with this analysis and stressed that the speech did not occur “on school premises.”⁷⁶

Even concluding that the speech occurred “at school,” again the majority of the Court avoided the traditional *Tinker* analysis and instead created another categorical exception to the application of *Tinker*.⁷⁷ Crediting the nation’s serious problems with youth drug use, and noting the banner’s “undeniable reference to illegal drugs,” the Court reasoned that it is consistent with the constitutional protections of free speech for school officials to punish student speech that “can reasonably be regarded as encouraging illegal drug use,” at least when the speech is clearly “at school.”⁷⁸

Unsurprisingly, Justice Stevens in his dissent was displeased with the majority’s disregard of the “foundations of *Tinker*” in favor of a sweeping generalization that could allow schools to punish students “for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers.”⁷⁹ Justice Thomas, arguing from the antithetical constitutional position, also observed that the majority’s analysis added to the “patchwork of exceptions to . . . *Tinker*.”⁸⁰

69. *Id.*

70. *Id.*

71. *Id.* at 398.

72. *Id.*

73. *Id.* at 400–01 (citations omitted) (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”).

74. *Id.* at 401.

75. *See id.* at 400.

76. *Id.* at 440 n.2 (Stevens, J., dissenting).

77. *See id.* at 403–09. The Court also declined to consider the speech “offensive” under the *Fraser* framework. *Id.* at 409.

78. *Id.* at 397, 401–02.

79. *See id.* at 438–46 (Stevens, J., dissenting).

80. *Id.* at 422 (Thomas, J., concurring). Justice Thomas was not vehemently opposed to the majority’s analysis, although he would have preferred wholly overruling *Tinker* to give schools complete authority to restrict student speech under the common law doctrine of *in loco parentis*. *Id.* at 419–22.

III. ANALYSIS: CIRCUIT VARIATION IN APPLYING *TINKER* TO OFF-CAMPUS STUDENT SPEECH

The Supreme Court has not specifically addressed the reach of school authorities in regulating student speech that occurs online or otherwise outside of the traditional school environment.⁸¹ Consequently, U.S. Courts of Appeals have struggled to apply rigid precedent to the current technological and social landscape.⁸² As described below, the variation exists not only in the application of *Tinker* to off-campus speech, but also in the fundamental structure of the *Tinker* framework.

A. *First Prong of Tinker: Circuit Splits on a “Substantial Disruption”*

The most frequently cited principle from *Tinker* is that the effects of punishable speech must somehow create or at least risk a “substantial disruption” of the learning environment.⁸³ However, Courts of Appeals have diverged in their conceptualizations of not only what *Tinker* requires regarding the effects of student speech⁸⁴ but also whether, and if so how, the intent of the speaker should be considered when student speech occurs off campus.⁸⁵

1. *Effects of Off-Campus Speech in Creating a “Substantial Disruption”*

Circuit courts have adopted two major approaches to contemplate what the effects of student speech must be for the speech to be regulable. The Second Circuit’s test requires that the speech either create (1) an actual disruption of the learning environment or (2) a reasonably foreseea-

81. As noted, the Supreme Court has hedged by specifically stating that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.” *Id.* at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

82. See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012) (considering student speech in online Myspace.com profile); *J. S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012) (considering suspension of a student for criticizing a school official on Myspace.com profile); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012) (considering whether a school may punish a student for creating a fake social network profile for the school’s principal); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011) (considering whether a student can be punished at school for blog post made at home); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008) (considering whether a student can be punished for online sharing of a drawing of a threat made against a teacher); see also Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011).

83. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Although this Note highlights the phrase “substantial disruption,” courts analyzing student speech cases treat the language “substantial disruption” and “substantial interference” as interchangeable terms of art.

84. See *infra* Part III.A.1.

85. See *infra* Part III.A.2.

ble risk of such disruption.⁸⁶ The Third Circuit, although it adopts the Second Circuit's test in theory, employs a more concrete analysis in that it additionally requires a very explicit comparison of the facts at hand to the facts in *Tinker*.⁸⁷ Although most scholarly attention has focused on the Second and Third Circuits' split,⁸⁸ some examples of off-campus student speech cases from district courts outside of these circuits are included at the end of this Section to provide a glimpse into how lower courts are understanding this issue.⁸⁹

a. Second Circuit: "Actual Disruption" or "Reasonably Foreseeable Risk"

The first case in which the Second Circuit confronted off-campus student speech was *Wisniewski v. Board of Education*.⁹⁰ The analytical difficulty faced by the court was compounded by the particularly alarming communications at issue. Like most adolescents at the time, eighth grade student Aaron Wisniewski used AOL Instant Messaging from his parents' home computer to communicate with his friends.⁹¹ What made Wisniewski's communications unique was the photo he used for his icon: "a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood" and below which were the words "Kill Mr. VanderMolen," Wisniewski's English teacher.⁹² While he had this icon in April 2001, Wisniewski instant messaged about fifteen people, including several of his classmates.⁹³ After a student notified Mr. VanderMolen of the icon, Wisniewski was suspended for five

86. See *Doninger*, 642 F.3d at 349 (citing *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008)); *Wisniewski*, 494 F.3d at 39.

87. See *Snyder*, 650 F.3d at 928–30.

88. See, e.g., Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 906–907 (2012).

89. The Ninth Circuit and Fourth Circuit also recently analyzed the issue of whether it was reasonable for a school official to forecast a "material and substantial" disruption of school activities. See *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354, 358 (2014); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013). Both circuits noted that a school's unique history, such as a history of gang violence or race-related confrontations, is relevant to the reasonableness of a predictive assessment of a "substantial" disruption by a school official. See *Dariano*, 745 F.3d at 359; *Hardwick*, 711 F.3d at 440. Because these cases involved clearly on-campus student speech, namely wearing t-shirts emblazoned with the American flag and the Confederate flag, respectively, to school, this Note does not highlight them in the analysis of a "substantial disruption" of the school environment. See *Dariano*, 745 F.3d at 359; *Hardwick*, 711 F.3d at 430–31. However, *Dariano* and a Tenth Circuit case similar to *Hardwick* involving a depiction of the Confederate Flag at school will be used to analyze *Tinker*'s "rights of others" language. See *infra* Part III.B.1. This portion of *Tinker* has been subjected to scant analysis by commentators and courts, so even doctrinal analysis of on-campus speech is useful. See *infra* Part III.B.1; see also *Dariano*, 745 F.3d at 359; *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000).

90. 494 F.3d 34 (2d Cir. 2007).

91. *Id.* at 35.

92. *Id.* at 36 (internal quotation marks omitted).

93. *Id.* The icon was also viewable by any of his list of contacts at anytime. *Id.*

days.⁹⁴ Mr. VanderMolen, upon his own request, was relieved from teaching Wisniewski's class.⁹⁵

Wisniewski was then charged under state law for "endangering the health and welfare of other students and staff," and, after a hearing regarding long-term suspension, Wisniewski was suspended for a full semester.⁹⁶ The hearing officer found that Wisniewski created and displayed the icon outside of school as a joke; nevertheless, the hearing officer determined that the speech was punishable.⁹⁷

The court declined to consider the case under the "true threat" doctrine, under which the government can constitutionally restrict speech by *anyone* when the speech rises to a "true threat."⁹⁸ Instead, the court employed a *Tinker* analysis.⁹⁹ With respect to under what circumstances off-campus student speech can meet the "substantial disruption" requirement, the court concluded that, at the very least, there must be a reasonably foreseeable risk of a "substantial disruption" within the educational environment.¹⁰⁰ The court, focusing more heavily on the issue of the intent of the speaker, summarily stated that the "risk of substantial disruption is not only reasonable, but clear."¹⁰¹ Therefore, the Second Circuit upheld the dismissal of Wisniewski's Section 1983 claim.¹⁰²

The next student speech case considered by the Second Circuit, *Doninger v. Niehoff*,¹⁰³ provided the Second Circuit with an opportunity to augment the analysis of its off-campus *Tinker* rule. In *Doninger*, the Junior Class Secretary of a Connecticut high school ("Doninger") wanted to protest her school's decision to postpone the annual battle-of-the-bands concert ("Jamfest") for a third time.¹⁰⁴ On April 24, 2007,

94. *Id.*

95. *Id.*

96. *Id.* at 36–37.

