BACK TO THE FUTURE: THE SECOND CIRCUIT'S FIRST AMENDMENT LESSONS FOR PUBLIC STUDENT DIGITAL SPEECH†

Michael J. Grygiel††

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† *For Christopher, Catherine, and Bobby Grygiel – may you always exercise your digital free speech rights as responsible citizens.*

†† Co-Chair, Greenberg Traurig, LLP's National Media and Entertainment Litigation Group; Chair, New York State Bar Association's (NYSBA) Committee on Media Law, 2009–12; Media + Entertainment Law360's Editorial Advisory Board, 2017–20; and Member, NYSBA Task Force on Free Expression in the Digital Age, 2019 to present. The views expressed herein are my own and not necessarily those of Greenberg Traurig, LLP, or any of its clients. I have certain people to thank. The *Syracuse Law Review*'s editorial staff worked diligently to accommodate an extremely accelerated publication schedule. Several individuals at my law firm, to whom I am indebted, generously volunteered to assist with cite-checking responsibilities on an expedited basis: Olivia Bona, Josh Brown, Armound Ghoorchian, Zack Kleinsasser, Caroline Korpiel, Kristin McCarthy, Steve Mendelsohn, Michael Pusateri, Adam Siegler, and Heather Silver. My colleagues in the media defense bar Jack Greiner, Mark Jackson, Tyler Valeska, and Townsend Davis provided thoughtful comments on draft portions of the Article. My law partner Cyndy Neidl was a valuable sounding board who patiently listened to my ideas as this project evolved and also reviewed various section drafts. Rich Bernstein, who was very gracious with his time in working through various section drafts and providing insightful suggestions and criticism that improved the work product, merits particular thanks. Finally, three people are owed a special debt of gratitude for their efforts in support of this undertaking: Rani Jailall, for her customary painstaking attention to detail in coordinating the prepublication review process, and Becki Bice and Marie Jones, for their tireless dedication and professionalism in skillfully preparing the manuscript.

I. INTRODUCTION

A. The Unsettled State of Public Student Speech Doctrine: Social Media Expression Challenges the Existing Framework

In the landmark case of *Tinker v. Des Moines Independent Community School District*,[1] the Supreme Court prohibited public schools from punishing their students' in-school expression unless it substantially disrupts the educational environment.[2] The public student speech doctrine therefore applies within the "schoolhouse gate,"[3] denoting territorial limitations on the exercise of school control over student expression. This doctrine has been destabilized by the permeability of digital communications, which challenges the application of *Tinker*'s traditional framework premised on the location of a student's speech as a boundary to school regulation.[4] As a result of the discontinuity between established

1. 393 U.S. 503 (1969) (holding that a public high school's prohibition on students' wearing black armbands in school to protest Vietnam War, without evidence of substantial interference with school discipline, violated the First Amendment).

2. *Id*. at 509; *see also id*. at 511.

3. *Tinker* famously pronounced that students in our nation's public school system do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506.

4. Courts have noted what they perceive as the difficulty in applying the schoolhouse gate concept in the digital speech context. Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220–21 (3d Cir. 2011) (Jordan, J., concurring) ("For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools."); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) (en banc) (Barksdale, J.) ("Over 45 years ago, when Tinker was decided, the Internet, cellphones, smartphones, and digital media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations."); *see also id*. at 435 (Graves, J., dissenting) ("I recognize, however, that current technology serves to significantly blur the lines between on-campus and off-campus speech."). Commentators have likewise remarked on what they characterize as the complexity of the threshold inquiry of whether *Tinker* applies to networked student speech. Daniel Marcus-Toll, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3418 (2014) ("The increasingly easy transmission and accessibility of digital speech pose significant problems for the territory-based approach to school regulation of student speech under Tinker.") (footnote omitted); Barry P. McDonald, *Regulating Student Cyberspeech*, 77 Mo. L. Rev. 727, 732 (2012) ("The point is that the two-tier framework which has traditionally been tied to geographic places in which the regulated communications occur is much more difficult to apply to communications in cyberspace."); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 619 (2011) [hereinafter *Waldman II*] ("In the pre-Internet age, courts were more easily able to rely on the geographic on-campus/off-campus division when analyzing schools' authority over off-campus speech."); Kenneth R. Pike, *Locating the*

constitutional standards and the instantaneous global connectivity provided by social media platforms, the scope of public schools' authority over the off-campus digital expression of their students has persisted as a pressing First Amendment issue. For more than a decade, the trajectory of the law has been unsettled and alarming in this context. In generally deferring to the judgments of public school officials in upholding the constitutionality of their punishment of digital speech outside the school environment, federal courts have routinely prioritized school control and devalued students' free speech rights.[5]

It would be difficult to exaggerate the level of confusion that pervades this area of First Amendment law. Commentators have repeatedly objected to the traditional principles as unworkable in the digital speech era and criticized the case law applying them as in "disarray."[6] Federal

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Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech, 2008 BYU L. REV. 971, 973 (2008) ("As students adopt email, [w]eb sites, cell phones, and instant messaging software to facilitate personal expression, however, they are increasingly able to affect others at a distance, blurring the line between on- and off-campus speech. This 'telepresence' creates significant difficulties for a jurisprudence of student expression that draws distinctions based on whether a student is at school, at a school-sanctioned event, or might reasonably be viewed as acting under the school's imprimatur.") (footnotes omitted).

5. A conception of digital free speech rights that does not adequately account for the prevalence and importance of digital communication technologies in the day-to-day lives of today's students rests on an indefensible conception of social reality. JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 4 (2008) (explaining the transformational effect of modern digital technology and noting that today's students "live much of their lives online, without distinguishing between the online and the offline" and without separating "their digital identity and their real-space identity"); Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 173 (2010) ("Online activity is difficult, if not impossible, to separate from the lives of today's youth."). For an argument that such modern technologies promote not only social connectivity but identity development among youthful users, *see* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) ("The importance of these new technologies to the development of not only their social and cultural connections but also their identities should not be underestimated."); *see also id*. at 1032 ("Digital technology is part of almost every aspect of a teenager's life. Computers, mobile phones, and the Internet play critical roles in their social and cultural development.") (footnotes omitted); Nathan S. Fronk, *Doninger v. Niehoff: An Example of Public Schools' Paternalism and the Off-Campus Restriction of Students' First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1439 (2010) ("[C]ourts need to understand that digital technology plays a vital and critical role in the social and cultural development of teenagers in that it allows and fosters self-expression, self-realization, and self-reflection.") (footnote omitted); Tomain, *supra* at 169–76 (discussing applicability of First Amendment's self-realization theory to online student speech).

6. McDonald, *supra* note 4, at 737 ("In a word, the courts' positions on the governing rules for these disputes are currently in disarray."); *see also id*. at 732 ("it is little wonder that judges are struggling with whether to apply general free speech principles or special student speech standards to adjudicate a given dispute"); Pike, *supra* note 4, at 990 ("[W]hen it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent,

district and appellate courts have struggled in determining whether and how to apply *Tinker* in the evolving social media arena, at times openly expressing frustration at the lack of guidance from the Supreme Court.[7] In the absence of such guidance, and by way of conspicuous example, two different panels in the Third Circuit handed down conflicting rulings on the same day in cases that were virtually identical for First Amendment purposes.[8] As this embarrassing juxtaposition exemplifies, recent

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controlling legal principles."); Tomain, *supra* note 5, at 102 ("lower court decisions [are] in disarray as to the limits of school jurisdiction over online student speech"); Benjamin A. Holden, *Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 233, 238–39 (2018) ("The circuit courts are greatly conflicted in their treatment of student speakers, and the federal courts' application of the First Amendment to legally indistinguishable fact patterns often seems arbitrary."); Allison E. Hayes, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 249 (2010) (noting "mass confusion among lower courts" in the absence of controlling Supreme Court precedent); Elizabeth A. Shaver, *Denying Certiorari in* Bell v. Itawamba County School Board: *A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1580 (2017) ("The splintered and disparate approaches taken by the federal circuit courts have resulted in scores of different opinions among scholars and educators about the proper framework to be applied to student off-campus electronic speech."); Watt Lesley Black, Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions*, 20 NEV. L.J. 1, 27 (2019) ("[S]tudent-speech cases decided by the lower federal courts in the last fifteen years or so have brought about a confusing patchwork of varying standards and rulings on the important question of whether school officials have authority to discipline students for speech that is created and distributed outside of school.").

7. *Bell*, 799 F.3d at 403 (Costa, J., concurring) ("[T]his court or the higher one will need to provide clear guidance for students, teachers, and school administrators that balances students' First Amendment rights that *Tinker* rightly recognized with the vital need to foster a school environment conducive to learning."); Longoria v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267 (5th Cir. 2019) ("our cases have failed to clarify the law governing school officials' actions in disciplining off-campus speech."); R.L. *ex rel*. Jordan v. Cent. York Sch. Dist., 183 F. Supp. 3d 625, 631 (M.D. Pa. 2016) ("we note that our ability to decide with confidence whether [the] speech was protected by the First Amendment is hamstrung by the perplexing state of relevant precedent"); *see also id*. at 635 ("a district court in this Circuit takes up a student off-campus speech case for review with considerable apprehension and anxiety") (footnote omitted). The Supreme Court itself has acknowledged that its public student speech jurisprudence lacks clarity. Morse v. Frederick, 551 U.S. 393, 401 (2007) (Roberts, C.J.) ("[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents"); *see also id*. at 418 (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators."); *id*. at 427 (Breyer, J., concurring in part and dissenting in part) ("A decision on the underlying First Amendment issue is both difficult and unusually portentous.").

8. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010); Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010). Both *Snyder* and *Layshock* involved MySpace website profiles mocking school principals. Their holdings cannot be reconciled on a principled basis. Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 ST. LOUIS UNIV. L.J. 531, 537 (2015) ("The two cases were heard by separate three-judge panels, each issuing conflicting rulings—with the Blue Mountain panel ruling in the school's favor and the *Layshock* panel ruling in the

circuit court opinions are hopelessly fragmented with inconsistent rationales and disparate rules of decision, leaving more questions than answers for students, school administrators, and reviewing courts alike.[9] Contributing to the uncertainty, parents may not be aware that their children enrolled in public schools can be exposed to suspension or other discipline for engaging in online expressive activity away from the school environment.

This tangled state of affairs is presumably about to be untangled: in *B.L. ex rel. Levy v. Mahanoy Area School District*,[10] a more recent Third Circuit panel surveyed the conflicting approaches adopted by various sister circuits in examining the threshold relationship between digital speech and the educational environment, while illuminating their deficiencies in failing to protect the First Amendment rights of public high school students in the modern public square comprised of social media platforms.[11]

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student's favor.") (footnote omitted); Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1, 20 (2013) ("In sum, [the decisions] applied different variations of the Tinker standard and reached opposite conclusions on seemingly similar facts. These decisions, published by the Third Circuit on the same day, are perfect examples of the clear misunderstanding of which standard applies when evaluating students' off-campus cyber speech."); Carolyn Joyce Mattus, *Is it Really My Space: Public Schools and Student Speech on the Internet After* Layshock v. Hermitage School District *and* Snyder v. Blue Mountain School District, 16 B.U.J. SCI. & TECH. L. 318, 318 (2010) ("On February 4, 2010, two panels of the Third Circuit Court of Appeals reached divergent rulings on two cases with exceptionally similar facts."). The Third Circuit vacated the decisions and granted reconsideration en banc, leading to a splintered opinion reversing the student's punishment in Snyder while affirming the result in Layshock. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 565 U.S. 1156 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc), cert. denied, 565 U.S. 1156 (2012).

9. *See, e.g.*, *Snyder*, 650 F.3d 915 (en banc opinion with eight-judge majority, five-judge concurrence, and six-judge dissent); *Bell*, 799 F.3d 379 (en banc opinion with majority supplemented by three concurrences, accompanied by four dissents).

10. 964 F.3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (Jan. 8, 2021) (*mem.*).

11. In seemingly highlighting the need for Supreme Court review, the *Levy* court noted that five circuits (the Second, Fourth, Fifth, Eighth, and Ninth) have applied *Tinker* in upholding school discipline of off-campus student speech and criticized those decisions as incompatible with the First Amendment. *Id.* at 186–88. These appellate courts have variously described the threshold jurisdictional standard that must be satisfied before allowing *Tinker* to displace general First Amendment principles and apply to digital speech that originates and is disseminated off-campus. *Bell*, 799 F.3d at 395 (Barksdale, J.) (noting the "varied approaches" of courts in considering whether "*Tinker* applies to off-campus speech"); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068–69 (9th Cir. 2013) (surveying approaches taken by "our sister circuits [that] have wrestled with the question of *Tinker*'s reach beyond the schoolyard"). The Second and Eighth Circuits require that a student reasonably foresee that her networked communication will come to the attention of school authorities and create a risk of substantial disruption for *Tinker* to apply. Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) ("*Doninger II*"); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 766 (8th Cir. 2011). The Fourth Circuit requires the off-campus speech to have a sufficient "nexus" to the school's "pedagogical interests." Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir.

Whether these varying approaches merely reflect different descriptive labels or have substantive significance, the point of convergence in all of these cases is that once courts find that *Tinker* applies to the disputed off-campus digital speech, they routinely uphold student punishments based solely on predictions of substantial disruption by school officials, even when no disruption from the speech actually occurred and the predictions were seemingly engineered after the fact for litigation purposes. The Supreme Court has now stepped into the vacuum and agreed to review the decision in *Levy*, the first federal appellate court to hold, as a matter of constitutional law, that public schools are prohibited from punishing the non-violent and non-harassing off-campus social media expression of their students.[12] *Levy*, in which a high school cheerleader was dismissed from the team for Snapchats using profane language, presents two fundamental questions: *what* constitutional standard applies to school regulation of digital speech outside the schoolhouse gate (a substantive issue), and *when* it applies (a jurisdictional issue). The case affords an opportunity not only to clarify the law on these issues, much of which was initially improvised in "trying circumstances"[13] where school authorities

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2011), *cert. denied*, 132 S. Ct. 1095 (2012). The Fifth Circuit applies *Tinker* when the digital speaker "intended the speech to be public and to reach members of the school community"—a standard that is entirely different than a speaker's intent to introduce online speech into the school environment, and that will be met in every case where speech about school students, school personnel, or school affairs is posted on social media. *Bell*, 799 F.3d at 399. The Ninth Circuit employs a flexible three-prong test, to be applied "based on the totality of the circumstances," to determine whether student speech bears a "sufficient nexus" to a school to be punishable without violating the First Amendment. McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 707 (9th Cir. 2019) (*per curiam*) (combining elements of seriousness and likelihood of harm, reasonable foreseeability of reaching the school, and content and context of the speech).

12. *Levy*, 964 F.3d at 189. Prior to *Levy*, the strongest judicial expression of the principle that public school authority may not extend to students' digital speech beyond the schoolhouse gate can be found in Judge Smith's concurrence in *Snyder*, 650 F.3d at 940 ("[h]aving determined that J.S.'s speech took place off campus, I would apply ordinary First Amendment principles to determine whether it was protected[ ]"), and Judge Dennis's scathing dissent in *Bell*, 799 F.3d at 405 ("the majority opinion allows schools to police their students' Internet expression anytime and anywhere—an unprecedented and unnecessary intrusion on students' rights"). This Article advocates a position in substantive alignment with the central objection in those opinions to the First Amendment threat posed by the unshackled application of *Tinker* to students' off-campus digital expression. *Snyder*, 650 F.3d at 939 (Smith, J., concurring) ("Applying *Tinker* to off-campus speech would create a precedent with ominous implications."); *Bell*, 799 F.3d at 404 (Dennis, J., dissenting) ("The majority opinion . . . denigrates and undermines not only Bell's First Amendment right to engage in off-campus online criticism on matters of public concern but also the rights of untold numbers of other public school students in our jurisdiction to scrutinize the world around them and likewise express their off-campus online criticism on matters of public concern.").

13. *Levy*, 964 F.3d at 186. Although initially applied in digital speech cases involving threats of violence, the prevailing legal standards have "spread far and wide" to all kinds of online student speech. *Id*. As the *Levy* court pointed out, "bad facts make bad law" to the extent "the most challenging fact patterns have produced rules untethered from the contexts

sought to insulate students from violent or threatening expression, but to prevent the continued erosion of juvenile free speech rights unauthorized by *Tinker*.

B. The Unusual Provenance of the "Reasonable Foreseeability" Standard

This Article comprehensively examines the current digital free speech landscape in the federal courts culminating in *Levy*'s pivotal announcement of a First Amendment rule conferring broad protection on public school students' off-campus rights of expression exercised through technology that has thoroughly integrated the daily lives of those students[14]—a reality that has only accelerated as the COVID-19 pandemic has forced schools to operate remotely. It does so principally through the lens of the Second Circuit Court of Appeals's public student speech jurisprudence, tracing back to the seminal decision in *Thomas v. Board of Education, Granville Central School District*,[15] which invalidated a school district's punishment of an independent student newspaper where its publishers severed "all connections between their publication and the school"[16] because they did not intend it to reach school grounds.[17] Recognizing that a school's authority to discipline student speech derives

in which they arose." *Id*. at 187 (quoting United States v. Joseph, 730 F.3d 336, 337 (3d Cir. 2013)).

14. According to a recent study, ninety-five percent of the nation's teenagers use smartphones, and ninety-one percent of them use mobile devices for online accessibility. Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RESEARCH CENTER (May 31, 2018), https://www.pewresearch.org/internet/ 2018/05/31/teens-social-media-technology-2018/ [https://perma.cc/BDU3-Z4HM]. Further, almost half of the students in the 13–17 age group spend their free time outside of school texting or interacting with their friends on social media. *How Teens Spend Their After-School Hours*, BARNA GROUP (Aug. 29, 2017), https://www.barna.com/research/teens-spend-school-hours/ [https://perma.cc/SC7B-LPE6]. This Article assesses the public student speech framework's application to the digital speech of public school students enrolled in grades K-12, as the Supreme Court has not resolved the question of the doctrine's applicability at the college level. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."). Further, it does not address the distinct issues of cyber-bullying, cyber-stalking, or cyber-harassment, which are separate categories of expression meriting different treatment under the First Amendment.

15. *See generally* 607 F.2d 1043 (2d Cir. 1979) (reversing and invalidating a school's punishment of an off-campus student publication).

16. *Id*. at 1045.

17. *Id*. at 1050 (publication of student newspaper "was *deliberately designed* to take place beyond the schoolhouse gate") (emphasis added); *see also* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1106 (C.D. Cal. 2010) (students in *Thomas* "took specific efforts to segregate their speech from campus"); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 964 (5th Cir. 1972) ("The students neither distributed nor encouraged any distribution of the papers during school hours or on school property, although some of the newspapers did turn up there.").

from the unique educational interests and goals tied to the school setting, *Thomas* established a strong constitutional presumption protecting student speech that is communicated outside the schoolhouse gate.[18]

But that was not all that was said in *Thomas*—in a notable concurrence, Judge Newman suggested that, in certain narrow circumstances, schools may discipline student expression that takes place outside of school subject merely to basic negligence principles grounded in the traditional tort concept of foreseeability.[19] This proposed dispensation with territoriality as a limitation on school authority, casually unspooled in a footnote in *Thomas*, has profoundly influenced the course of the law affecting the First Amendment rights of public school students.[20] Nearly three decades later, in the first digital free speech case decided at the federal appellate level,[21] Judge Newman's recommendation abruptly resurfaced when the Second Circuit adopted it as the controlling rule of decision in *Wisniewski v. Board of Education, Weedsport Central School District*,[22] allowing schools to punish student speech deemed reasonably likely to come to the attention of school authorities and to cause a disruption in the school environment[23]—notwithstanding that the speech originated and was at all times kept outside of school by the speaker.[24] A

18. 607 F.2d at 1050 ("Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."); *see also* Holden, *supra* note 6, at 260 (*Thomas* "stand[s] for the proposition that student speech explicitly created and kept off campus should not be subject to school discipline.") (footnote omitted); Marcus-Toll, *supra* note 4, at 3417 ("The *Thomas* court concluded that *Tinker*'s significant grant of regulatory authority to school officials was conditioned on its territorial limit.") (footnote omitted).

19. 607 F.2d at 1058 n.13; Harriet A. Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1581 (2009) ("[S]ome courts have applied the student speech jurisprudence—primarily the *Tinker* analysis—to students' online speech . . . when it was foreseeable that the speech would make its way onto campus. This is the approach proposed by Judge Newman in his concurrence in *Thomas*.") (footnotes omitted).

20. Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 230–31 (2009) ("The notion of reasonable foreseeability that some result or consequence might transpire or occur—in this case, the reasonable foreseeability that the off-campus-created speech will capture the attention of school officials—invokes basic negligence principles, borrowed from tort law and applied here to a constitutional question of First Amendment protection for student expression.").

21. Black & Shaver, *supra* note 6, at 28 ("The Second Circuit Court of Appeals was the first federal appellate court to weigh in on the issue of school authority over a student's off-campus electronic speech.") (footnote omitted).

22. 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

23. *Id.* at 38; *see also Doninger II*, 527 F.3d at 48 (adopting *Wisniewski*'s reasonable foreseeability standard).

24. Black, *supra* note 8, at 533 ("The Second Circuit's interpretation of *Tinker* would allow schools to sanction speech in cases where material and substantial disruption occurs or

majority of federal courts has since relied upon the Second Circuit's "reasonable foreseeability" standard in examining the threshold relationship between off-campus digital speech and the school environment as a condition to *Tinker*'s applicability.[25] The improvident result, as emphasized in *Levy*, has been to chill the expression of student digital speakers outside of school to an extent that cannot be reconciled with core First Amendment principles.[26]

C. The Materiality of Territorial Restrictions Derives from the Institutional Interests of Public Secondary Schools

Numerous decisions preceding *Levy*, which reflect the view that public student digital expression, even when composed and disseminated outside of school and without school supervision or resources, requires expanded school control to prevent disruption from being projected into the educational environment by the "tools of modern technology,"[27] have failed to account for this chilling effect. The clear tendency in these cases is to regard online speech as "qualitatively different"[28] from speech

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can reasonably be forecast to occur, *irrespective of where the speech originates*.") (emphasis added) (footnote omitted).

25. Calvert, *supra* note 20, at 240 ("In summary, the Second Circuit has adopted, in both *Wisniewski* and *Doninger*, a jurisdictional test for school discipline over off-campus-created speech that focuses on the reasonable foreseeability of that speech either coming to the attention of school officials or reaching campus."); Holden, *supra* note 6, at 259 ("The Second Circuit's general rule is that public schools can regulate off-campus cyberspeech under *Tinker* if there is a reasonably foreseeable risk that [it] would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.") (internal quotations and footnote omitted).

26. 964 F.3d at 187–88.

27. *Layshock*, 650 F.3d at 221 (Jordan, J., concurring); Tomain, *supra* note 5, at 125–26 ("They argue the impact of online student speech in the school environment is so significant it merits extended jurisdiction. Essentially, they argue offensive, online speech is not functionally identical to offensive, offline speech and schools need exceptional jurisdiction over online speech to preserve the school environment.") (footnotes omitted). Federal court opinions are littered with unabashedly dystopian descriptions of the social media ecosystem. *See, e.g.*, *Snyder*, 650 F.3d at 950–51 (Fisher, J., dissenting) ("But with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment."); *Bell*, 799 F.3d at 435 (Prado, J., dissenting) ("I share the majority opinion's concern about the potentially harmful impact of off-campus online speech on the on-campus lives of students. The ever-increasing encroachment of off-campus online speech and social-media speech into the campus, classroom, and lives of school students cannot be overstated."); *Wynar*, 728 F.3d at 1064 ("outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment").

28. Frank D. LoMonte, *Reaching Through the Schoolhouse Gate: Students' Eroding First Amendment Rights in a Cyber-Speech World*, AM. CONST. SOC'Y FOR L. & POL'Y 2 (2009) ("Some of the recent First Amendment jurisprudence views speech on the internet as qualitatively different from that in print, because of its ease of worldwide access, justifying

communicated through print or analog methods because it is "generally nowhere and everywhere at the same time,"[29] and therefore as unsuitable for protection under the general First Amendment principles that, as reinforced in *Thomas* and, more recently, in *Levy*, govern student speech in the community at large.[30] Noting its pervasive use, immediacy of transmission, and vast accessibility—a worldwide audience, including the entire school community, can be reached "with the click of a mouse"[31]—the opinions endorse greater latitude for school regulation owing to the magnified possibility of harm perceived as resulting from social media

greater regulatory leeway to prevent harm."); Pike, *supra* note 4, at 1001–02 ("even when cyber-speech takes place away from campus, outside of school hours, and using only personal devices, there is a sense in which its availability on campus nonetheless distinguishes such speech from conventional off-campus speech").

29. Papandrea, *supra* note 5, at 1090; Kyle W. Brenton, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1225 (2008) ("The omnipresence of the Internet, however, provides a ready argument that off-campus cyberspeech is in some sense always 'on campus' as well."); *see also Snyder*, 650 F.3d at 940 (Smith J., concurring) (noting the "somewhat 'everywhere at once' nature of the internet"). As one court colorfully noted, "[t]o paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is *everywhere* where there is Internet access." Dig. Equip. Corp. v. AltaVista Tech., 960 F. Supp. 456, 462 (D. Mass. 1997) (emphasis in original).

30. These decisions adopt an "exceptionalist viewpoint" which "view[s] cyberspace as unique from the real world and requir[ing] new or different legal rules to properly regulate this new space." Tomain, *supra* note 5, at 123, 125 (footnote omitted). The irony of this conception is unmistakable: originally envisioned as a democratizing technological development that would support the decentralized flow of digital content through a multiplicity of unmediated applications with virtually nonexistent entry barriers, the Internet has in certain respects developed into a mechanism for increased government control and surveillance of expressive activity. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297 (2014) ("The very forces that have democratized and decentralized the production and transmission of information in the digital era have also led to new techniques and tools of speech regulation and surveillance that use the same infrastructure."); *see also id.* at 2298 (identifying "collateral censorship" as a method by which the government regulates a first-party speaker through, among other things, the exercise of "soft power" over second-party private infrastructure owners). The prevailing public student digital speech architecture represents a disturbing point on this continuum.

31. Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn. 2009) ("*Doninger III"*) ("An email can be sent to dozens or hundreds of other students by hitting 'send.' A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse."); *J.S.*, 593 F.3d at 301 (Fisher, J.) ("We thus cannot overlook the context of the lewd and vulgar language contained in the profile, especially in light of the inherent potential of the Internet to allow rapid dissemination of the information."); McDonald, *supra* note 4, at 746 ("[I]n truth[,] cyberspace knows no geographic boundaries and cybercommunications are much more pervasive, enduring and easy to engage in than communications in the 'physical' world[.]"); Holden, *supra* note 6, at 287 ("[C]ourts appear to leap directly from *Tinker*, decided the year America first landed a man on the moon, to this Brave New World in which student speech is instantaneously uttered, beamed into outer space, and returned to the eyes and ears of hundreds or even thousands of fellow students in the blink of an eye.").

speech.[32] The most extreme version of this view aggrandizes Judge Newman's suggestion in *Thomas* by calling for the abandonment of *Tinker*'s doctrinal distinction between speech within and without the schoolhouse gate as artificial and obsolete in this context.[33] As a consequence, and as the case law leading up to *Levy* illustrates, virtually all digital expression having anything to do with the public school system, school personnel, or other students has been relegated to containment under the relaxed standards of the public student speech framework.[34]

This dramatic expansion of school authority vitiates *Tinker*, which established that school regulation over student speech must be anchored by the need to protect the orderly and effective operation of public schools. Contrary to the reasoning of many federal court opinions, the relationship to the school environment of student speech communicated on digital platforms can therefore never be immaterial to determining *Tinker's* applicability.[35] As a starting point, territoriality necessarily informs and limits the exercise of a school's authority to regulate student speech because of its correlation with the primary educational role of public schools—i.e., geographic considerations, as with school

32. LoMonte, *supra* note 28, at 12 ("This perception that digital media are uniquely dangerous, and that their dangerousness calls for relaxing the burden on government to justify limiting speech, pervades the rulings in *Blue Mountain*, . . . *Wisniewski*, and *Doninger*. Fortunately, this casualness about First Amendment standards is not universally accepted.").

33. *Bell*, 799 F.3d at 393 (rejecting distinction based on off-campus origination of digital speech as "untenable" because "it fails to account for evolving technological developments"); *Layshock*, 650 F.3d at 220 (Jordan, J., concurring) (focusing "on an 'off-campus versus on-campus' distinction is artificial and untenable in the world we live in today"); *R.L.*, 183 F. Supp. 3d at 647 ("Indeed, a bright line distinction between on-campus and off-campus speech in the context of Internet speech is both anachronistic and illogical."). The academic literature is also replete with exhortations that physical and spatial distinctions are no longer relevant in assessing *Tinker*'s applicability to off-campus public student digital speech. *See, e.g.*, Holden, *supra* note 6, at 285 ("Courts should begin with the premise that traditional boundaries of the 'schoolhouse gate' are meaningless in 2016, and will become even more irrelevant in the future.") (footnote omitted); Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1224 (2003) (contending that "geographic distinction is no longer appropriate as a dispositive element in school speech cases"); Stephanie Klupinski, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 644 (2010) (rejecting "location fixation" as "misguided" and "not a determining factor that warrants a separate inquiry" in assessing public school speech proscriptions).

34. McDonald, *supra* note 4, at 750 ("Certainly the courts applying the *Tinker* disruption analysis to all forms of student cyberspeech disputes without regard to where the speech occurred, or how its content relates to the school, are missing the boat and in many cases will be applying function-sensitive rules where the application of more robust free speech principles would be warranted.").

35. Brenton, *supra* note 29, at 1216 ("But geography remains relevant to a school's claim of authority, because *Tinker* and its progeny do not necessarily apply beyond the schoolhouse gates.") (footnote omitted); McDonald, *supra* note 4, at 730 ("[I]t is indefensible for courts to be taking the position that student speech rules, and particularly the *Tinker* disruption standard, apply to these disputes regardless of the geographic location of the speech.").

sponsorship and supervision, are reliable indicia of speech "that affects matter[s] of legitimate concern to the school community[.]"[36] That is to say, real-world physical and spatial boundaries guide the prudential application of public student speech principles not simply as an adventitious marker for their own sake but because they correspond with and delineate the unique constellation of institutional interests meriting protection in the secondary educational context.[37] Indeed, *Tinker*'s framework rests on the location of the speech as a constitutional precaution that a school's legitimate educational goals are sufficiently implicated to justify the "more stringent restrictions [on speech] acceptable"[38] under that framework. It follows that the more remote the connection between the speech and the school, the less substantial the need to protect both a school's educational objectives and the instructional processes by which those goals are pursued, raising concerns that school officials are censoring speech that should be protected under general First Amendment principles.[39]

It has become fashionable, however, to assert that *Tinker*'s schoolhouse gate is merely a legal construct that no longer provides a meaningful guardrail for a school's ability to punish student Internet speech.[40] According to this reasoning—an inflated variation of the theory introduced by Judge Newman—reliance on territorial considerations no longer makes sense because the omnipresence of speech on digital platforms does not prevent *Tinker*'s unrestrained application to off-campus social media expression that can reasonably be anticipated to reach and have an adverse impact on the school environment.[41] The misguided skepticism over whether a sustainable boundary on *Tinker*'s applicability remains

36. *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

37. *See, e.g.*, Sullivan v. Hous. Indep. Sch. Dist., 307 F. Supp. 1328, 1340 (S.D. Tex. 1969) ("In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education.").

38. *Thomas*, 607 F.2d at 1049.

39. McDonald, *supra* note 4 at 754 ("The more off campus such speech is, the more we question the legitimacy of a school's right to police it simply because we expect a school's authority and disciplinary power to be wielded mainly in the physical spaces where it can be said the public has given the school authority to wield it—namely, at school or in school-supervised and controlled activities or events."); *see also Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting) ("[S]tudent speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.").

40. Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 39 CAP. UNIV. L. REV. 129, 149 (2007) ("[T]he concept of defining speech by its geographic origin or receipt is nothing more than a legal construct to limit the scope of a school district's authority to punish student speech.") (footnote omitted).

41. *See, e.g.*, *Snyder*, 650 F.3d at 945–48 (Fisher, J., dissenting); *Layshock*, 650 F.3d at 221–22 (Jordan, J., concurring).

technologically feasible has led to a series of cases discussed in this Article in which school punishment of out-of-school social media expression was found acceptable under the First Amendment. These decisions are constitutionally problematic, and their abrogation of the schoolhouse gate as a limit on school authority demeans the legacy of *Thomas* and the promise of *Levy* by precluding public high school students' endowment with First Amendment rights in equal measure to those of other citizens.[42] Their analysis is seriously flawed, for two fundamental reasons. First, it has created an "expansionary dynamic"[43] that allows for the sweeping exercise of school authority over student speech in the modern public square, which *Tinker* impliedly placed off limits from governmental interference. In this manner, and as assailed by the *Levy* court, *Tinker*'s narrow accommodation of the special interests unique to the educational environment has morphed into "a vast font of regulatory authority"[44] that justifies increased school control over broad swaths of student speech.[45] As Judge Krause concluded in *Levy*, the result "is to erase the dividing line between speech in 'the school context' and beyond it, a line which is vital to young people's free speech rights."[46]

Second, if the inflection point of these opinions is to posit the irrelevance of the actual physical location of a digital speaker and the method of dissemination of digital speech in determining whether the speech is subject to diminished protection under *Tinker*'s balancing test, then the dispositive inquiry reduces merely to an after-the-fact characterization of the putative effects of the speech on the school environment, which obfuscates the central need of identifying a legitimate educational interest at a meaningful risk of being compromised as a constitutional prerequisite to regulating student expression.[47] However, neither public school

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42. Thomas, 607 F.2d at 1052 ("the student is free to speak his mind when the school day ends"); *Snyder*, 650 F.3d at 936 (Smith, J., concurring) ("the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large").