97. *Id.*

98. *See id.* at 37–38 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). The court notes that other courts have considered student speech depicting the murder of a school official or student to be a "true threat" but reasoned that relying on the *Watts* "true threat" test alone did not give school officials sufficient flexibility to maintain order in the learning environment. *See id.* at 38 (citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621–32 (8th Cir. 2002) (en banc); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371–73 (9th Cir. 1996)). While some commentators agree that even a combination of the "true threat" doctrine and the *Tinker* doctrine inappropriately restricts school officials in their attempts to protect the safety of students and teachers, others argue that this doctrinal two-step inquiry is *necessary* in order to prevent the trampling of students' First Amendment rights. Compare Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271 (2008), with Fiona Ruthven, Note, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 IOWA L. REV. 931, 935–36 (2003). This Note does not delve into this debate, although it does recognize that the "true threat" doctrine can be and has been an alternative method for schools to restrict student behavior in a manner that comports with their constitutional guarantees. *See Doe*, 306 F.3d at 621–22; *Lovell*, 90 F.3d at 371–73.

99. *Wisniewski*, 494 F.3d at 38.

100. *Id.* at 40.

101. *Id.*

102. *Id.*

103. 527 F.3d 41 (2d Cir. 2008).

104. *Id.* at 44.

Doninger met with three other students to use an on-campus computer to access the email account of a student's father.¹⁰⁵ Their purpose, which they accomplished, was to send an email encouraging recipients to contact the superintendent about the cancellation of Jamfest.¹⁰⁶ The district superintendent ("Schwartz") and school principal ("Niehoff") in fact received several telephone calls.¹⁰⁷ Niehoff then confronted Doninger, telling her that she should have come directly to school officials to resolve the issue.¹⁰⁸ That evening, Doninger posted a public blog entry on livejournal.com suggesting that Jamfest was cancelled due to "douchebags in [the] central office" and encouraging others to continue contacting school officials.¹⁰⁹ When Niehoff discovered the blog post on May 17, she encouraged Doninger to decline her nomination for Senior Class Secretary.¹¹⁰ Doninger refused, and Niehoff revoked her administrative endorsement, effectively destroying her nomination.¹¹¹

The court first acknowledged that if Doninger's speech had been expressed on campus it would have been regulable under *Fraser* as "offensive."¹¹² Because it was not clear, however, whether the *Fraser* exception applied to off-campus student speech, the Court performed a traditional *Tinker* analysis.¹¹³ Finding that the speech created a reasonably foreseeable risk of "substantial disruption," the court identified three factors relevant to this inquiry: (1) the language used; (2) the misleading nature of the communication; and (3) the student's role in school-sponsored activities.¹¹⁴ All three factors weighed in favor of Niehoff's position that the speech created a reasonably foreseeable risk of "substantial disruption," but the court used *Kuhlmeier* to particularly highlight the student's privilege of participating in "school-sponsored" activities.¹¹⁵ Consequently, the court affirmed the district court's denial of Doninger's requested preliminary injunction.¹¹⁶

105. *Id.*

106. *Id.*

107. *Id.* The district court also found that as a result of Doninger's behavior, Niehoff and Schwartz had to miss several school-related activities over the next two days. *Id.* at 46.

108. *Id.* at 45.

109. *Id.*

110. *Id.* at 46.

111. *Id.*

112. *Id.* at 50.

113. *Id.* Most courts that have considered this issue have also held that *Fraser* is inapplicable to off-campus student speech. Jett, *supra* note 88, at 913 (citing Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 456–57 (W.D. Pa. 2001)).

114. *Doninger*, 527 F.3d at 50–52 (noting that an "actual disruption" in the school environment need not occur in response to the argument that the disruption of phone calls was the result of the group email, which was not at issue, rather than Doninger's blog). In a subsequent claim for damages, the Second Circuit performed a more robust factual comparison to *Tinker*, like the Third Circuit, but this was in the context of determining whether Niehoff was entitled to qualified immunity because the constitutional right at issue was not "clearly established." See *Doninger v. Niehoff*, 642 F.3d 334, 338 (2d Cir. 2011); see also *infra* Part III.A.1.b.

115. *Doninger*, 527 F.3d at 48, 52–53.

116. *Id.* at 53.

b. Third Circuit: Addition of a Factual Comparison to *Tinker*

In 2011, the Third Circuit simultaneously issued two opinions regarding off-campus student speech: *J.S. ex rel. Snyder v. Blue Mountain School District*¹¹⁷ and *Layshock ex rel. Layshock v. Hermitage School District*.¹¹⁸ However, only in *Snyder* did the court discuss the issue of a “substantial disruption” under *Tinker*.¹¹⁹ The court did not reach the issue in *Layshock*, because the school district did not argue that it had the jurisdiction to discipline the student under the *Tinker* doctrine.¹²⁰

Nevertheless, the Third Circuit’s analysis in *Snyder* of the requisite effects of student speech in creating a “substantial disruption” added a practical dimension to the Second Circuit’s generic rule. In *Snyder*, eighth grade student “J.S.” and classmate “K.L.” created a fake MySpace profile on J.S.’s home computer that mocked their middle school principal, McGonigle.¹²¹ The profile contained several rude and disparaging comments; many comments were of a sexual nature, and several used profane language.¹²² After students apparently found the profile by either searching MySpace or by obtaining the URL, J.S. made the profile “private” so only accepted “friend[s]” on the website could view it.¹²³ Nevertheless, the profile caused “rumblings” throughout the school, including a five-to-six minute disruption of a math class and the cancellation of a “small number of student counseling appointments.”¹²⁴ McDonigle suspended J.S. for ten days, but he declined to press charges for harassment.¹²⁵

Citing *Doninger*, the court noted that, even if the “rumbling” effects of J.S.’s speech were equivalent to the insufficient disruption in *Tinker*, an “actual disruption” of the school environment need not occur; school officials merely need to reasonably anticipate such a disruption at the time.¹²⁶ What differentiated the Third Circuit’s approach was the court’s detailed analysis of the factual record in comparison to the record in *Tinker*. Illuminating oft-forgotten facts of *Tinker*, including the polarization of the country over the Vietnam War and the fact that a math class

117. 650 F.3d 915 (3d Cir. 2011).

118. 650 F.3d 205 (3d Cir. 2011).

119. Compare *Snyder*, 650 F.3d at 928, with *Layshock*, 650 F.3d at 214.

120. *Layshock*, 650 F.3d at 214–19. Rather, the school district argued that the speech was punishable under *Fraser* as “lewd and offensive” and ultimately “on campus” because it “ended up inside the school community.” *Id.* at 216–17. The court rejected this argument, concluding that *Fraser* does not grant jurisdiction to schools to punish “expressive conduct which occurred outside of the school context.” *Id.* at 219 (citing *Morse v. Frederick*, 551 U.S. 393, 404 (2007)).

121. *Snyder*, 650 F.3d at 920. The profile did not use McGonigle’s name, but it did include an official photograph of him from the school district’s website. *Id.*

122. *Id.* at 920–21.

123. *Id.* at 921. Because MySpace was blocked by school computers, no students could view the website at school. *Id.* Furthermore, the only printout of the profile that was brought on campus was per McDonigle’s request. *Id.*

124. *Id.* at 922–23. The latter occurred because McGonigle requested that the school counselor sit in on his meetings with J.S. and T.L. *Id.* at 923.

125. *Id.* at 922.