43. *Levy*, 964 F.3d at 187.

44. *Id*. at 189.

45. Hoder, *supra* note 19, at 1598 ("if schools are given the authority to punish and censor any student activity on the Internet that will foreseeably reach [the] school campus, then the potential jurisdiction of school power over students' online activity would be limitless") (footnote omitted).

46. 964 F.3d at 188 (citation omitted).

47. Those interests, inventoried by the Fifth Circuit in an early post-*Tinker* decision invalidating, as a First Amendment violation, student suspensions for distributing outside school premises an underground newspaper created away from school without school resources, have attenuated applicability to digital expression that is not intentionally introduced into the school environment:

> Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours,

officials nor reviewing courts may indulge the penalization of student speech by hypothesizing effects supposedly injurious to the need "to prescribe and control conduct in the schools."[48] Under the guise of preventing interference with the secondary education process, expedient forecasts of implausible disruption tacitly but impermissibly allow school administrators to scrutinize the *content* of digital expression without consideration of whether the speaker intended to introduce the speech into the school environment.[49] This places at particular risk of suppression student speech that is resistant or controversial, or that criticizes a public school's policies, personnel, or operations.[50] Thus, it flouts Justice Alito's unequivocal admonition that the educational mission of public schools can never justify the policing of student's public discourse based on school authorities' disapproval of the views expressed, a result anathema to the First Amendment.[51]

The "reasonable foreseeability" standard renounced by the majority opinions in both *Thomas* and *Levy* represents a radical departure from longstanding public student speech doctrine, which differentiates the level of protection afforded student speech depending on the location and context in which it is communicated—i.e., whether within or without the schoolhouse gate.[52] Nothing in the Supreme Court's jurisprudence suggests that school authority may extend to punish allegedly disruptive speech—no matter its medium or format—away from the confines of the schoolhouse or when it is not subject to school supervision. Rather, the

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> because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms.

Shanley, 462 F.2d at 968–69 (footnote omitted).

48. *Tinker*, 393 U.S. at 507.

49. Frank D. LoMonte, *Students Do Not Shed Their Constitutional Rights at the Login Screen: Slamming the Schoolhouse Gate on School Control over Social Media Speech*, 2 EDUC. L. & POL'Y REV. 36, 43 (2015) ("a content-based regulation on speech is presumptively unconstitutional and will be struck down unless it passes the most demanding level of scrutiny").

50. Tomain, *supra* note 5, at 106 n.51 ("When school administrators are the subject of the critical speech, it is even more difficult for them to be objective about whether and how much punishment should be imposed.").

51. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

52. *Tinker*, 393 U.S. at 506; LoMonte, *supra* note 28, at 19 ("The Supreme Court's jurisprudence is clear, and technological innovation has not rendered it obsolete. If the publication of a student's speech does not take place on school grounds, at a school function, or by means of school resources, then a school cannot punish the speaker without violating her First Amendment rights.").

Supreme Court has indicated precisely the opposite in holding that First Amendment protections apply wholesale to speech on the Internet.[53] The use of negligence-based standards, long disfavored to the point of exclusion from constitutional free speech doctrine,[54] to penalize off-campus digital expression is difficult if not impossible to reconcile with that precedent.[55]

This Article takes the position that, lacking instruction otherwise from the Supreme Court, there is no constitutionally valid reason for courts adjudicating cyberspeech disputes to retreat to unqualified acceptance of Judge Newman's supposition that a school's power to regulate student expression may extend beyond the educational environment.[56] While *Tinker*'s concept of the schoolhouse gate as a point of First Amendment demarcation may be more metaphorical than real in the digital age, territorial limitations should nevertheless remain not only a relevant, but ordinarily controlling, determinant of the constitutional status of public student speech.[57] This will revive scrupulous protection for public students' social media expression that is unconnected to the school setting and untethered from school activities or school supervision, the punishment of which has been upheld (often in the absence of any disruption to the educational environment) by the courts in a manner both unimaginable and intolerable under the First Amendment had the communication at issue been delivered in a traditional communications medium.[58] Even acknowledging that whether digital communications are

53. *Levy*, 964 F.3d at 179–80 (first quoting Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 868 (1997); and then quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1736–37 (2017)); *see also Reno*, 521 U.S. at 863 (the Internet is a medium afforded "the highest protection from governmental intrusion") (quoting Am. Civ. Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring)).

54. As Justice Black wrote during an earlier period in our nation's history when the First Amendment liberties of political dissidents were being broadly constrained, punishing freedom of speech based on "notions of mere 'reasonableness' . . . is not likely to protect any but those 'safe' or orthodox views which rarely need" First Amendment protection. Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

55. *See Bell*, 799 F.3d at 412–16 (Dennis, J., dissenting) (objecting to expansion of school authority to regulate off-campus student expression as contrary to Supreme Court precedent).

56. My advocacy is pragmatic rather than theoretical: to identify the doctrinal implications and consequences of an implicit (albeit contestable) assumption of cyberspace as situated differently and apart from real space as justification for expanded regulatory control in the former domain, which has distracted courts from a faithful application of First Amendment principles in the specific context of public school students' online expression.

57. McDonald, *supra* note 4, at 754 ("the physical space in which cyberspeech occurs" is relevant to determination of the governing legal standard); *see also Shanley*, 462 F.2d at 974 ("We do note, however, that it is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts.").

58. Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 162 (2003) ("Rather, student off-campus speech during activities that

protected by the First Amendment principles that govern speech in the community at large "plainly cannot turn solely on where the speaker was sitting when the speech was originally uttered,"[59] the place of origination and method of dissemination establish an appropriate constitutional baseline for limiting the scope of school regulatory authority. The critical point, correctly adhered to in *Levy*, is that "like other kinds of speech, cyber-speech may or may not cross the threshold of the schoolhouse gate."[60] Courts which have defaulted to *Tinker* through application of the reasonable foreseeability test in digital speech cases without careful consideration of the place where the speech originated, how it was disseminated, and whether it sufficiently involved legitimate educational interests of the school have disserved "the cherished democratic liberties that our Constitution guarantees."[61]

D. Intentionality as a Constitutional Limitation on School Authority over Public Student Expression in the Modern Public Square

Thomas and *Levy* made explicit what was implicit in *Tinker*: when students express themselves outside of school and beyond school supervision, they are entitled to full constitutional protection of their free speech rights the same as any other citizen[62]—no matter how inappropriate, controversial, or provocative their expression. To vindicate this foundational principle, digital speech originating away from school without school oversight or reliance on school resources should be considered outside the schoolhouse gate unless a student intentionally introduces the

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lack any connection to the school should be considered a category of speech that deserves full protection of the courts. As *Tinker* stated, students away from school have all of the constitutional rights of adults.") (footnote omitted); Papandrea, *supra* note 5, at 1030 ("Permitting school officials to restrict student speech in the digital media expands the authority of school officials to clamp down on juvenile expression in a way previously unthinkable.").

59. *Snyder*, 650 F.3d at 940 (Smith, J., concurring).

60. Pike, *supra* note 4, at 974.

61. *Hazelwood*, 484 U.S. at 290 (Brennan, J., dissenting); *see also* McDonald, *supra* note 4, at 730 ("a basic application of the *Tinker* disruption standard, as most courts are doing, is simply inadequate to account for the free speech interests that may be implicated by such cases").

62. *Thomas*, 607 F.2d at 1045 ("Where, as in the instant case, school officials bring their punitive power to bear on the publication and distribution of a newspaper off the school grounds, that power must be cabined within the rigorous confines of the First Amendment, the ultimate safeguard of popular democracy."); Markey, *supra* note 40, at 142 ("Distilled to its basics, [*Thomas*] portends that off-campus student speech should enjoy *full* First Amendment protection, unless the student somehow caused the speech to occur on-campus.") (emphasis in original) (footnote omitted); LoMonte, *supra* note 49, at 45 (in *Thomas*, "the Second Circuit held that *Tinker*'s limits on freedom of expression were 'wholly out of place' in the context of an 'underground' humor magazine that students produced on their own time and with their own money").

speech into the educational environment.[63] In the absence of affirmative measures by the speaker to disseminate networked speech within a school setting, to an audience under school supervision, or in the context of a school-sponsored activity or event, courts should immunize student digital expression from school punishment under the First Amendment.[64] This constitutional limitation on public school authority accommodates the protean nature of cyberspace as a domain for free expression, promotes student communication across an evolving range of digital technologies, and provides assurance to student speakers that they will not be exposed to school punishment merely for expressing their thoughts on social media platforms.

The Supreme Court has acknowledged that the exchange of information on social media is "integral to the fabric of our modern society and culture."[65] When students blog or tweet outside of school, exchange cell phone text messages away from school premises, or post on Instagram or Snapchat before the school day begins or after it ends—the *samizdat* of modern digital culture[66]—their discourse in the "modern public square"[67] is independent of their status as students.[68] Digital communications shared among classmates and social media postings external to the school environment cannot reasonably be perceived as endorsed by the school, do not entail a commitment of school resources, and do not

63. Tuneski, *supra* note 58, at 140 ("Thus, school officials should be prohibited from punishing students for constitutionally protected speech which originates from and is disseminated from off-campus locations unless the speaker takes additional steps to direct the expression towards the school."); Brenton, *supra* note 29, at 1237 ("Unless such harm is attributable directly to the intentional actions of the online student speaker, the school should have no power to censor the speech."); Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 839 (W.D. Tenn. 2013) ("The speech was not made at school, directed at the school, or involved the use of school time or equipment.").

64. Tuneski, *supra* note 58, at 177–78 ("If the author does not take steps to encourage the dissemination at school, it can be presumed that the author intended the speech which originated off-campus to be viewed and received off-campus.") (footnote omitted).

65. *Packingham*, 137 S. Ct. at 1738; *see also* Pike, *supra* note 4, at 994 ("The Internet is a powerful medium of communication, and one that is arguably indispensable in modern life.").

66. Papandrea, *supra* note 5, at 1036 ("Not surprisingly, young people commonly use digital media to discuss school—their teachers, the school administrators, their fellow students, and the events of their daily lives. The difference is that instead of keeping a handwritten diary, they keep blogs. Instead of talking on landline phones, they talk on cell phones and use text messaging and instant messaging.").

67. *Packingham*, 137 S. Ct. at 1732.

68. This point has long been judicially recognized with respect to non-digital speech. *See, e.g.*, Klein v. Smith, 635 F. Supp. 1440, 1441 (D. Me. 1986) ("The student was not engaged in any school activity or associated in any way with school premises or his role as a student.") (footnote omitted).

compromise the functional interests germane to the educational process.[69] Moreover, they are not associated with the school or its course of instruction,[70] do not interfere with pedagogical objectives or curriculum management, and do not intrude on the learning environment.[71] As a matter of First Amendment law, they should be presumptively insulated from school discipline unless the speaker takes "additional, purposeful steps to ensure that the expression was disseminated at school."[72] Making the exercise of school authority subject to the speaker's intentional introduction of digital expression into the school environment will endow students' free speech rights with appropriate protection and will restore "clarity and predictability"[73] to this unstable area of law.[74] Otherwise, as underscored in *Levy*, students confronted with the vague and indeterminate reasonable foreseeability standard prevailing in the current legal landscape will self-censor their off-campus digital speech to avoid on-campus punishment by school authorities.[75] As a result, valuable speech about a variety of

69. LoMonte, *supra* note 49, at 38 ("[N]one of the justifications for diminishing students' rights while they are in school applies to speech they disseminate after-hours on Twitter.") (footnote omitted).

70. Tuneski, *supra* note 58, at 164 ("Unless the student makes an effort to have the site viewed from school or uses a school account to express himself, the speaker has made no attempt to associate with the school. It is thus logical that expression created off-campus and directed to a general audience away from campus should be considered off-campus speech.").

71. Papandrea, *supra* note 5, at 1054 ("[B]ecause most digital speech cases do not have a geographic nexus to the school, there is a necessary disconnect between the challenged expression and any actual disruption to the classroom or learning environment."); *see also id.* at 1093 ("For the most part, however, digital communications do not intrude into the public space, and therefore by their very nature cannot cause an immediate disruption to the work of the school."); Hayes, *supra* note 6, at 271 (because digital speech "lack[s] a geographical nexus to the school" "[t]here is a seeming disconnect between the student expression and any actual disruption to the classroom") (footnote omitted).

72. Tuneski, *supra* note 58, at 142.

73. *Levy*, 964 F.3d at 188.

74. Avery Medjuck, *Everywhere at Once: The* Tinker *Framework and Off-Campus, Online Speech*, N.Y.U. L. MOOT COURT BD. PROC. (Feb. 23, 2018), http://proceedings.nyumootcourt.org/2018/02/everywhere-at-once-the-tinker-framework-and-off-campus-online-speech/ ("only a test that considers the intent of the student speaker can adequately balance students' free speech rights against administrators' need to protect the school environment"); Holden, *supra* note 6, at 284 ("The notion of 'intent to communicate' seems to be a distinguishing touchstone, separating those speech fact patterns which judges find protected by the First Amendment from those which are unprotected.").

75. *Levy*, 964 F.3d at 185 ("Obscure lines between permissible and impermissible speech have an independent chilling effect on speech."); Tuneski, *supra* note 58, at 177 ("the imprecision of the standards necessitates the conclusion that student speakers would be forced to chill their speech in order to ensure that they remain immune from the jurisdiction of the schools"); Allison N. Sweeney, *The Trouble with Tinker: An Examination of Student Free Speech Rights in the Digital Age*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359, 416–17 (2018) ("A student cannot know with any certainty whether his school can generally regulate his off-campus online speech, and thus might find that his best course of action is to

important issues on the minds of students—including criticism of public school systems—will be stifled, to the detriment of an informed community.[76]

Punishing students for digital expression generated in their homes or at other locations away from school when they did not intend to communicate the speech within the school environment and did not take any steps to do so amounts to unprecedented governmental interference with freedom of expression.[77] At a minimum, the First Amendment prohibits public schools from dictating what their students may and may not say outside of school on the "vast democratic fora of the Internet,"[78] a level of censorship incompatible with our constitutional principles, values, and heritage.[79] With the exception of certain narrow and historically recognized categories, no other branch of free speech law tolerates tipping the balance so heavily in favor of the government by requiring a speaker to anticipate the impact of her speech, thereby stripping protection from students' expression even when they are removed from the custodial school setting.[80] To safeguard expressive liberty from infringement by public school boards—majoritarian political bodies susceptible to community pressure and predisposed to avoid controversy[81]—the *Thomas* court rejected basic negligence principles as an inherently illimitable basis for the regulation of student speech and invalidated the punishment of the not-so-underground newspaper at issue in that case based on a determination

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refrain from speaking at all. This standard, therefore, effectively chills off-campus online student speech and silences young American speakers.") (footnote omitted).

76. LoMonte, *supra* note 28, at 1. ("Self-publishing has allowed young writers to address sensitive social issues candidly, and to vent their criticism of school personnel and programs. This speech can have real value—not just for the writer, and not just for the student audience, but for adults who seek an inside glimpse into what young people are thinking, even if it may be uncomfortable reading, and we would all be poorer if it were lost."); Tuneski, *supra* note 58, at 143 ("While much of the controversial student expression may be considered valueless by some observers, other examples involve valuable critiques of school policies and issues impacting the lives of adolescents.").

77. *See* Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) ("Requiring less than an intent to communicate the purported threat would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts.").

78. *Reno*, 521 U.S. at 868; *see also Levy*, 964 F.3d at 179–80.

79. *Snyder*, 650 F.3d at 933 ("An opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion."); *Layshock*, 650 F.3d at 216 ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.").

80. LoMonte, *supra* note 49, at 41 ("our online speech jurisprudence reassigns the benefit of the doubt from the speaker to the regulator, leaving students vulnerable to censorship-motivated overreaching").

81. *See Thomas*, 607 F.2d at 1051–52.

that the students intended to segregate their publication from exposure to an in-school audience.[82]

The best way "to avoid these ends" is "by avoiding these beginnings:"[83] a return to the same intent-to-communicate standard, accompanied by the non-deferential judicial review of public school censorship efforts exemplified in both *Thomas* and *Levy*, is necessary to prevent school officials from overstepping the bounds of the First Amendment in the digital speech context.[84] By "swiping left" and eliminating the reasonable foreseeability test from the threshold determination of whether digital speech is subject to school control—i.e., whether the speech is within or without *Tinker*'s schoolhouse gate; whether it is the speech of a *student* or of a *citizen*[85] —meaningful constitutional protection for off-campus public student expression will be restored.[86] As a result of this retro-doctrinalism—going back to the future to secure freedom of speech—advances in information technology will no longer excuse increased government control over public student expression based merely on flimsy predictions of disruption, a development at odds not only with recognition of the Internet as a "dynamic, multifaceted category of communication"[87] that allows any student to "become a town crier with a voice that resonates farther than it could from any soapbox"[88] but with the First Amendment itself. Judge Krause's majority opinion in *Levy* is nothing if not an alembic of these principles.[89]

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82. Tomain, *supra* note 5, at 150 ("Under *Thomas*, schools do not have jurisdiction over lewd and indecent speech merely because it may come onto campus.") (footnote omitted).

83. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

84. Exacting judicial scrutiny is required of the justifications proffered by public schools for regulating online student speech through resort to function-sensitive standards when the speech is communicated outside the schoolhouse gate. McDonald, *supra* note 4, at 755 ("[R]eviewing courts ought not to apply the foregoing standards in a manner that is deferential to the judgments of those officials. Rather, a healthy amount of scrutiny and skepticism regarding claims of substantial disruption, and especially claims of forecasted disruption, should be applied in such cases.").

85. Aleaha Jones, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the* Tinker *Standard*, 15 DUKE L. & TECH. REV. 155, 160 (2017) ("In fact, current approaches advocated by the circuit courts allow for all speech by teenagers enrolled in public schools to be considered 'student speech,' which may seriously infringe on student freedom of speech.").

86. *See Levy*, 964 F.3d at 179–80; *see also* Calvert, *supra* note 20, at 234 ("This distinction—whether a result or outcome is merely *foreseeable* or whether it is actually *intended*—would make a vast difference on the jurisdictional question at issue in cases like *Wisniewski*.").

87. *Reno*, 521 U.S. at 870.

88. *Id.*

89. *Levy*, 964 F.3d at 189 ("We are equally mindful, however, that new communicative technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative. And we cannot permit such efforts, no matter

Like the Snapchatting cheerleader in *Levy*, whether the nation's K-12 public school students will benefit in full constitutional measure going forward from the unprecedented communicative opportunities afforded by social media platforms will now be decided by the Supreme Court. The time has come to end the circuit courts' misguided flirtation with garden-variety negligence concepts that have allowed public schools to impede the free speech rights of their students. This does not require the development of new substantive standards to govern off-campus speech,[90] but rather application of the Court's existing precedent to deal with the narrow circumstances where off-campus social media expression is intentionally introduced into the school environment and proves disruptive to the educational process. The First Amendment's public student speech architecture need not be revised or recalibrated to uphold protection for the "free speech rights of all young people who happen to be enrolled in public school"[91] simply because today's students rely on "the interconnection of electronic pathways"[92] to exercise those rights.

Part II of this Article reviews the four Supreme Court cases establishing the constitutional parameters for student speech in public secondary schools and addresses the confusion resulting from those decisions, which at times has infected the rationales in digital speech cases decided by lower federal courts.[93] Despite their increasingly qualified conception of students' First Amendment rights in the school environment, nothing in these decisions supports *Tinker*'s extension to off-campus online speech by public school students. To the contrary, outside of the school context, *Tinker* implies that students' First Amendment rights are protected by the same limitations on governmental authority as those of all citizens. Part III examines the Second Circuit's influential public student speech jurisprudence, in particular the provenance of the "reasonable foreseeability" standard and its flawed extrapolation to cyber-expression outside the schoolhouse gate in the *Wisniewski* and *Doninger II* cases. It argues that these cases incorrectly applied Supreme Court precedent and, further, includes a critique of how garden-variety negligence principles

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how well intentioned, without sacrificing precious freedoms that the First Amendment protects.").

90. Shaver, *supra* note 6, at 1581 ("Although the scope of students' First Amendment rights regarding off-campus electronic speech is a thorny one, the Supreme Court's existing precedents, when considered together, largely provide the appropriate framework to balance students' constitutional rights against the authority of school officials to maintain an orderly and effective learning environment at school.").

91. *Levy*, 964 F.3d at 179.

92. *Reno*, 521 U.S. at 889 (O'Connor, J., concurring).

93. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 397 (2011) ("the difficulty in the area results primarily from lower courts' fundament misunderstanding of the Supreme Court's opinions").

funneling into *Tinker*'s application grant public school districts excessive authority to restrict the digital free speech of K-12 students based on school officials' arbitrary and retaliatory disapproval of its message—a path to censorship repudiated by Justice Alito's concurrence in *Morse v. Frederick*.[94] Part IV contrasts the rules of decision, rationales, and outcomes in recent off-campus student speech cases from the Third and Ninth Circuits, focusing on the decision in *B.L. ex rel. Levy v. Mahanoy Area Public School District*[95] in which the Supreme Court granted *certiorari* on January 8, 2021. Part V offers a detailed exposition of the recurring constitutional fault lines underlying the current public school digital free speech landscape and examines their adversity for students' First Amendment rights when exercised online. It includes an examination of the procedural and substantive deficiencies of a reasonable foreseeability standard in protecting students' free speech rights in the modern public square; a discussion of the need to disaggregate the threshold question of the scope of *Tinker*'s applicability from the satisfaction of its evidentiary requirements; an analysis of the origins of the misapplied "targeting" rubric often invoked as justification for the exercise of school authority over off-campus social media expression; an explanation of why *Fraser*'s rationale would cede broad censorial authority to school officials if extended to students' off-campus social media expression; and a critique of *Tinker* as unsuitable for application to public student speech outside the school environment. In order to ensure that adequate protection is provided to the free speech rights of student speakers, Part VI endorses a communicative intent standard to determine, in the first instance, whether contested digital expression qualifies as on- or off-campus speech. This requires a return to the *Thomas* court's insistence that speech a student does not intentionally introduce into the school environment merits full constitutional protection. Finally, Part VII contextualizes school regulation of student digital First Amendment rights by challenging the conception of networked communications entrenched in judicial assessments of those rights and by situating their exercise within the current cultural moment. It concludes that alternative remedies are available to sanction harmful student speech beyond the scope of school authority because not purposefully communicated in the educational environment, and recommends that public schools entrusted with educating our nation's youth help them become responsible and engaged digital citizens by doing what schools do best—teaching students about constructive participation in

94. *See generally* 551 U.S. 393 (2007) (reversing and remanding the Ninth Circuit's finding of a First Amendment violation).

95. 964 F.3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (Jan. 8, 2021) (*mem.*).

democratic self-government through informed public discourse in the modern public square.

The exercise of school authority over off-campus student digital speech is a zero-sum game. In each and every instance, it diverts resources from the educational system, intrudes on parental disciplinary prerogatives,[96] and, except in the most unusual of cases, punishes freedom of expression in violation of the First Amendment. To borrow from Judge Newman's pithy observation in *Thomas*, the First Amendment may not give a public high school student the right to wear Cohen's jacket in the classroom setting,[97] but it unquestionably protects a student's right to wear the same jacket outside of school or to post the same profane anti-government message on social media[98]—even with the knowledge that the message will likely come to the attention of school officials.

II. THE U.S. SUPREME COURT'S QUARTET OF PUBLIC STUDENT SPEECH CASES—A PATTERN OF RETRENCHMENT & SEEDS OF CONFUSION

A. Tinker*'s "Material Disruption" Standard: Balancing Students' Right of Expression Inside the Schoolhouse Gate with the Special Characteristics of the Educational Environment*

In *Tinker v. Des Moines Independent Community School District*,[99] the first public student speech case decided by the Supreme Court, the plaintiffs (13-, 15- and 16-year-old students) wore black armbands to school in Des Moines, Iowa, to demonstrate their opposition to America's involvement in the Vietnam War.[100] Aware in advance of this protest,

96. *Thomas*, 607 F.2d at 1051 ("Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Parens patriae*.") (footnote omitted).

97. *Id.* at 1057 (Newman, J., concurring) ("In short, the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."). Judge Newman's reference was to Cohen v. California, 403 U.S. 15 (1971), which overturned on First Amendment grounds the criminal conviction of a Vietnam war protestor for breaching the peace by wearing inside a courthouse a jacket bearing the slogan "Fuck the Draft."

98. Tomain, *supra* note 5, at 116.

99. *See generally* 393 U.S. 503 (holding that a prohibition of in-school student expression, without evidence of substantial disruption to the school environment, is not permissible under the First Amendment).

100. *Id*. at 504. The *Tinker* plaintiffs' protest was not without considerable personal cost, as community response to the armbands included vehement disagreement and even threats of violence. Someone telephoned the Tinkers on Christmas Eve and threatened to blow up their house by the morning. RONALD K.L. COLLINS, SAM CHALTAIN, WE MUST NOT BE AFRAID TO BE FREE 277 (2011). Mary Beth Tinker received a death threat from another caller, the family received postcards accusing them of being Communist Party sympathizers, and the Tinkers' residence was targeted with red paint. Mary Beth Tinker, *Foreword: Special Issue of the Education Law & Policy Review/Free Speech in Public Educational Institutions*, 2 EDUC. L. & POL'Y REV. x, xviii (2015); Kelly Shackelford, *Mary Beth and John Tinker and* Tinker v. Des Moines*: Opening the Schoolhouse Gates to First Amendment Freedom*, 39 J. SUP. CT. HIST. 372, 377 (2014).

school administrators adopted a policy prohibiting students from wearing an armband to school, upon penalty of suspension until the armband was removed.[101]The protestors were suspended based on this regulation.[102] Beginning its analysis with the now familiar observation that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[103] Justice Fortas's majority opinion found that wearing the armbands as an act of symbolic expression involved "direct, primary First Amendment rights akin to 'pure speech.'"[104] In the absence of any evidentiary showing in the record that the presence of the armbands had "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school"[105] or infringed on the rights of other students,[106] the *Tinker* Court determined that their display was protected by the First Amendment.[107]

Tinker balanced the in-school free speech rights of students with the unique requirements of the educational process and the need to preserve conditions conducive to effective learning in the school environment. Even inside the school building and during school hours, however, the decision made clear that students have a broad right to speak their mind on controversial and divisive issues, and that schools' exercise of authority over their students' in-school expression was relatively limited.[108] An important aspect of *Tinker*'s rationale is the insistence that adequate protection of the expressive liberties of public school students requires exacting scrutiny by reviewing courts of the reasons proffered by school officials for censuring in-school speech.[109] The decision rejected school

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Despite the threats that the Tinkers' armbands provoked, the Supreme Court found their symbolic speech protected under the First Amendment, as discussed below in the text.

101. 393 U.S. at 504.

102. *Id.*

103. *Id.* at 506. "This statement draws a distinction between the rights of students outside of school and their treatment while in school, suggesting that their rights are greater while they are away from school." Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 142 n.88 (2000); *see also* Tuneski, *supra* note 58, at 147 ("The Court created a distinction between expression taking place off-campus and that which occurs inside the schoolhouse gates.").

104. 393 U.S. at 508; *see also Barnette*, 319 U.S. at 632 ("Symbolism is a primitive but effective way of communicating ideas").

105. 393 U.S. at 509 (internal quotation marks and citation omitted).

106. *Id.* at 509, 513.

107. *Id.* at 508, 514 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.").

108. *Levy*, 964 F.3d at 177–78 ("*Tinker* thus struck a balance, reaffirming students' rights but recognizing a limited zone of heightened governmental authority. But that authority remains the exception, not the rule.").

109. 393 U.S. at 511 ("In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

officials' argument that the armband regulation was justified based on a concern that disruption might result from wearing the symbol in school because of its polarizing message, emphasizing that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[110] Although *Tinker* allows public school authorities to regulate student speech in the school environment before a disruption actually materializes,[111] the decision requires that they first satisfy the rigorous burden of demonstrating that any such regulation is based on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,"[112] as determined by non-deferential judicial review.[113] In short, *Tinker* mandates a close nexus between a school's regulation of student speech and the preservation of its legitimate institutional goals or pedagogical interests.

In the more than four decades since *Tinker* was decided, the opinion has lost none of its rhetorical force in valuing the free speech rights of students to speak on controversial issues in the public school setting.[114]

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110. *Id.* at 508; *see also* Harpaz, *supra* note 103, at 129 n.22 ("Moreover, the record made it clear that the decision to expel students wearing armbands had been made in advance of their attendance at school and not as a result of actual reactions by other students. The school's decision to adopt a rule banning the wearing of armbands to protest the Vietnam War was not based on any specific knowledge of planned counter demonstrations, but instead relied on the general fact that strong opinions existed about the War.").

111. 393 U.S. at 514. As colorfully phrased by the Sixth Circuit, "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door." Lowery v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007). The Second Circuit has stated that, in applying *Tinker*, "the relevant inquiry is whether 'the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 78 (2d Cir. 2010) (quoting *Tinker*, 393 U.S. at 514) (alterations in original).

112. 393 U.S. at 509; *see also* Harpaz, *supra* note 103, at 128 ("[T]he Court imposed a significant burden on the school to justify silencing student speech despite the need for school authorities to exercise substantial control over students during the school day."); *see also* Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 635 (2002) (*Tinker* "force[s] the school district to provide at least some evidence of the alleged substantial and material disruption or evidence that a substantial and material disruption is reasonably foreseeable") (footnote omitted).

113. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1773 (1987) ("The constitutional standard adopted by the Court required the school to present evidence sufficient to convince a judge that plaintiffs' speech was incompatible with the educational process. In effect, then, the Court in *Tinker* held that the constitutionality of the school's regulation would be determined by independent judicial review of whether the regulation was necessary for the attainment of the school's educational objectives."); Mattus, *supra* note 8, at 333 n.136 (noting that in *Tinker* "the Supreme Court did not defer to the school's judgment").

114. 393 U.S. at 509; *see also* Harpaz, *supra* note 103, at 128 ("[T]he Court recognized that the students had the right to express controversial political ideas"); Erwin Chemerinsky, *How Will Morse v. Frederick Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 23 (2008) ("*Tinker* powerfully expressed the importance of protecting student speech."). *Tinker* is clearly a rights-based decision that, in both rhetoric and result, embraced broad protection of students' free

Tinker emphasized that, under the Constitution, students are autonomous individuals "possessed of fundamental rights which the State must respect"[115] who "may not be confined to the expression of those sentiments that are officially approved."[116] On one level, the case directly involved the core First Amendment principle prohibiting the government from censoring speech on the basis of viewpoint.[117] But despite the fact that the student suspensions in *Tinker* were unquestionably related to their expression of a specific political position[118]—support for a truce in the Vietnamese war hostilities[119]—there is nothing in the decision that limits its

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speech rights even inside the schoolhouse gate. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 530–32 (2000) (identifying protection of public students' First Amendment rights as one of *Tinker*'s main themes); LoMonte, *supra* note 28, at 3 ("*Tinker* stands as the high-water mark for student First Amendment rights . . . .").

115. 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution"); *see also* Miller, *supra* note 112, at 634 ("The *Tinker* Court focused on the fact that students are 'persons' under the Constitution and, as such, they are entitled to certain fundamental rights that the state—even the state in its role as school—must respect.") (footnote omitted).

116. 393 U.S. at 511.

117. Although not denominated in the opinion as viewpoint-based discrimination, *Tinker* found that the prohibition of "one particular opinion" on the Vietnam war violated the First Amendment. *Tinker*, 393 U.S. at 510–11 ("a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition"). The Second Circuit has explained that "[v]iewpoint discrimination is a 'subset or particular instance of the more general phenomenon of content discrimination,' in which 'the government targets not subject matter but particular views taken by speakers on a subject.'" Make the Rd. By Walking, Inc. v. Turner, 378 F.3d 133, 150 (2d Cir. 2004) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831, 829 (1995); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197–00 (1983). The Second Circuit has also noted that distinguishing between content-based and viewpoint-based discrimination may, in certain contexts, be "a problematic endeavor." Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 630 (2d Cir. 2005) ("[I]t can be difficult to discern what amounts to a subject matter unto itself, and what, by contrast, is best characterized as a *standpoint* from which a subject matter is approached") (emphasis in original). Government attempts to regulate speech based on a particular message communicated are presumptively unconstitutional. *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); All. for Open Soc'y Int'l., Inc. v. U.S. Agency For Intern. Dev., 651 F.3d 218, 235 (2d Cir. 2011) ("It is well established that viewpoint-based intrusions on free speech offend the First Amendment.").

118. Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 431 (9th Cir. 2008) ("In essence, the Court found the armband prohibition unconstitutional *not* simply because it worked to prohibit students from engaging in a form of pure speech, but because it did so based on the *particular opinion* the students were espousing.") (emphasis in original). The Supreme Court has more recently acknowledged that "[t]he essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment." *Morse*, 551 U.S. at 403; *see also* Guiles *ex rel*. v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006) ("*Tinker* involved political viewpoint-based discrimination . . . ."); Pike, *supra* note 4, at 979 ("The speech at issue in *Tinker* stands as a classic example of core political expression.").