126. *Id.* at 928.

was “wrecked,” the court noted that the ridiculous content of the speech, the “private” setting of the profile, and the mere “rumblings” among students prevented a reasonable calculation that this speech would “substantial[ly] disrupt” the educational environment.¹²⁷ Accordingly, the Third Circuit reversed the district court’s grant of summary judgment to the school district and its denial of J.S.’s motion for summary judgment.¹²⁸

c. District Court Examples Analyzing “Substantial Disruption”

The decisions of district courts have remained largely outside the spotlight of scholarly literature,¹²⁹ but the fact that district courts tend to align with the Third Circuit’s analysis is germane to this Note’s analysis. Two cases are particularly illustrative.¹³⁰ In *T.V. ex rel. B.V. v. Smith-Green Community School Corporation*, underage high school volleyball players were suspended from six games for posting risqué “slumber party” photos online.¹³¹ Because the photos did not actually cause any disruptions of school activities and were intended to be humorous and silly, the court held that the speech could not be constitutionally punishable under *Tinker* as an actual disruption or as a reasonably foreseeable risk of a disruption.¹³² In doing so, the court explicitly compared the “disruption” at hand to the context in *Tinker*: “[a]s was true of the armbands in *Tinker*, the photos in this case could be said, at best, to have ‘caused discussion outside of the classrooms, but no interference with work and no disorder.’”¹³³

One year earlier, in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, a high school student was suspended for posting a video clip on

127. *Id.* at 928–30 (“If *Tinker*’s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not ‘reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,’ neither can J.S.’s profile.” (citations omitted)). The court also held that the school did not have jurisdiction to punish J.S. under *Fraser*, which cannot apply “outside the school, during non-school hours.” *Id.* at 932.

128. *Id.* at 933.

129. See generally, e.g., Jett, *supra* note 88; Rory Allen Weeks, Note, *The First Amendment, Public School Students, and the Need for Clear Limits on School Officials’ Authority over Off-Campus Student Speech*, 46 GA. L. REV. 1157 (2012).

130. See *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 783–84 (N.D. Ind. 2011); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117–19 (C.D. Cal. 2010).

131. 807 F. Supp. 2d at 772. The court did not have to address whether the students could be punished for “obscene” materials, as the photographs did not include “deviate sexual conduct” as defined under Indiana law. See *id.* at 778. The court also did not consider whether the speech could be punishable as “lewd and offensive” speech under the *Fraser* exception as it determined that *Fraser* is limited to on-campus speech. See *id.* at 779 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring)).

132. See *id.* at 783–84. The court also made a poignant observation about the “importance” of speech with respect to when it is entitled to First Amendment protection. The court rightfully posited that the photographs in this case were not artful critiques of public policy, but the court also rightfully countered that they do not have to be in order to come within the protective shield of the First Amendment. See *id.* at 775 (“No message of lofty social or political importance was conveyed, but none is required.”).

133. See *id.* at 783–84 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

YouTube from her home computer.¹³⁴ The video clip depicted other students talking at a public restaurant about student “C.C.,” calling her “spoiled” and a “slut.”¹³⁵ Because no “school activities” were actually disrupted and at most the school officials could reasonably foresee a risk of “gossip” among the students, this court also held that the speech was not within *Tinker*’s reach.¹³⁶ The court specifically noted that even if the fear of gossip among junior high school students were reasonable, gossip is akin to the general “buzz” among the students in *Tinker* and is not sufficiently disruptive to constitutionally punish student speech.¹³⁷

d. Who Cares?: Implications of the “Substantial Disruption” Analysis

This somewhat abstract legal analysis has profound repercussions on our understanding of self-government. Democracy depends on a precarious balance between the need to allow the free circulation of ideas to flourish and the simultaneous need to use force to compel citizens to abide by binding laws,¹³⁸ and the legal analysis used to understand off-campus student speech affects this balance between freedom and order in the classroom.

By using the generic term “disruption” without imposing a court-supplied rigid definition of the term,¹³⁹ the Second Circuit’s approach emphasizes maintaining order in a classroom to teach students civility. If students are to understand how to be respectful dissenters in public debates in the future, they must learn how to express their views within the confines of a structured environment.¹⁴⁰ School officials must have some breathing room to censor speech that disrupts this educational mission. This conceptualization harmonizes with the Second Circuit’s consideration of the student’s role in school-sponsored activities; certainly students taking on an “extracurricular role as a student government leader” must understand how speech should properly be disseminated to preserve order.¹⁴¹ Under such an understanding, it is appropriate to punish student speech that causes the school to receive some phone calls due to a stu-

134. See 711 F. Supp. 2d at 1099.

135. See *id.* at 1098.

136. See *id.* at 1117–19.

137. See *id.* at 1120 (citing *Tinker*, 393 U.S. at 514).

138. See MEIKLEJOHN, *supra* note 33, at 9–14 (“Political freedom does not mean freedom from control. It means self-control.”).

139. *Doninger v. Niehoff*, 527 F.3d 41, 51–52 (2d Cir. 2008).

140. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[P]ublic education must prepare pupils for citizenship . . . [by] inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government” (quoting another source (internal quotation marks omitted))). See generally James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students’ Rights to Off-Campus Internet Speech Against the School’s Compelling Interests*, 79 U. CIN. L. REV. 855 (2010).

141. See *Doninger*, 527 F.3d at 52 (“Avery’s conduct risked not only disruption of efforts to settle the Jamfest dispute, but also frustration of the proper operation of LMHS’s student government and [the] undermining of the values that student government . . . is designed to promote.”).

dent secretary's blog that was "not consistent with her desired role as a class leader."¹⁴²

On the other hand, by comparing the facts at hand to the context of an extremely divisive war and a "wrecked" math class in *Tinker*,¹⁴³ the Third Circuit's approach emphasizes allowing students to freely express (and hear) a variety of viewpoints. If students fear punishment of their online speech, they may inappropriately censor themselves, leading to a "chilling effect on the exercise of constitutional rights."¹⁴⁴ Moreover, the "chilling effect of school discipline can be considerable because of school officials' 'susceptibility to community pressure,' their low level of understanding of First Amendment jurisprudence, the possibility that a principal will 'act "arbitrarily, erratically, or unfairly,"' and the low likelihood that a student will challenge a punishment."¹⁴⁵ Under such an understanding, it would be inappropriate to punish a student who mocked the school principal via a fake social media profile when it only interfered with classroom activities for "five or six minutes."¹⁴⁶ Otherwise, students may fear voicing their opinions and creating a robust debate regarding school officials and policies.¹⁴⁷

2. *Considering the Intent of the Off-Campus Speaker to Reach School*

Courts agree that in order for school officials to have jurisdiction to punish student speech, the officials must make a *reasonable* determination that there is a risk of a "substantial disruption" of the educational environment due to the speech; however, circuit courts have diverged in their analyses of the extent to which the student must intend his or her speech to reach the school environment in order for an official's determination to be objectively reasonable.¹⁴⁸ The Second and Third Circuits have implied, though not formally held, that the standard should be that

142. *See id.* (internal quotation marks omitted).

143. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928–30 (3d Cir. 2011) (citation omitted).

144. *Cf. Patrick*, *supra* note 140, at 879–80.

145. Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1599 n.241 (2009) (quoting Thomas v. Board of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1051–52 (2d Cir. 1979)).

146. *See Snyder*, 650 F.3d at 922.

147. *See id.* at 941 (Smith, J., concurring) ("We must tolerate thoughtless speech like J.S.'s in order to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination."). Although Robert Bork has famously argued that the only type of speech that deserves protection under the First Amendment is political speech and that "[f]reedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives," the Supreme Court has emphatically rejected this view. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 743 (1997) (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971)).