119. 393 U.S. at 514 ("They wore [the armbands] to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example,

holding "only to political speech or to political viewpoint-based discrimination."[120] Rather, *Tinker*'s "material and substantial disruption" test, at least in theory, is content-neutral[121] and attempts to balance the free speech rights of students with the need to maintain an appropriate level of discipline and order in public schools so that the educational process may proceed without undue interference.[122] In striking this balance, *Tinker* established a stringent evidentiary standard that governs personally expressive activities by students even inside the schoolhouse gate: absent a showing that such activities "substantially interfere with the work of the school or impinge upon the rights of other students,"[123] or

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to influence others to adopt them."); *see also* Papandrea, *supra* note 5, at 1040 ("The Court expressed particular concern in *Tinker* that the school's regulation was aimed at a particular viewpoint on a particular subject—in this case, opposition to the Vietnam War.") (footnote omitted).

120. *Guiles*, 461 F.3d at 326; *Snyder*, 650 F.3d at 926 ("Although *Tinker* dealt with political speech, the opinion has never been confined to such speech.").

121. The Second Circuit has explained that "*Tinker* established a protective standard for student speech under which *it cannot be suppressed based on its content*, but only because it is substantially disruptive." *Guiles*, 461 F.3d at 326 (emphasis added); *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770 (5th Cir. 2007) ("Instead, *Tinker*'s focus on the result of speech rather than its content remains the prevailing norm. The protection of the First Amendment in public schools is thereby preserved."); *Shanley*, 462 F.2d at 970 ("[E]xpression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content"); *Recent Cases: First Amendment—Student Speech—Third Circuit Applies Tinker to Off-Campus Student Speech* – J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011) (*en banc*), 125 HARV. L. REV. 1064, 1069 (2012) [hereinafter *Recent Cases:* Snyder] ("[T]he *Tinker* test turns on the outcome of a student's speech rather than its content"); Brenton, *supra* note 29, at 1229 ("The *Tinker* test itself is content-neutral"); Alison Hofheimer, *Saved by the Bell? Is Online, Off-Campus Student Speech Protected by the First Amendment?*, 40 FLA. ST. U. L. REV. 971, 974 (2013) ("[t]he Court explicitly rejected the idea that school officials could regulate speech based on the content or message expressed").

122. As a justification for restricting student speech, *Tinker* focused on the need to protect the effective "functioning of the learning environment" in public schools. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1121 (2010) [hereinafter *Waldman I*] ("[T]he need for protection—of other students' well-being and/or of the school environment as a whole—was a core justification underlying the particular speech restrictions that the Court permitted."); *see also* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 61 (1996) (*Tinker* "allowed the school some greater degree of power than the State possesses generally" to regulate speech "because of the 'special circumstances of the school environment'") (citing *Tinker*, 393 U.S. at 506). Thus, *Tinker* essentially "strike[s] a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment." *Snyder*, 650 F.3d at 926 (Chagares, J.); *Layshock*, 650 F.3d at 212 (*Tinker*'s balancing standard "recognized that the unique nature of the school environment had to be part of any First Amendment inquiry"); Miller, *supra* note 112, at 653 ("the heavy burden of *Tinker* strikes a compromise between the schools' interest in maintaining a safe and educational environment and the students' interest in free expression").

123. 393 U.S. at 509. *Tinker*'s material and substantial disruption standard has been criticized for its indeterminacy, as the Court "gave short shrift to elaborating on what will constitute a material disruption [and] what will suffice as substantial disorder." Abby Marie Mollen,

can reasonably be forecast to cause such a material disruption,[124] on-campus speech is protected under the First Amendment.[125] As the decision makes clear, a desire on the part of school officials to protect the school's reputation or to avoid controversy often associated with unpopular viewpoints or beliefs is constitutionally insufficient to satisfy this test.[126] As it makes equally clear, the "maintenance of a pervasive and unquestioned form of authority"[127] by silencing student protest is not justified by the educational mandate of the public school system.

In evaluating the First Amendment rights of students "in light of the special characteristics of the school environment,"[128] the *Tinker* Court advanced a broad conception of expressive liberty that signaled the need for tolerance by school authorities appropriate to the diversity of viewpoints to be expected in a modern pluralistic society.[129] Rejecting out of hand

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Comment, In Defense of the "Hazardous Freedom" of Controversial Student Speech, 102 NW. U. L. REV. 1501, 1507 n.37 (2008).

124. Miller, *supra* note 112, at 651 ("In a way, *Tinker* provides two standards. The first is whether a reasonable school official could foresee a disruption, and the second is whether a reasonable school official would find such a disruption to be substantial and material.") (footnote omitted).

125. Shanley, 462 F.2d at 978 ("Tinker simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation's priceless topsoil of the First Amendment.").

126. 393 U.S. at 510 ("[T]he action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.") (footnote omitted). For an apparent misreading of *Tinker* that distorts this First Amendment principle, *see Bell*, 799 F.3d at 400 (Jolly, J., specially concurring) ("When *Tinker* refers to a disruption, it is saying that student ideas may be expressed on campus *unless they are so controversial* that the expression creates a disruption.") (emphasis supplied).

127. Post, supra note 113, at 1773.

128. 393 U.S. at 506.

129. 393 U.S. at 508 ("Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance."). Assessments of Tinker's efficacy have diverged with the passage of time. On one hand, the decision's balancing test has been denounced as too generous in protecting student expression while inadequately accounting for public school officials' need to maintain order in the schools. Morse, 551 U.S. at 421 (Thomas, J., concurring) ("Tinker has undermined the traditional authority of teachers to maintain order in public schools"); Dupre, *supra* note 122, at 98 (arguing that the material disruption test is too difficult an evidentiary burden for school administrators to meet and therefore "does not allow schools to create an environment where serious learning will consistently occur"). On the other, *Tinker* has been criticized for introducing a vague and malleable standard that, as it has been applied by the courts, allows school officials too much latitude in punishing student expression that did not substantially disrupt the educational environment. Tuneski, *supra* note 58, at 171 ("A review of the cases . . . shows that school officials and some courts have considered significantly smaller disruptions to be 'substantial' ones. In addition, disruptions that only indirectly affect classrooms have been punished. Thus, the substantial disruption test has become in practice an easily satisfied threshold for courts and school officials seeking to justify punishing students for their expression."). *See also Guiles*, 461 F.3d at 326 (Cardamone, J.) ("Nor is *Tinker* entirely clear as to what

the notion that public schools may treat students as passive recipients of state-approved beliefs, the decision recognized that the unimpeded communication of ideas among students is itself an instrumental part of the educational process.[130] Importantly, there is nothing in *Tinker* that suggests its holding applies outside of the unique context of the educational environment or in situations where the legitimate functional interests of the public secondary school system are not directly implicated.[131] To the contrary, *Tinker* strongly implies that, once beyond the schoolhouse gate, students enjoy full First Amendment freedoms,[132] "the basis of our

constitutes 'substantial disorder' or 'substantial disruption' of or 'material interference' with school activities.").

130. 393 U.S. at 512 (student speech in public schools contributes to the "marketplace of ideas" and "personal intercommunication among the students" is "an important part of the educational process") (quoting Keyishian v. Bd. of Regents, 385 U.S. 569, 603 (1967) (internal quotation marks omitted). That is not to say that student speech within the school setting is endowed with the same level of constitutional protection as general public discourse. Rather, it is subject to preservation of the school's legitimate functional interests. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2365 n.44 (2000) ("the classroom itself represents a managerial domain dedicated to instruction, rather than to the open-ended pursuit of knowledge") (contrasting pedagogical constraints of university classroom with marketplace of ideas applicable to culture of general scholarship).

131. *Bell*, 799 F.3d at 424 (Dennis, J., dissenting) ("*Tinker* does not authorize school officials to regulate student speech that occurs off campus and not at a school-sponsored event, where the potential 'collision' of interest[s] upon which *Tinker*'s holding pivots simply is not present."); *see also id*. at 425 ("the Supreme Court crafted a specific level of scrutiny (the 'substantial-disruption' test) to evaluate restrictions on speech *within school* that strikes a balance between the competing interests at stake") (emphasis in original); *Sullivan*, 307 F.Supp. at 1340 ("it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education"); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 270 (2001) ("The Court in *Tinker*, however, never suggested that this limitation on students' speech rights applied *outside* the school setting or that it gave schools the power to punish off-campus expression that never reached the campus confines") (emphasis in original); Hoder, *supra* note 19, at 1572 ("[T]he Court expressly limited the application of this standard to speech that occurs on campus and during school hours") (footnote omitted). *Tinker* applies not only in the classroom but also at school-sponsored events, including extracurricular activities and interscholastic athletic competitions, which implicate institutional interests in preserving the effective functioning of these events and activities. 393 U.S. at 512–13 (*Tinker*'s balancing standard governs student speech "in the cafeteria, or on the playing field, or on the campus during the authorized hours").

132. Tuneski, *supra* note 58, at 162 ("As *Tinker* stated, students away from school have all of the constitutional rights of adults.") (footnote omitted); Calvert, supra note 131, at 271 ("The *Tinker* Court, it is important to emphasize, narrowly confined the role of schools in such a way as to suggest their authority does not reach past the schoolhouse gate."); LoMonte, *supra* note 28, at 1 ("The unmistakable implication of *Tinker v. Des Moines Independent Community School District* was that students showed up at the schoolhouse possessing the full benefits of the First Amendment; the only question was how much of that bundle of rights they were forced to check at the gate."); Aaron A. Caplan, *Public School Discipline For Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140 (2003) ("When *Tinker* said that students do not shed their First Amendment rights at the schoolhouse gate, it necessarily implied that they have the ordinary complement of First Amendment rights outside those gates. Otherwise, they would have nothing to shed (or not shed).").

national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society."[133] If extended to off-campus speech, the balancing process contemplated by the substantial disruption test would afford school authorities impermissible latitude to discipline student speech on a wide array of important public issues, including whistle-blowing and political speech protected at the core of the First Amendment.[134]

B. Fraser*'s "Educational Mission" Rationale: Civic Values Instruction & the Prohibition of "Offensive" Student Expression in the Public Secondary School Setting*

The Supreme Court addressed the issue of the expressive rights of students in public schools for a second time in *Bethel School District No. 403 v. Fraser*,[135] where the plaintiff gave a speech during a high school assembly in nomination of a fellow student for elective class office.[136] The remarks in question, which Chief Justice Burger's majority opinion characterized as "offensively lewd and indecent,"[137] were delivered to approximately 600 high school students, including many who were as young as 14,[138] as "part of a school-sponsored educational program in self-government."[139] Emphasizing the "role and purpose of the American public school system"[140] in instilling the fundamental civic values

133. 393 U.S. at 509.

134. *Snyder*, 650 F.3d at 939 (Smith, J., concurring) (noting that *Tinker* "authorizes schools to suppress political speech" at the core of the First Amendment); *Bell*, 799 F.3d at 405 (Dennis J., dissenting) ("[T]he *Tinker* framework is far too indeterminate of a standard to adequately protect the First Amendment right of students . . . to engage in expressive activities outside of school"); Tuneski, *supra* note 58, at 161 ("the *Tinker* Court would have abhorred a school's attempt to infringe student expression outside of the schoolhouse gates"); LoMonte, *supra* note 49, at 59–69 (*Tinker*'s balancing test insufficiently protects students' off-campus speech).

135. *See generally* 478 U.S. 675 (1986).

136. *Id*. at 677. The divergent views in the majority and dissenting opinions of the student who delivered the assembly speech at issue in *Fraser* border on comical: the same individual Chief Justice Burger's opinion for the Court dismissively characterized as "this confused boy" was described by Justice Stevens in dissent as "an outstanding young man with a fine academic record." *Id*. at 683, 692.

137. *Id*. at 685; *see also id*. at 677–78 (the favored candidate was referred to "in terms of an elaborate, graphic, and explicit sexual metaphor").

138. *Id*. at 677.

139. 478 U.S. at 677.

140. *Id*. at 681. In emphasizing that "schools must teach by example the shared values of a civilized social order," the *Fraser* majority embraced a model of the public education system in which schools are responsible for inculcating fundamental civic values. *Id*. at 683. *Accord*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship . . . [I]t is a principal instrument in awakening the child to cultural values . . ."). *See* Goldman, *supra* note 93, at 400 ("Specifically, the Court identified the inculcation of fundamental values, including the teaching of socially appropriate behavior, as a proper function of public

necessary for a democratic society,[141] the *Fraser* Court held that the speaker's three-day suspension and removal from the school's list of graduation speakers[142] was constitutionally permissible: "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[143] *Fraser* is therefore an expressly content-based decision[144] driven by the school's appropriate

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schools.") (footnote omitted); *Waldman I*, *supra* note 122, at 1123 (*Fraser*'s "educational rationale" is consistent with regulating uncivil student speech and "guiding students toward appropriate ways of expressing themselves at school"); Harpaz, *supra* note 103, at 131 ("[t]he main theme stressed [in *Fraser*] was the inappropriateness of vulgar language in a school setting").

141. *Fraser*, 478 U.S. at 681. *See also* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) ("When [the government] acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people."); James v. Bd. of Educ. of Cent. Dist. No. 1 of the Towns of Addison, 461 F.2d 566, 573 (2d Cir. 1972) ("a principal function of all elementary and secondary education is indoctrinative" and includes "transmit[ting] the basic values of the community").

142. *Fraser*, 478 U.S. at 678. Fraser was subsequently permitted, "by a write-in vote of his classmates," to speak at the school's commencement ceremony. *Id*. at 679.

143. *Id*. at 685. The understanding of the public-school system's role communicated by the *Fraser* Court "elevates obedience to institutional authority into an independent educational objective." Post, *supra* note 113, at 1774 n.241.

144. Apart from the public student speech framework and certain limited "categories hav[ing] a historical foundation in the Court's free speech" case law, content-based restrictions on speech are presumptively invalid under the First Amendment. United States v. Alvarez, 567 U.S. 709, 717–18 (2012) (Kennedy, J.) (noting the "substantial and expansive threats to free expression posed by content-based restrictions"); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (under the First Amendment, "the most exacting scrutiny [applies] to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); Ashcroft v. Am. Civ. Liberties. Union, 542 U.S. 656, 665–66 (2004). To the extent *Fraser* suggests that its holding applies to "an offensive *form* of expression" without trenching on the content of speech, it rests on a tenuous conceit. *Fraser*, 478 U.S. at 682 (emphasis supplied); *see also id*. at 683 ("Nothing in the Constitution prohibits the states from insisting that certain *modes* of expression are inappropriate and subject to sanctions.") (emphasis supplied); *see also* Newsom *ex rel.* Newsom v. Albermarle Cty. Sch. Bd., 354 F.3d 249, 256 (4th Cir. 2003) ("When speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message."); E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint."). The putative form-content division traces to Justice Stevens's plurality opinion in *Federal Commc'ns Comm. v. Pacifica Found.*, which distinguished between governmental regulation of "a point of view" and "the way in which it is expressed," at least where indecent language is involved. 438 U.S. 726, 746 n.22 (1978). The *Pacifica* plurality's troublesome distinction conflicts with the Supreme Court's earlier decision in *Cohen v. California*, in which Justice Harlan forcefully explained that the government cannot control *how* something is said without impacting *what* is said—*i.e.*, that eliminating particular language from the civic vocabulary necessarily affects the meaning of public discourse. 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); *cf. Thomas*, 607 F.2d at 1057 ("Justice Harlan was quite right to caution in *Cohen* that regulation of particular language runs some risk of regulating the expression of

interest in instructing students about standards of decency in public discourse. It was also derived from the need for public secondary schools, consistent with their educational purpose, "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent or lewd speech"[145] in the school environment.

A cloistered prudishness imbues the *Fraser* majority opinion that is out of step with the blatantly sexualized fare that, over three decades later, is a staple of both network and cable television programming yet pales in comparison to what is readily available on the Internet.[146] In noting that the disputed language was relatively inoffensive under contemporary standards prevailing at the time, Justice Brennan's concurrence observed that it was unlikely to upset younger students in the audience,[147] and renounced the authority of school officials to penalize the same speech had it been given "outside of the school environment."[148] Justice Brennan also noted that *Fraser*'s holding was limited to "a speech given to a high school assembly,"[149] and pointed out that the case might have been

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ideas.") (Newman, J., concurring). For the reasons identified in *Cohen*, the notion that schools can regulate a certain form or manner of in-school expression divorced from the speaker's ability to communicate ideas or without affecting the emotive charge of the speech is a dubious proposition under the First Amendment.

145. *Fraser*, 478 U.S. at 683–84 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."). *Fraser* arguably extended to the public school setting the holding in *Pacifica*, where the Supreme Court upheld the authority of the FCC to regulate an afternoon radio broadcast of a comedic monologue that, while indecent, fell short of obscene. 438 U.S. at 748–51. The exposure of children to the broadcast was a matter of obvious concern in *Pacifica* and logically supports an in-school ban on the use of indecent language having similarly marginal social value in the presence of an impressionable captive audience. Michael J. O'Connor, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. PA. J. CONST. L. 459, 467 (2009) ("*Fraser* is an extension of this concept for obscenity, declaring that speech that was borderline before, now measured against the potential susceptibility of children to its influence, is no longer shielded by the Constitution."); B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 316 (3d Cir. 2013) (*en banc*) (Smith, J.) (schools may categorically prohibit "plainly lewd speech" under *Fraser* because it "offends for the same reason obscenity offends and thus has slight social value"). As Judge Newman pithily noted, "[i]f the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds." *Thomas*, 607 F.2d at 1057 (Newman, J., concurring).

146. Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877 (7th Cir. 2011) ("from the perspective enabled by 25 years of erosion of refinement in the use of language," the speech in *Fraser* "seems distinctly lacking in shock value"); *see also Thomas*, 607 F.2d at 1057 (Newman, J., concurring in result) ("Courts have a First Amendment responsibility to insure that robust rhetoric in student publications is not suppressed by prudish failures to distinguish the vigorous from the vulgar.").

147. *Fraser*, 478 U.S. at 689 n.2 (Brennan, J., concurring) ("Thus, I disagree with the Court's suggestion that school officials could punish respondent's speech out of a need to protect younger students.").

148. *Id*. at 688.

149. *Id*. at 689 (emphasis supplied).

decided differently in a different context even within the school setting where the state's interest in protecting students was not as strong.[150]

Three independent but related factors contributed to the outcome in *Fraser*: (1) the speech was directed to a captive audience, which may have included unwilling listeners along with students impressionably young in age;[151] (2) the lewd sexual content of the remarks undermined the "fundamental values of 'habits and manners of civility' essential to a democratic society"[152] to be instilled by a public school education; and (3) because the comments took place during an official school-sponsored event, the school was entitled "to disassociate itself"[153] from them to instruct both the student speaker *and* the student audience that they were unacceptable during a school assembly.[154] Absent any one of these three

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150. *Id*. ("Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."); *see also id.* at 696 (Stevens, J., dissenting) ("On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment.").

151. *Fraser*, 478 U.S. at 685 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."); Allison Martin, *Tinkering with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate*, 43 SETON HALL L. REV. 773, 793 (2013) ("An important element in *Fraser* is that the student speaker had a captive audience, as he gave the speech during a mandatory school assembly during school hours.") (footnote omitted); Kara D. Williams, *Public Schools v. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 727 (2008) ("an on-campus school assembly involves a captive audience."); *Waldman I*, *supra* note 122, at 1123 (restricting student speech that is lewd or uncivil in the *Fraser* setting "both educates the student speaker and prevents other students from being exposed to inappropriate examples").

152. *Id.* at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). While the public school system is responsible for inculcating the civic values necessary for effective self-government, it operates in many respects as an anti-democratic institution in achieving that objective. This accounts for the central tension underlying the First Amendment student speech framework.

> [H]ow can a constitutional provision whose aim, many think, is to constrain the government from interfering in or directing a diverse and pluralistic society's conversations about the common good be incorporated into a context in which the state—again, that which this constitutional provision binds—is exercising "managerial" authority for the purpose of producing not just certain *facilities*, but certain core values, loyalties, and commitments?

Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools*, 12 LEWIS & CLARK L. REV. 45, 58–59 (2008) (emphasis in original). *See also* ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 2 (2009).

153. *Fraser*, 475 U.S. at 685; Miller, *supra* note 112, at 631("Fraser's speech was given at a school assembly, and it was perfectly appropriate for the school to disassociate itself from the speech by punishing it") (footnote omitted); *see also Hazelwood*, 484 U.S. at 288–89 (Brennan, J., dissenting) (where the "indicia of school sponsorship increase the likelihood" that student expression may erroneously be attributed to the school, "state educators may therefore have a legitimate interest in dissociating themselves" from the speech").

154. Emily Gold Waldman, *No Jokes About Dope: Morse v. Frederick's Educational Rationale*, 81 UMKC L. REV. 685, 690 (2013) ("the punishment would serve as a lesson to this

factors, *Fraser*'s circumscribed rationale for penalizing expression by students to prevent a school from being associated with offensive or inappropriate speech incompatible with its educational mission is presumptively unavailable.[155] *Fraser* thus narrowly authorizes the abridgment of "lewd, indecent or offensive"[156] public student speech in a specific in-school context.[157]

Unlike the armbands worn in *Tinker*, readily understood as solely the expression of the individual student protesters,[158] Matthew Fraser's "sexually explicit monologue"[159] could, according to the Court, be identified with the school (through tolerance if not condonation) and could therefore be censured within constitutional free speech parameters.[160] The dissociative aspect of *Fraser* as a limitation on the exercise of school authority over student speakers is often overlooked by courts struggling to discern the contours of its holding.[161] While the decision is hardly a model

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student-speaker—*and other student-listeners*—about the habits and manners of civility as values in themselves") (footnote omitted) (emphasis added).

155. *See* Tomain, *supra* note 5, at 115–18; *see also id*. at 104 n.40 (noting "captive-audience and need-to-disassociate factors" of *Fraser*'s holding). *Fraser*'s rationale that schools have a legitimate interest in inculcating norms of civil discourse applies only to certain types of student speech that occur on the school's premises. McDonald, *supra* note 4, at 738 ("the fact that the speech occurred where such norms are being taught legitimizes the application of a less protective speech standard than would otherwise be applied to such speech off school grounds"). If *Fraser's* reach is not limited to speech within the confines of the school, "[s]ome schools, if empowered to do so, might eliminate all student speech touching on sex or merely having the potential to offend." *B.H.*, 725 F.3d at 318 (Smith, J.).

156. *Fraser*, 475 U.S. at 683.

157. Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) ("*Fraser*'s First Amendment rights were circumscribed in light of the school environment in which the speech occurred.").

158. Harpaz, *supra* note 103, at 129 ("Mary Beth [Tinker] made no use of school facilities for her personal act of self-expression other than wearing the armband to school"). For additional discussion of the distinction between an individual student's personal expression and speech that, because of school sponsorship or affiliation, may erroneously be attributed to the school, *see infra* text accompanying notes 349–57.

159. *Fraser*, 478 U.S. at 685.

160. *Id*. at 683 (public schools "may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech"). The limits of those parameters cannot be identified on a principled basis, however, because a school's educational mission is ultimately the product of majoritarian value judgments. Where the line protecting student speech falls between ideas embraced as socially acceptable and those rejected as socially unacceptable is variable and difficult to discern and fails to provide guidance to would-be speakers. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 119 (2008) ("There is a continuum from uncontroversial ideas to controversial ones, from ideas that are accepted as part of the school's mission to ideas that almost certainly would not be if the issues were squarely raised.").

161. Even before the Supreme Court decided *Fraser*, the Second Circuit in *Thomas* capsulized the dissociative rationale in recognizing that, within the school environment, the judgment of school officials in "prohibiting ordinarily protected speech" should receive greater

of analytic clarity,[162] and was a clear departure from *Tinker* in abandoning the need to show a material disruption to the educational environment as a condition for punishing in-school speech,[163] it in no way—as Justice Brennan's concurrence cautioned—grants public educators extended license to punish offensive or vulgar student speech outside of school that is deemed to conflict with the fundamental values imparted by a secondary education.[164] There is nothing in the opinion that would countenance such a broad reading, which would effectively convert *Fraser* into a

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deference because "the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression." *Thomas*, 607 F.2d at 1049. This rationale was elaborated in Judge Newman's concurring opinion in *Thomas* which, as discussed below in the text, essentially provided a blueprint for the majority opinion in *Fraser*. *See infra* text accompanying notes 291–97.

162. With surprising candor, the Supreme Court has acknowledged that "[t]he mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404 (Roberts, C. J.). *See also* Pike, *supra* note 4, at 982 ("the majority's holding [in *Fraser*] is difficult to pin down"); Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1700 (2009) ("Though the court did not explicitly articulate the relevant standard of review for student speech restrictions, it applied a very relaxed one."). What is clear in *Fraser* is the decision's move away from the rights-based conception of student speakers advanced in *Tinker*. *See* Miller, *supra* note 112, at 637 ("the rights-based decision in *Tinker* viewed the work of schools as the teaching of a formal curriculum only, the cases that followed . . . saw the public school as an instrument of socialization") (footnote omitted); Mark G. Yudof, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 366 (1995) ("children in public schools are viewed less as the bearers of individual rights and more as the repositories of community responsibilities"); Harpaz, *supra* note 103, at 132 ("the theme of individuality emphasized in *Tinker* was nowhere to be seen" in *Fraser*).

163. *Morse*, 551 U.S. at 405 ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") (citations omitted); *Hazelwood*, 484 U.S. at 271 n.4 (noting the "difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*"). *See also* Papandrea, *supra* note 5, at 1048 ("[T]he Court's analysis was a dramatic deviation from the Court's treatment of First Amendment rights generally and from *Tinker* specifically. In *Fraser*, the Court did not find that the speech was materially disruptive nor did it find that the speech interfered with the rights of other students, as *Tinker* would seem to require.") (footnote omitted); Chemerinsky, *supra* note 114, at 20 ("Although the Court did not overrule *Tinker*, it clearly abandoned the idea that speech can be punished only if it is actually disruptive of school activities."). In his *Thomas* concurrence, Judge Newman had previously expressed the view that the on-campus distribution of indecent speech could be regulated without need of satisfying *Tinker*'s requirements. *Thomas*, 607 F.2d. at 1055 ("nothing in *Tinker* suggests that school regulation of indecent language must satisfy the criterion of a predictable disruption").

164. *Fraser*, 478 U.S. at 689 (Brennan, J., concurring) ("The Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."); Sagehorn v. Ind. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 859 (D. Minn. 2015) ("Nothing about the Supreme Court's decision in *Fraser* suggests that the same considerations would extend beyond the boundaries of the schoolyard."); *see also* Fronk, *supra* note 5, at 1432 ("Nowhere in the *Fraser* opinion does the majority extend a school's right to punish students for offensive and lewd behavior to non-disruptive off-campus speech, regardless of its lewdness or vulgarity.") (footnote omitted); Mattus, *supra* note 8, at 334 ("It would be stretching *Fraser*, however, to say that a school's authority to teach students how to be good citizens extended into students' homes outside of school hours.").

vehicle for majoritarian censorship in disregard of both its highly contextualized rationale and commensurately narrow holding.[165]

The savvy observation that "*Fraser* explained what every parent already knows*"*[166] captures in common sense terms the essence of the decision—i.e., that school authorities are allowed to regulate the lewd and offensive speech of students in school settings *"*because of *'*society*'*s countervailing interest in teaching students the boundaries of socially appropriate behavior.*'"*[167] *Fraser* thus stands for the narrow principle that punishment of sexually oriented or indecent speech *"*inappropriate for a school-sponsored assembly*"*[168] or other mandatory school activity or function where it may reasonably be understood as bearing the tacit approval or implicit endorsement of the school does not violate the First Amendment.[169] The decision does not confer generalized authority to penalize a student*'*s sexualized or otherwise offensive speech, irrespective of where and when that expression takes place, on the basis of a school*'*s *"*educational mission*"* as defined by school authorities.[170] Extending

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165. Both the Supreme Court and the Second Circuit have disavowed even a broad in-school application of *Fraser* that would permit "public school officials to censor any student speech that interferes with a school's 'educational mission'" because of the stark threat of viewpoint-based discrimination entailed by such an approach. *Morse*, 551 U.S. at 423 (Alito, J., concurring); *id*. at 409 (Roberts, C.J.) ("We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"); *Guiles*, 461 F.3d at 328 ("it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency"). An example of such an impermissibly broad application of *Fraser* can be found in *Boroff v. Van Wert City Bd. of Educ.*, where the Sixth Circuit upheld a school district's refusal to allow a high school senior to wear an "offensive" Marilyn Manson T-shirt to school "because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." 220 F.3d 465, 469 (6th Cir. 2000). The dissent concluded that the T-shirt's prohibition was viewpoint discrimination reflecting majoritarian religious values, "which is accompanied by an all-but-irrefutable presumption of unconstitutionality." *Id*. at 473 (Gilman, J., dissenting).

166. Cuff *ex rel.* Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109, 118 (2d Cir. 2012) (Pooler, J., dissenting).

167. *Id*. (quoting *Fraser*, 478 U.S. at 681) (emphasizing the narrowness of *Fraser*'s holding); Coy *ex rel.* Coy v. Bd. of Educ. of N. Canton City Sch., 205 F. Supp. 2d 791, 798 (N.D. Oh. 2002) ("*Fraser* ultimately upheld the school's discipline of the student because of the school's need to teach students appropriate social behavior."); Sweeney, *supra* note 75, at 382 ("To teach students the bounds of appropriate social interaction in our society involves teaching them what sort of language is appropriate for students to use when communicating with their peers at school.") (footnote omitted).

168. *Fraser*, 478 U.S. at 689 n.2 (Brennan, J., concurring).

169. Again, the speech in *Fraser* was punishable by the school not only because it was offensive but also because, given the forum in which it was delivered, "the punishment conveyed an important lesson to the student body about proper forms of expression." *Waldman II*, *supra* note 4, at 597 (footnote omitted). *See also* Miller, *supra* note 112, at 654 n.203 ("there is a reasonable argument that the school's constitutional power was derived more from the school-sponsored nature of the medium than from the actual words muttered").

170. In *Layshock v. Hermitage Sch. Dist.*, a panel of fourteen Third Circuit judges unequivocally rejected the school district's argument that *Fraser* allowed it to regulate a "lewd and

Fraser to uphold the values-based regulation of online (or offline) speech outside of the school environment would distort its rationale and violate the First Amendment by allowing school administrators to roam beyond their educational domain in exerting control over student expression.[171] The Internet in no way resembles a captive audience,[172] and there is no need for a school to separate itself from students' digital speech that no reasonable reader would associate with it.[173]

Although it has received little attention, *Fraser*'s paternalism in protecting a "captive audience of children"[174] and affording school authorities latitude to regulate the in-school communication of indecent language without need of showing that "the use of such language will

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vulgar" online parody profile of a school principal that was composed by a student on a computer "at his grandmother's house during non-school hours . . . ." 650 F.3d at 217 n.16, 207 (McKee, C. J.); *see also id*. at 219 ("*Fraser* does not allow the School District to punish . . . expressive conduct which occurred outside of the school context").

171. *See infra* text accompanying notes 926–45. Mickey Lee Jett, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 916 (2012) ("The application of *Fraser* to off-campus student speech would give schools wide latitude to restrict student speech even though the Supreme Court has never authorized schools to punish students for off-campus speech that is unrelated to school activities or that does not cause a substantial disruption.") (footnote omitted); *see also* Tomain, *supra* note 5, at 129 ("Allowing schools to apply *Fraser* to online speech results in a monopoly by the school over student speech rights and the rights of others, a monopoly that restricts rights guaranteed by the Constitution.") (footnote omitted); *id.* at 131 ("*Fraser* cannot be applied to online, off-campus speech without extending *Fraser* beyond the rule created by the Supreme Court").

172. Tomain, *supra* note 5, at 138 ("*Fraser* requires a captive audience and there are no captive audiences online"); Harpaz, *supra* note 103, at 160 n.151 ("Unlike the auditorium [in *Fraser*], the Internet is unlikely to involve the same possibility of a captive audience except in rare circumstances. Student use of the Internet generally involves autonomous decisions to access particular sites or create particular content."); *Evans*, 684 F. Supp. 2d at 1374 ("For the Court to equate a school assembly to the entire internet would set a precedent too far reaching.").

173. Tomain, *supra* note 5, at 118 ("A school has no need to disassociate itself from off-campus student speech that is not part of a school-sponsored event because no one would reasonably associate a school with such speech. Similarly, a school need not disassociate itself from online student speech because there is no reasonable association between a school and online student speech."); Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 406 (2013) ("If a high school student utters purely independent speech, as opposed to speech in a school-sponsored setting, no reasonable listener would think that the school had placed its imprimatur on that speech—or on that student.").

174. *Thomas*, 607 F.2d at 1057 ("the element of choice on the part of the viewing or listening public, . . . has not been considered to be sufficiently present where juvenile audiences are involved") (footnote and citation omitted) (Newman, J., concurring); *see also Zamecnik*, 636 F.3d at 879–80 ("A school has legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists of its students, including the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours."). For criticism of the *Fraser* Court's failure to explain the "captive audience" term as allowing public schools to engage in content-based regulation of student speech in the school environment, *see* Erica Salkin, *Are Public School Students "Captive Audiences?" How an Unsupported Term in Fraser Created a "Mischievous Phrase" in Educational Speech Law*, 20 COMM. L. & POL'Y, 35, 35–37 (2015).

predictably lead to disruption*"*[175] is informed by and closely tracks Judge Newman*'*s concurrence in *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*[176] As stated in that opinion, school authorities *"*need not capitulate to a student*'*s preference for vulgar expression*"*[177] because its *"*circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children.*"*[178] While the *Thomas* concurrence*'*s rationale was subsequently enshrined wholesale as constitutional doctrine in *Fraser*,[179] it is important to note that this aspect of Judge Newman*'*s analysis was limited to *"*consideration of whether the on-campus distribution of this publication is protected by the First Amendment,*"*[180] and did not reach the authority of school officials to venture beyond the school environment to regulate indecent student speech in the general community.[181] Moreover, *Fraser'*s precursor also cautioned that school officials do not have *"*limitless discretion to apply their own notions of indecency*"*[182]—an injunction which has arguably gone unheeded in the Second Circuit*'*s own public student digital speech jurisprudence.[183]

C. Hazelwood*: A Rational Basis Test Governs School-Sponsored Expression*

In *Hazelwood School District v. Kuhlmeier*,[184] staff members of a high school newspaper brought an action contending that their First Amendment rights had been violated after officials at Hazelwood East High School in St. Louis County, Missouri, deleted articles describing students' experiences with teenage pregnancy and the "impact of divorce

175. 607 F.2d at 1057.

176. *Id.* at 1054–57.

177. *Id.*

178. *Id.* (emphasis added); *see also id.* at 1055 ("Two other decisions of the Supreme Court have grappled with the specific issue of regulating indecent language, and the sum of their teaching indicates that the Court would not accord First Amendment protection to indecent language in a student publication distributed to high school students *on school property*.") (emphasis added).

179. The language of the holding in *Fraser* mirrors that employed in the *Thomas* concurrence. *See infra* text accompanying notes 293–97. *Cf. Fraser*, 478 U.S. at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."), *with Thomas*, 607 F.2d at 1057 ("The First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency.") (Newman, J., concurring in judgment).

180. *Thomas*, 607 F.2d at 1054 (emphasis added).

181. *Id.* at 1058 ("The extent to which school authority might be asserted for off-campus activities need not be determined, since the school has disclaimed such power.").

182. *Id.* at 1057.

183. *See infra* text accompanying notes 497–516.

184. 484 U.S. at 260.

upon students at the school."[185] *The Spectrum* was "produced as part of the school's journalism curriculum"[186] and composed by students enrolled in a specific journalism class.[187] Their teacher "selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company."[188] In addition, final pre-publication approval of the contents of each issue of *The Spectrum* was reserved to the school's Principal,[189] and its printing cost was funded from the Board of Education's annual budget.[190]

Distinguishing between "speech that is sponsored by the school and speech that is not,"[191] the *Hazelwood* court cast aside the *Tinker* standard[192] and held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[193] *Hazelwood* establishes that, in situations where a school is affirmatively promoting

185. *Id.* at 263.

186. *Id.* at 262.

187. *Id.*

188. *Id.* at 268.

189. 484 U.S. at 263, 268–69; *accord*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561 (2005) ("Moreover, the record demonstrates that the Secretary [of Agriculture] exercises final approval authority over every word used in every promotional campaign.").

190. 484 U.S. at 262.

191. *Id.* at 271 n.3. Determining whether speech is school-sponsored under *Hazelwood* includes consideration of "(1) where and when the speech occurred; (2) to whom the speech was directed and whether recipients were a 'captive audience'; (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials; (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students." Morgan v. Swanson, 659 F.3d 359, 376 (5th Cir. 2011) (footnotes omitted).

192. 484 U.S. at 272–73 ("we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression") (footnote omitted); *see also* Holden, *supra* note 6, at 254 ("The *Hazelwood* Court made no *Tinker*-style inquiry into whether publication of the censored content would have been disruptive or interfered with the rights of other students.") (footnote omitted).

193. *Hazelwood*, 484 U.S. at 273 (footnote omitted). The *Hazelwood* standard appears substantively identical to that adopted by the Supreme Court the following year which authorizes prison officials to censor mail received by inmates if, in their judgment, it is "reasonably related to legitimate penological interests." Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987) ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials.")). While the parallel is uncomfortable, it underscores the broad latitude of public educators to control student expressive activities sponsored by the school.

particular student expression by "lend[ing] its name and resources"[194] to the speech, the institutional interests in controlling the speech are heightened and justify regulation of its content "in any reasonable manner."[195] Applying a lenient minimum rationality standard of review,[196] the *Hazelwood* Court concluded that it was reasonable for school officials to censor *The Spectrum* where they had charged its staff with failure to comply with journalistic standards taught as part of the curriculum and neglecting the privacy of the subjects of the purged articles.[197]

The extremely deferential *Hazelwood* standard,[198] which allows courts to invalidate a school district's censorship decision only when it "has no valid educational purpose,"[199] is restricted to the dissemination

194. 484 U.S. at 272; *see also* Waldman, *supra* note 173, at 385 ("The Court thus divided the student speech universe, giving schools far greater discretion over school-sponsored speech than over student speech that just 'happened to occur' at school.") (footnote omitted); Holden, *supra* note 6, at 254 (*Hazelwood* "stands for the proposition that the First Amendment will not protect student speech that appears to carry the school's endorsement"). As Jay Worona, General Counsel & Director of Legal and Policy Services to the New York State School Boards Association, has summarized the decision, *Hazelwood* involves "the school putting its money where the student's mouth is." CLE presentation sponsored by NDNY Fed. Ct. Bar Ass'n, Inc., "Do You Know What Your Children Are Saying Online? The First Amendment Rights of Public School Students in the Digital Age" (Dec. 5, 2013).

195. 484 U.S. at 270. Because the school was not obligated to select the alternative with the least restrictive impact on speech, the *Hazelwood* Court found that the Principal's decision to delete "the problematic articles" in their entirety, rather than to modify them prior to publication, was reasonable under the circumstances and did not violate the First Amendment. *Id.* at 275–76. The Second Circuit has interpreted *Hazelwood*'s reasonableness requirement as encompassing both the particular method of censorship employed and the "predicate factual decisions made by the school in triggering" a censorship decision. *Peck*, 426 F.3d at 630.

196. Miller, *supra* note 112, at 632–33 ("Reasonably related to a legitimate pedagogical interest is merely a restatement of what has become known as the rational basis test. State action satisfies the rational basis test when it is 'rationally related to a legitimate government interest.' The test is an extremely lenient standard of constitutional scrutiny, and many judges see it as a means through which the courts can defer to the judgment of the appropriate decision maker.") (footnotes omitted).

197. 484 U.S. at 274–76. *Hazelwood* identified three reasons that public school authorities are entitled to exercise increased control over school-sponsored expressive activities: "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speakers are not erroneously attributed to the school." *Id.* at 271. The latter two reasons derive directly from *Fraser*'s rationale and authorize a school to take appropriate measures to ensure that student expression is suitable to the emotional maturity of its recipients and to dissociate itself from student speech that transgresses "the boundaries of socially appropriate behavior" and may reasonably be perceived as endorsed by the school. *Fraser*, 478 U.S. at 681, 685–86; *see also Waldman I*, *supra* note 122, at 1122 ("Particularly in *Fraser* and *Hazelwood*, the Supreme Court indicated that speech restrictions could appropriately be used to educate the student speaker as well as other students. Such lessons might relate either to general civility or to specific coursework.").

198. Miller, *supra* note 112, at 633 ("*Kuhlmeier* is very much a case about judicial deference to school officials in the affairs of public schooling.").

199. 484 U.S. at 273.

of student expression that is part of a curricular exercise or is otherwise sponsored by the school.[200] While there was no question that Matthew Fraser's comments were his own speech, but could be associated with the school because delivered in a student assembly with compulsory attendance, the articles published in *The Spectrum* represented the speech of the school itself.[201] *Hazelwood* authorizes much tighter control over student expressive activities by the government in its role as a primary and secondary school educator[202] consistent with its general power to control its own speech.[203] The converse is also true, however: "the less the speech

200. *Guiles*, 461 F.3d at 330 (*Hazelwood* applies when "the speech is school-sponsored") (emphasis in original); Waldman, *supra* note 173, at 405 ("*Hazelwood* repeatedly emphasized that schools should have broad reign over student speech that might reasonably be seen as bearing the school's own imprimatur.") (footnote omitted); Hofheimer, *supra* note 121, at 977 (*Hazelwood* concerns school-sponsored publications "and other expressive activities within the school's curriculum, such that the public may consider the message to be affirmatively promoted by the school") (footnote omitted).

201. *Morse*, 551 U.S. at 423 (Alito, J., concurring) (*Hazelwood* "allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ"); *see also* Pike, *supra* note 4, at 984 ("the school was not engaged in disciplining independent on-campus speech, but in making administrative decisions about a message appearing under the school's imprimatur—a sort of government-sponsored speech test") (footnote omitted). *Hazelwood*'s rationale thus overlaps with *Fraser*'s in that it permits the broad regulation of school-supported student expression when the views of the speaker may be viewed as attributable to the school. *Hazelwood*, 484 U.S. at 271 (school-sponsored publications include "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"). *Hazelwood*'s rationale is narrower than *Fraser*'s in one sense, because it applies only when the school itself is effectively functioning as the speaker, but broader in another sense because not limited to speech regarded as offensive owing to its sexual nature.

202. *See* Lee, *supra* note 162, at 1744 ("determining how speech ought to be encouraged, directed, and limited as part of the educational process itself is far more multifaceted and open ended").

203. *See id.* at 1711 (in both government speech and school speech contexts, the government's regulatory interest "arises from the speech's integral relationship to implementing the institutional mission," including the furtherance of its own communicative interests). *Hazelwood* may thus be regarded as of a piece with the government speech doctrine, which affords the government the ability to control the message expressed in its own speech or in speech that may be attributed to it. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015) ("when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position"); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (first citing Rust v. Sullivan, 500 U.S. 173, 194 (1991); and then citing Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)) (when the government speaks, it has the ability "to select the views that it wants to express"); *Johanns*, 544 U.S. at 562; *see also* O'Connor, *supra* note 145, at 469 ("In the past several decades, there has been substantial evolution of the government speech doctrine, which recognizes that government has a legitimate right to speak and to take sides on issues when doing so. *Hazelwood* recognizes that schools are government actors and therefore entitled to control speech that could be reasonably viewed as originating with them.") (footnotes omitted); Goldman, *supra* note 93, at 404 ("*Kuhlmeier* would be viewed as involving government, not student, speech"); Edward L. Carter et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 177–81 (2006) (situating *Hazelwood* within general parameters of government speech doctrine). The Supreme Court has recognized the government speech

has to do with the curriculum and school-sponsored activities, the less likely any suppression will further a 'legitimate pedagogical concern[],'"[204] with the school's regulatory capability correspondingly diminished.

D. Morse v. Frederick*: The Categorical Pro-Drug Advocacy Exception to Protected Public Student Speech*

The Supreme Court's most recent engagement with public student speech came in *Morse v. Frederick*.[205] Joseph Frederick, a senior at Juneau-Douglas High School ("JDHS"), unfurled a large banner bearing the curious phrase "BONG HiTS 4 JESUS" while the Olympic Torch Relay made its way through Juneau, Alaska, on its pilgrimage to commence the 2002 Winter Games in Salt Lake City.[206] Students from JDHS had been permitted to leave class and watch the relay procession from the street, in the presence of teachers and administrators, as "an approved social event or class trip."[207] When Frederick did not comply with the school principal's spontaneous demand that the banner be taken down, he was suspended for ten days,[208] which he challenged in federal court as a violation of his First Amendment rights.

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doctrine's applicability in the public university setting. *See Rosenberger*, 515 U.S. at 833 ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker . . . ."). It would apply with at least as much force to public secondary and primary schools given the extensive curricular requirements formally mandated by the states in those contexts.

204. Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) *reh'g en banc denied*, No. 10-2100/2145, 2012 U.S. App. LEXIS 8592, at *1 (6th Cir. Apr. 19, 2012) (quoting *Hazelwood*, 484 U.S. at 273).

205. 551 U.S. 393. *Morse v. Frederick* was a 5-4 decision, with Chief Justice Roberts writing for the majority. Justice Alito's concurring opinion was joined by Justice Kennedy, with Justice Thomas issuing a separate concurrence taking the iconoclastic position that "the Constitution does not afford students a right to free speech in public schools," and urging that *Tinker* be overruled. *Id.* at 418–19, 422 ("I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."). Justice Breyer concurred in part and dissented in part, stating that the Court "should not decide this difficult First Amendment issue" but only that qualified immunity barred the student's money damages claim against school officials. *Id.* at 425. Justice Stevens dissented on the constitutional merits in a strongly worded opinion joined by Justices Souter and Ginsburg. *Id.* at 433–48.

206. *See id.* at 397. The banner's lack of "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (citing Spence v. Washington, 418 U.S. 405, 411 (1974)).).

207. *Morse*, 551 U.S. at 397.

208. *See id.* at 398–99.

Chief Justice Roberts's majority opinion in *Morse* upheld the school district's punishment of the speech because it could "reasonably be regarded as encouraging illegal drug use,"[209] but only after acknowledging that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[210] Although the banner was displayed on a public street in the course of a civic event open to the general public at which student attendance was optional—in contrast to the mandatory in-school assembly in *Fraser*, which included students "who[ ] were only 14 years old"[211]—the first sentence of the opinion characterized the speech as taking place "[a]t a school-sanctioned and school-supervised event."[212] This threshold characterization maneuver[213] avoided

209. *Id.* at 397. The *Morse* majority's extrapolation from the "cryptic" language on Frederick's banner as reasonably conveying a pro-drug message is open to serious question. *See id.* at 401. In reaching this conclusion, the Court accepted Principal Morse's explanation that the phrase could plausibly be interpreted as (1) a directive to smoke marijuana or, more generally, (2) a celebration of illegal drug use. *Id.* at 401–02. In dissent, Justice Stevens disagreed that the "silly, nonsensical banner" could be proscribed as advocacy promoting illegal drug use—the real reason for its display of an "obtuse reference to marijuana" was Frederick's desire to get picked up on national television coverage of the Olympic Torch Relay. *Morse*, 551 U.S. at 446, 444, 434.

210. *Id.* at 401 (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir. 2004).

211. *Fraser*, 478 U.S. at 683.

212. *Morse*, 551 U.S. at 396. As indicia supporting the characterization of the speech as occurring at a school event, the *Morse* majority indicated that the banner was unfurled "during normal school hours;" students' attendance at the Torch Relay parade had been approved by the school; teachers and administrators were present and supervising the students; "[t]he high school band and cheerleaders performed;" and the banner was "plainly visible to most students." *Id.* at 400–01. Owing to these factors, the majority opinion concluded that "Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'" *Id.* at 401. The *Morse* dissent noted that the banner was not displayed on the school's premises, and that "Frederick might well have thought that the Olympic Torch Relay was neither a 'social event' (for example, prom) nor a 'class trip.'" *Id.* at 440 n.2 (Stevens, J., dissenting).

213. *See Snyder*, 650 F.3d at 938 (Smith, J., concurring) ("[I]n *Morse*, the Court took care to refute the contention that the plaintiff's speech, which took place at a school field trip, did not occur 'at school.'") (citing *Morse*, 551 U.S. at 401); *J.C.*, 711 F. Supp. 2d at 1102 ("The Court found that the Torch Relay was a school-sponsored event occurring during school hours, which the principal permitted students and faculty to attend.") (citing *Morse*, 551 U.S. at 397); McDonald, *supra* note 4, at 739 ("Although it did not clearly explain its reasoning, the Court indicated that the speakers were effectively at school because the banner was displayed at a school-sponsored and controlled event in close proximity to the school.") (footnote omitted); Hofheimer, *supra* note 121, at 979 ("the Court treated Frederick's off-campus speech, which occurred beyond the school's physical boundaries, as though it was on-campus speech by classifying the relay as a school-sanctioned activity with adult supervision, effectively making it resemble typical student speech cases"); Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L. Q. 835, 859 (2008) ("the Court did not question whether releasing the students to watch the Torch Relay—a corporate-sponsored, private event—was a school activity akin to a field trip"). The *Morse* Court's readiness to find that the banner was displayed at a school-related event is a study in contrast with the Second Circuit's approach in *Thomas*, where, notwithstanding more extensive contacts

the need for the Court to address the issue of whether the school's authority reached off-campus student expression and facilitated the conclusion that, under the circumstances, the principal's failure to act "would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."[214] Thus, by finding that the banner was subject to the dominion of school authorities—that is to say, was inside the schoolhouse gate—notwithstanding its exhibition on a public street, the decision in *Morse* was bootstrapped within *Fraser*'s contextualized rationale to create a new category of punishable student speech.[215]

Based on the majority's reasoning, Frederick's speech certainly would not have been punished had his banner condemned unlawful drug use—e.g., a "BONG HiTS R 4 LOSERS"[216] message could have been proudly displayed without fear of reprisal by the school. This illustrates that, in *Morse*, the Supreme Court for the first time upheld a viewpoint-based restriction of a speaker's message[217] displayed to the general public

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between the students' underground newspaper and the school, the exercise of school authority was found to encroach on protected speech. 607 F.2d at 1047–48. Even though "a few articles were transcribed on school typewriters" and finished copies of the newspaper were actually stored in a teacher's classroom closet in *Thomas*, the nexus between the speech and the school was "*De minimis*" because the newspaper was "conceived, executed, and distributed outside the school." *Id.* at 1050. Certainly, the same could be said of the banner at issue in *Morse*, which was unfurled on a public street corner by a student attending an open community event.

214. *Morse*, 551 U.S. at 410; *see* Waldman, *supra* note 154, at 691 ("Further harming Frederick, from the perspective of the educational rationale, was that he displayed his banner right in front of school officials, essentially flouting their own repeated teachings about the dangers of drugs.") (footnote omitted).

215. *See* Shaver, *supra* note 6, at 1552 (*Morse* "created an additional content-based category by allowing restrictions on student speech that could reasonably be interpreted as promoting illegal drug use") (footnote omitted); Waldman, *supra* note 154, at 698 ("*Morse* only makes complete sense if you read it as endorsing the view that schools, as part of their educational mission, can disapprove of—and restrict—student speech suggesting that drugs are a trivial or joking matter."). The result in *Morse* was foreshadowed in *Hazelwood*, where the majority opinion stated in *dicta* that, to ensure "that the views of the individual speaker are not erroneously attributed to the school," school officials "must also retain the authority to refuse to sponsor student speech that *might reasonably be perceived to advocate drug . . . use*" *Hazelwood*, 484 U.S. at 271, 272 (emphasis added).

216. *See* Denning & Taylor, *supra* note 213, at 863 ("Only speech that encourages or celebrates the use of illegal drugs is punished; speech that denigrates drug use ('BONG HiTS R 4 LOSERS'?) is presumably permissible."); O'Connor, *supra* note 145, at 468 ("*Morse* restricts speech on the basis of viewpoint, banning only pro-drug speech, not anti-drug speech"); *Guiles*, 461 F.3d at 329 (holding, in opinion issued several months before the Supreme Court's decision in *Morse v. Frederick*, that First Amendment protects student's right to wear T-shirt with drug and alcohol images, "especially when considering that they are part of an anti-drug political message").

217. *See Morse*, 551 U.S. at 426 (Breyer, J., concurring in part and dissenting in part) ("This holding, based as it is on viewpoint restrictions, raises a host of serious concerns."); Chemerinsky, *supra* note 114, at 18 ("First, the Court upheld a viewpoint-based restriction in a public forum. I cannot think of any other case that ever has done this."); Hans Bader, *BONG*

by simply deferring to the school principal's "reasonable" interpretation of its meaning. In effect, *Morse* created another narrow exception to *Tinker* by proscribing at a school-supervised event (as in *Fraser*) student expression perceived as contributing to the serious social dangers of illegal drug use.[218] Without need of satisfying *Tinker*'s material disruption standard[219] (again, as in *Fraser*), the school was allowed to remove the banner because "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[220] The decision also did not account for the fact that the speech was delivered in a traditional public forum,[221] where *Fraser*'s captive audience element was

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HiTS 4 JESUS: The First Amendment Takes a Hit, CATO INST. 142 (2007), https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2007/9/bader.pdf ("Whatever other limits the Supreme Court had placed on students' free speech rights in the past, it had never countenanced viewpoint discrimination of student speech prior to *Morse*, as lower courts recognized.") (footnote omitted). *Cf. Tinker*, 393 U.S. at 513 ("[i]f a regulation were adopted by school officials forbidding . . . the expression by any student of opposition to [the Vietnam war] anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students").

218. *See Morse*, 551 U.S. at 407–08; *Waldman I*, *supra* note 122, at 1119 ("*Fraser* and *Morse*, in turn, provide special rules for particular categories of disfavored student speech—that is, plainly offensive speech and advocacy of illegal drug use."). The overlapping rationales of *Fraser* and *Morse* are demonstrated by flipping their fact patterns. If Matthew Fraser's remarks to the school assembly he was addressing were devoid of any sexual references or innuendo, but could reasonably have been construed as promoting illegal drug use, there would seem to be little doubt that the First Amendment would not have immunized the speech from punishment. Similarly, if Joseph Frederick's banner contained indecent sexual language, or championed sexual activity among high school students, the same result would obtain and the speech at a school-sponsored event would be unprotected as inimical to the school's basic educational mission.

219. *See* Chemerinsky, *supra* note 114, at 20 ("Although the Court did not overrule *Tinker*, it clearly abandoned the idea that speech can be punished only if it is actually disruptive of school activities.").

220. *Morse*, 551 U.S. at 410. The *Morse* Court found the "BONG HiTS 4 JESUS" message especially harmful because "[d]rug abuse can cause severe and permanent damage to the health and well-being" of high school students. *Id.* at 407; *see also id.* at 408 ("[T]he governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

221. Without exception, public streets have historically been considered a public forum for First Amendment purposes. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); United States v. Grace, 561 U.S. 171, 180 (1983) (public space occupies a "special position in terms of First Amendment protection"); Frisby v. Schultz, 487 U.S. 474, 480 (1988) (referring to public streets "as the archetype of a traditional public forum"); E. Conn. Citizens Action Grp. v. Powers, 723 F.2d 1050, 1054 (2d Cir. 1983) (citing *Tinker*, 393 U.S. 503, 505) ("[C]ourts have opened to specific forms of expressive activity public property that serves a function akin to streets and parks as an arena for discussion."). Government regulation of speech in a public forum is subject to strict constitutional scrutiny. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is

entirely absent and parade spectators (including Frederick's schoolmates) could easily "avert[ ] their eyes"[222] from the banner.

Justice Alito's concurring opinion in *Morse* is instructive in the pointed cautionary note it sounds. Reminiscent of Justice Brennan's concurrence in *Fraser*, it considered regulation of the "BONG HiTS 4 JESUS" banner "as standing at the far reaches of what the First Amendment permits"[223] and within the grounds for student speech restrictions "already recognized in the holdings of this Court."[224] In narrowing *Morse*'s holding to speech encouraging illegal drug use that does not include commentary "on any political or social issue,"[225] Justice Alito emphatically dismissed the claim that school authorities have wide latitude to regulate student expression that interferes with a school's "educational mission"—the linchpin of *Fraser*'s holding—as an alarming invitation to viewpoint-based censorship:

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.
>
> . . . The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based

narrowly drawn to achieve that end."); Zalaski v. City of Bridgeport Police Dept., 613 F.3d 336, 341 (2d Cir. 2010) (*per curiam*); *see, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons.").

222. *Cohen*, 403 U.S. at 21.

223. *Morse*, 551 U.S. at 425 (Alito, J., concurring).

224. *Id.* at 422.

225. *Id.* A logical and legal disconnect arises from Justice Alito's carve-out for speech on political and social issues: if "BONG HiTS 4 JESUS" (as construed by the Court) undermines the school's anti-drug campaign, more purposeful advocacy or disagreement—*e.g.*, "Support Legalized Marijuana"—necessarily, and arguably more effectively, accomplishes the same end.

> To advocate the legalization of marijuana or any other drug is to imply that drug use is not so bad or dangerous as conventional wisdom would suggest; and if tolerance of 'Bong Hits 4 Jesus' signals a lack of commitment in the school's anti-drug message, it is unclear why tolerance of "Legalize Marijuana" does not do the same thing. The difference in treatment must be a function of the content of the speech. "Legalize marijuana" is political advocacy, traditionally high-value speech; "Bong Hits 4 Jesus" is (at least in the Court's eyes) an incitement to illegal action, traditionally low-value speech.

John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 230 (2007).

> on disagreement with the viewpoint expressed. *The argument, therefore, strikes at the very heart of the First Amendment.*[226]

While willing to let school authorities strike down pro-drug speech as uniquely dangerous given the custodial responsibilities associated with the protection of students in the school environment,[227] Justice Alito was not prepared to go any further in allowing viewpoint-based restrictions on student expression.[228] In laying down this important marker, the concurrence refused to grant public schools broad constitutional authority to restrict student speech deemed contrary to the political and social agendas ordained by school officials, noting that the government's manipulable "educational mission" rubric could have been invoked to ban the black armbands protected in *Tinker*.[229]

In parallel reasoning, the *Morse* majority also rejected "the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*."[230] Attempting to keep *Fraser* at arm's length, the *Morse* Court stated that "[t]he concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting

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226. *Morse*, 551 U.S. at 423 (emphasis added); *see also* Shaver, *supra* note 6, at 11 ("Justice Alito wisely recognized the dangerousness of such a position, since any particular school's educational mission could be defined—and re-defined—to fit the political, social or moral views of particular administrators.") (footnote omitted).

227. *See Morse*, 551 U.S. at 425 (Alito, J., concurring).

228. For another example of Justice Alito objecting to government regulation of speech based on its viewpoint, *see Walker*, 576 U.S. at 223 (Alito, J., dissenting) (rejecting as "blatant viewpoint discrimination" Texas's disallowance of a Confederate battle flag emblem as part of a specialty license plate program on the ground that "many of its citizens would find the message off ensive").

229. *See Morse*, 551 U.S. at 423 (Alito, J., concurring) ("During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission."). Justice Alito's concern in *Morse* about *Tinker*'s nullification through an expansive application of *Fraser*'s rationale was presaged by the Second Circuit's opinion in *Guiles* where Judge Cardamone, in narrowing the meaning of "plainly offensive" under *Fraser* to "speech containing sexual innuendo and profanity" expressed the same reservation:

> . . . *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency. Yet the Supreme Court held the school could not censor the students' speech in that case.

Guiles, 461 F.3d at 328.

230. *Morse*, 551 U.S. at 409 ("We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"). The Second Circuit had previously rejected a broad reading of *Fraser*'s "educational mission" rubric as introducing a wide-ranging threat of censorship of student speech. *Guiles*, 461 F.3d at 330 ("Moreover, the phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern.").

illegal drug use."[231] But when this statement is unpacked, it does not hold up in terms of either free speech doctrine or theory. The arbitrary and mischievous notion that public schools can segregate and prohibit speech construed as advocating illegal drug use while leaving untouched other speech that communicates an "offensive" political or social message is untenable under the First Amendment. It sidesteps that the reason Joseph Frederick's banner was found objectionable was *because of* its pro-drug message, just as Matthew Fraser's oratory was found offensive *because of* its sexualized nature.[232] In both cases, the content of the speech was the predicate for its punishment by the school district. It can plausibly be maintained that, like speech encouraging unlawful drug use, speech supporting the legalization of marijuana—i.e., advocating for a change in the government's drug policy—"might be perceived as offensive to some"[233] and perhaps many members of a school community. Surely, however, *Morse*'s rationale could not constitutionally justify prohibiting a student from stating in a classroom social justice discussion that draconian drug laws are a failed policy and that marijuana possession should be decriminalized to avoid racially disproportionate incarceration rates.[234] *Morse*'s putative distinction between speech punishable as promoting illegal drug use and speech exempt from punishment because deemed offensive for other reasons therefore collapses, as the decision effectively extends *Fraser*'s "offensiveness"

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231. *Morse*, 551 U.S. at 409.

232. *See* O'Connor, *supra* note 145, at 466 ("This content versus method distinction is difficult to apply when one considers that the 'method' the school and the Court found objectionable was part of the content of Fraser's speech.").

233. *Morse*, 551 U.S. at 409; *see also id*. at 426 (Breyer, J., concurring in part and dissenting in part) ("But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.").

234. In the public university context, the Second Circuit has recognized the need for "free and open debate" on national drug policy, noting that the educational process is harmed by the "excessive regulation" of speech on "matters of public concern." Blum v. Schlegel, 18 F.3d 1005, 1011–12 (2d Cir. 1994) (holding law professor's advocacy of marijuana legalization and criticism of national drug control policy protected under First Amendment). Whether the same speech would be protected in the secondary educational environment seems a relatively safe proposition after *Morse*, although the majority downplayed the inherently political nature of Frederick's speech that necessarily follows from its strained construction of the banner as conveying a pro-drug message by stating that "this is plainly not a case about political debate over the criminalization of drug use or possession." *Morse*, 551 U.S. at 403. This averment, together with the concurrence's emphasis that the decision did not support any restriction of speech "on any political or social issue," and the dissent's insistence that debate "about the wisdom of the war on drugs or of legalizing marijuana for medicinal use" must remain protected under the First Amendment, indicates that a significant majority of the Justices in *Morse* would refuse to include speech of political or social importance within its newly fashioned "pro-drug" exception to the public student speech framework. *See id.* at 422, 445 (footnote omitted); *Shanley*, 462 F.2d at 972 ("controversial" statement in off-campus student newspaper "advocating a review of the laws regarding marijuana" encouraged students to "become informed of social issues" and was protected under First Amendment).

rationale to pro-drug advocacy with no principled basis for restricting its application to that particular message.[235]

It is hard to see how *Morse*'s rationale can be limited in a sensible or coherent way in future cases because there are many examples of student speech that could conceivably be regarded as "present[ing] a grave and in many ways unique threat to the physical safety of students."[236] As Justice Stevens pointed out in dissent, "[g]iven the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use."[237] Depending on how *Morse* is interpreted by lower courts, its abandonment of the longstanding First Amendment requirement of viewpoint neutrality[238] opens the door to regulation of other

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235. *See Morse*, 551 U.S. at 426 (Breyer, J., concurring in part and dissenting in part) ("One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions.").

236. *Id.* at 425 (Alito, J., concurring); *see also* Papandrea, *supra* note 5, at 1053 ("Although the Court emphasized that its holding in *Morse* was limited to speech concerning illegal drug use, it is hard to accept such a narrow view of the holding as a theoretical matter. Indeed, some lower courts have held that a school may now restrict the expression of its students whenever school officials reasonably believe that the speech is harmful or threatening to the students.") (footnote omitted); Chemerinsky, *supra* note 114, at 21–22 ("There are countless examples of behavior that is illegal and harmful that might be expressed by students. Imagine a t-shirt or a banner encouraging promiscuous sexual activity illegal under statutory rape laws and potentially devastating to health . . . The point is that if schools can punish 'Bong Hits 4 Jesus,' it is hard to see why they could not sanction that speech as well."); O'Connor, *supra* note 145, at 470 ("Though drug use by children is unquestionably harmful, so are a myriad of other issues: teen pregnancy, school violence, low graduation rates, and poor instruction. It is unclear what separates pro-drug speech from the rest.").

237. *Morse*, 551 U.S. at 446 (Stevens, J., dissenting); *see also id*. at 426 (Breyer, J., concurring in part and dissenting in part) ("What about encouraging the underage consumption of alcohol?"); *Kowalski*, 652 F.3d at 572 (citing *Morse*, 551 U.S. 393) (noting federal government regulatory initiative in support of duty of schools to protect students from cyber-bullying and harassment in the school environment).

238. The Second Circuit has stated that the "long-held requirement of viewpoint neutrality" applies to "any and all government restriction of private speech." *Peck*, 426 F.3d at 631, 633 (viewpoint neutrality "remain[s] a core facet of First Amendment protection"). In dissenting in *Morse*, Justice Stevens objected that restricting speech based on its apparently pro-drug message "invites stark viewpoint discrimination" "because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint." *Morse*, 551 U.S. at 437 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The dissent elaborated that "carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment." *Id.* at 438–39. Further, Justice Stevens noted that the confiscation of Frederick's banner flouted the First Amendment standard for incitement established in Brandenburg v. Ohio, 395 U.S. 444 (1969), because "punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid." *Morse*, 551 U.S. at 436. Justice Stevens did not discern a causal relationship between

perspectives that school authorities regard as particularly harmful or threatening to students, in violation of the foundational principle "that government has no power to restrict expression because of its message."[239] If *Morse*'s application is not limited to the unambiguous solicitation of drug law violations by public school students at school events,[240] the potential emerges for school suppression of a broad array of controversial viewpoints expressed by student speakers.[241] This sweeping abridgment of students' First Amendment rights is precisely what Justice Alito's concurrence bluntly warned against yet paradoxically invited in

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the "silly, nonsensical"" banner's "nonsense message" and the danger of increased unlawful drug use among public high school students because they "do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it." *Id.* at 444, 446. To the extent the decision in *Morse* reflects the established First Amendment distinction between advocacy of unlawful conduct (Morse's banner) and advocacy of a change in governmental policy (the Tinkers' armbands), it makes no attempt to adhere to *Brandenburg*'s strict requirements as the basis for penalizing the former category of speech when the speech takes place in a setting controlled by a public school.

239. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); *see also* Chemerinsky, *supra* note 114, at 19 ("Viewpoint restrictions of speech are virtually never allowed. The government obviously should not be able to advance a particular position by silencing those holding an opposite view."); Goldman, *supra* note 93, at 420 ("Yet, government regulation based on viewpoint is an anathema to positive change and maximizes the risk of creating a totalitarian state."). The extension of content-based regulation of student speech (allowed in *Fraser*) to viewpoint discrimination (ratified in *Morse*) has been struck down as a First Amendment violation when engaged in by public universities to deny funding to a student publication as part of an extracurricular speech program. *See Rosenberger*, 515 U.S. at 834 (when a public university "expends funds to encourage a diversity of views from private speakers . . . [it] may not discriminate based on the viewpoint of private persons whose speech it facilitates"). Moreover, while a public university may allocate student activity fees for ideological purposes in furtherance of its educational mission, it must adhere to the cardinal "requirement of viewpoint neutrality" in making such decisions. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233–34 (2000); Amidon v. Student Ass'n of State Univ. of N.Y. at Albany, 508 F.3d 94, 100 (2d Cir. 2007) ("The denial of funding in a viewpoint-discriminatory manner is as impermissible as the denial of access to a physical forum in a viewpoint-discriminatory manner."). Thus, in the post-secondary educational setting, viewpoint neutrality governs both the payment of student fees that support as well as the administration of extracurricular speech programs.

240. *See* Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280, 298 n.44 (5th Cir. 2014) (Dennis, J.), *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015), *rev'd*, 799 F.3d 379 (5th Cir. 2015) (*en banc*). (*Morse* "in no way expands school officials' authority to restrict student speech on social or political matters; rather, the decision held only that schools have the limited authority to restrict speech at school or a school-approved event that could be reasonably viewed as promoting illegal drug use"); *see also* Chemerinsky, *supra* note 114, at 25 (*Morse* should be read narrowly because "[i]t was a 5-4 decision and two of the Justices in the majority—Alito and Kennedy—emphasized that the holding is just about the ability of schools to punish student speech encouraging drug use. The opinion should be read no more broadly than that.").

241. *See* Denning & Taylor, *supra* note 213, at 865 ("If it is true that one of schools' primary functions is to keep students safe from physical harm while outside their parents' care, then all manner of speech encouraging or celebrating activities that are physically dangerous—from driving fast to having sex—is potentially the subject of a similar categorical exclusion.").

permitting the regulation of speech regarded as presenting a serious threat to the safety of students subject to school supervision.[242]

The deferential decision in *Morse* has been severely criticized[243] and "seems to have provided more questions than answers,"[244] and its influence on future cases, including digital speech cases, is still playing out. With respect to the threshold exercise of the school's authority, the decision should be confined to circumstances where outside-of-school speech is properly subject to school regulation because part of a school-supervised activity.[245] However, there is a risk that it may be construed more broadly to reach student speech away from the school's premises merely

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242. Justice Alito emphasized the exposure to physical safety threats that students may be faced with in public schools, which "can be places of special danger"—an apparent allusion to the recent wave of mass shooting violence that our nation's schools have tragically experienced. *Morse*, 551 U.S. at 424. In finding that an example of student speech was punishable as a threat of violence unprotected by the First Amendment, the Fifth Circuit predictably picked up on this aspect of *Morse* in basing its holding in part on the need to protect the safety of students. *See Ponce*, 508 F.3d at 771 n.2 ("The harm of a mass school shooting is, by contrast, so devastating and so particular to schools that *Morse* analysis is appropriate."); *id.* at 771–72 ("If school administrators are permitted to prohibit student speech that advocates illegal drug use . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive death threats, to the school population as a whole."). The Eleventh Circuit has extended *Morse*'s holding in the same manner. Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) ("[*Morse*'s] rationale applies equally, if not more strongly, to speech reasonably construed as a threat of school violence.").

243. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (footnote omitted):

> It is difficult to read *Morse* and see the Roberts Court as protective of free speech. The banner at issue in this case was silly and incoherent. There was not the slightest evidence that it caused any harm; there was no claim that it was disruptive and certainly no evidence that it increased the likelihood of drug use. But, the conservative majority still ruled against speech and in favor of the government.

Chemerinsky, *supra* note 114, at 21 ("My concern is thus that *Morse v. Frederick* is a significant departure from well established First Amendment principles, even those that concern when student speech can be punished."); Bader, *supra* note 217, at 141 ("The Court's opinion in *Morse* was disappointing in many respects. Its decision was a marked departure from its prior First Amendment rulings, in permitting viewpoint discrimination and censorship based on speculation about the consequences of speech."); Papandrea, *supra* note 5, at 1055–56 (noting the *Morse* Court's "apparent willingness to continue to erode student speech rights and to expand the power of school officials to punish student expression").

244. Holden, *supra* note 6, at 255.

245. *See, e.g.*, Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 332–33 (6th Cir. 2010) ("As this Court has already recognized, however, the *Morse* holding was a narrow one, determining no more than that a public school may prohibit student expression *at school or at school-sponsored events during school hours* that can be 'reasonably viewed as promoting drug use.'") (emphasis added); *B.H.*, 725 F.3d at 332 (Hardiman, J., dissenting) ("Indeed, courts have been especially careful to underscore the narrowness of the Court's holding in *Morse*."); *J.C.*, 711 F. Supp. 2d at 1102 ("In reviewing the disciplinary action in *Morse*, the Court promulgated a narrow holding decidedly restricted to the facts of the case.").

when it is a source of concern to teachers or school administrators.[246] Such an interpretation would have disturbing implications for public student digital speech,[247] and would inevitably compound the effect of *Morse*'s creation of a pro-drug advocacy exception to the First Amendment in public schools.[248]

III. THE SECOND CIRCUIT'S PUBLIC STUDENT SPEECH JURISPRUDENCE: THE PROVENANCE OF THE REASONABLE FORSEEABILITY STANDARD & EXPANDED SCHOOL CONTROL OVER EXPRESSION IN THE MODERN PUBLIC SQUARE

A. Thomas*: The "Separate Spheres" Conception of Public Student Free Speech Rights*

1. The First Amendment Confers Broad Protection on Student Speech in the General Community

Issued more than four decades ago, well before the advent of the digital age, the Second Circuit's decision in *Thomas v. Board of Education, Granville Central School District*[249] remains compelling in its treatment of public student constitutional free speech principles. The plaintiffs in *Thomas*, four high school students, prepared an underground newspaper named "*Hard Times*"[250] which the court described as "saturated with distasteful sexual satire, including an editorial on masturbation and articles alluding to prostitution, sodomy, and castration."[251] The students primarily worked on the publication in their homes after school hours,[252] although occasional articles were "composed or typed within the school

246. *See* LoMonte, *supra* note 28, at 6 ("*Morse* can be read narrowly, for the unremarkable proposition that when students are acting under school supervision, as they are on a field trip, they are speaking 'at school,' or more broadly, to say that speech physically off school grounds that is directed at the school equals speech 'at' school."); Alison Virginia King, *Constitutionality of Cyberbullying: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VANDERBILT L. REV. 845, 870 (2010) ("Under an expansive reading of *Morse*, the slightest connection with the school, such as a website created off-campus that is directed at the school community, might trigger categorization as on-campus speech.") (footnote omitted).

247. *See* Papandrea, *supra* note 5, at 1055–56 (*Morse* "indicates that, at least on a theoretical basis, the Court might be willing to give schools broader authority to punish student speech in the digital media.").

248. *See Morse*, 551 U.S. at 446 (Stevens, J., dissenting) ("Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.").

249. 607 F.2d at 1043. The *Thomas* majority opinion was written by Chief Judge Kaufman and joined by Judge Kearse. In a separate opinion, Judge Newman concurred in the result.

250. *Id.* at 1045.

251. *Id.* at 1045 n.3.

252. *See id.* at 1045.

building"[253] after classes, and they also consulted with a teacher "for advice on isolated questions of grammar and content."[254] The newspaper was printed by a local business and sold off campus at a nearby convenience store.[255] Its publication was first discovered when "a teacher confiscated a copy from a student"[256] and delivered it to school administrators, following which "schoolwide examinations were conducted without incident"[257] over a two-day period. When the President of the Board of Education subsequently learned about the paper from her son and "intimated her dissatisfaction with the administrators' inaction,"[258] the students responsible for "*Hard Times*" experienced some of their own, as they were suspended for five days and had a disciplinary letter placed in their school files.[259]

On this record, the *Thomas* court found *Tinker* inapplicable, which it distinguished as limited to "expression within the school itself."[260] In determining that the newspaper's publication and distribution was beyond the reach of the school's disciplinary authority, the majority noted that its cover page bore a legend "disclaiming responsibility for any copies found on school property"[261] and concluded that "all but an insignificant amount of relevant activity in this case was *deliberately designed* to take place beyond the schoolhouse gate."[262] Even though "*Hard Times*" was "addressed to the school community"[263] and included articles about "school lunches, cheerleaders, classmates, and teachers,"[264] *Thomas* focused on the *intent* of the student-publishers in finding that it "was conceived, executed, and distributed outside the school"[265] and therefore not subject to

253. *Id.*

254. *Thomas*, 607 F.2d at 1045.

255. *See id.*

256. *Id.*

257. *Id.* at 1046.

258. *Id*. The President of the Granville Board of Education was "[s]hocked and offended" at the content of *Hard Times*. *Thomas*, 607 F.2d at 1046.

259. *See id.* The plaintiffs in *Thomas* were also segregated during study halls for at least a month and lost all student privileges while they were suspended. *See id.*

260. *Id.* at 1050; *see also Bayer*, 684 F. Supp. 2d at 1373 ("The [*Thomas*] court found that the situation at hand was a factual context distinct from that envisioned by *Tinker* and its progeny.").

261. *Thomas*, 607 F.2d at 1045.

262. *Id.* at 1050, 1045 (the students "assiduously endeavored to sever all connections between their publication and the school") (emphasis added).

263. *Id.* at 1045.

264. *Id.*

265. *Id.* at 1050. *Thomas*'s conclusion that the newspaper's "scant and insignificant school contacts" did not support the exercise of the school's regulatory authority contrasts markedly with the Supreme Court's approach in *Morse*, where the connections between the "BONG HiTS 4 JESUS" banner, spontaneously unfurled on a public street corner in the presence of spectators from the general community, and the school were even more attenuated. *See Thomas*,

Tinker.[266] Indeed, the opinion assumed that where an "off-campus publication includes criticism of the school itself,"[267] the "*foreseeability* of distribution within the school increases,"[268] but expressly disavowed this as a basis for the exercise of school authority.[269]

Throughout the decision, the court stressed the importance of procedural due process protections in First Amendment cases, including "that the constitutional status of speech be determined by the judiciary"[270] before the imposition of punishment. Strict adherence to these requirements is particularly important in the context of public student speech, where "those charged with evaluating expression have a vested interest in its regulation, [and] the temptation to expand the otherwise precise and narrow boundaries of punishable speech may prove irresistible."[271] As evidence that school authorities were bending to community sentiment in suspending the students who composed "*Hard Times*," Chief Judge Kaufman pointed out that they had taken no action until pressured to do so by

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607 F.2d at 1045. Because the students in *Thomas* "diligently labored to ensure that Hard Times was printed outside the school, and that no copies were sold on school grounds," their composition of some of the articles on school typewriters and the storage of finished editions "secretly and unobtrusively . . . in a teacher's closet" did not override the students' intent to remove the publication beyond the schoolhouse gate. *Id.* at 1050.

266. Christopher E. Roberts, *Is MySpace Their Space?: Protecting Student Cyberspeech in a P ost-Morse v. Frederick World*, 76 UMKC L. REV. 1177, 1191 (2008) ("in *Thomas*, although the newspaper was distributed at school, the students' speech was protected because they did not intend the speech to reach school grounds") (footnotes omitted).

267. *Thomas*, 607 F.2d at 1052 n.18.

268. *Id.* (emphasis added).

269. *See id.* ("Nevertheless, we believe that this power is denied to public school officials where they seek to punish off-campus expression simply because they *reasonably foresee* that in-school distribution may result.") (emphasis added); Hoder, *supra* note 19, at 1598 n.235 (because it would stretch school authority to reach protected off-campus expression, "the *Thomas* court rejected using the foreseeability test to determine school jurisdiction over student speech").

270. *Thomas*, 607 F.2d at 1048 ("Speech may not be suppressed nor any speaker punished unless the final determination that specific words are unprotected is made by an impartial, independent decisionmaker."). Unlike federal district courts, public school administrators "are generally unversed in difficult constitutional concepts" implicated by student speech cases. *Thomas*, 607 F.2d at 1051; *see also Cohen*, 403 U.S. at 25 ("Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

271. *Thomas*, 607 F.2d at 1048; *see also infra* text accompanying notes 842–58; Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 531 (9th Cir. 1992) ("In a case such as this one, where arguably political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion."); *see also* Tomain, *supra* note 5, 175–76 ("The problem of biased decision making is compounded when school administrators who are the targets of online speech are also the individuals that make decisions on whether and how severely to punish a student¾their judgment may be clouded by the content aimed at them.") (footnote omitted); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 696 n.54 (1978) ("There is perhaps an inherent and unavoidable conflict of interest involved in entrusting some aspects of the protection of the right to criticize those in power to the very people who have the most to lose by such criticism.").

the President of the Board of Education and, further, that the school had "continued to operate normally"[272] during the period immediately following publication.[273] Because school officials had succumbed to the temptation warned against in *Thomas* and imposed discipline for the off-campus exercise of students' free speech rights, their failure to comply with the necessary safeguards violated constitutional procedures.[274]

Thomas recognized that, as a consequence of their "intimate association with the school itself"[275] and "understandable desire to preserve institutional decorum,"[276] even well-intentioned school district officials have an inherent overregulation bias[277] that is likely to induce a pronounced chill of student speech.[278] Unwilling to tolerate "an added

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272. *Thomas*, 607 F.2d at 1052 n.17.

273. *See id*. ("school officials were content to do nothing at all for six full days"); *id.* at 1051 ("We note, in this connection, that Granville school administrators failed to discipline the appellants until urged to do so by a community leader, Board of Education President Tatko."). The after-the-fact retaliation against student speech rejected in *Thomas* is a pattern that has met with varying degrees of judicial oversight in more recent Second Circuit cases. *Cf. Guiles*, 461 F.3d at 322, 331 (where parent of student "whose politics evidently were opposed" to the plaintiff's complained to teachers about the plaintiff's T-shirt bearing images of drugs and alcohol as part of political message, prompting school officials to take disciplinary action after the plaintiff had worn the T-shirt to school "on average once a week for two months" without incident, dilatoriness of response indicated "defendants' censorship was unwarranted" under *Tinker*), *with Doninger II*, 527 F.3d at 53 (resolution of dispute over date for scheduling high school's Jamfest concert at least two weeks before student's blog posting was discovered and punishment imposed by school authorities not considered in court's application of *Tinker*, which found a "foreseeable risk of substantial disruption to the work and discipline of the school").

274. *See Thomas*, 607 F.2d at 1050 ("Because the [school] do[es] not satisfy this standard, we find that the punishments imposed here cannot withstand the proscription of the First Amendment.") (footnote omitted); *id.* at 1052 ("In a system of free expression premised in part on the availability of an impartial arbiter, such an unreviewable sanction must be confined to a rigidly restricted area.").

275. *Id.* at 1051.

276. *Id.*

277. The *Thomas* court noted that, even when school authorities are acting in good faith, their tendency to overregulate student speech results in the inhibition of protected expression. *See id.* at 1051 ("Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials."); *see also* Tomain, *supra* note 5, at 175 ("Administrators may truly believe they are acting in the best interests of the school and the students. Regardless, this good faith belief does not overcome human nature, especially when the school administrator has a natural inclination to protect the school and its administrators from unsavory speech.") (footnotes omitted); *Shanley*, 462 F.2d at 976 ("But the Constitution can be no more loosely interpreted because the motivations behind its infringement may be benign.").

278. In stirring language, the *Thomas* court issued a strong warning about the danger of student self-censorship through overbroad regulation of speech by school officials:

> Indeed, we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone. To avoid the chilling effect that inexorably produces a silence born of fear, we have been intentionally frugal in exposing expression to government regulation.

increment of chilling effect"[279] emanating from the punishment of student expression outside of the school environment,[280] the decision repudiated the school district's reaction to the newspaper's publication as a stark example of community censorship prohibited by the First Amendment.[281] Emphasizing that, when off school grounds and not subject to school supervision, public school students are free to exercise their expressive liberties—even when their speech is vulgar or indecent—just like any other citizen,[282] *Thomas* reinforced *Tinker*'s conception of students as autonomous rights-bearing individuals rather than "closed-circuit recipients"[283] of communications approved by the government, concluding with a memorable lesson in First Amendment law that subsequent decisions would do well to consider:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.[284]

Thomas, 607 F.2d at 1048.

279. *Id.* at 1051. The chilling effect is "a specific substantive doctrine lying at the very heart of the first amendment." Schauer, *supra* note 271, at 688. It *"occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." Id.* at 693 (emphasis in original).

280. The *Thomas* court noted that the chilling effect on student speech is "intensified because the promise of judicial review is virtually an empty one" owing to the typically short span of sanctions levied by school officials in this context, which allows for judicial review only after the fact in most cases. *Thomas*, 607 F.2d at 1052; *see also* Tuneski, *supra* note 58, at 146 ("Many suspensions for internet speech are likely to be unreported and unchallenged for a variety of reasons. Most notably, students and their families may not want to endure the potential humiliation, hassle, and expense of a court battle to reverse a suspension that has already been served in order to benefit the greater good.").

281. *See Thomas*, 607 F.2d at 1051 ("We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve.").

282. "When minors are away from campus and engaging in speech activities that are not supervised by the school, they are no longer *students* but are, instead, simply *minors*¾indeed, *citizens*¾with substantial rights." Calvert, *supra* note 20, at 248 (emphasis in original); *see also Tinker*, 393 U.S at 511 ("Students in school as well as out of school are 'persons' under our Constitution."); Calvert, *supra* note 131, at 271.

283. *Tinker*, 393 U.S. at 511.

284. *Thomas*, 607 F.2d at 1052.

According to the constitutional vision animating *Thomas*, public high school students have "separate identities, assigned to the individual by the environment [in which] the person presently finds himself or herself, [and which] should not interfere with each other in the context of free speech."[285] Thus, virtually as a matter of constitutional stipulation, when students speak as members of the general community, they are beyond the reach of schools' disciplinary authority and their expression is entitled to full First Amendment protection.[286] This promotes social utility by enabling them to become engaged citizens through the proliferation of speech,[287] and fosters the unrestrained exchange of information preferred in our constitutional system.[288]

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285. Brian Oten, *Disorder in the Courts: Public School Student Expression on the Internet*, 2 FIRST AMEND. L. REV. 403, 412–13 (2004). A decision issued a few months after *Tinker* elaborated the separate status concept, according to which students are endowed with unfettered First Amendment rights when away from school:

> In this court's judgment, it makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner.

Sullivan, 307 F. Supp. at 1340–41 (invalidating as First Amendment violation the expulsion of two students who distributed underground newspaper in park across the street from high school, despite likelihood of publication being brought onto campus); *see also Shanley*, 462 F.2d at 964 (overturning three-day suspensions on First Amendment grounds where "students neither distributed nor encouraged any distribution" of underground newspaper "during school hours or on school property, although some of the newspapers did turn up there"); *Klein*, 635 F. Supp. at 1440–41 (holding student's digital salute to teacher in restaurant parking lot "after school hours" could not be punished under First Amendment; "[a]ny possible connection between his act of 'giving the finger' to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities" was "far too attenuated to support discipline").

286. *See Thomas*, 607 F.2d at 1050 n.13 ("we hold that school officials are powerless to impose sanctions for expression beyond school property in this case"); LoMonte, *supra* note 49, at 46 (*Thomas* "necessarily rests on the assumption that students reclaim the full benefit of their constitutional rights when they leave campus"); Tuneski, *supra* note 58, at 162 ("student off-campus speech during activities that lack any connection to the school should be considered a category of speech that deserves full protection by the courts"); Goldman, *supra* note 93, at 405 ("Student speech that does not occur under school supervision should receive the same First Amendment protection as non-student speech.").

287. *See* Oten, *supra* note 285, at 413 ("If a young person is classified at all times as a student, and thus subjected to the broader restrictions of student speech, the ability of young people to function in society as private citizens is greatly diminished.").

288. From its inception, First Amendment doctrine has recognized that the exercise of free speech rights is an affirmative value. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Schauer, *supra* note 271, at 691 ("Free speech is an affirmative value¾we are concerned with encouraging speech almost as much as with preventing its restriction by the government.") (footnotes omitted). For later examples of doctrinal cultivation of First Amendment rights, *see Mosley*, 408 U.S. at 95–96 ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."); Bose Corp. v. Consumers Union of U.S., Inc., 466

2. Judge Newman's Concurrence: School Regulation may be Justified Based on the "Reasonably Foreseeable Consequences" of Off-Campus Speech

In a notable concurring opinion that has profoundly influenced the trajectory of post-*Tinker* public student speech jurisprudence, Judge Newman agreed that the plaintiffs, who had been informed by school officials that they would not be disciplined if the newspaper was kept away from school property, had been punished in violation of constitutional due process requirements for their "essentially off-campus"[289] publication activities. Because the students' amended complaint sought to distribute "*Hard Times*" on school grounds,[290] however, the concurrence also found it necessary to reach the question of "whether the on-campus distribution of this publication is protected by the First Amendment."[291] Judge Newman answered this question resoundingly in the negative: "indecent language in a student publication distributed to high school students on school property"[292] was constitutionally proscribable and, further, could be regulated without need of showing a predictable disruption under *Tinker*.[293] The *Thomas* concurrence centered on the involuntariness of other students' exposure to such in-school expression,[294] finding that where "the audience at which a publication is specifically directed consists solely of high school students, and distribution is demanded at a school building attended by students down to the age of 11, First

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U.S. 485, 503–04 (1984) ("[T]he freedom to speak one's mind is not only an aspect of individual liberty¾and thus a good unto itself¾but also is essential to the common quest for truth and the vitality of society as a whole."); *Alvarez*, 567 U.S. at 728 ("Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person . . . Society has the right and civic duty to engage in open, dynamic, rational discourse."). Moreover, the promotion of free speech values is an integral component of our public education system. *See, e.g.*, Bd. of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226, 263 (1990) (Marshall, J., concurring) ("That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools.").

289. *Thomas*, 607 F.2d at 1053 ("The school authorities had explicitly informed the students that no disciplinary action would be taken if the students kept their publishing activities off school property."); *see also id.* at 1054 ("Thus the conclusion that the students were in fact disciplined for off-campus activity suffices to establish that their discipline was imposed in violation of the Fourteenth Amendment.") (footnote omitted); *id.* at 1058 n.13 ("discipline for off-campus activity was disclaimed by school authorities and therefore cannot be imposed consistently with the Due Process Clause").

290. *See id.* at 1054.

291. *Id*.

292. *Thomas*, 607 F.2d at 1055.

293. *See id.* at 1055 ("Yet nothing in *Tinker* suggests that school regulation of indecent language must satisfy the criterion of a predictable disruption.") (footnote omitted); *id.* at 1057.

294. *See id.* at 1057 ("Moreover, the element of choice on the part of the viewing or listening public, . . . has not been considered to be sufficiently present where juvenile audiences are involved.").

Amendment protection is not available for language that is indisputably indecent."[295] Along with the captive audience element, the suppression of indecent material by school authorities was permissible under the First Amendment because "its circulation *on school grounds* undermines their responsibility to try to promote standards of decency and civility among school children"[296] in discharging the school's educational mission—the exact rationale subsequently adopted by the Supreme Court in *Fraser*.[297]

In addition to the rationale absorbed wholesale as constitutional principle in *Fraser*—i.e., that public schools' authority encompasses the regulation of sexualized or offensive speech within the confines of the schoolhouse when necessary to protect a youthful captive audience from unsought or unwanted exposure, and to impart the values of civility and decency to those they are responsible for educating, without need of satisfying *Tinker*'s predictable disruption criterion—another suggestion in the *Thomas* concurrence has also had enduring doctrinal significance, particularly in the digital student speech context. In a footnote to the last sentence of his opinion, Judge Newman ventured that geographic boundaries need not constrain school authorities' ability to regulate speech that

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295. *Id.* at 1057. (footnotes omitted). Similar to the circumstances of the student assembly in *Fraser*, which included students as young as 14 years of age, the premises where "Hard Times" would have been distributed consisted of "a single building for students in grades 7 through 12, the youngest of whom are age 11." 478 U.S. at 677, 683; *Thomas*, 607 F.2d at 1057 n.12. The audience composition of comparatively less mature and more impressionable members strongly factored into reliance on the captive audience doctrine in both Judge Newman's concurrence in *Thomas* and the Supreme Court's decision in *Fraser* in order to protect younger students from unwanted exposure to lewd and indecent expression.

296. *Thomas*, 607 F.2d at 1057 (emphasis added). In fashioning this justification, Judge Newman concluded that "[t]he First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency." *Id.* The holding in *Fraser* echoes the language of Judge Newman's conclusion. *See supra* text accompanying notes 174–81; *Fraser*, 478 U.S. at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

297. *Fraser*, 478 U.S. at 683 ("schools must teach by example the shared values of a civilized social order"). By jettisoning *Tinker*'s substantial disruption test and granting school officials more constitutional latitude derived from the interests discussed above in the text to punish indecent speech in the unique context of the school environment, Judge Newman's concurrence prefigured the rationale of *Fraser*, a case that was not decided until seven years later, with remarkable exactitude. The *Thomas* majority had similarly observed that greater deference is appropriate where school authorities seek to restrict in the school setting what would otherwise be permissible student speech based on a school's interests in (1) protecting a captive audience from unwanted exposure to lewd and indecent content, and (2) dissociating itself from plainly offensive student expression. *See Thomas*, 607 F.2d at 1049 ("Moreover, school officials must have some latitude *within the school* in punishing and prohibiting ordinarily protected speech both out of regard for fellow students who constitute a captive audience, and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression.") (emphasis added). As did Judge Newman's concurrence, Chief Judge Kaufman's majority opinion presaged the rationale adopted in *Fraser*, with the express understanding that it would be limited to student expression within the school environment.

affects matters concerning the school.[298] According to this theory—and again, without need of satisfying *Tinker*'s requirements—the First Amendment might not prohibit the regulation of a publication "containing clearly indecent language"[299] distributed to public high school students "at the perimeter of the school grounds."[300] In order to prevent such "vulgar material"[301] from filtering into the schoolhouse in such circumstances, Judge Newman suggested reliance on the "traditional standard of the law that holds a person responsible for the natural and reasonably foreseeable consequences of his action"[302]—i.e., a First Amendment proximate cause test. From this offhand proposal, offered in *dicta* with respect to indecent material distributed in print format at the edge of the schoolyard, as a wellspring, a reasonable foreseeability standard has become entrenched as the predominant decisional rule in litigation over public student digital free speech rights. However, the cases adopting that basic negligence principle—including decisions in the Second Circuit itself[303]—have ignored the significant accompanying limitation (as originally conceived by Judge Newman) on its application to expression that is *intended* to reach inside the schoolhouse gate,[304] resulting in a dramatic expansion of school control over off-campus student digital expression.[305]

In a cultural landscape where ubiquitous social media connectivity, incessant tweeting, and instantaneous text messaging have become the norm, it may be tempting to dismiss the *Thomas* majority's reasoning as unsuited to the reality of the modern communication technologies that

298. *See Thomas*, 607 F.2d at 1058 n.13. ("School authorities ought to be accorded some latitude to regulate student activity that affects matter[s] of legitimate concern to the school community, and territoriality is not necessarily a useful concept in determining the limit of their authority.").

299. *Id*.

300. *Id*. Judge Newman's musings in this regard were clearly *dicta* given his acknowledgement that "[t]he extent to which school authority might be asserted for off-campus activities need not be determined, since the school has disclaimed such power." *Id*. at 1058 (footnote omitted).

301. *Id.* at 1085 n.13.

302. *Thomas*, 607 F.2d at 1085 n.13.

303. *See infra* text accompanying notes 375–79 and 460–63.

304. *Thomas*, 607 F.2d at 1057 ("Other courts have upheld school discipline for distribution occurring just off school grounds, where circulation on school property was *intended* and predictable.") (emphasis added); Hoder, *supra* note 19, at 1577 ("Judge Newman suggested that, even if the *Tinker* standard is not met, discipline of students for distributing indecent material off school grounds may be justified *if the circulation on school property was intended*.") (emphasis added) (footnote omitted).

305. *See infra* text accompanying notes 380–88 and 464–70; *see* Papandrea, *supra* note 5, at 1091–93.

permeate the lives of today's public school students.[306] But that would be a serious mistake, as its insightful analysis still resonates in the digital age and has much to teach us in its capacious recognition of students' free speech rights in the community at large.[307] By establishing a resolute commitment to public students' First Amendment rights in the form of a "strong presumption against punishing off-campus speech,"[308] the decision removed the threat of governmental suppression from the sphere of public discussion, committing the choice of what shall be communicated outside of the school environment to individual students and their families in the belief that it will ultimately yield a more informed and capable society.[309] There is timeless constitutional value in *Thomas*'s vigilant safeguarding of off-campus student expression, without which "[t]he risk is simply too great that school officials will punish protected speech and thereby inhibit future expression."[310] Its powerful reaffirmation of the First Amendment premium on avoiding the stifling of communication through debilitating self-censorship marks the decision's enduring

306. The notion that *Thomas* has been rendered precedentially anachronistic by advances in communications technology is misguided. Rather, the decision's recognition that public school officials "susceptibl[e] to community pressure" will be prone to overreach in punishing controversial or offensive student speech and its corresponding rejection of the resulting chilling effect as intolerable under the First Amendment establish an enduring constitutional framework for the analysis of students' First Amendment rights in the digital age. *Thomas*, 607 F.2d at 1051–52; *see infra* text accompanying notes 1000–16.

307. *Thomas* notes repeatedly that student expression away from the school environment is entitled to full protection under the First Amendment, which "forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon." 607 F.2d at 1051; *see id.* at 1045 ("When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government."); *id.* at 1049 ("Moreover, since First Amendment freedoms beyond these institutions are jealously guarded, the more stringent restrictions acceptable within them will in no wise inhibit expression in the larger community.").

308. O'Connor, *supra* note 145, at 475; *see* Adam Dauksas, *Doninger's Wedge: Has Avery Doninger Bridged the Way for Internet Versions of Matthew Fraser?*, 43 J. MARSHALL L. REV. 439, 448 (2010) (citing *Thomas* for the proposition that "schools have absolutely no authority to regulate a child's behavior beyond the schoolhouse gates.") (footnote omitted).

309. Tuneski, *supra* note 58, at 152 ("Thus, the Second Circuit emphasized that students are not subject to school discipline once they leave at the end of the day. Outside of school, parents rather than school officials may regulate what material a child encounters."); Papandrea, *supra* note 5, at 1084 ("government speech restrictions can more often than not actually interfere with the choices some parents have made regarding their children's upbringing") (footnote omitted); *Morse*, 551 U.S. at 424 (Alito, J., concurring) (outside the school environment, control over students reverts to parents, who "can attempt to protect their children in many ways").

310. *Thomas*, 607 F.2d at 1051. The Second Circuit had previously recognized a structurally related point in upholding the in-school, non-proselytizing First Amendment rights of public high school teachers, stating that "[u]nder the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression." *James*, 461 F.2d at 575.

contribution to public student speech jurisprudence.[311] Moreover, *Thomas*'s unwavering fidelity to principles of expressive liberty would reduce much of the confusion in the current public school speech arena by ensuring that students who communicate on digital platforms away from the school environment and outside of school supervision are endowed with robust First Amendment rights that may be restricted only by parental, not state, control.[312] Regrettably, however, *Thomas*'s constitutional vision of students as engaged participants in a democratic society remains largely unvindicated in the digital speech context. In recent cases, as elaborated below, federal appellate courts have largely abandoned *Thomas*'s core principles and retreated to the reasonable foreseeability test proposed in Judge Newman's concurrence, with pernicious consequences for public student digital expression.[313]

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311. *Thomas*, 607 F.2d at 1048 ("[A] cautious expositor of controversy may well choose silence over expression if he knows that his words will be judged by a decisionmaker predisposed to rule against him."); *see also* Hoder, *supra* note 19, at 1599 ("In *Thomas*, the Second Circuit was concerned about the chilling of protected expression that might result if schools are given the authority to punish speech that occurs off campus.") (footnote omitted); *see also* Schauer, *supra* note 271, at 693 ("The danger of this sort of invidious chilling effect lies in the fact that something that 'ought' to be expressed is not. Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should.").

312. The *Thomas* court emphasized the preservation of parental prerogatives over student speech outside the school community. 607 F.2d at 1051, 1053 n.18 ("In the instant case, however, a parent who believed *Hard Times* was a harmless prank is powerless to erase his child's suspension, and the child whose parents deemed the paper acceptable reading cannot obtain a copy."). *Cf. Morse*, 551 U.S. at 424 (Alito, J., concurring) ("It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities."). *See* McDonald, *supra* note 4, at 742 ("While schools can legitimately demand civil communications during times and places that are under their control and supervision, it would strain credulity to believe that the public has tasked schools, rather than parents or other guardians, with the responsibility of shaping the characters and manners of our youth outside of school."); *see also* Palfrey & Gasser, *supra* note 5, at 181 ("Parents and other family members can make the crucial difference in terms of helping young people to assess information quality on their own.").

313. Despite its strong demarcation between on-campus (subject to *Tinker*) and off-campus (fully protected under the First Amendment and subject only to parental control) public student expression, *Thomas* "envision[ed] a case in which a group of students incites substantial disruption within the school from some remote locale." 607 F.2d at 1052 n.17. While this footnote acknowledged the possibility that student speech originating beyond the schoolhouse gate might, in certain circumstances, warrant the exercise of school disciplinary authority pursuant to *Tinker*, the clear import of Chief Judge Kaufman's reasoning is that any such occasion would be extraordinary and subject to careful judicial scrutiny. *See Layshock*, 650 F.3d at 219 ("schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' *under certain very limited circumstances*") (emphasis added). The First Amendment implications of this observation in the student digital speech context are addressed below. *See infra* text accompanying notes 1016–32.