148. *See* Jessica K. Boyd, Note, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1236 (2013); Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1235 (2008).

the student possess some sort of specific intent to reach campus in order for the speech to be regulable.¹⁴⁹ Contrarily, the Fourth and Eighth Circuits clearly demand a lesser showing to establish jurisdiction, namely that the student intend the speech to directly reach students and/or faculty of the school and only indirectly reach campus.¹⁵⁰

a. Specific Intent to Reach Campus

In the cases considered in the preceding Section regarding the requisite effects of student speech, the Second and Third Circuits also expressed opinions regarding the requisite intent of the speaker: the student may have to possess a specific intent for his or her off-campus speech to in fact reach campus in order to be punished.¹⁵¹

In *Wisniewski*, the Second Circuit divided over what state of mind is required for the off-campus student to be subject to school discipline.¹⁵² The panel was divided over whether the school must prove that it was “reasonably foreseeable” that the student speech would reach campus, but all agreed the issue was moot because the speech did reach campus.¹⁵³

The Second Circuit clarified this analysis in *Doninger*. The court still did not hold that purpose or intent was a prerequisite to find that it was “reasonably foreseeable” that other students or school officials would receive the communication, but the court specifically noted that *Doninger*’s blog post was “purposely designed . . . to come onto campus” and that her “intent in writing it was specifically ‘to encourage her fellow students to read and respond.’”¹⁵⁴ Yet, the court then backpedaled and reframed the issue by holding that the district court did not err in finding that “it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it.”¹⁵⁵

The Third Circuit walked a similar line in *Snyder*, although it was more forceful in its analysis.¹⁵⁶ In finding that it was not reasonable for school officials to perceive a risk of a “substantial disruption” of the classroom, the Third Circuit expressly distinguished *Doninger*’s blog

149. See *Snyder*, 650 F.3d at 930; *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

150. See *D.J.M. ex rel. D.M. v. Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754, 762 (8th Cir. 2011); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); see also *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012), *reh’g and reh’g en banc denied* (Nov. 21, 2012).

151. See *Snyder*, 650 F.3d at 929; *Doninger*, 527 F.3d at 50.

152. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007).

153. See *id.* (“[T]he panel is divided as to whether it must be shown that it was reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school preempts any inquiry We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.”).

154. See *Doninger*, 527 F.3d at 50 (internal citations omitted).

155. See *id.* (quoting *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 217 (D. Conn. 2007) (internal quotation marks omitted)).

156. See *Snyder*, 650 F.3d at 930.

from J.S.'s fake MySpace profile in that J.S. did *not* intend for the speech to come to school but rather made efforts to prevent that result by making the profile private.¹⁵⁷ According to the court, the fact that J.S.'s classmates could still view the profile was insufficient to conclude that J.S.'s speech "targeted the school."¹⁵⁸ Thus, it was impossible for school officials to make an objectively reasonable determination that the learning environment was at risk of a "substantial disruption."¹⁵⁹

b. Intent to Reach Students and/or Faculty and Indirectly Reach Campus

The opinions of the Fourth and Eighth Circuits clearly hold that a student need not intend for speech to reach campus in order for the school to have jurisdiction to punish him or her due to a reasonable forecast of a "substantial disruption" of school activities.¹⁶⁰ Rather, the student need only intend to reach other students or school authorities with the speech, which would imply an indirect transmission of the speech to campus.¹⁶¹

The Fourth Circuit first explicated the jurisdictional issue in *Kowalski v. Berkeley County Schools*, which was another case involving a student who posted information on MySpace from her home computer.¹⁶² Rather than mocking her principal, however, Kowalski created a webpage entitled "Students Against Sluts Herpes" to ridicule a fellow student, "Shay N."¹⁶³ Also unlike *Snyder*, a student ("Parsons") accessed the MySpace profile from a school computer.¹⁶⁴ Parsons also posted demeaning photographs and sexually explicit language.¹⁶⁵ Because Kowalski had created the website, school administrators suspended her for ten days, prevented her from attending school events in which she was not a direct participant for ninety days, and removed her from the cheerleading squad for the rest of the school year.¹⁶⁶

Concluding that the speech did in fact create a "substantial disruption" of the order and discipline of the school under *Tinker*, the court was faced with the jurisdictional issue.¹⁶⁷ It held that, because Kowalski

157. *See id.*

158. *Id.* at 930–31.

159. *See id.* ("The fact that her friends happen to be Blue Mountain Middle School students is not surprising, and does not mean that J.S.'s speech targeted the school.")

160. *See, e.g., Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *D.J.M. ex rel. D.M. v. Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011).

161. *See Kowalski*, 652 F.3d at 573; *D.J.M.* 647 F.3d at 766; *see also S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012).

162. *See Kowalski*, 652 F.3d at 567.

163. *See id.* It was also contended that the acronym "S.A.S.H." stood for "Students Against Shay's Herpes." *See id.*

164. *See id.* at 568.

165. *See id.* One photograph depicted Shay N. with a sign across her pelvis that read "Warning: Enter at your own risk." *See id.*

166. *See id.* at 569.

167. *See id.* at 573.

knew that her speech could be “published beyond her home” and would reach fellow students that had been invited to the page, the speech “could reasonably be expected to reach the school or impact the school environment.”¹⁶⁸ In other words, Kowalski intended to reach her fellow classmates and knew that the “fallout” would “be felt in the school itself.”¹⁶⁹ Therefore, the speech, even though perhaps not “on campus” as required in order to apply the *Fraser* exception, had a sufficient nexus with campus to be punishable under the traditional *Tinker* doctrine.¹⁷⁰

The Eighth Circuit mirrored this more lenient analysis in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*,¹⁷¹ in which eighth grade student D.J.M. sent alarming online instant messages from his home computer to his classmate (“C.M.”).¹⁷² Disturbed by D.J.M.’s obscene language and threats of shooting other students, C.M. notified school officials of these messages.¹⁷³ D.J.M. was subsequently suspended for ten days.¹⁷⁴ After determining that the school district was justified in its punishment of D.J.M. under the “true threat” doctrine, the court also conducted a *Tinker* analysis.¹⁷⁵ Even though the court did not need to consider the issue, and even though D.J.M. was not independently spreading the speech to his fellow classmates, the Eighth Circuit also held the speech constitutionally punishable under *Tinker*, as it was “reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”¹⁷⁶

One year later, in *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School District*, the Eighth Circuit cited *D.J.M.* for the proposition that *Tinker* merely requires that it be “reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.”¹⁷⁷ The Eighth Circuit relied on the district court’s finding that the racist and sexually explicit speech on a student blog created by high school students Steven and Sean Wilson was “targeted at” the high school, without further analysis, to determine that the plaintiffs were unlikely to succeed on the merits of their Section 1983 claim.¹⁷⁸ This summary determination that the speech was “targeted at” the school was notable, given the unique facts of the case: the students created this webpage using a Dutch domain site, which prevented American internet users from accessing the page without knowledge of the website address;

168. *See id.*

169. *Id.*

170. *See id.* at 573–75.

171. 647 F.3d 754 (8th Cir. 2011).

172. *See id.* at 757.

173. *Id.* at 757–58.

174. *See id.* at 759.

175. *See id.* at 765; *see also supra* note 98.

176. *See D.J.M.*, 647 F.3d at 766.

177. 696 F.3d 771, 777 (8th Cir. 2012) (citing *D.J.M.*, 647 F.3d at 766).

178. *See id.* at 778.

“[t]he site was not password-protected”; and the Wilsons only personally told five students the web address.¹⁷⁹

c. Who Cares?: Implications of the Intent Analysis

These two answers to the jurisdictional question of requisite intent have drastically different practical consequences for the administration of justice and the encouragement of robust debate in the public square. If students must have some kind of specific intent to reach the campus itself, as implied by the Second and Third Circuits, then that can be a major evidentiary burden for the defendant school officials. It is extremely difficult to prove subjective intent,¹⁸⁰ especially in this murky area where the courts have not yet articulated exactly where the student must “intend” the speech to reach.¹⁸¹ Moreover, it is not clear what factors should be used to determine intent,¹⁸² especially since this approach assumes that the intent to merely reach campus indirectly is insufficient to constitutionally censor the speech.¹⁸³ Even speech that reaches nearly all of the student’s peers could be considered beyond the jurisdictional reach of administrators.¹⁸⁴

Contrarily, if jurisdiction attaches when students merely intend the speech to be seen or heard by other students or school officials, as implied by the Fourth and Eighth Circuits, the reach of school censorship is almost limitless. It is hard to imagine a situation in which a student’s posting on any social networking site would not be conclusive evidence of intent to reach his or her fellow students, regardless of whether the speech relates to the school.¹⁸⁵ That uncertainty would severely chill students from expressing their sincerely held opinions online.¹⁸⁶ Students would be discouraged from engaging with one another and robustly debating issues important to them in an environment only tangentially related to the classroom.¹⁸⁷ A long jurisdictional arm that allows school officials to censor speech, ensuring that only so-called “appropriate” speech is tolerated, may sound eerily familiar to students who read *1984* in their Language Arts courses.¹⁸⁸

179. See *id.* at 773.

180. See Hoder, *supra* note 145, at 1595 (citing *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002)).

181. See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

182. See Boyd, *supra* note 148, at 1236.

183. *Id.*

184. *Id.* at 1236–37.