B. Guiles*: The Tinker Standard Presumptively Governs Student Expression in Public Schools*

In *Guiles ex rel. Guiles v. Marineau*, the Second Circuit again found itself in "the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents."[314] Zachary Guiles, a seventh-grade public school student in Vermont, sought an injunction prohibiting, as a violation of the First Amendment, enforcement of a school dress-code policy with respect to his T-shirt which, "through an amalgam of images and text,"[315] criticized then President George W. Bush "as a chicken-hawk"[316] and "accuse[d] him of being a former alcohol and cocaine abuser."[317] As part of this message, the T-shirt "display[ed] images of drugs and alcohol."[318] When a parent chaperone complained after Guiles wore the T-shirt on a school field trip, a school official instructed him either not to wear it to school or to "tape over the offending images with duct tape."[319] Two days later, Guiles came to school with portions of the T-shirt covered by duct tape, over which he had written the word "Censored."[320]

Issued the year before *Morse v. Frederick*[321] was decided by the Supreme Court, the *Guiles* opinion began with a painstaking survey of the "*Tinker-Fraser-Hazelwood* trilogy,"[322] from which it distilled the following taxonomy of public student speech principles:

- Schools are permitted "wide discretion" to punish in-school speech that is "vulgar, lewd, indecent or plainly offensive;"[323]
- If the speech is sponsored by the school, it may be censored for reasons that are "reasonably related to legitimate pedagogical concerns;"[324] and
- *Tinker* applies to all other student speech, which is immunized from school regulation "unless it would materially and substantially disrupt classwork and discipline in the school."[325]

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314. *Guiles*, 461 F.3d at 321. The unanimous opinion in *Guiles* was written by Judge Cardamone and joined by Judge Pooler and then Circuit Judge Sotomayor. *See id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Guiles*, 461 F.3d at 320.

319. *Id.* at 323.

320. *Id.*

321. *See Morse*, 551 U.S. at 393.

322. *Guiles*, 461 F.3d at 325.

323. *Id.* (first citing *Fraser*, 478 U.S. at 683–85; and then citing *Hazelwood*, 484 U.S. at 272 n.4).

324. *Id.* (quoting *Hazelwood*, 484 U.S. at 273).

325. *Id.* (citing *Tinker*, 393 U.S. at 513).

In applying these principles, the court easily determined that *Hazelwood* did not control because the student's T-shirt was not school sponsored,[326] but then veered into a belabored discussion of the scope of *Fraser*, which the district court had relied on in upholding the school's censorship of the T-shirt's images as "plainly offensive or inappropriate."[327] Through an extended definitional exercise, *Guiles* limited the term "plainly offensive"[328] for purposes of *Fraser* to "speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity."[329] Based on its clarification of *Fraser*, the *Guiles* court held that the images on the T-shirt, while they "may cause school administrators displeasure and could be construed as insulting or in poor taste,"[330] did not qualify as "plainly offensive" and were therefore protected under the First Amendment.[331] Further, in passages that directly anticipated the Supreme Court's decision ten months later in *Morse v. Frederick*, the decision disavowed a reading of *Fraser* as endowing schools with broad authority to regulate student expression that conflicts with their "educational mission," recognizing that to do so would nullify *Tinker*.[332]

Because the drug and alcohol images on the T-shirt were clearly not prurient or scatological as required to fall within *Fraser*, the decision in *Guiles* eventually turned on a straightforward application of *Tinker*, with

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326. *Guiles*, 461 F.3d at 327 ("No one disputes that the school did not sponsor Guiles's T-shirt or that the T-shirt could not reasonably be viewed as bearing the school's imprimatur.").

327. *Id.* at 323; *see also id.* at 327–29.

328. *Id.* at 328.

329. *Id.*; *cf.* Broussard v. Sch. Bd. of City of Norfolk, 801 F. Supp. 1526, 1536 (E.D. Va. 1992) ("Speech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitation."). *See* Tomain, *supra* note 5, at 104 n.40 ("Courts disagree as to whether *Fraser* is limited to lewd and indecent sexual speech or whether it applies to other categories of offensive speech.").

330. *Guiles*, 461 F.3d at 329.

331. *Id.* The *Guiles* court rejected the lower court's broad reading of "plainly offensive" under *Fraser* as encompassing the T-shirt's drug and alcohol imagery. *Id.* at 327 ("We believe the district court misjudged the scope of *Fraser* and, consequently, applied it in error.").

332. *Id.* at 330 ("Moreover, the phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern . . . Indeed, if schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect."); *id.* at 328 (rejecting broad reading of *Fraser* under which "the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency"). These passages from *Guiles* were echoed in both the majority and concurring opinions in *Morse*, which similarly cabined *Fraser*'s "educational mission" rationale. *See Morse*, 551 U.S. at 409 (Roberts, C.J.); *see also id.* at 423 (Alito, J., concurring). *See* Miller, *supra* note 112, at 662 ("The concepts of indecency and offensiveness can be stretched to such extremes that the *per se* exception espoused in *Fraser* could swallow the *Tinker* rule at the whims and caprices of both schools and courts.").

the court holding that the school district's censorship was unjustifiable because "Guiles's T-shirt did not cause any disruption or confrontation in the school."[333] Nor could there be a reasonable forecast of disruption, because the student had worn the T-shirt to school "on average once a week for two months without any untoward incidents occurring."[334] The sole complaint about the T-shirt came from another student with an opposing political point of view[335]—the daughter of the parent chaperone who had objected to its "harsh rhetoric and imagery to express disagreement with the President's policies and to impugn his character."[336] As this objection makes clear, censorship of the T-shirt in *Guiles*, as with the armbands in *Tinker*, was directed at the political message its imagery conveyed in violation of the First Amendment's prohibition of viewpoint discrimination.[337] While the *Guiles* court expressed some uncertainty as to whether *Tinker* applied "only to political speech or to political viewpoint-based discrimination,"[338] it determined that the material disruption test is the generally applicable standard that governs all student on-campus speech not falling within the *Fraser* and *Hazelwood* (and now, also, *Morse*) exceptions.[339]

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333. *Guiles*, 461 F.3d at 330.

334. *Id.* at 331.

335. *Id.* at 322.

336. *Id.*

337. *Id.* at 330 ("We believe . . . that these images are presented as part of an anti-drug T-shirt, and, moreover, a T-shirt with a political message."); *see Snyder*, 650 F.3d at 943 (Fisher, J., dissenting) ("The [*Tinker*] Court was concerned that peaceful and nonintrusive political speech was censored by the school."); *see also* Barber *ex rel.* Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 857 (E.D. Mich. 2003) (where student's T-shirt bore a photograph of President Bush with the inscription "International Terrorist" to express opposition to the Iraq war, court found no evidence of disruption; "[t]he record . . . does not reveal any basis for [assistant principal's] fear aside from his belief that the t-shirt conveyed an unpopular political message"). The *Guiles* court found that, by directing the plaintiff to tape over the drug and alcohol illustrations, the school had impermissibly diffused the political message that he had intended to communicate by wearing the T-shirt, "blunting its force and impact." 461 F.2d at 331 ("The pictures are an important part of the political message Guiles wished to convey, accentuating the anti-drug (and anti-Bush) message."). In tension with the disallowance of the school's censorship of a particular political message in *Guiles*, the Supreme Court subsequently authorized limited viewpoint censorship in *Morse v. Frederick* by permitting schools to ban "speech that can reasonably be regarded as encouraging illegal drug use." 551 U.S. at 397. Thus, under the holding in *Morse*, public schools may dispense with the core First Amendment requirement of viewpoint neutrality in order to regulate what is deemed pro-drug speech by students. *See supra* text accompanying notes 238–42.

338. 461 F.3d at 326. The seeds of this uncertainty were sown in *Fraser*, where the majority opinion distinguished the "pervasive sexual innuendo" at issue in that case from the political viewpoint expressed in *Tinker*. *Fraser*, 478 U.S. at 683, 685 ("the penalties imposed in this case were unrelated to any political viewpoint"). *Cf. Snyder*, 650 F.3d at 926 (Chagares, J.) ("Although *Tinker* dealt with political speech, the opinion has never been confined to such speech.").

339. *See Guiles*, 461 F.3d at 326 (the Supreme Court "considers the rule of *Tinker* to be generally applicable to student-speech cases"); *see also* Saxe v. State Coll. Area Sch. Dist., 240

Judge Cardamone's thoughtful analysis in *Guiles* reflects appropriate concern for students' First Amendment rights in reaffirming that "*Tinker* established a protective standard for student speech under which it *cannot be suppressed based on its content*, but only because it is substantially disruptive."[340] In a factual setting that was essentially the contemporary equivalent of *Tinker*,[341] the decision recognized in no uncertain terms that conferring broad regulatory authority "whenever a school decides a student's expression conflicts with its 'educational mission'"[342] would amount to a free hand to suppress student speech "which causes displeasure or resentment or is repugnant to accepted decency"[343]—a "sweeping reading of *Fraser*"[344] that violated Zachary Guiles's First Amendment rights. Yet the opinion's digression into the supposed interplay between *Fraser* and *Tinker* illustrates the difficulty courts are having in discerning the scope of *Fraser*'s applicability when deciding which substantive student speech standard applies in a given case—a choice which is ordinarily outcome-determinative[345]—particularly when the speech at issue is profane or touches on sexual matters (although that was not the case in *Guiles*).[346] This follows from a misreading of *Fraser* as

F.3d 200, 214 (3d Cir. 2001) (Alito, J.) ("Speech falling outside of [*Fraser* and *Hazelwood*] is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others."); Hardwick v. Heyward, 711 F.3d 426, 435 n.11 (4th Cir. 2013) ("[W]e must continue to adhere to the *Tinker* test in cases that do not fall within any exceptions that the Supreme Court has created until the Court directs otherwise.").

340. 461 F.3d at 326 (emphasis added); *see also Ponce*, 508 F.3d at 770 ("*Tinker*'s focus on the result of speech *rather than its content* remains the prevailing norm. The protection of the First Amendment in public schools is thereby preserved.") (emphasis added); *Bell*, 799 F.3d at 402 (Elrod, J., concurring) ("*Tinker* allows the suppression of student speech (even political speech) *based on its consequences rather than its content*") (emphasis added).

341. *See, e.g.*, Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects of Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1122 (2003) ("While times change, some student speech issues today are oddly reminiscent of that earlier time when the Court so generously extended the guarantee of free speech into the educational arena.").

342. *Guiles*, 461 F.3d at 330.

343. *Id.* at 327–28.

344. *Id.* at 330.

345. As the *Guiles* court noted, the selection of which substantive standard in the public student speech framework governs is likely to be outcome-determinative in any given case. *Id.* at 327 ("Where this case falls on the *Tinker-Fraser-Hazelwood* spectrum primarily determines whether the defendants' censorship of Guiles's T-shirt survives First Amendment scrutiny.").

346. In fairness to the *Guiles* court, this detour is to some extent attributable to the "lack of clarity in the Supreme Court's student-speech cases." *Id.* at 326. This includes in particular the analysis in *Fraser*, the opacity of which the Supreme Court has itself acknowledged. *See Morse*, 551 U.S. at 404 ("The mode of analysis employed in *Fraser* is not entirely clear."); *see also Guiles*, 461 F.3d at 330 ("the exact contours of what is plainly offensive [under *Fraser*] are not so clear to us as the star Arcturus is on a cloudless night"); R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 542 (2d Cir. 2011) ("the Supreme Court has not clarified the extent to which the *Fraser* doctrine applies in contexts beyond the facts of that case—specifically,

granting school administrators unchecked discretion to suppress in-school speech they consider "vulgar, lewd, indecent or plainly offensive,"[347] even as these terms were definitionally narrowed in *Guiles*, irrespective of the specific context in which the speech issues.[348] Unmooring *Fraser*'s deferential standard from its narrow context, however, fails to distinguish between expressive activities that might reasonably be perceived as associated with the school[349] and "a student's personal expression that happens to occur"[350] on school grounds.[351] This is a critical

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beyond those situations in which a student speaker at a school assembly uses lewd language"); Lee, *supra* note 162, at 1700 ("the [*Fraser*] Court did not explicitly articulate the relevant standard of review for student speech restrictions").

347. *Guiles*, 461 F.3d at 325.

348. Such an acontextual interpretation of *Fraser* is arguably a significant step towards permitting schools to restrict any in-school student speech dealing with sexual matters. *See B.H.*, 725 F.3d at ("Some schools, if empowered to do so, might eliminate all student speech touching on sex or merely having the potential to offend."); *see also* Harpaz, *supra* note 103, at 160 ("As a number of lower courts have found, *Fraser* may not be dependent on the fact that Fraser spoke at an official school assembly."). In a case decided after *Guiles*, a Second Circuit panel noted that "we have not interpreted *Fraser* as limited either to regulation of school-sponsored speech or to the spoken word." *R.O.*, 645 F.3d at 542. The Third and Ninth Circuits have broadly construed *Fraser* as allowing schools categorically to ban sexualized in-school student speech irrespective of its context. *Saxe*, 240 F.3d at 214 ("Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language."); *Chandler*, 978 F.2d at 529 ("school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event").

349. *See, e.g.*, Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1214 (11th Cir. 2004) (concluding that student's murals constituted school-sponsored expression because they were displayed in prominent school locations where members of the public might reasonably believe that they bore the imprimatur of the school).

350. *Hazelwood*, 484 U.S. at 271.

351. *See* Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 n.4 (E.D. Mo. 1998) (drawing a distinction between school-sponsored speech, governed by *Hazelwood*, and a student's personal expression taking place on school property, governed by *Tinker*). The *Guiles* court recognized the crucial distinction between "school-sponsored speech and student speech that happens to occur on school grounds" but did not incorporate it into the decision's First Amendment analysis, which would have readily identified *Tinker* as the controlling precedent and obviated the need for an exegesis of the scope of *Fraser*'s applicability. 461 F.3d at 325. In *B.H.*, where two middle school students were suspended for wearing to school bracelets with the slogan "I ♥ boobies! (KEEP A BREAST)" as part of a national campaign to promote breast cancer awareness, a majority comprised of nine Third Circuit judges recently committed a more extreme version of this error by ignoring this distinction in declaring that the scope of a school's regulatory authority under *Fraser* is not "limited to official school functions and classrooms." 725 F.3d at 293, 297–98, 307 n.14. The defect in this reasoning, which regards students as captive audience members throughout the school day irrespective of the immediate location or environment in which the challenged speech occurs, is that it would marginalize *Tinker*. *Id.*; *Guiles*, 461 F.3d at 330 ("The flaw in defendants' position is that it conflates the rule of *Hazelwood* with *Fraser*, and in doing so, eviscerates *Tinker*."). By turning what should have been an "open-and-shut" *Tinker* case into a hybridized *Fraser-Morse* case, the unprescinded conception of students' rights as speakers in *B.H.* yielded a constitutional hodgepodge that provides no meaningful guidance to school administrators or lower courts. 25 F.3d at 320, 340 (Greenaway, Jr., J., dissenting) ("In light of the majority's approach, school districts seeking guidance from our First Amendment jurisprudence in this context will find only

distinction in the public student speech framework: in the former category, educators are entitled to exercise increased control over the speech under *Fraser* in order to prevent the erroneous attribution of the speaker's expression to the school.[352] In the latter, where the government's regulatory interest is tied to protecting the effective functioning of the educational process itself, *Tinker* exclusively supplies the governing standard subject to the First Amendment limitation that students "cannot be punished merely for expressing their personal views on the school premises."[353]

Because of this limitation, there was no need in *Guiles* for the Vermont school to dissociate itself from the offensive images depicted on the student's T-shirt—the message expressed was clearly personal to the speaker, conveyed on a private article of clothing that he chose to wear.[354]

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confusion."). Although it upheld the students' right to wear the bracelets as protected speech under both *Fraser* (the bracelets were not plainly lewd) and *Tinker* (the students had worn the bracelets "on campus for at least two weeks without incident,"), the convoluted rationale of *B.H.* unnecessarily spilled much ink in making certain types of obviously personal in-school student expression vulnerable to suppression without the need for school officials to show a substantial disruption or realistic threat of disruption to the school environment, in contravention of the cardinal principle that students "cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours'"—unless school authorities can satisfy the *Tinker* standard. *Id.* at 320, 321; *Hazelwood*, 484 U.S. at 266; *see id.* at 280 (Brennan, J., dissenting) ("Even the maverick who sits in class passively sporting a symbol of protest against a government policy, or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy of condemning teenage sex.") (citation omitted).

352. *Hazelwood*, 484 U.S. at 271. Where the indicia of school support or affiliation "increase the likelihood of such attribution," the school may have "a legitimate interest in dissociating [itself] from student speech." *Id.* at 288–89. No such indicia were present in *Guiles*.

353. *Id.* at 266. While the personal expression/school-affiliated speech distinction underlying the public student speech framework emerged intact in *Guiles*, it was obscured by the Court's reasoning. *See, e.g.*, Pyle v. S. Hadley Sch. Comm., 861 F.Supp. 157, 166 (D. Mass. 1994), *certifying questions to*, 55 F.3d 20 (1st Cir. 1995) (concluding that school had absolute right to prohibit "'vulgar' or plainly offensive speech (*Fraser*-type speech)" even when it does not take place at an official school function).

354. *See Boroff*, 220 F.3d at 475 (Gilman, J., dissenting) ("I do not believe that school officials can reasonably be thought to endorse or condone a message worn on a student's T-shirt simply because they do not prohibit the student from wearing the T-shirt to school"); *see also* Castorina *ex rel.* Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 543 (6th Cir. 2001) (rejecting argument that school could be perceived as endorsing student's display of Confederate flag if it failed to ban T-shirt bearing the flag's image); *see also Barber*, 286 F. Supp. 2d at 856 ("no reasonable person could conclude that a school endorses the messages on its students' clothing"). Where, unlike the individual personal expression on Zachary Guiles's T-shirt, the student speech is "made pursuant to official educational channels or activities," the school's regulatory interests include more than avoiding disruption to the educational environment, and judicial evaluation of speech restrictions is more deferential. Lee, *supra* note 162, at 1743, 1744 ("determining how speech ought to be encouraged, directed, and limited as part of the educational process itself is far more multifaceted and open ended") (footnote omitted); *Hazelwood*, 484 U.S. at 271 ("Educators are entitled to exercise greater control" over speech bearing a public school's imprimatur).

Like the armbands in *Tinker*, Guiles's T-shirt involved the passive expression of a personal viewpoint "akin to 'pure speech.'"[355] Moreover, its images were "displayed in a manner commonly used to convey silently an idea, message, or political opinion to the community."[356] There would seem to be little if any risk that the T-shirt's imagery would be misconstrued as endorsed by the school district, and the school's interest in inculcating habits of civil discourse was surely less with respect to a message displayed as part of an individual wardrobe choice[357] than in a student speech delivered to a mandatory school assembly.[358] Finally, by evaluating the T-shirt under both the *Fraser* and *Tinker* standards before determining it passed constitutional muster[359]—a sort of First Amendment double jeopardy—the *Guiles* court commingled "independent analytical constructs"[360] that apply in different contexts for different purposes.[361] *Tinker* and *Fraser* are independent and distinct constitutional standards, not interchangeable approaches for regulating student speech.[362] The process-of-elimination analysis in *Guiles* ultimately

355. *Tinker*, 393 U.S. at 508; *see Defoe*, 625 F.3d at 332 ("*Tinker* governs this case because by wearing clothing bearing images of the Confederate flag, Tom Defoe engaged in 'pure speech,' which is protected by the First Amendment, and thus *Fraser* would not apply."); *see also* Harpaz, *supra* note 103, at 129 ("Moreover, Mary Beth [Tinker] made no use of school facilities for her personal act of self-expression other than wearing the armband to school.").

356. *Chandler*, 978 F.2d at 530; *see* Fraser, 478 U.S. at 680 (*Tinker* upheld "the students' right to engage in a nondisruptive, passive expression of a political viewpoint").

357. The Third Circuit *en banc* majority's observation in *B.H.* that "no one could reasonably believe that the Middle School was somehow involved in the morning fashion decisions of a few students" reinforced that the bracelets worn by the students represented their personal expression. 725 F.3d at 321. The same can be said of Guiles's T-shirt, which similarly lacked any indicia of school support for or affiliation with its message. In both *Guiles* and *B.H.*, then, the risk that the message conveyed might be erroneously associated with the school was attenuated to the point of nonexistence, rendering *Fraser* inapplicable.

358. *See Fraser*, 478 U.S. at 689 (Brennan, J., concurring) (noting that Fraser's "speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty"); *id.* at 696 (Stevens, J., dissenting) ("It seems fairly obvious that [Fraser's] speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment.").

359. The majority opinion in *B.H.* committed the same analytical error. 725 F.3d at 323 ("the School District's ban cannot pass scrutiny under *Fraser* or *Tinker*"); *see* Denno v. School Bd. of Volusia Cnty., Fla., 218 F.3d 1267, 1274 (11th Cir. 2000) (*Tinker* does not apply to the exclusion of *Fraser* for purpose of determining qualified immunity of school district officials with respect to deprivation of student's First Amendment rights in violation of 42 U.S.C. § 1983 (2021)).

360. *B.H.*, 725 F.3d at 331 (Hardiman, J., dissenting).

361. *Id.* at 332 (Hardiman, J., dissenting) ("The fact that courts have maintained analytical separation among the different *Tinker* carve-outs makes sense because the Supreme Court created each one for a unique purpose.").

362. *Chandler*, 978 F.2d at 532–33 (Goodwin, J., concurring) ("Because the majority in this case concedes that the speech at issue is not within the parameters of either *Fraser* or

arrived at the correct result under the First Amendment's public student speech framework, but took some unnecessary detours along the way.

C. Wisniewski*: The Expansion of School Authority Over Off-Campus Instant Messaging with Violent Symbolism Through the Adoption of Simple Negligence Principles*

While the satirical newspaper in *Thomas* and the sloganeering T-shirt in *Guiles* may have been in poor taste, they said nothing to threaten the safety or security of students, teachers, or the school premises. In other cases, however, the post-Columbine educational environment has understandably involved heightened concern over student speech perceived as threatening violence.[363] On first impression, the facts in *Wisniewski v. Board of Education, Weedsport Central School District*,[364] the first public student electronic speech case decided by a federal appellate court, are disturbing. Aaron Wisniewski, an eighth-grade middle school student, used an instant messaging ("IM") program on his parents' home computer to communicate with a "buddy list"[365] composed of "some 15 members."[366] As described by the court, Aaron's IM identification icon was a "small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood."[367] Below the drawing were the words "Kill Mr. VanderMolen,"[368] the name of Aaron's English teacher. After the icon had been in circulation among the group for three weeks, a classmate (apparently not one of the buddies) provided VanderMolen with a copy of the icon, who then requested and was permitted to stop teaching Aaron's class.[369] Following a school superintendent's hearing, the Board of

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Hazelwood but is instead governed by *Tinker*, it was entirely unnecessary to address the issue; the majority's dicta amounts to nothing more than a preview, or worse, an advisory opinion.") (footnote omitted).

363. Papandrea, *supra* note 5, at 1067 ("Since the Columbine High School Massacre in 1999 that left twelve students and one teacher dead, almost no school has demonstrated tolerance of student speech that contains even the slightest reference or depiction of violence.") (footnote omitted); *Waldman II*, *supra* note 4, at 602 (in post-Columbine decisions, "courts have become acutely sensitive to the pressures that school officials face in trying to predict which students will engage in violence and in attempting to thoroughly investigate any potential risk"); Richards & Calvert, *supra* note 341, at 1094 ("Columbine is weighing heavily on the minds of judges when they consider whether student speech constitutes a threat of violence or a disruptive force of the educational environment.").

364. 494 F.3d at 35–36. Judge Newman wrote the opinion in *Wisniewski*, which was joined by Judge Straub. Without writing a separate opinion, then Chief Judge Walker concurred in the judgment. *Id.* at 39 n.4.

365. *Id.* at 36.

366. *Id.*

367. *Id.* (footnote omitted).

368. *Wisniewski*, 494 F.3d at 36.

369. *Id.* at 36.

Education approved Aaron's suspension for a full semester of classes.[370] In upholding the suspension, the *Wisniewski* panel stated that it was necessary for school authorities to have "significantly broader authority"[371] than would otherwise be allowed under the "true threats" doctrine[372] in order to punish student expression that can "reasonably [be] understood as urging violent conduct."[373] The court proceeded to apply the *Tinker* standard to the computerized messaging at issue, which took place outside of school hours and away from school facilities on a private

370. *Id.* at 37 ("Aaron was suspended for the first semester of the 2001–2002 school year.").

371. *Id.* at 38.

372. The Supreme Court has defined true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003). True threats are not protected under the First Amendment. *Id.* at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death.") (emphasis added); *see* United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2012) (Livingston, J.) The Second Circuit's test for determining whether speech is punishable as a true threat "is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury." United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006) (quoting United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (internal quotation marks omitted) (interpreting 18 U.S.C. § 876 (2021), which proscribes threats mailed via U.S. Postal Service)); Heller v. Bedford Cent. Sch. Dist., 665 F. App'x. 49, 51 n.1 (2d Cir. 2016) (Livingston, J.) ("The test for whether a communication is a true threat is objective, and the determination is a question of law."); *see also* United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997) ("it is not necessary for the Government to prove that [the defendant] had a specific intent or a present ability to carry out his threat, but only that he intended to communicate a threat of injury through means reasonably adopted to that purpose") (internal quotation marks and citation omitted). The Second Circuit has not addressed whether the Supreme Court's decision in *Virginia v. Black* "altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat." *Turner*, 720 F.3d at 420 n.4; *see id.* at 432 n.1 (Pooler, J., dissenting) ("I take no position as to whether, after *Black*, we must read a subjective intent requirement into our true threats analysis."). However, *Elonis v. United States*—the first Supreme Court social media speech case—established through the application of federal common law principles that a true threat requires proof of a defendant's subjective intent before criminal penalties can be levied by the government, without reaching the issue of whether the First Amendment imposes such a requirement. 135 S. Ct. 2001, 2011 (2015) ("The mental state requirement must therefore apply to the fact that the communication contains a threat."). The incorporation of a "reasonable person" standard as the basis for "true threat" jury instructions would therefore seem a dubious proposition following *Elonis*. Notably, the jury instruction invalidated in *Elonis* was substantively identical to that found in *Turner* as having "properly defined the elements necessary for the jury to find a true threat." 720 F.3d at 427. In applying a subjective intent element as a matter of statutory interpretation, the *Elonis* majority opinion did not consider whether the defendant's posting of his violent lyrics on Facebook could impact the determination of whether they constituted a "true threat." As discussed below, the *Wisniewski* court's decontextualization of the IM communications at issue by similarly failing to take account of the social media environment in which they were expressed introduced a chilling effect on students' online freedom of expression that was compounded by the imposition of an objective liability standard.

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

computer,[374] and concluded that the IM transmissions "crosse[d] the boundary of protected speech"[375] because of the "*reasonably foreseeable* risk"[376] that the icon would (1) "come to the attention of school authorities"[377] and (2) thereby "cause a disruption within the school environment."[378] Judge Newman's opinion in *Wisniewski* thus disinterred the proximate cause standard proposed in his *Thomas* concurrence three decades earlier and applied it in the digital speech context.[379]

Wisniewski represents an alarming extension of *Tinker*'s reach through the incorporation of basic negligence principles in making the threshold determination that a student's digital speech originating and maintained outside of the school environment is subject to punishment by public school authorities.[380] In holding that off-campus expression may be

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374. *Id.* at 39 ("The fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.").

375. *Id.* at 38.

376. *Id.* (emphasis added).

377. *Id.* The *Wisniewski* panel disagreed about whether it was necessary to undertake the reasonable foreseeability inquiry where, as in that case, the off-campus speech had in fact reached the school. *Wisniewski*, 494 F.3d at 39 ("In this case, the 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 pretermits any inquiry as to this aspect of reasonable foreseeability."). As the court explained in a footnote, Judge Walker concurred in the opinion but expressed reservations about the court's jurisdictional formulation out of concern that "it might permit a school to punish a student for the content of speech the student could never have anticipated reaching the school, such as a draft letter concealed in his night-stand, stolen by another student, and delivered to school authorities." *Id.* at 39 n.4 (citing *Porter*, 393 F.3d at 615 n.22). The concurrence would therefore require that the reasonable foreseeability of whether a student's out-of-school expression "might reach campus" be determined from the perspective of a reasonable adult. *Id.* Although it is uncertain whether this approach, with its clear overtones of the Establishment Clause's endorsement test, would meaningfully enhance protection of off-campus digital speech, the concurrence cited *Thomas* in acknowledging that "substantial First Amendment concerns" are implicated by a public school's assertion of regulatory authority over out-of-school student speech based on traditional negligence principles. *Id.* For criticism of the *Wisniewski* majority's willingness to dispense with a reasonableness inquiry in the event the off-campus expression reaches the school environment, *see* Papandrea, *supra* note 5, at 1061 ("It is hard to understand how a panel would not be required to determine whether it was in fact reasonably foreseeable whether Wisniewski's IM icon would come to the attention of school officials, given that the icon appeared only on private communications Wisniewski sent to his friends, he did not use a school computer to send these communications, and the icon came to the school's attention only weeks later when another student, who had not received an e-mail from Wisniewski himself, told the teacher about it.") (footnotes omitted).

378. *Wisniewski*, 494 F.3d at 35.

379. *See Thomas*, 607 F.2d at 1053–58.

380. Calvert, *supra* note 20, at 230–31 ("The notion of reasonable foreseeability that some result or consequence might transpire or occur-in this case, the reasonable foreseeability that the off-campus-created speech will capture the attention of school officials—invokes basic negligence principles, borrowed from tort law and applied here to a constitutional question of First Amendment protection for student expression."); LoMonte, *supra* note 49, at 70 ("Notably, the *Wisniewski* 'reasonably foreseeable' formulation is a mere negligence standard; a student

disciplined merely if its discovery by school officials is reasonably foreseeable[381] and, upon such discovery, deemed substantially disruptive, the decision collapsed *Tinker*'s jurisdictional (the "schoolhouse gate") and substantive (material interference with the operation of the school) elements into a single standard—an approach never contemplated by *Tinker* itself, which was limited to student speech within the school environment.[382] The *Wisniewski* formulation, driven by the "potentially threatening *content* of the icon,"[383] clearly implies that the more controversial or provocative the online speech, the greater its vulnerability to control by school administrators.[384] This approach seemingly opens up a wide range of contemporary student expression to potential disciplinary action because of the simple fact that, in the digital communications age, student speech—especially when it is offensive or disturbing, as in *Wisniewski*—will invariably "if not inevitabl[y]"[385] find its way to school authorities.[386] In short,

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need not intend for his speech to reach the school or to cause a disruption, or even know that it will do so.").

381. "The rule, then, from *Wisniewski* appears to boil down to a rather primitive 'if-then' formula: If it is reasonably foreseeable that student speech created off campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it." Calvert, *supra* note 20, at 228.

382. McDonald, *supra* note 4, at 733 ("Many [courts] are even using language from [*Tinker*] to answer the threshold question of whether to apply ordinary or student speech rules to a given dispute involving off campus speech, even though *Tinker* had nothing to do with student speech occurring off school grounds.") (footnote omitted); Brenton, *supra* note 29, 1228 ("The *Wisniewski* decision exposes the inherent danger when courts use disruption to justify stepping over the threshold inquiry.") (footnote omitted). For another opinion conflating the jurisdictional and substantive elements of the analysis, *see Snyder*, 650 F.3d at 951 (Fisher, J., dissenting) (declaring that, because a student's harmful speech about her school's principal was disseminated online where it was accessible to the student body, "it was reasonably foreseeable that her speech would cause a substantial disruption of the educational process and the classroom environment").

383. 494 F.3d at 39 (emphasis added); *see J.C.*, 711 F. Supp. 2d at 1113 ("*Wisniewski* support[s] the proposition that *the content of the speech alone* may be a sufficient basis upon which to reasonably predict a substantial disruption, at least where the speech is violent or threatens harm to a person affiliated with the school") (emphasis added).

384. Tuneski, *supra* note 58, at 150 ("Under this view, school districts that disapprove of the content of off-campus speech would be able to punish the creators as long as the expression reaches the campus.").

385. 494 F.3d at 40.

386. Owing to the nature of the medium, once disseminated and absent unusual measures, digital expression is committed to cyberspace and effectively remains subject to discovery—by school authorities, parents, and other students—in perpetuity. Pike, *supra* note 4, at 1003 ("The primary difficulty presented by such technologies is that they create a permanent record of communication that another may transmit."); Palfrey & Gasser, *supra* note 5, at 29 ("It's no secret that the digital medium is characterized by high degrees of accessibility and persistence."). A commentator has identified three practical reasons why controversial digital speech originating outside of the school environment but related to school affairs is likely to be discovered by school officials: (1) "Tattletale Students: It is reasonably foreseeable that at least one student in a school will play the role of whistleblower or snitch and reveal the misdeeds of others;" (2) "Curious Teachers/Administrators: Given that school officials are now well aware

the jurisdictional standard fashioned in *Wisniewski* is easily satisfied[387] and "grant[s] schools virtually unbridled discretion to restrict juvenile speech generally."[388]

Beyond its inherent application bias against controversial speech, *Wisniewski*'s jurisdictional elasticity is constitutionally unsound because it allows schools to punish student digital expression even though the student speaker never *intended* the speech to come to the attention of school officials.[389] The *Wisniewski* court not only disregarded whether Aaron Wisniewski subjectively intended his off-campus messaging to reach school authorities[390]—which would seem unlikely for obvious reasons—but also the nature of the particular IM technology at issue, which objectively indicates the absence of such intent.[391] This puts students in the

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of the types of internet postings that students today often create, it is reasonably foreseeable that some teachers and principals will proactively search online, via Google, Yahoo or other search engines, for postings about themselves or their school;" and (3) "In-School Buzz/Discussion: If a student has created a provocative website regarding classmates or teachers, there is certain to be some level of hallway gossip and buzz about it that, quite foreseeably, might be overheard by school officials." Calvert, *supra* note 20, at 235–36.