185. See Weeks, *supra* note 129, at 1184.

186. See R. CHACE RAMEY, *STUDENT FIRST AMENDMENT SPEECH AND EXPRESSION RIGHTS: ARMBANDS TO BONG HiTS* 143 (MELVIN I. UROFSKY, ed. 2011).

187. See generally *supra* note 147 and accompanying text.

188. See generally GEORGE ORWELL, *1984* (1949).

B. *Second Prong of Tinker: Courts Ignoring the “Rights of Others”*

The phraseology of *Tinker* left courts with little clarity as to whether the rule involved only the “substantial disruption” issue or whether it was in fact a two-pronged analysis under which a school could also constitutionally punish student speech for “collid[ing] with the rights of others,” even in the absence of a reasonably foreseeable risk of a “substantial disruption” of the school environment.¹⁸⁹ Some Circuit Courts of Appeals seem to view the “rights of others” as a separate prong of the analysis, although in these cases there is either also a “substantial disruption” of the learning environment or the court does not articulate a workable definition of the “rights of others.”¹⁹⁰ Other courts show no indication of considering *Tinker* to be a two-pronged analysis and conflate the “rights of others” language with the “substantial disruption” test.¹⁹¹

1. *Weak Application of a “Rights of Others” Prong*

The Tenth Circuit in 2000 appeared to consider the “rights of others” language in *Tinker* as a separate test that would allow the constitutional restriction of student speech in *West v. Derby Unified School District No. 260*.¹⁹² In *West*, a middle school student in a district with a history of violent incidents due to racial tensions between African American and Caucasian students drew a Confederate Flag on a piece of paper in his math class.¹⁹³ Obviously, the jurisdictional complexities of off-campus student speech cases were not present in *West*, but the court’s framing of *Tinker* was illustrative. The court utilized *Tinker*’s language that speech impinging upon other students’ “right[s] to be secure and let alone” to imply that students had the right to be free from “hostile confrontations” or “full-fledged brawl[s]” as a result of racial tension.¹⁹⁴ Although the issue was largely subsumed in the court’s analysis of whether there was a

189. See, e.g., Martha McCarthy, *Student Electronic Expression: Unanswered Questions Persist*, 277 EDUC. L. REP. 1, 9, 16–17 (2012).

190. See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)) (expressly “declin[ing] to elaborate on when offensive speech crosses the line” to invade the “rights of others”); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (finding both prongs of *Tinker* satisfied by holding that “Derby School District officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone” given the history of racial tension and violence in that school district). *But see* *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–76 (8th Cir. 1986) (citing Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640 (1984)) (holding that the “rights of others” prong cannot be met unless school officials could be liable in tort), *rev’d on other grounds*, 484 U.S. 260, 273 n.5 (1988) (quoting *Tinker*, 393 U.S. at 513) (“We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid ‘invasion of the rights of others,’ . . . except where that speech could result in tort liability to the school.”).

191. See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011).

192. See 206 F.3d 1358, 1366 (10th Cir. 2000).

193. *Id.* at 1361.

194. *Id.* at 1366.

“substantial disruption” of the educational environment,¹⁹⁵ this appears to be the first case to have a holding not overturned by the Supreme Court¹⁹⁶ in which the “right of others” issue was not treated wholly summarily.¹⁹⁷

Fourteen years later, the Ninth Circuit employed this analysis in *Dariano v. Morgan Hill Unified School District*,¹⁹⁸ although on an arguably even more controversial set of facts.¹⁹⁹ Instead of the Confederate flag, students at a California high school wore t-shirts with American flags.²⁰⁰ The problem was that they wore the t-shirts for a school-sponsored Cinco de Mayo celebration, and the previous year’s celebration involved threats of violence and substantial tension between Mexican American students and Caucasian students.²⁰¹ The Ninth Circuit paralleled the Tenth Circuit’s reasoning: anticipated mob-like violence can constitute both a “substantial disruption” of the school environment and a “collision with the rights of other students to be secure and to be let alone.”²⁰² Because of the historical background of that school and the fact that additional threats had already been made on that particular day, the court held it was reasonable to anticipate a violent situation that would implicate *Tinker*’s concerns.²⁰³

On the other hand, when the Ninth Circuit used *Tinker* to consider *off-campus* student speech, its “rights of others” analysis was more explicit. The Ninth Circuit’s analysis in *Wynar v. Douglas County School District* was essentially the converse of the *West* and *Dariano* analyses; *Wynar* clearly treated the “rights of others” language as a separate prong of the *Tinker* analysis, but it did not provide any insight into what such “rights” may entail.²⁰⁴ Because *Wynar* involved a high school student sending online instant messages from his home computer “to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would ‘take out’ other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre,” the court really did not need to perform an in-depth legal analysis of the is-

195. *Id.* at 1366–67.

196. *Cf. Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–76 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260, 273 n.5 (1988).

197. *West*, 206 F.3d at 1366.

198. 745 F.3d 354, 361 (9th Cir. 2014).

199. *See, e.g., Eugene Volokh, Not Safe To Display American Flag in American High School*, WASH. POST, Feb. 27, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/not-safe-to-display-american-flag-in-american-high-school/> (“If you dislike speech and want it suppressed, then you can get what you want by threatening violence against the speakers When thuggery pays, the result is more thuggery.”).

200. *Dariano*, 745 F.3d at 357.

201. *Id.*

202. *Id.* at 359 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 514 (1969)).

203. *Id.* at 360. The court also noted that the assistant principal’s reaction (allowing students with less ostentatious flags on their clothing to go back to class and giving other students the option to either turn their shirts inside-out or return home with an excused absence) was reasonable in light of the threat posed. *Id.*

204. 728 F.3d 1062, 1071–72 (9th Cir. 2013).

sue.²⁰⁵ In fact, the court explicitly refrained from participating in the debate over what student speech may “cross[] the line” under the “rights of others” prong since “[w]hatever the scope of the ‘rights of other students to be secure and to be let alone’ . . . the threat of a school shooting impinges on those rights.”²⁰⁶

The most detailed consideration of the “rights of others” prong actually occurred in the Eighth Circuit (years before *West* or *Wynar*) at the appellate level in *Kuhlmeier*.²⁰⁷ The Eighth Circuit in *Kuhlmeier* held that school officials cannot constitutionally punish student speech for invading the “rights of others” unless publication of the speech could create tort liability for the school.²⁰⁸ The court concluded that because the affected students would clearly not have a claim for the tort of invasion of privacy, the school was not constitutionally justified in punishing *Kuhlmeier*.²⁰⁹ The Supreme Court, however, reversed the Eighth Circuit’s holding that the school district’s punishment violated *Kuhlmeier*’s First Amendment rights.²¹⁰ Yet, the High Court expressly declined to comment on the Eighth Circuit’s “rights of others” analysis and instead created a blanket carve-out from *Tinker*.²¹¹

2. *Non-Application of a “Rights of Others” Prong*

Other Circuit Courts of Appeals often mention the “right to be secure and let alone” in their analyses, but the phrase is never explained nor used as an independent prong to determine that speech was or was not protected by the First Amendment.²¹² It appears that the Second Circuit may have once considered the “rights of others” to be a separate inquiry when it held, in *Trachtman v. Anker*, that the distribution of sex questionnaires to high school students was punishable student speech in that it collided with other students’ rights to be free from “psychological harm.”²¹³ However, the stinging dissent in *Trachtman*, and the Second Circuit’s noticeable refusal to even mention the “rights of others” in *Doninger*, seem to suggest that the Second Circuit no longer abides by a two-pronged *Tinker* analysis, at least not for off-campus student speech

205. See *id.* at 1064–65.

206. *Id.* at 1072 (quoting *Tinker*, 393 U.S. at 514).