387. Calvert, *supra* note 20, at 237 ("The bottom line is that it is reasonably foreseeable that almost any provocative form of student speech posted online that criticizes or castigates students, teachers, or administrators will come to the attention of school authorities. It is a jurisdictional standard that appears to be very easy for school officials to prove.").

388. Papandrea, *supra* note 5, at 1091; *see id.* at 1092 ("[I]t appears that under the *Wisniewski* test, schools are given authority to punish student expression whenever the speech concerns the school in some way."); Brenton, *supra* note 29, at 1228 ("*Wisniewski* requires only that it be reasonably foreseeable that the speech will reach campus; once on campus it must be reasonably foreseeable that the speech will cause a disruption. Thus, *Wisniewski* effectively removes all restraints on a school's power to regulate student cyberspeech.") (footnote omitted).

389. The *Wisniewski* court categorically disavowed the intent of the speaker as irrelevant to its jurisdictional analysis. 494 F.3d at 40 ("These consequences permit school discipline, *whether or not Aaron intended his IM icon to be communicated to school authorities* or, if communicated, to cause a substantial disruption.") (emphasis added). This is a striking departure from *Thomas*, which focused on the students' intent to avoid distribution of their underground newspaper on school grounds in holding that it was protected under the First Amendment. 607 F.2d at 1050; Papandrea, *supra* note 5, at 1061 n.279 ("It is impossible to reconcile *Wisniewski* with *Thomas*, the Second Circuit's 1979 opinion concerning off-campus newspapers."). Indeed, Judge Newman's concurrence in *Thomas*—contrary to his opinion for the court in *Wisniewski*—also impliedly considered the intent of the students in recognizing that they were improperly punished "for their essentially off-campus activity" after being informed to the contrary by school officials. 607 F.2d at 1053 ("The students endeavored to keep their publication and distribution activities off the campus and, for all practical purposes, succeeded.").

390. Calvert, *supra* note 20, at 228 ("For the Second Circuit, the fact that the student did not intend for the icon to come to the attention of either his teacher or other school officials made no difference.") (footnote omitted). *See* DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 30 (2014) ("The intended audience matters, regardless of the actual audience. Unfortunately, adults sometimes believe that they understand what they see online without considering how teens imagined the context when they originally posted a particular photograph or comment.").

391. Unlike content posted on an insecure website available to anyone with access to the Internet, the icon at issue in *Wisniewski*—which was never "sent to VanderMolen or any other

untenable position of having to anticipate the discovery of digital speech that was never intended to be communicated within the school environment,[392] even when they may have taken affirmative measures to prevent such a result.[393] In contrast, and as elaborated below, an approach that takes meaningful account of the intent of the speaker would provide greater protection to off-campus digital expression consistent with both First Amendment and constitutional due process principles by presumptively insulating such expression from the disciplinary reach of school authorities.[394]

Compounding its dramatic expansion of the school district's disciplinary authority,[395] *Wisniewski* diluted *Tinker*'s balancing test in positing that, at least where digital speech involving threats of violence is involved, its discovery by school officials will necessarily lead to in-school consequences that are materially disruptive.[396] With little in the way of factual support, the court simply announced the conclusion that the icon's discovery gave rise to a foreseeable risk of substantial disruption to the school environment.[397] That conclusion does not appear to have been

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school official"—was part of a closed electronic text messaging network to which only selected participants had access. 494 F.3d at 36. It could not be discovered through an Internet search engine, but instead required active disclosure by a recipient or a classmate with knowledge of its existence. Under these circumstances, not to mention the fear of disciplinary action that would likely ensue, it is difficult to conceive that Aaron Wisniewski actually intended his IM icon to reach school officials.

392. LoMonte, *supra* note 28, at 8 ("This means that the speaker is charged with anticipating that his message will be shown, without his authorization, to people with whom he never intended to communicate."); O'Connor, *supra* note 145, at 475 ("If students are subject to punishment because of their off-campus speech simply because an unknown individual brings it onto campus without their knowledge or consent, then they are not really free to speak their mind.").

393. *See* Calvert, *supra* note 20, at 234. In *Thomas*, the presence of a disclaimer on the student newspaper was a factor considered by the court in determining that it was not intended for distribution on school grounds. *See* 607 F.2d at 1045.

394. *See infra* text accompanying notes 1016–32. A jurisdictional standard that, as in *Thomas*, turns on the intent of the student speaker will result in more digital speech-protective outcomes. *See* Pike, *supra* note 4, at 1002–07; *see also* Tuneski, *supra* note 58, at 140–42, 177–78; *see also* Oten, *supra* note 285, at 405, 423–24; *see also* Calvert, *supra* note 20, at 234–35.

395. *See* Calvert, *supra* note 20, at 251 ("[A]n approach like that adopted by the Second Circuit that relies solely on whether it is reasonably foreseeable that the speech in question will come to the attention of school authorities gives schools sweeping off-campus jurisdictional power.").

396. *See* 494 F.3d at 38–39, 40. It has been noted that the "tragic history of mass school shootings" across the nation does not justify curtailing the First Amendment. *Bell*, 774 F.3d at 303 n.50 (Dennis, J.) ("Although the history of violence in schools may be a pertinent consideration in determining whether school officials acted reasonably, school officials cannot simply shirk constitutional dictates by pointing to a school tragedy each time a student sings, writes, or otherwise uses violent words or imagery outside of school.").

397. *See Wisniewski*, 494 F.3d at 40 ("And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."). The *Wisniewski* court's tepid application of

supported by the record, however, where what the court cited as evidence of interference with the school's functional interests was sparse to the point of pretextual. Almost in passing, *Wisniewski* referenced "special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time"[398] as evidence of material disruption. Putting aside for the moment *Tinker*'s dubious applicability in this context, which raises serious First Amendment concerns,[399] these factors, whether considered individually or collectively, do not reach the level of substantial interference with the operation of the school required to punish student speech.[400]

First, while the matter no doubt required immediate attention from school administrators once they were informed about the icon, that fact alone does not satisfy *Tinker*. There is no explanation from the court as to how the IM icon's restricted transmission or the school's investigation of its use interfered with the actual learning process or the maintenance of appropriate school order conducive to a proper educational environment.[401] A school's administrative response should not, in the ordinary course, amount to just cause for suppressing student speech, as that would permit school authorities to bootstrap their own actions as justification for imposing disciplinary measures. As *Tinker* makes plain, some degree of increased administrative oversight in public schools is part of the price to be paid for the "hazardous freedom"[402] of student free speech. Moreover, the fact that the IM icon had already been in circulation for three weeks without any adverse impact on the school environment also

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Tinker did not adequately consider the context of the IM icon's transmission. *See Waldman II*, *supra* note 4, at 623–24 ("As to the test's second part, these decisions echoed the conclusion . . . that any threatening language about school officials—even if in attempted humor—can be considered substantially disruptive."). Further, difficulties in interpretation are more likely "in the context of Internet postings, where the tone and mannerisms of the speaker are unknown." *See* Kyle A. Mabe, Note, *Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 89 (2013).

398. 494 F.3d at 36.

399. *See infra* text accompanying notes 946–84.

400. *See* Papandrea, *supra* note 5, at 1065 ("In *Wisniewski*, . . . the court found that an icon attached to instant messages sent to some students outside school was materially disruptive to the school merely because the school administrators had to spend time investigating it, including time interviewing students during class time, and the teacher who was the subject of the icon refused to teach the student ever again.") (footnotes omitted).

401. *See J.C.*, 711 F. Supp. 2d at 1117 ("However, there is no evidence that the school's investigation had any ripple effects on class activities or the work of the School."); *see also* T.V. *ex rel.* B.V. v. Smith-Green Comm. Sch. Corp., 807 F. Supp. 2d 767, 783 (N.D. Ind. 2011) ("Here, school officials cannot point to any *students* creating or experiencing actual disruption *during any school activity*.") (emphasis in original).

402. *Tinker*, 393 U.S. at 508.

discredits the punishment of the speech through reliance on *Tinker* in this instance.

Second, the substitution of a new English teacher for Aaron Wisniewski's eighth-grade class, while obviously not ideal, was solely the result of the previous teacher's response to the speech and, under these circumstances, also falls short of *Tinker*'s requirements.[403] Reliance on a teacher's adverse personal reaction, no matter how idiosyncratic or unreasonable, as a justification for punishment would in effect cede protection of speech to the response of others[404]—a paradigmatic example of the "heckler's veto" problem.[405] Today's teachers are familiar with their

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403. *See* Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1060, 1063 (D.Or. 2015) (Mosman, J.) (health class teacher's request that student who posted Facebook messages stating the teacher "needs to be shot" and was the "worst teacher ever" be removed from her class are "insufficient to constitute a material and substantial influence with appropriate discipline *at the school*") (emphasis in original); *see also* Richards & Calvert, *supra* note 341, at 1114 ("the reaction of the most thin-skinned of teachers may now trigger the end for student expression in public schools") (referring to Supreme Court of Pennsylvania's interpretation of *Tinker* in J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638 (Pa. 2002)); *see also* Denning & Taylor, *supra* note 213, at 885 ("we think that claims of widespread disruption occasioned by the effect of cyberspeech on *teachers* ought to be greeted with skepticism") (emphasis in original). *Contra J.S.*, 569 Pa. at 645, 674 (where student's web page included "a diminutive drawing of [teacher] with her head cut off and blood dripping from her neck," teacher's inability to complete the school year and medical leave absence the following school year "unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment") (footnote omitted); *Snyder*, 650 F.3d at 951 (Fisher, J., dissenting) (student's website posting "was at least potentially psychologically harmful" to school principal and teacher).

404. *See* Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

405. *See Cuff*, 677 F.3d at 120 (Pooler, J., dissenting) ("The First Amendment's protection of free speech cannot hinge entirely on the reaction of a listener to a person's speech. If that were the case, the First Amendment would only be as strong as the weakest, or at least the most thin-skinned, listener in a crowd."). While Aaron Wisniewski's immature and ill-advised selection of IM icon is certainly not to be condoned, in view of the determination by law enforcement authorities that no actual threat to Mr. VanderMolen's physical safety was involved, the latter's request to be relieved of his teaching responsibilities should not qualify as a substantial and material interference with the educational process under *Tinker*. *Wisniewski*, 494 F.3d at 36.

> This is an incredibly problematic conclusion, of course, not only because the speech that allegedly hindered the educational process originated off-campus and never called for disruptions on campus, but because it suggests that a single teacher's arguably thin-skull, personal reaction to commentary posted on an *outside* Web site dictates and controls what constitutes a disruption of the educational process *inside* a school. This is tantamount to a heckler's veto—the speaker's rights were trampled by the audience's reaction.

Calvert, *supra* note 131, at 249 (2001) (emphasis in original); *see also* Tuneski, *supra* note 58, at 171–72 ("If a student could be punished anytime that a teacher is upset by the magnitude and strength of the student's off-campus criticism, students would have little First Amendment protection. Setting the standard of First Amendment protection on the reaction of listeners threatens to abridge far more speech than is constitutionally permissible."); *see also Snyder*, 650 F.3d at 930, 930 n.7 (Chagares, J.) ("despite the unfortunate humiliation" student's website profile

students' social media use, and it should hardly come as a surprise that they may be the subject of humorous, unflattering, and disparaging commentary on digital platforms.[406] It merits emphasis that Aaron Wisniewski did not personally threaten Mr. VanderMolen in school[407] or interrupt the class in any way. The icon was part of an IM service removed from the school setting and, again, did not intrude on the learning environment. After *Wisniewski*, it is not an exaggeration to say that "anytime a teacher reacts adversely to student speech there might be a substantial and material disruption of, or interference with, the educational environment sufficient to restrict the speech."[408] A more sensible solution would have been to transfer Aaron Wisniewski to a different class, rather than substituting a different teacher.

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caused its subjects, "the possibility of discomfort by the recipients of the speech" is insufficient under First Amendment to justify its prohibition). *Cf. Waldman II*, *supra* note 4, at 651, 652 (referencing psychological research studies, which did not focus on cyberspeech, indicating that "certain instances of [hostile student] speech can cause genuine significant emotional distress to the targeted school officials, resulting in various forms of educational disruption," but recommending "objective reasonableness" standard by which courts would "require that such speech be reasonably likely to cause significant emotional distress to a school official, or otherwise make it reasonably likely that his or her ability to perform his job will be impaired.") (footnote omitted); *see also id.* at 654–55 (student speech originating off-campus that "is so severely harassing toward school officials that it causes them significant emotional distress or undermines their ability to do their jobs" is sufficiently disruptive to justify its regulation); *see also Snyder*, 650 F.3d at 946–47 (Fisher, J., dissenting) (quoting Benoit Galand et al., *School Violence and Teacher Professional Disengagement*, 77 BRIT. J. OF EDUC. PSYCHOL. 465, 467 (2007)) (concluding that "harassment has tangible effects on educators" in the form of diminished teacher motivation and inability to relate to students).

406. "Surely teachers today should expect to hear or read negative or hurtful things about themselves posted on the Internet by students." Richards & Calvert, *supra* note 341, at 1115; *see also* Martin, *supra* note 151, at 795 ("Teachers and administrators are in a better position to simply ignore the offensive online speech and view the speech as a necessary price to pay for the freedoms afforded by the Constitution.") (footnote omitted); *see also* LoMonte, *supra* note 49, at 57 ("School employees occupy positions of public trust. As such, they are expected to absorb even harsh and at time[s] unfair criticism, so as to leave the essential 'breathing space' for citizens to freely discuss the performance of their public servants.") (footnote omitted).

407. 494 F.3d at 36.

408. Richards & Calvert, *supra* note 341, at 1114. In *Wisniewski*, the teacher's response to the icon escalated rather than defused the situation. *See Snyder*, 650 F.3d at 931 ("If anything, [middle school principal's] response to the profile *exacerbated* rather than contained the disruption in the school.") (emphasis in original) (footnote omitted). A contrasting judicial view crediting the personal discipline and resiliency of professional educators confronted with provocative off-campus student speech is presented in *Klein v. Smith*: "The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know that the prophecy implied in their testimony will not be fulfilled. I think that they know that, too." 635 F. Supp. at 1441 n.4 (overturning, as First Amendment violation, student's ten-day suspension for extending middle finger to teacher in parking lot of restaurant). This observation remains apt for school districts considering the penalization of off-campus digital expression based on disproportionate teacher reactions.

Third, school authorities could just as easily have interviewed the students involved out of class rather than during class time.[409] Their administrative choice in this regard should be a non-factor in *Tinker*'s application.[410] On balance, the nebulous indicia of disruption cited in *Wisniewski* derive more from the school authorities' reaction to the graphic nature of the text-messaging icon than from any reasonably predictable interference with the educational process required to justify regulation under *Tinker*.[411]

At its core, *Wisniewski*'s holding implicates the relationship between student expression threatening violence, and the likelihood of such violence occurring through the student's own conduct, as the basis for regulating speech. But that misframes the relevant constitutional question—"the question under *Tinker* is whether this boy's speech itself had the potential to cause a disruption at school,"[412] not whether "the speech might somehow forecast or predict the actions of a particular student."[413] *Wisniewski* thus implicitly reconfigured the First Amendment analysis into a means of predicting the future behavior of the *speaker*, as distinct from the realistically foreseeable consequences of the *speech itself* within the school environment. In doing so, the decision allowed the IM icon's transmission to be punished based on mere conjecture that it could result in the onset of violence without any legitimate basis for finding that it came within what Justice Stevens described in *Morse* as "the vanishingly small category of speech that can be prohibited because of its feared consequences."[414] This speculation was refuted by the findings made by both

409. The minimal class time missed by the students who were interviewed in *Wisniewski* does not qualify as a substantial disruption under *Tinker*. *See T.V.*, 807 F. Supp. 2d at 783 ("evidence that a student temporarily refused to go to class and that five students missed some undetermined portion of their classes because of the episode, did not rise to the level of a substantial disruption"); *see also J.C.*, 711 F. Supp. 2d at 1119 ("the Court finds that the mere fact that a handful of students are pulled out of class for a few hours at most, without more, cannot be sufficient" under *Tinker*).

410. Contrary to *Wisniewski*, the Third Circuit has held that relatively nominal examples of administrative inconvenience are not a constitutionally acceptable justification for punishing student speech. *See Snyder*, 650 F.3d at 929 (Chagares, J.) ("some officials rearranging their schedules" to deal with student's website profile of school principal is insufficient to satisfy *Tinker*).

411. *See Snyder*, 650 F.3d at 929 n.6 (school district's response to student's website profile "is not relevant to determining the level of disruption that *the profile* caused in the school") (emphasis in original); *see also* Papandrea, *supra* note 5, at 1065 ("Some courts conclude that *Tinker*'s material-and-substantial disruption standard is met . . . even when only the school administration reacts to the speech.").

412. *Cuff*, 677 F.3d at 122 (Pooler, J., dissenting).

413. *Id.* at 123.

414. *Morse*, 551 U.S. at 438 (Stevens, J., dissenting). *Wisniewski* implicates the First Amendment distinction between incitement and true threats elaborated in Judge Pooler's dissent in *Turner*, 720 F.3d at 429 ("our First Amendment analysis has true threats and incitement as two categories of unprotected speech"); *see also id.* at 431 ("*Brandenburg* (incitement) and

law enforcement personnel who investigated the matter and a psychologist who evaluated Aaron that he intended the icon as a joke, understood the seriousness of the poor decision he had made, and did not represent a threat to his English teacher.[415] It runs headlong into *Tinker*'s admonition that the punishment of student speech is intolerable under the First

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Watts (true threats), and their respective progeny, offer different constitutional protections, and those afforded to advocacy would have less force if we analyzed all speech under the 'true threats' test."). For a treatise-like discussion of the interplay and differences between these two related and unprotected categories of speech in the context of a website maintained by a radio talk show host that appealed to violent white supremacist groups, *see id.* at 429–36. Considering the syntax of the communication at issue, and with the understanding (as discussed above in the text) that the icon was directed towards his "buddy list" members rather than to the teacher, if anything it approximated a "prediction[ ] or exhortation[ ] *to others*" to commit a violent act. United States v. Bagdasarian, 652 F.3d 1113, 1119 (9th Cir. 2011) (emphasis added). Because it therefore was not a "true threat," Aaron Wisniewski's IM icon represents speech punishable, if at all, only through the test for incitement adopted by the U.S. Supreme Court in *Brandenberg v. Ohio*, which distinguishes "advocacy of the use of force or of law violation" from communications "directed to inciting or producing imminent lawless action and [which are] likely to incite or produce such action." 395 U.S. at 447. This test requires a showing that the speaker "intended to produce" immediate unlawful harm that society has a right to prevent. Hess v. Indiana, 414 U.S. 105, 109 (1973); *see also Dennis*, 341 U.S. at 585 (Douglas, J., dissenting) ("There must be some immediate injury to society that is likely if speech is allowed."); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (First Amendment prohibits incitement that "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"); Bader, *supra* note 217, at 144 ("Generally, even speech that expressly advocates illegal conduct cannot be prohibited unless the speaker deliberately incites imminent unlawful action.") (footnote omitted). The facts in *Wisniewski*, where the icon had been distributed for a three-week period without a disruption in Aaron Wisniewski's classroom or school (let alone any violent or unlawful results) and was meant as a joke rather than as an exhortation to his classmates to commit violence, plainly do not meet the imminence-of-harm and intent elements required under *Brandenberg*'s incitement standard.

415. *Wisniewski*, 494 F.3d at 36. Apparently because of its perceived gravity, the speculative nature of the harm accepted as an indicator of potential disruption in *Wisniewski* displaced consideration of the likelihood of its occurrence, a First Amendment requirement when speech is punished based on its projected harmful consequences. *See Morse*, 551 U.S. at 436 (Stevens, J., dissenting) ("[P]unishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid."); *see also* O'Connor, *supra* note 145, at 468 n.53 ("Another aspect that should eventually be examined is the likelihood of the harmful result being obtained from the speech in question. It does not appear from decisions in the lower courts that this has been thoroughly examined, with most inquiries focusing on the potential magnitude of the resultant harm."); *see also Wynar*, 728 F.3d at 1071 ("the harm described would have been catastrophic had it occurred" where student's instant messages threatened shootings of specific classmates). In this respect, *Wisniewski*'s analysis is at odds with Justice Brandeis's famous admonition that "[f]ear of serious injury cannot alone justify suppression of free speech . . . ." *Whitney*, 274 U.S. at 376; *see also id.* at 377 ("There must be the probability of serious injury to the State."). In this sense, it is reminiscent of the infamous reformulation of the "clear and present danger" test by the plurality opinion in *United States v. Dennis*, which also adopted a loose balancing standard that permitted courts to override First Amendment liberties where the would-be harm arising from the speech in question was viewed as especially grave. 341 U.S. at 510 ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.") (internal quotations omitted).

Amendment when based on nothing more than an "undifferentiated fear or apprehension of disturbance."[416] Finally, it is an outlier in First Amendment law, where the notion that content-based predictions of harmful consequences attributed to speech outside of the school environment may provide justification for the imposition of either civil or criminal liability has almost universally been rejected as presumptively invalid.[417]

There is no mistaking that, given the tragic wave of mass shootings that has afflicted our nation's schools,[418] the issue raised in *Wisniewski* presents an extremely serious challenge for school personnel.[419] To be sure, school administrators confronted with threats of student violence must proceed with utmost caution by conducting an immediate and diligent investigation,[420] and, where appropriate, by notifying law

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416. *Tinker*, 393 U.S. at 508.

417. McDonald, *supra* note 4. at 731 ("[I]f the government attempts to regulate speech on the basis of concerns about its content, including the effect of certain content on a listener, then such regulations are subjected to strict scrutiny and usually invalidated.") (footnote omitted). *See, e.g.*, *Whitney*, 274 U.S. at 374 (Brandeis, J., dissenting) (First Amendment "ordinarily" denies states "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be fraught with evil consequences"). There is an important distinction in First Amendment doctrine between regulation where harm is understood as the result of the speech's mere utterance, and regulation intended to prevent harms that are only indirectly or conditionally related to liability standards. With respect to the former, the "law allows content-based regulation of speech" in limited "categories [with] a historical foundation in the Court's free speech tradition." *Alvarez*, 567 U.S. at 718 (listing traditional categorical First Amendment exceptions); *see also* Gabrielle Russell, *Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1466, 1477 n.67 (2008) (enumerating "nine basic categories of unprotected speech" as "obscenity, fighting words, defamation, child pornography, perjury, blackmail, incitement to imminent lawless action, true threats, and solicitations to commit crimes") (citation omitted). With respect to the latter, the Supreme Court has repeatedly rejected attempts to restrict free speech based on predictions of its allegedly harmful consequences, even when the government has asserted a powerful regulatory justification. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253–54 (2002) (First Amendment requires a "significantly stronger, more direct connection" to permit restrictions on speech that the government maintained would result in increased incidence of child molestation).

418. *Cuff*, 677 F.3d at 115 n.1 ("confronting a threat of school violence may be appropriate given the recent wave of school shootings that have tragically affected our nation").

419. *See, e.g.*, Calvert, *supra* note 131, at 282 ("The problem, of course, is that when speech even begins to hint at violent conduct, school administrators seem to consider it a true threat worthy of punishment and they concomitantly forget about the safety-valve function of speech. Part of this reaction may be attributable to post-Columbine jitters.").

420. As the Second Circuit concluded in Cox v. Warwick Valley Cent. Sch. Dist., 654 F.3d 267, 274 (2d Cir. 2011), "a school administrator must be able to react to ambiguous student speech by temporarily removing the student from potential danger (to himself and others) until it can be determined whether the speech represents a real threat to school safety and student learning." *See also Cuff*, 677 F.3d at 123 (Pooler, J., dissenting) ("But there is absolutely no question that a school, upon reading a student's journal entry or overhearing a comment made in class, can investigate—and even detain—that student in order to determine whether he poses a threat to himself or others at the school."). The school's investigative action is protective rather than disciplinary, however. *Cox*, 654 F.3d at 274 ("Making such distinctions often requires an

enforcement authorities[421]—as they did in *Wisniewski*. However, the task of distinguishing hyperbolic musings of violent fantasy from ominous precursors of actual danger is a complex and context-sensitive inquiry that is not amenable to determination under the public student speech framework.[422] While this inquiry necessarily demands vigilant concern for student and school safety at all times,[423] it should be committed to law

investigation, and the investigation may result in discipline, but the investigation itself is not disciplinary—it is precautionary and protective.").

421. Papandrea, *supra* note 5, at 1099 ("School officials can and should alert the police if they come across violent speech that they believe poses a threat to the safety of its students.") (footnote omitted). In *Wisniewski*, a police officer interviewed Aaron Wisniewski and concluded that his use of the IM icon was intended as a joke and, further, that he understood the seriousness of the situation and did not represent a threat to his English teacher or any other school officials. 494 F.3d at 36. Aaron was also examined by a psychologist who similarly concluded that he "had no violent intent, posed no actual threat, and made the icon as a joke." *Id.* Based on these findings, which were swept aside—first by school administrators and then by the court—in *Wisniewski*, the instant messaging icon at issue would appear less a credible threat of violence and more an eighth grade student's misguided attempt at humor. The matter should have ended there without the constitutionally impermissible exercise of disciplinary authority by Weedsport Central School District officials.

422. *See, e.g.*, Ashley Packard, *Threats or Theater: Does Planned Parenthood v. American Coalition of Life Activists Signify That Tests for "True Threats" Need to Change?*, 5 COMM. L. & POLICY 235, 237 (2000) ("[D]etermining what is and is not a true threat . . . is sometimes difficult. Threats are frequently implicit, rather than explicit. In such cases, the meaning of threats is dependent upon the context in which the speech takes place.").

423. The court's extreme deference to the judgment of the school district evident in *Wisniewski* typifies the leniency of judicial oversight in violent student expression cases. Calvert, *supra* note 131, at 243–44 ("since the tragedy at Columbine High School in April 1999, courts have granted vast deference to school officials when it comes to squelching any speech that can be perceived as a threat of violence") (footnote omitted). Certain federal appellate decisions have expressly referred to the Columbine tragedy in emphasizing the need for public school administrators to respond as may be necessary under the circumstances to protect school security and student safety. *See Doe*, 306 F.3d at 626 n.4 ("We find it untenable in the wake of Columbine . . . that any reasonable school official who came into possession of [student's] letter would not have taken some action based on its violent and disturbing content."); *see also* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) ("After Columbine, . . . and other school shootings, questions have been asked about how teachers or administrators could have missed telltale 'warning signs,' why something was not done earlier and what should be done to prevent such tragedies from happening again."). Others have focused on the potential liability exposure in the absence of an immediate response by the school district, a concern that can appropriately be addressed by turning over such matters to law enforcement professionals for prompt and thorough investigation. *See Boim*, 494 F.3d at 984 ("We can only imagine what would have happened if the school officials, after learning of [student's] writing, did nothing about it and the next day [student] did in fact come to school with a gun and shoot and kill her math teacher."); *see also Ponce*, 508 F.3d at 772 ("School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."); *see also* Goldman, *supra* note 93, at 412 ("courts are aware of the epidemic of school violence and are sensitive to the risks schools would face if they failed to act when confronted with student threats") (footnote omitted).

enforcement and professional medical authorities rather than public school administrators.[424]

Notwithstanding the pressing public safety concerns implicated on the surface of *Wisniewski*, the record in the case revealed virtually no evidence of either substantial disruption to the school environment or material interference with the learning process as required by *Tinker* before student speech can be punished.[425] There had been no previous threats or violence committed by Aaron Wisniewski,[426] who "expressed regret"[427] for his creation of the icon, and no true threat found by law enforcement officers who investigated the incident.[428] Based principally—and

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424. *See Doe*, 306 F.3d at 636 (McMillian, J., dissenting) (". . . I question whether the school had any legitimate authority over such a statement, made in the privacy of his home, not at school or during school hours or using school equipment, which was stolen from his home by one of his friends, . . . and then turned over to school officials. If anything, the statement was arguably a police matter, for which, I note, the local prosecuting attorney refused to issue any charges."); *see also* Calvert, *supra* note 131, at 268 ("If a student's home-created Web site that allegedly threatens violence is called to a school administrator's attention, the administrator would seem to act within his or her scope of authority by alerting the police to the site. At this stage, however, it then should be left to the police to address and investigate the Web site.").

425. *Waldman II*, *supra* note 4, at 622 (footnote omitted) ("the Second Circuit did not describe in detail any actual disruption nor explain why a substantial disruption was foreseeable, other than to state that Mr. VanderMolen was 'distressed' to learn about the icon, and asked and was allowed to stop teaching the student's English class"); *see also* LoMonte, *supra* note 49, at 70 ("The Second Circuit's ruling in *Wisniewski* exemplifies just how attenuated the chain of foreseeability can become.").

426. Whether a student's disciplinary track record is relevant under *Tinker* depends on the facts of the particular case:

> [I]n certain situations, in evaluating a student's threat under *Tinker*, it may be appropriate, and even necessary, to assess the student's prior disciplinary history as part of an inquiry into whether or not school officials reasonably believed that the threat might cause a substantial disruption. For instance, if a student who makes a threat had a history of aggressive and violent behavior—and his or her classmates were aware of that history—then they may be more likely to take such a threat seriously. As a result, such a threat might reasonably be expected to cause a substantial disruption by frightening members of the school community, even if the same threat, when made by another student, might not.

Cuff, 677 F.3d at 121 n.3 (Pooler, J., dissenting). *Cf.* Demers *ex rel.* Demers v. Leominster Sch. Dept., 263 F. Supp. 2d 195, 198, 199 (D. Mass. 2003) (holding student's drawing of school Superintendent "with a gun pointed at his head and explosives at his feet" presented a true threat to school safety where student had "a history that includes disruptive classroom behavior, substance abuse problems, incidents involving assaultive behavior to students and school staff, psychiatric hospitalizations, and court probation").

427. *Wisniewski*, 494 F.3d at 36.

428. *Id*. In determining whether speech constitutes a "true threat" proscribable under the First Amendment, courts have considered several contextual factors, including whether the speech was communicated directly to the subject; whether the language was conditional; whether the speaker had made similar threatening statements on previous occasions or had a propensity to commit violence; and the reaction of a reasonable recipient. *See, e.g.*, *Doe*, 306 F.3d at 623 (listing five non-exclusive factors relevant to determination of how a reasonable recipient would view an alleged threat); *J.S.*, 569 Pa. at 645, 656–58 (applying these factors to conclude that student's website including a drawing of a teacher "with her head cut off and blood dripping from her neck" "was a sophomoric, crude, highly offensive and perhaps misguided

arguably solely—on the (over)reaction of the teacher involved,[429] the Second Circuit uncritically accepted "prophylactic overreaching"[430] by school authorities and ignored the extremely strict causality required when the government seeks to penalize out-of-school speech because of its purportedly harmful effects.[431] Unfortunately, the consequences of granting the school district broad off-campus jurisdictional authority were not only legal but personal for the Wisniewski family, which eventually moved out of the district "because of school and community hostility."[432]

Wisniewski flung *Tinker*'s schoolhouse gate wide open in making student digital speech perceived as urging violence[433] readily subject to

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attempt at humor or parody" but "did not reflect a serious expression of intent to inflict harm"); Williams, *supra* note 151, at 711–12 (listing contextual factors considered by courts in determining whether speech constitutes a "true threat").

429. *See* Papandrea, *supra* note 5, at 1067 ("[C]ourts generally permit the unreasonable reaction of teachers and school officials to constitute a disturbance. In several cases, teachers have refused to teach in the face of speech that would be protected speech if uttered by anyone other than a student. Given that teachers are arguably public figures, the willingness of courts to give credence to such thin-skinned behavior is striking.") (footnotes omitted) (criticizing courts' application of *Tinker* standard as too deferential to schools' claims of reasonably anticipated substantial disruption).

430. *See* Pike, *supra* note 4, at 1001 ("Columbine is a red herring; the problem of student violence may permit limited suspension of First Amendment rights, but it does not excuse inconsistent and potentially unconstitutional misapplication of the *Tinker* standard based on whether the court takes umbrage at the content of a given student's speech.").

431. As reaffirmed in *Alvarez*, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." 567 U.S. at 725. Thus, when "the causal link is contingent" and the alleged harms "indirect," the punishment of speech is not allowed under the First Amendment. *Ashcroft*, 535 U.S. at 250.

432. *Wisniewski*, 494 F.3d at 37.