207. See *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–76 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260 (1988).

208. *Id.* at 1376.

209. See *id.* (citing W. PROSSER & W. KEATON, *THE LAW OF TORTS* 809 (4th ed. 1971)).

210. *Kuhlmeier*, 484 U.S. at 276.

211. See *id.* at 273 n.5; see also *supra* Part II.B.2.

212. See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011) (reasoning that interference with the “rights of other students” can itself create the “substantial disruption” required for speech to be regulated); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 n.9 (3d Cir. 2011) (dismissing the argument that McGonigle’s right to be free from defamation allowed a constitutional restriction of the student speech).

213. See 563 F.2d 512, 519–20 (2d Cir. 1977).

cases.²¹⁴ Ultimately, most circuits view the “rights of others” language in *Tinker* as mere dictum that does not create a second prong distinct from the “substantial disruption” analysis.

3. *Who Cares? Implications of the “Rights of Others” [Non]Analysis*

The extent to which impinging on the “rights of others” influences the regulability of student speech has profound implications for balancing competing constitutional rights: the right to free speech versus the right to privacy.²¹⁵ Theoretically, greater protection of the “rights of others,” or at least recognizing it as a separate route to restricting student speech, grants school officials greater flexibility in responding to (and ultimately deterring) student-on-student harassment or bullying.²¹⁶ If the “substantial disruption” prong is the only available means to restrict student speech, it will be more difficult to punish student-to-student communications, which by their very nature do not create a widespread disruption of the learning environment in most cases.²¹⁷

On the other hand, it is immensely difficult to articulate any limiting principle on this broad authority. If schools are granted such vast power to punish student speech, they may turn into the High Court’s famed “enclaves of totalitarianism.”²¹⁸ Student online speech would be immensely chilled if students feared being punished for saying anything that may hurt another student’s feelings.²¹⁹ Sometimes students will have viewpoints about public policies or social mores that will unquestionably offend many of their classmates.²²⁰ To echo the oft-quoted Judge Kozinski, “[o]f the possible measures a school might take to deal with

214. Compare *id.*, with *Doninger v. Niehoff*, 527 F.3d 41, 48–53 (2d Cir. 2008), and *Trachtman*, 563 F.2d at 521–22 (Mansfield, J., dissenting) (“Even accepting *arguendo* the majority’s thesis to the effect that other students’ rights include the right to be free of any emotional stress, defendants have failed to sustain their burden of showing that the First Amendment values in the present case are outweighed by the risk of psychological harm.”).

215. The “right of privacy” is not enumerated in the Constitution but instead has been read into the “penumbra” of the Bill of Rights. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

216. See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1123 (C.D. Cal. 2010) (citing *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006)) (rejecting school district’s argument based on *Harper* that students have a right to be free from psychological stress imposed by other students); see also Christine Metteer Lorillard, *When Children’s Rights “Collide”: Free Speech vs. The Right to Be Let Alone in the Context of Off-Campus “Cyber-Bullying,”* 81 *MISS. L.J.* 189, 246–56 (2011) (discussing impact of *Beverly Hills* on understanding the *Tinker* “rights of others” analysis in an age of student-on-student harassment).

217. See Lorillard, *supra* note 216, at 253.

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

219. See Lorillard, *supra* note 216, at 253.

220. In *Harper v. Poway Unified Sch. Dist.*, a high school authorized the Gay-Straight Alliance student group to hold a “Day of Silence” to promote tolerance of homosexuals, and, in response, one student wore a t-shirt expressing his religious objection to the practice of homosexuality. 445 F.3d 1166, 1171–73 (9th Cir. 2006). In concluding that the student’s t-shirt “‘colli[des] with the rights of other students’ in the most fundamental way” by imposing psychological harm on persons belonging to historically oppressed minority groups, the Ninth Circuit recognized the potentially game-changing nature of its ruling and specifically limited its holding to race, religion, and sexual orientation, but not gender. See *id.* at 1178, 1183 n.28.

substantial disruption of the school environment, those involving viewpoint discrimination would seem to me to be the least justifiable.”²²¹

C. *Summing Up: Implications of the Student Speech Analysis*

Ultimately, this analysis demonstrates that the answer to the seemingly benign question of when students may be punished for their Twitter tirades or scandalous Snapchats has extensive impacts on basic constitutional principles. In a self-governing society, school officials are charged with not only training up the next generation in the virtues of citizenship²²² but also imparting upon students the importance of the freedom of speech in creating robust public debate.²²³ Yet concerns of a “chilling effect” on student speech exist alongside desires to affirmatively chill the modern bullying epidemic by granting school officials flexibility in doling out punishments for speech that impinges upon students’ rights to privacy.²²⁴ This Note recommends an approach that responds to these intersecting concerns by (1) taking *Tinker*’s “rights of others” language seriously, thereby acknowledging that students have important privacy interests in remaining free from bullying and harassment; and (2) strengthening both prongs of this Note’s “*Tinker* plus” analysis, thereby prohibiting school officials from having an unduly long jurisdictional arm to reach into students’ private lives.

IV. RESOLUTION

This Note recommends that the Supreme Court rework its analysis of student speech in order to keep pace with the changing technological, social, and legal environment. First, the analysis must recognize technological trends in communication. Students increasingly interact with one another via electronic communications—particularly social networking websites such as Twitter, Instagram, and Facebook²²⁵—that can occur inside or outside the “schoolhouse gate.” Second, the analysis should reflect the social trend of increased awareness of the dangers of bullying in all forms. Most pertinently, antibullying advocates have transformed the term “cyberbullying,” once foreign to the American psyche, into a frequent topic in both nationwide conversations and family discussions.²²⁶ Third, the analysis should reflect (and ultimately incorporate) the legal trend in most states of recent legislation prohibiting cyberbullying and electronic harassment.²²⁷

221. See *id.* at 1197 (Kozinski, J., dissenting).

222. See *supra* notes 140–42 and accompanying text.

223. See CHEMERINSKY, *supra* note 147, at 752–53.

224. See *supra* notes 215–17 and accompanying text.

225. See MADDEN, *supra* note 19, at 2.

226. See, e.g., *Cyberbullying*, *supra* note 20.

227. See Hinduja & Patchin, *supra* note 21.

This Note contributes to the scholarship by arguing that the Court should accomplish this lofty goal by strengthening both prongs of the *Tinker* analysis to apply to all student speech (with only exceptions for the “illegal drug use” in *Morse* and the “school-sponsored expression” in *Kuhlmeier*) by capitalizing upon the proliferation of antiharassment and anticyberbullying laws. By strengthening both prongs of the analysis, schools will be prevented from broadly punishing speech merely because the speaker was a student and the content was controversial in a technological era where a person’s role as a student is seamlessly interconnected with his or her other societal roles. At the same time, an incorporation of antiharassment and anticyberbullying laws into the “rights of others” language would allow the Court to create a jurisprudential mechanism to constitutionally restrict speech when punishment is necessary to address major public policy concerns over students’ privacy and safety.

A. *Strengthening the Two Tinker Prongs*

This Note argues that the Supreme Court must recognize that *Tinker* is in fact a two-pronged rule that offers school officials two alternative (though sometimes overlapping) routes to constitutionally restrict student speech. However, in order to prevent overly chilling so-called “student” speech that is only tangentially related to maintaining order in the classroom, this Note also recommends that both of these prongs pose higher hurdles than the traditional understanding suggests.

1. *First Tinker Prong: “Substantial Disruption”*

As the review of the case law suggests,²²⁸ defining what in fact constitutes a “substantial disruption” of the learning environment requires a consideration of both the effects of the speech and the intent of the speaker. With respect to the first issue, this Note recommends that the Third Circuit’s “addition of a factual comparison to *Tinker*” analysis is superior to the Second Circuit’s more sweeping analysis. With respect to the second issue, this Note recommends that in a more technologically interconnected world, the Second and Third Circuits’ shared understanding of a “specific intent to reach campus” is more appropriate than the Fourth and Eighth Circuits’ focus on a mere intent to reach other students or faculty members.

a. *Effects of Off-Campus Speech in Creating a “Substantial Disruption”*

In analyzing what effects of student speech create a reasonable forecast of a “substantial disruption,” the Third Circuit’s approach of carefully comparing the facts of the case to the facts in *Tinker* is the cor-

228. See *supra* Part III.A.

rectly balanced approach. Not only does this approach appropriately respect precedent, it is also less arbitrary than defining reasonable foreseeability according to some ill-defined yet supposedly “objective” standard. Furthermore, when courts are able to consider the context of *Tinker*, particularly the tumultuous social and political environment throughout the Vietnam War and the fact that a math class was “wrecked,” this conceptualization provides better insulation of student speech that teachers or administrators may find merely inappropriate, difficult, or uncomfortable.²²⁹ Of course, school officials will still be able to maintain a degree of control over the learning environment, but they will only be allowed to do so when the situation is more problematic than the non-trivial disruption in *Tinker*.

Furthermore, this standard is more appropriate given the protection of qualified immunity afforded in Section 1983 cases when the constitutional right is not “clearly established.”²³⁰ An individual may assert a claim under 42 U.S.C. § 1983 when a person, while acting under color of law, deprives another person of his or her constitutional rights.²³¹ In Section 1983 claims, defendants can assert “qualified immunity” to avoid liability if the constitutional right was not “clearly established” at the time of the violation.²³² Although the Third Circuit’s approach is not a bright-line rule, this more detailed analysis provides better guidance as to when school officials violate the First Amendment rights of students in a manner that has been “clearly established” jurisprudentially so that those officials will be held accountable for infringing the constitutional rights of students. As a result, deterrence effects will emerge; by actually holding school officials liable for violations of students’ First Amendment rights, other school officials will be unable to rest on immunity and will be deterred from punishing students when the risk of classroom disruption is not greater than that of *Tinker*.²³³

b. Considering the Intent of the Off-Campus Speaker to Reach School

Regarding to what extent the student must intend his or her speech to reach certain recipients or places in order for school officials to have jurisdiction to restrict it, the Second and Third Circuits’ shared analysis better balances the need for a disciplined learning environment with the reality of mediated interpersonal communication among students regardless of geography. By inherently assuming that an intent to reach campus is required, the Second and Third Circuits’ shared analysis is more compatible with the structural realities of online communication. Oftentimes whatever a social media user communicates is then shared with his or her

229. See Weeks, *supra* note 129, at 1188.

230. See Saucier v. Katz, 533 U.S. 194, 201 (2001).

231. 42 U.S.C. § 1983 (2012).

232. 533 U.S. at 201.

233. See generally Eaton, *supra* note 23.

“friends,” “connections,” or “followers,” a significant portion of which are highly likely to be the user’s classmates if the user is a student. Therefore, if the Fourth and Eighth Circuits’ analysis focusing on the intent to reach fellow students were followed, virtually *all* online student communications would be within the school’s jurisdiction.²³⁴

Again, a less robust jurisdictional requirement would risk chilling students’ abilities to engage in robust debates with their social networks, including their classmates. It is inappropriate to use the *Tinker* doctrine, the seminal “student speech” framework, when young adults are hardly acting in their roles as “students.”

Although there are conceptual difficulties in distinguishing whether the student actually intended the speech to reach campus, factual analogies to the blog in *Doninger* can be illuminating.²³⁵ Speech that is truly “purposely designed . . . to come onto the campus,” must be more aggressive than merely sharing a social media status update with one’s “friends” or writing a generic blog that address life as a student.²³⁶ This is a necessary check to protect the First Amendment freedoms of young adults (who happen to be students) when they communicate online.

Critics may fear that higher bars to the regulation of student speech will only exacerbate heart-wrenching instances of harassment and tragic cases of cyberbullying. In addition to the recharacterization of the “rights of others” prong,²³⁷ threatening speech can be regulated under the “true threat” doctrine regardless of the person’s role in the educational context.²³⁸ Under *Watts v. United States*,²³⁹ speech is punishable when it constitutes a “true threat,” and the Eighth Circuit has used this standard independently of *Tinker* to punish a student’s speech when a recipient “would [reasonably] interpret the purported threat as a serious expression of an intent to cause a present or future harm.”²⁴⁰ Obviously, threatening speech by students cannot be tolerated, but the horizons of the *Tinker* doctrine need not be expanded to cover such speech when an independent doctrine is available.²⁴¹

2. *Second Tinker Prong: Defining the “Rights of Others” Today*

The frequently ignored, or at best undervalued, “rights of others” language in *Tinker* should be treated as the second of a two-pronged

234. See Weeks, *supra* note 129, at 1189.

235. See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (quoting *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 206 (D. Conn. 2007)) (highlighting that “[t]he blog posting directly pertained to events at LMHS, and Avery’s intent in writing it was specifically ‘to encourage her fellow students to read and respond.’”).

236. See *id.* (internal quotation marks omitted).

237. See *infra* Part IV.A.2.

238. See, e.g., *D.J.M. ex rel. D.M. v. Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754, 761 (8th Cir. 2011); *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002).

239. 394 U.S. 705, 707–08 (1969).

240. *Doe*, 306 F.3d at 622.

241. See *supra* note 98.

analysis under which student speech can be restricted. This Note argues that school officials should be permitted to punish student speech that interferes with the “rights of others” in situations in which schools have legal responsibilities to students. As described below, this analysis would incorporate both when the school could be liable in tort, as suggested by the Eighth Circuit,²⁴² but also when the school has statutorily-created responsibilities to its students.

The Supreme Court should recognize that the “rights of others” in an age of cyberbullying should incorporate the rights students have under state antibullying and federal harassment statutes.²⁴³ Some federal harassment statutes contemplate school district liability directly. For example, Title IX of the Education Amendments of 1972 renders school districts liable for peer sexual harassment that is “severe, persistent, and interfere[s] with the victim’s ability to participate in or to receive benefits from the educational program” when “a person with authority to intervene [has] actual knowledge of the harassment and reflect[s] deliberate indifference toward the victim.”²⁴⁴ Allowing schools to punish student speech in violation of such liability-contemplating harassment statutes is a logical extension when state actors have a responsibility to protect certain student rights. If, for example, a male student were “severe[ly]” and “persistent[ly]” interfering with a female student’s ability to concentrate in school by posting sexually harassing images of her on his Instagram with a caption encouraging other students to make sexually explicit comments when they see her, a school official could constitutionally punish him for his online speech. Again, this is a natural extension of the liability of the school district under Title IX.²⁴⁵

While state antibullying and cyberbullying statutes sometimes do not contemplate school district liability,²⁴⁶ they often require schools to perform an even more activist role in policing the school environment.²⁴⁷ One poignant example is New Jersey, where the state’s “Antibullying Bill of Rights . . . prohibits bullying, harassment, or intimidation that disrupts the school or interferes with the rights of others.”²⁴⁸ The statute requires each school district to have an “antibullying specialist” and to investigate complaints within ten days.²⁴⁹ Schools’ performance in these

242. See *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375–1376 (8th Cir. 1986) (citing Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640 (1984)), *rev’d on other grounds*, 484 U.S. 260 (1988).

243. See McCarthy, *supra* note 189, at 12–13.

244. See *id.* at 11–12 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)). Other federal harassment statutes that contemplate school district liability include Titles VI and VII of the Civil Rights Act of 1964, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. See *id.* at 11.

245. See U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL, available at <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf>.

246. Hinduja & Patchin, *supra* note 21.

247. See McCarthy, *supra* note 189, at 12–13.

248. *Id.* at 13 (citing N.J. STAT. ANN. § 18A:37–13 (West 2015)).

249. *Id.*

areas is then reported, and principals can be disciplined for inadequacies.²⁵⁰ Consequently, under both the federal and state frameworks, schools have responsibilities to protect the interests of students, and this is translatable into a conceptualization that students have a “right” to be free from illegal harassing and bullying behavior.

Recognizing the “rights of others” as a legitimate prong of the analysis is also respectful of precedent in that the carved-out exception to *Tinker* expressed in *Fraser* could be maintained, just recharacterized. School officials would be able to punish “lewd and offensive” speech when the school itself would be liable for the speech. Under one understanding, *Fraser* could be subsumed under Title IX peer sexual harassment prohibitions; if schools can be liable when they know about and fail to intervene in the face of peer sexual harassment, then they should be able to constitutionally restrict student speech to that effect.²⁵¹ Under another understanding, the offensive speech proscribed by *Fraser* could be restricted by schools when they would face tort liability. For example, although the Eighth Circuit did not find that the school would be liable for an invasion of privacy tort in *Kuhlmeier*,²⁵² other situations are conceivable in which the student would in fact meet Prosser and Keeton’s definition of the tort in order to hold the school liable.²⁵³

B. *Application of this Analysis to (Almost) All Student Speech*

Completely tearing down the “schoolhouse gate” is most consistent with an era in which “cyberspace blurs just where schoolhouse gates are.”²⁵⁴ A framework that eschews physicality will also be able to accommodate a predicted future with even greater levels of mediated communication, particularly among young adults and children.²⁵⁵

Furthermore, the application of *Tinker* to almost all student speech, regardless of location, is useful with respect to qualified immunity when the constitutional right at issue is not “clearly established.” Obviously, assertions of “qualified immunity” abound in unsettled areas of the law,

250. *Id.*

251. *See id.* at 11–12.

252. *See Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986) (citing W. PROSSER & W. KEATON, *THE LAW OF TORTS* 809 (4th ed. 1971)), *rev’d on other grounds*, 484 U.S. 260 (1988).

253. *See Lorillard, supra* note 216, at 201; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (arguing that an individual has a privacy right to be free from “(1) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs[;] (2) Public disclosure of embarrassing private facts about the plaintiff[;] (3) Publicity which places the plaintiff in a false light in the public eye[; and] (4) Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”).

254. *See Lorillard, supra* note 216, at 196 (citing Kenneth R. Pike, Comment, *Locating the Misaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 973 (2008)).

255. *See* Dominic E. Madell & Steven J. Muncer, *Control Over Social Interactions: An Important Reason for Young People’s Use of the Internet and Mobile Phones for Communication?*, 10 CYBERPSYCHOL. & BEHAV. 137, 137 (2007) (demonstrating that focus groups of young adults indicated a preference for mediated communications due to an increase in control over the timing and content of the communication).

including the extent to which the First Amendment shields off-campus student speech.²⁵⁶ Because courts need not wrestle with complex metaphysical questions about the location of speech, the constitutional right will be “clearly established” (at least to a greater degree). This will prevent overbroad protection of qualified immunity and will allow for greater deterrence of unconstitutional behavior by school officials under a specter of liability.²⁵⁷

The only exceptions that must remain, in the absence of the Supreme Court overruling any prior opinions, are the “school-sponsored” expressions in *Kuhlmeier*²⁵⁸ and the speech “promoting illegal drug use” when the student is “at school” in *Morse*.²⁵⁹ The Court in both cases expressed policy concerns that relate only to on-campus speech. In *Kuhlmeier*, the Court wanted to allow schools to control the content of speech it itself sponsored,²⁶⁰ making the speech by nature linked to the campus. In *Morse*, the Court explicitly recognized that the constitutional punishment of speech promoting drug use was limited to when the student was “at school.”²⁶¹ As Justice Stevens noted in his dissent, the speech would “unquestionably” have been protected had it simply “been unfurled elsewhere.”²⁶² Therefore, unless the school is itself sponsoring the speech by causing a recipient to understand that the school has endorsed its content or a student is clearly “at school,” this Note recommends that all speech be analyzed under a heightened version of the *Tinker* doctrine.

V. CONCLUSION

This is an age in which students are more likely to blog about their opposition to public policy than to wear protesting armbands to class; where students are more likely to tweet double entendres in favor of a student government nominee than to announce them at a school assembly; where students are more likely to text one another about scandalous pregnancies among their peers than to write about it in the school newspaper; and where students are more likely to post a Vine video unfurling a banner that reads “BONG HiTS 4 JESUS” in an attempt to “go viral” rather than to unfurl such a banner at a school-sanctioned viewing of the Olympic Torch to attract television cameras. In this era of mediated communications, it is necessary that students’ rights to free speech not be unconstitutionally infringed due to outdated legal frameworks.

256. See, e.g., *Doninger v. Niehoff*, 642 F.3d 334, 345–46 (2d Cir. 2011) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated on other grounds* by *Pearson v. Callahan*, 555 U.S. 223 (2009)).

257. See *id.*

258. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

259. *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

260. *Kuhlmeier*, 484 U.S. at 273.

261. *Morse*, 551 U.S. at 394.

262. *Id.* at 434 (Stevens, J., dissenting).

Unfortunately, this is also an age where students are constantly harassed, bullied, and even threatened by other students. In 2011, one in five teens admitted to being bullied in the past year, either in person, by phone, by text message, or online.²⁶³ Furthermore, young adults are often ill-equipped to manage and confront these behaviors on their own.²⁶⁴ For example, “teens say that the most frequent thing they see when someone is being treated badly [online] is for others to ignore” the behavior.²⁶⁵ As such, school officials must have constitutional leeway to restrict student speech that crosses the line from meaningless folly to statutorily forbidden and emotionally crushing behavior.

The Supreme Court must face the reality that there is no clearly defined “schoolhouse gate” in which to contain students. The Court should take on the difficult task of defining the constitutional protections entitled to student speech in a digital era in order to provide guidance to Courts of Appeals, which have struggled to apply the Court’s framework to cases involving blogs, instant messaging, and social media websites.²⁶⁶ This Note argues that the proper approach would be for the Supreme Court to apply a heightened version of its *Tinker* doctrine to all student speech cases regardless of geography with two exceptions where the speech must be physically related to campus: “school-sponsored” student speech and student speech “promoting illegal drug use.” The heightened threshold for the “substantial disruption” prong will prevent over-punishment of speech occurring when young adults are not truly acting as “students” and encourage the robust debate necessary for self-government, while the incorporation of antiharassment and cyberbullying statutes into the “rights of others” prong would allow school officials to restrict speech that social consensus has deemed a severe threat to students’ privacy interests.

If only Frederick had been more forward-thinking in his attempts to garner national attention. If instead of unfurling a banner he had tried to achieve fame by getting #BONGHiTS4JESUS to trend on Twitter, the Supreme Court may have given lower courts more guidance than a jurisprudential rendition of John Cage’s famed composition *4’33”*.²⁶⁷ While a musical piece comprised entirely of silence undoubtedly poses interesting

263. AMANDA LENHART ET AL., TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES: HOW AMERICAN TENNS NAVIGATE THE NEW WORLD OF “DIGITAL CITIZENSHIP,” PEW RESEARCH CTR. 5 (2011), available at http://pewinternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf.

264. *Id.*

265. *Id.* at 39.

266. See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J. S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

267. JOHN CAGE, *4’33”*.

issues in copyright law,²⁶⁸ the Court's silence on the extent to which the First Amendment protects online or otherwise off-campus student speech has only led to unprincipled line drawing. This is unacceptable when it comes to an individual freedom *guaranteed* by the Constitution. Although this Note takes the position that the best solution is a "*Tinker* plus" rule that accommodates two necessary exceptions, it is ultimately recommended that the Supreme Court finally and clearly resolve the issue.

268. See generally David M. Seymour, *This Is the Piece that Everyone Here Has Come to Experience: The Challenges to Copyright of John Cage's 4'33"*, 33 LEGAL STUD. 532 (2013).