433. The graphically violent nature of the IM icon at issue in *Wisniewski* does not, absent more, disqualify it from constitutional protection. *See Cuff*, 677 F.3d at 117 (Pooler, J., dissenting) ("Thus, speech or expression that involves violent content, no matter how distasteful, does not necessarily forfeit all First Amendment protection."); *see also Bell*, 799 F.3d at 415 (Dennis, J., dissenting) ("it cannot seriously be contested that minors enjoy the First Amendment right to engage in speech containing violent imagery when they are at home, away from school"); *see also* Tomain, *supra* note 5, at 110 ("Children have the right to play violent video games, view pornographic material with their parents' consent, and create juvenile, offensive online posts that provide little or no value to society.") (footnote omitted). The *Wisniewski* decision arguably did not take into account that the use of violent imagery on digital technology platforms is a manifestation of the larger issue of "violence and violent images *throughout* our society." Palfrey & Gasser, *supra* note 5, at 210 (emphasis in original) (footnote omitted); *see also id.* at 214 ("Digital Natives, like those who grew up before them, experience violence in the culture all around them."). Such imagery permeates contemporary teenage social life in various forms, particularly in graphically violent video games, which are a ubiquitous entertainment source. *See* Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 728 (2011) (Alito, J., concurring in judgment) (the "prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite 'deviant' or 'morbid' impulses."). The IM icon at issue in *Wisniewski* was therefore both a product and reflection of the current socio-cultural environment inhabited by secondary school students,

school disciplinary authority,[434] even when it undisputedly "occurred away from school property,"[435] involved private communications exchanged between a small group of friends on a restricted electronic messaging system,[436] was clearly not intended to reach the campus or school officials,[437] and was brought to the school's attention only weeks after the fact when another student showed the IM icon to the teacher.[438] Under

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making its use in digital communications unfortunate but also unsurprising. *See Doe*, 306 F.3d at 631 (Heaney, J., dissenting) ("Today's teenagers witness, experience, and hear violence on television, in music, in movies, in videogames, and for some, in abusive relationships at home. It is hardly surprising that such violence is reflected in the way they express themselves and communicate with their peers, particularly where adult supervision is lacking."); *see also* Richards & Calvert, *supra* note 341, at 1089, 1110 ("The reality is that teen culture is saturated with violent imagery and profane language; . . . Thus, the use of that same language and imagery by minors is only a natural reflection of their environment.") (footnotes omitted); *see also* Papandrea, *supra* note 5, at 1100 ("That teenagers would use violent themes and images in their expression is unremarkable.").

434. Papandrea, *supra* note 5, at 1100 ("Permitting schools to punish violent digital speech would expand school authority over juvenile speech exponentially."); *see also* Chemerinsky, *supra* note 114, at 22 ("[*Wisniewski*] goes even further than *Morse* because it says that even speech that occurs entirely outside school can be punished."); *see generally* Richards & Calvert, *supra* note 341, at 1091 ("Quite simply, the events at Columbine gave high school administrators all the reasons—legitimate or illegitimate—they needed to trounce the First Amendment rights of public school students in the name of preventing violence.").

435. *Wisniewski*, 494 F.3d at 39. Given the absence of the IM icon's physical intrusion into the school environment in *Wisniewski*, the decision cannot be harmonized with *Thomas*. Papandrea, *supra* note 5, at 1061 n.279 ("It is impossible to reconcile *Wisniewski* with *Thomas*, the Second Circuit's 1979 opinion concerning off-campus newspapers. In that case, the students did some work on the papers at school, occasionally consulted with a teacher, and left some copies of the paper in a school closet.").

436. *Wisniewski*, 494 F.3d at 35–36. The *Wisniewski* decision was not mindful of the significance of expressive context when students communicate in networked environments, because they often choose to represent themselves differently when social norms and audience expectations have changed. The case perhaps involved an example of what has been called "context collapse," which "occurs when people are forced to grapple simultaneously with otherwise unrelated social contexts that are rooted in different norms and seemingly demand different social responses." BOYD, *supra* note 390, at 31. Suffice to say that Aaron Wisniewski's self-representation would in all probability have been quite different had exposure to his IM icon not been restricted to fifteen of his friends.

437. *Wisniewski*, 494 F.3d at 36. For the reasons discussed above in the text, the facts in *Wisniewski*, including the particular communications technology involved, fail to support the court's reasonable-foreseeability-of-discovery finding. Papandrea, *supra* note 5, at 1092 ("Because Wisniewski did not send the message to any school officials or even make his icon generally available on the Internet, it is hard to imagine why it should have been reasonably foreseeable to Wisniewski that his school would find out about it. Indeed, the school learned about the icon only after one of Wisniewski's schoolmates tattled on him.") (footnote omitted). The IM service's closed transmission network precludes a determination that Aaron Wisniewski intended to introduce the icon to the school environment.

438. *Wisniewski*, 494 F.3d at 36. In contrast to the determination in *Wisniewski*, the Third Circuit has rejected outright the notion that another student's downloading of digital speech and delivery of a copy to school authorities renders it on-campus speech subject to school discipline. *Levy*, 964 F.3d at 188 n.11 (student social media speech that reaches the campus "downstream" through the activities of other parties is not subject to *Tinker*); *see also Snyder*, 650 F.3d at 933

the circumstances, Aaron Wisniewski's instant messaging "crossed a line, but it was not the line between on-campus and off-campus speech. [It] crossed the line between appropriate and inappropriate off-campus expression, which is not a line that the school should police."[439] In policing that line, the decision raised the question of whether, under the First Amendment, school authority could be extended to other types of digital expression generated outside of the school environment that capture the attention of school officials, including student speech with no overtones of violence that criticized school operations and was posted on a digital site accessible to the general community.[440] As discussed below, this question was soon to be answered by the Second Circuit.[441]

D. Doninger II*: The Punishment of Off-Campus Digital Speech Critical of Public School Operations*

1. The Reasonable Foreseeability Standard's Application to a Student's Blog Posting about a School Event

In *Doninger v. Niehoff*,[442] the Second Circuit again encountered the issue of off-campus digital speech, this time a student's posting on a blog

(Chagares, J.) ("the fact that another student printed [the] profile and brought it to school at the express request of [school official] does not turn [the] off-campus speech into on-campus speech").

439. Brenton, *supra* note 29, at 1228.

440. *See* LoMonte, *supra* note 49, at 49 ("Following the *Wisniewski* decision, courts began viewing schools' assertion of jurisdiction over off-campus expression with markedly less skepticism.").

441. *See infra* text accompanying notes 459–70.

442. 527 F.3d at 41. The analysis below focuses on the opinion in *Doninger II*, which affirmed the district court's denial of a First Amendment-based preliminary injunction application in Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) ("*Doninger I*"). *Doninger II* was decided by a unanimous panel, with the opinion written by Judge Livingston and joined by then Circuit Judge Sotomayor as well as Judge Preska, sitting by designation from the Southern District of New York. After the conduct of discovery on remand, the district court decided the parties' respective cross-motions for summary judgment. *Doninger III*, 594 F. Supp. 2d at 211. On appeal from this decision, the Second Circuit reversed the lower court's partial denial of the defendants' summary judgment motion, holding that the school district officials were entitled to qualified immunity with respect to the plaintiff's First Amendment claims. Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011) ("*Doninger IV*"). *Doninger IV* was also a unanimous decision, with Judge Livingston again authoring the court's opinion joined by Judges Kearse and Cabranes. Because it directed the entry of judgment in favor of the school district on the basis that "any First Amendment right allegedly violated here was not clearly established," the *Doninger IV* court declined to decide the constitutional digital speech issue on the merits. 642 F.3d at 346 ("We do not reach the question whether school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary. We see no need to decide this question."). Less than two months later, a majority comprised of eight judges sitting *en banc* in the Third Circuit similarly refrained from deciding the First Amendment question of whether *Tinker* applies to off-campus student speech on the Internet. *Snyder*, 650 F.3d at 926 ("we will assume, without deciding, that *Tinker* applies to J.S.'s speech in this case") (footnote omitted);

that was "independently operated [and] publicly accessible"[443] on the Internet. The plaintiff Avery Doninger, a Student Council member and junior class officer at Lewis Mills High School ("LMHS") in Burlington, Connecticut, was dismayed when notified by school administrators that an annual "battle-of-the-bands concert"[444] called "Jamfest"[445] could not be held in the school's new auditorium on the scheduled date because of the unavailability of the teacher who operated the sound and lighting equipment.[446] Concerned that the rescheduling might cause some bands to drop out of the event, Doninger posted a message at home that evening on "a website unaffiliated"[447] with the school, stating that "[J]amfest is cancelled due to douchebags in central office."[448] Her posting attributed this decision to the school district's superintendent, who "got pissed off and decided to just cancel the whole thing all [*sic*] together,"[449] and urged recipients to "write something or call [the superintendent] to piss her off more."[450] The next morning, having received an influx of "phone calls and emails regarding Jamfest,"[451] school officials met with the Student Council members, including Doninger, and reached an agreement to move the concert to a later date, thereby "resolv[ing] the dispute over Jamfest's scheduling."[452] Approximately two weeks later, the superintendent learned of the blog posting "when her adult son found it while using an Internet search engine."[453] As a result, school officials decided to prohibit Doninger from seeking election to the position of Senior Class Secretary because "the blog post failed to demonstrate good citizenship."[454]

Doninger challenged her electoral disqualification and moved for a preliminary injunction, alleging a violation of her First Amendment rights and seeking to have the school conduct a new election in which she was allowed to participate.[455] The district court denied the injunctive relief

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see also id. at 936 (Smith, J., concurring) ("I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place.").

443. *Doninger II*, 527 F.3d at 43.

444. *Id.* at 44.

445. *Id.*

446. *Id.*

447. *Id.* at 45. The message was posted on livejournal.com, "an online community that allows its members to post their own blog entries and comment on the blog entries of others." *Doninger I*, 514 F. Supp. 2d at 206.

448. *Doninger II*, 527 F.3d at 45.

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 46.

453. *Doninger II*, 527 F.3d at 46.

454. *Doninger IV*, 642 F.3d at 342.

455. *Doninger II*, 527 F.3d at 46–47.

application, going so far as to assert that the plaintiff "does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in *uncivil and offensive* communications regarding school administrators."[456] Taking into account that the punishment was tied to Doninger's student government activities,[457] the Second Circuit affirmed, declaring that the blog posting's "off-campus character does not necessarily insulate the student from school discipline."[458]

i. Doninger II*'s "Bare Foreseeability" Jurisdictional Standard Impermissibly Expands Public School Authority over Student Digital Speech*

In reviewing the district court's determination that the plaintiff failed to demonstrate a likelihood of success on the merits of her First Amendment claim, the *Doninger II* court noted at the outset that the Supreme Court has yet to decide a case involving public student speech that "does not occur on school grounds or at a school-sponsored event."[459] The panel had little difficulty in finding such speech within the scope of school authority, however, and concluded that a student's expressive activity in cyberspace is subject to regulation—even when it is composed away from school grounds, during non-school hours, and is not part of (although is about) a school-sponsored event—if it "'would foreseeably create a risk of substantial disruption in the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[460] This formulation merged the threshold determination of *Tinker*'s applicability with its "substantial disruption" test, effectively converting them into a crude foreseeability standard and diluting

456. *Doninger I*, 514 F. Supp. 2d at 216 (emphasis added).

457. *Doninger II*, 527 F.3d at 52.

458. *Id.* at 50; *see also Recent Cases: First Amendment - Student Speech - Second Circuit Holds That Qualified Immunity Shields School Officials Who Discipline Students for Their Online Speech*. - Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), cert denied, No. 11-113, 2011 WL 3204853 (U.S. Oct. 31, 2011), 125 HARV. L. REV. 811, 814 (2012) [hereinafter *Recent Cases*: Doninger] ("Judge Livingston read *Wisniewski* as having established that off-campus speech could be disciplined in accordance with *Tinker*.") (footnote omitted) (citing *Doninger IV*, 642 F.3d at 347).

459. *Doninger II*, 527 F.3d at 48; *see also Snyder*, 650 F.3d at 925 ("the precise issue before this Court is one of first impression").

460. *Doninger II*, 527 F.3d at 48 (quoting *Wisniewski*, 494 F.3d at 40). The determination in *Doninger II* that the off-campus digital speech was subject to regulation merely because it was reasonably foreseeable that it would come to the attention of school officials had been disavowed by the Second Circuit almost three decades earlier in *Thomas* as conferring excessive school authority over student expression. 607 F.2d at 1052 n.18 ("Nevertheless, we believe that this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result.").

both inquiries in the process.[461] Adopting the same jurisdictional leniency as *Wisniewski*, *Doninger II* repeated the district court's finding that the blog posting, "although created off-campus, 'was purposely designed by Avery to come onto the campus.'"[462] That conclusion is hardly self-evident, however, and no evidence is cited in either opinion to support it. Indeed, the undisputed fact that school authorities did not become aware of the posting until almost two weeks after the fact, through its discovery on the Internet at a point when the Jamfest controversy had long been resolved,[463] undermines the attribution of intentionality to the speaker in this context.

To bolster its jurisdictional finding, the court noted that the blog posting "directly pertained to events at LMHS"[464] and was intended to elicit responses from classmates.[465] Given that student social media speech—like its non-digital predecessors—frequently addresses school affairs and school activities, *Doninger II*'s application of a "bare foreseeability"[466] test suggests that schools can regulate "virtually all student Internet speech that relates to school issues and tries to galvanize student action. Such speech, after all, is likely to generate in-school discussion that may reach the ears of school administrators, who can search for that speech on the Internet"[467]—precisely what occurred in *Doninger II*. It seems fair to say that the belated discovery of the blog posting in *Doninger II* through a routine online search inverted the controlling inquiry by permitting school authorities to track down the speech, rather than

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461. *See* Calvert, *supra* note 20, at 243 (footnote omitted) (the decision "appears to be blending the substantive rule from *Tinker* for determining when a school can censor student speech with the threshold question of when schools can assert jurisdiction over it in the first place;" discussing "operational test" used in Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007)).

462. *Doninger II*, 527 F.3d at 50 (quoting *Doninger I*, 514 F. Supp. 2d at 216).

463. *Doninger III*, 594 F. Supp. 2d at 220 ("However, Defendants did not even discover the blog entry until weeks after the Jamfest incident had been resolved, at which point there was no longer any potential for disruption.").

464. *Doninger II*, 527 F.3d at 50.

465. *Id.*

466. In *Snyder*, five Third Circuit judges concurring in an *en banc* decision rejected a "bare foreseeability" approach to jurisdiction as impermissibly extending the regulatory authority of public school officials to online student expression outside of the school environment. 650 F.3d at 940 (Smith, J., concurring) ("A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.").

467. *Waldman I*, *supra* note 122, at 1128 (footnote omitted); *see also* Papandrea, *supra* note 5, at 1091–92 ("Students' speech frequently concerns topics related to their school and classmates. Given this reality, it is hard to imagine when it would not be directed to campus, or when it would not be reasonably foreseeable that students' digital expression would come to the school's attention."). The Second Circuit recognized this common sense point nearly forty years ago in *Thomas*: "[i]ndeed, if an off-campus publication includes criticism of the school itself, we assume the foreseeability of distribution within the school increases." 607 F.2d at 1052 n.18.

encountering the speech after it entered the schoolhouse gate, as a basis for exercising their disciplinary authority.[468]

The elastic jurisdictional calculus employed in *Doninger II* imposes no meaningful limits on the extension of schools' authority over student digital speech,[469] even when their regulatory interests are attenuated and insubstantial.[470] On its face, it would permit the regulation, in a manner never contemplated by *Tinker*,[471] even of traditional modes of non-digital expression that are unquestionably beyond the reach of governmental authority and protected by the First Amendment.[472] For example, had Avery Doninger instead submitted the identical content of her blog posting for

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468. *See D.J.M.*, 647 F.3d at 765 ("[s]chool officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech" they find disagreeable or offensive). Through this inversion, LMHS administrators effectively extended jurisdiction over the blog posting as the result of their own conduct in searching for the speech in cyberspace.

> When a teacher or principal hears about a student's off-campus-created Web site and then downloads it . . . for review, this act does *not* constitute the intentional downloading of the site in school by the student. The student has not brought the speech on campus. In this case, instead, it is the school administration that has brought the speech on campus. This act should *not* give the school legal grounds for claiming greater authority over the speech on the basis that it "appeared" on campus. In other words, the school must not be able to bootstrap jurisdiction over the speech with its own acts.

Calvert, *supra* note 131, at 266 (emphasis in original); *see also* Goldman, *supra* note 93, at 424 ("[T]he principal's reading of the posting at school entails no more school involvement than if the student wrote a letter to the *New York Times* and the principal read the letter when he took the *Times* to his office.").

469. *See* Calvert, *supra* note 20, at 237 ("The bottom line is that it is reasonably foreseeable that almost any provocative form of student speech posted online that criticizes or castigates students, teachers, or administrators will come to the attention of school authorities. It is a jurisdictional standard that appears to be very easy for school officials to prove."); *see also Waldman I*, *supra* note 122, at 1128 ("In *Doninger*, the Second Circuit not only endorsed but also broadened the 'reasonable foreseeability' standard. The court indicated that simply because Doninger had blogged about a high school event, encouraged fellow students to respond to her message, and urged students to contact the administration, it was reasonably foreseeable that her blog posting itself would reach school grounds.") (footnote omitted).

470. McDonald, *supra* note 4, at 751 ("Merely asking whether a student speaker could foresee that her speech could reach the school campus, particularly in the interconnected world of cyberspace, is effectively saying the same thing that the lower courts are—that they will apply student speech standards to virtually all of these disputes, essentially giving schools carte blanche to wield supervisory power over student cyberspeech even where they do not have a legitimate and substantial basis for doing so.").

471. *See* Calvert, *supra* note 131, at 270 (*Tinker* "never suggested that [its] limitation on students' speech rights applied *outside* the school setting or that it gave schools the power to punish off-campus expression that never reached the campus confines") (emphasis in original).

472. *See* Papandrea, *supra* note 5, at 1092 ("Permitting school officials broad authority to punish student speech whenever it comes to their attention would grant them the power to punish students who engage in a political protest in the town square, write a letter to the editor in the local newspaper, or simply speak to their friends while walking around the mall.").

publication in a local newspaper,[473] or distributed it on a handbill in a municipal park, or made the same comments while debating school administrators' handling of the Jamfest controversy during a community affairs program broadcast on a cable television public access channel,[474] her expression would have been immunized from punishment under the Supreme Court's established free speech jurisprudence. While these examples of more familiar communication methods—all "conceived, executed, and distributed outside the school"[475]—would no doubt similarly "manage[ ] to reach school administrators,"[476] they would not therefore be subject to penalization by public school officials.[477] This disparity invites the fundamental question of "why schools should be given more authority to restrict digital speech than they would have to punish non-digital expression."[478] Seemingly abetted by the "everywhere at once"[479] nature of the communication medium itself, it indicates a lack of solicitude on the part of school administrators (and reviewing courts) for student speech on digital platforms,[480] a conceptual disconnect from the Supreme Court's recognition that expression on the Internet "is as diverse

473. If the blog posting's content had been included in a publication printed by students and distributed away from LMHS, it unquestionably would have been protected under *Thomas*. *See Evans*, 684 F. Supp. 2d at 1373 ("Indeed, if [student] had run an editorial in the publication at issue in *Thomas* with the same subject matter as her Facebook group, the outcome of *Thomas* would not have changed.").

474. *See* Tuneski, *supra* note 58, at 164 ("Clearly, a student expressing his opinions on a television program would be considered an off-campus speaker; it is inconceivable that the student would become an on-campus speaker merely because another student turned on a television in a school classroom and viewed the broadcast.").

475. *Thomas*, 607 F.2d at 1050.

476. *Doninger II*, 527 F.3d at 50.

477. *See* Papandrea, *supra* note 5, at 1092; *see also* Goldman, *supra* note 93, at 408.

478. Papandrea, *supra* note 5, at 1092.

479. *Snyder*, 650 F.3d at 940 (Smith, J., concurring); *see also* Papandrea, *supra* note 5, at 1090 ("digital speech is generally nowhere and everywhere at the same time").

480. *See* Calvert, *supra* note 20, at 252 ("One somewhat subtle factor lurking in the background of all of this, . . . is a fear of the power of relatively new technologies with which students are much more comfortable and familiar than many of their teachers and principals."); *see also* Papandrea, *supra* note 5, at 1035 ("The current hysteria about children and digital media reflects the same historical tendency of adults to work themselves up into a panic in the face of cultural change."); Caplan, *supra* note 132, at 115 ("[h]abits adopted by young people are frequently the targets of moral panic, with each generation of the middle-aged lamenting the downfall of the nation's teenagers and the perceived deviation from a better past"). By way of example, the concurring opinion in the Third Circuit's *en banc* decision in *Layshock* reveals an exaggerated wariness of digital speech technology. 650 F.3d at 222 (Jordan, J., concurring) ("Modern communications technology, for all its positive applications, can be a potent tool for distraction and fomenting disruption."); *see also id.* (expressing concern over how "poisonous accusations lobbed over the internet are likely to play out within the school community").

as human thought"[481] and endowed with "the highest protection from governmental intrusion."[482] But misplaced apprehension over the impact of new communications technologies does not justify curtailing the First Amendment rights of students who use those technologies away from school.[483] Disciplinary responses reflecting such technological myopia miss the basic point that the intangible nature of off-campus digital communications, which (unlike the Tinkers' armbands, Fraser's oratory, and Frederick's banner) are not physically present in the school environment, makes them *less* intrusive and therefore *less* likely than traditional speech methods to interfere with the normal operation of the educational process.[484] As elaborated below, in all but the most exceptional circumstances student digital speech outside of the school environment should be beyond the reach of school authorities and entitled to full First Amendment protection.[485]

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481. *Reno*, 521 U.S. at 870 (citing *Am. Civ. Liberties Union*, 929 F. Supp. at 842); *see also id.* at 885 ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

482. *Id.* at 863 (citing *Am. Civ. Liberties Union*, 929 F. Supp. at 883); *see also id.* at 870 ("our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet as a communications medium); *see also* Doe v. Shurtleff, 628 F.3d 1217, 1222 (10th Cir. 2010) ("The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet."). The Second Circuit has determined that not only computer programs but also their constitutive code qualify as speech protected under the First Amendment. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) ("Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code."); *see also id.* at 447 ("But the fact that a program has the capacity to direct the functioning of a computer does not mean that it lacks the additional capacity to convey information, and it is the conveying of information that renders instructions 'speech' for purposes of the First Amendment.") (footnote omitted).

483. *See* Calvert, *supra* note 20, at 252 ("But the fear of the powerful, unknown or unfamiliar must not be used as a rationale to affect and reduce the First Amendment rights of minors when they embrace these technologies away from the campus."). Such apprehension clearly impacted the district court's consideration of the online speech issue in *Doninger*, which noted that "we are not living in the same world that existed in 1979"—the year the Second Circuit decided the *Thomas* case. *Doninger III*, 594 F. Supp. 2d at 223; *see also id.* ("A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike.").

484. Papandrea, *supra* note 5, at 1093 ("For the most part, however, digital communications do not intrude into the public space, and therefore by their very nature cannot cause an immediate disruption to the work of the school."); *see also id*. at 1054 (digital speech "typically is created, shared, and viewed off the school grounds"); *see also* Harpaz, *supra* note 103, at 162 ("Unlike the ability to wear an armband to school and engage in expression without any assistance from the school, the Internet cannot yet be worn to school like an article of clothing."). *Accord, Reno*, 521 U.S. at 869 ("communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden") (quoting *Am. Civ. Liberties Union*, 929 F. Supp. at 844).

485. *See infra* Section VI.A. *Tinker*'s steadfast protection of the symbolic classroom protest of America's controversial involvement in an unpopular and socially divisive war reveals the illogic of providing *less* protection to off-campus digital speech—particularly where, as in

2. Doninger II *Upheld School Punishment of Political Speech Protected at the Core of the First Amendment*

The "unbridled, unduly expansive nature"[486] of the Second Circuit's jurisdictional determination in *Doninger II* dramatically increased the power of school authorities to regulate public student digital speech by subordinating cardinal First Amendment principles.[487] Avery Doninger's choice of the blog posting "as a means of communicating her displeasure with the administration's decisions and encouraging others to contact school officials with their own opinions"[488] was a choice to engage in political speech[489] protected at the core of the First Amendment.[490] This type of digital expression "relating directly to the affairs of the school"[491] signifies nothing less than democracy in action, and its suppression by school administrators merits scant, if any, deference. Arguably more

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Doninger II, no disruption to the educational process occurred. *See* Tomain, *supra* note 5, at 108–09 ("If one believes scrupulous protection of free speech rights at school is necessary, . . . it would be illogical to provide less protection to off-campus speech, especially when it creates no substantial disruption on campus.") (footnote omitted).

486. Papandrea, *supra* note 5, at 1092.

487. *See* Calvert, *supra* note 20, at 251 ("an approach like that adopted by the Second Circuit that relies solely on whether it is reasonably foreseeable that the speech in question will come to the attention of school authorities gives schools sweeping off-campus jurisdictional power").

488. *Doninger I*, 514 F. Supp. 2d at 217.

489. *See Recent Cases:* Doninger, *supra* note 458, at 817–18 ("Because the blog post urged people to take action by contacting school authorities, it was of a political nature. Even with rude and potentially misleading content, the blog post was still political speech, which lies at the core of the First Amendment, and was thus deserving of strong protection.") (footnotes omitted); *See* Fronk, *supra* note 5, at 1433 ("The blog post can be characterized as political speech in that it criticized the actions of those in authority, the school administrators, for a governance decision, the postponement of Jamfest."); *see also* Tomain, *supra* note 5, at 150 (Doninger "engaged in political speech by soliciting public support to save the music festival from being rescheduled for a fourth time or being canceled altogether"). The political nature of the blog post is underscored by Avery Doninger's contention that the Student Council's faculty advisor "told them that the auditorium belonged to the taxpayers, as it had been paid for with the taxpayers' money, and so the students should send a mass email to the taxpayers explaining the students' plight and enlisting the taxpayers' support to hold Jamfest in the auditorium." *Doninger I*, 514 F. Supp. 2d at 204.

490. *See Morse*, 551 U.S. at 403 ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'") (citing *Black*, 538 U.S. at 365); *see generally* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system.").

491. *Doninger IV*, 642 F.3d at 338. Because the blog posting addressed the community at large, it also "involve[d] the First Amendment rights of nonstudents—the right of citizens to receive political speech about a public high school music festival." Tomain, *supra* note 5 at 150; *see also Bell*, 799 F.3d at 426 (Dennis, J., dissenting) ("In addition, authorizing schools to regulate students' off-campus speech likewise burdens the constitutional interest of fellow citizens in hearing students' off-campus speech.").

vulnerable to retaliatory censorship by school authorities "susceptib[le] to community pressure"[492] who have a "vested interest in suppressing controversy,"[493] it should be constitutionally safeguarded to promote robust and uninhibited communication on public issues and to avoid apprehensive self-censorship of student speech.[494] In shutting down valuable political discourse,[495] the outcome in *Doninger II* is far removed from the frugality of regulation embraced in *Thomas* as the constitutional benchmark for public student expression.

3. The Extension of Fraser*'s Rationale to Online Student Expression: Standardless Regulation Based on a Public School's "Educational Mission"*

After concluding that the school's disciplinary authority extended to the off-campus blog posting, the *Doninger II* court proceeded to apply the *Tinker* standard as recast in *Wisniewski*, holding that the speech at issue "foreseeably create[d] a risk of substantial disruption within the school environment."[496] The decision cited three factors in finding that *Tinker*'s

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492. *Thomas*, 607 F.2d at 1051.

493. *Id.* Both the Supreme Court in *Tinker* and the Second Circuit in *Thomas* recognized that "school administrators often seek to repress student speech in order to avoid controversy and protect the reputation of the school." Papandrea, *supra* note 5, at 1093–94 (footnote omitted). *See Tinker*, 393 U.S. at 510 ("the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression"); *see also Thomas*, 607 F.2d at 1048 ("when those charged with evaluating expression have a vested interest in its regulation, the temptation to expand the otherwise precise and narrow boundaries of punishable speech may prove irresistible").

494. Throughout the decision in *Thomas*, the Second Circuit stressed the First Amendment imperative of avoiding self-censorship on the part of student speakers. *Thomas*, 607 F.2d at 1048, 1051, 1052. The risk of chilling student digital speech becomes more acute when it criticizes school leadership or school operations because, as stated above, it is not only likely to reach school administrators but also to become a target of censorship by those with a vested interest in avoiding the controversy that may arise from such speech. *See* McDonald, *supra* note 4, at 728 (punishment of student cyberspeech critical of official school actions or policies "raise[s] much greater risks and concerns that school officials are engaging in illegitimate censorship of speech critical of their own actions rather than imposing discipline to protect legitimate institutional interests"); *see also* Goldman, *supra* note 93, at 422 ("Where the student has criticized school officials, less deference should be given to administrators' disciplinary decisions. When school officials are criticized, their objectivity is compromised.") (footnote omitted).

495. *See* Pike, *supra* note 4, at 999 (punishing valid criticism of school officials by student speakers "allows the school to trample student rights by proscribing a very important kind of speech—speech that encourages improvement in the educational process"); *see also* Laycock, *supra* note 160, at 120 ("It can never be part of a school's basic educational mission to suppress student interest or participation in political discussion.").

496. *Doninger II*, 527 F.3d at 48 (quoting *Wisniewski*, 494 F.3d at 40). In denying preliminary injunctive relief, the district court had determined that *Fraser*, rather than *Tinker*, controlled the constitutional analysis. *Doninger I*, 514 F. Supp. 2d at 216 ("this case is closer to *Fraser* than to *Tinker*, though . . . this case is neither just like *Fraser* nor *Tinker*"); *see also Doninger II*, 527 F.3d at 50 n.2 ("we acknowledge that the district court did not expressly rely on *Tinker* to determine that Doninger was unlikely to succeed on her First Amendment claim").

requirements had been satisfied by the school district. First, it objected to the language employed in the blog posting as "hardly conducive to cooperative conflict resolution."[497] Although the court disclaimed reliance on *Fraser*,[498] this proposition plainly represents a qualitative assessment of the speech at issue. On a factual level, it is difficult to sustain—as the opinion acknowledges, within a day after the blog message was posted agreement on rescheduling the Jamfest event was achieved through consultation between Student Council members and school administrators.[499] On a doctrinal level, it "stretche[d] *Fraser* too far"[500] by focusing on the posting's "plainly offensive"[501] content and thereby eroded *Tinker*'s requirement of showing a substantial disruption to the order and discipline of the school as a condition for restricting student speech.[502] In short, the court clearly disapproved of the disrespectful language used and implicitly extended

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497. *Doninger II*, 527 F.3d at 51.

498. *Id.* at 49 ("We need not conclusively determine *Fraser*'s scope . . ."); *see also id.* at 50 ("We therefore need not decide whether other standards may apply when considering the extent to which a school may discipline off-campus speech.").

499. *Id.* at 46. The delay in the imposition of punishment until after the Jamfest concert had been rescheduled should have precluded a reasonable forecast of material disruption under *Tinker*. *See* Tomain, *supra* note 5, at 143 n.293. ("It is difficult to understand how the Second Circuit used this distinction as a basis to support its substantial-disruption analysis. The school resolved the music-festival-scheduling issue prior to discovering the existence of Doninger's blog post. Failing to discover the blog post prior to resolution of the scheduling issue leans heavily, if not dispositively, in favor of finding Doninger's blog post did not cause a substantial disruption to the school environment.") (citations omitted). On remand, the district court acknowledged this point in considering the parties' respective cross-motions for summary judgment, concluding that evidence in the record suggested that Avery Doninger may have been punished "because the blog entry was offensive and uncivil and not because of any potential disruption at school." *Doninger III*, 594 F. Supp. 2d at 219.

500. *Morse*, 551 U.S. at 409 (rejecting broad reading of *Fraser* that would "encompass any speech that could fit under some definition of 'offensive'").

501. *Doninger II*, 527 F.3d at 49 (internal quotations and citations omitted). In *Guiles*, the Second Circuit had limited speech that is "plainly offensive for purposes of *Fraser*" to "something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity." 461 F.3d at 328. Without citing *Guiles* anywhere in the opinion, *Doninger II* compared the speech at issue to the "vulgar, lewd, and sexually explicit language" proscribed in *Fraser* and found that the blog posting "contained the [same] sort of language that properly may be prohibited in schools." 527 F.3d at 49. *Contra*, Tomain, *supra* note 5 at 150 ("Under the Second Circuit's Guiles v. Marineau precedent, the content of Avery's blog post is not the type of speech subject to *Fraser*. The single use of the term 'douchebag' and the phrase 'piss her off more' is [*sic*] not equivalent to the sexual innuendo in *Fraser*. *Guiles* requires more.") (footnote omitted).

502. *Waldman II*, *supra* note 4, at 612 ("Allowing schools to restrict any speech that disrupts their educational mission of promoting 'civility' represents a significant dilution of the *Tinker* standard."). In *Guiles*, the Second Circuit noted that such a broadened application of *Fraser* would "eviscerate[ ] *Tinker*" by expanding school officials' authority over in-school student expression deemed "plainly offensive" without the need of showing a substantial disruption to the school environment. 461 F.3d at 330; *see also id.* ("Indeed, if schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect.").

Fraser's prohibition of "vulgar and offensive terms in public discourse"[503] within the school setting to digital speech outside of the school setting.[504] The result is to encourage the far-reaching exercise of school authority over digital speech based on its message while dispensing with the need to show material interference with the work of the school, thereby placing students' First Amendment rights at risk.[505]

To avoid that risk, the values-driven suppression of student speech ratified in *Doninger II* was expressly disavowed by the Second Circuit itself on two previous occasions,[506] and was forcefully repudiated by Justice Alito in *Morse* as "strik[ing] at the very heart of the First Amendment."[507] Because the "educational mission" of secondary schools, ultimately defined by public officials beholden to majoritarian political constituencies and averse to controversy, "can easily be manipulated in dangerous ways"[508] to allow for the viewpoint-based regulation of student speech—as warned against in the *Morse* concurrence, and as seemingly

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503. *Fraser*, 478 U.S. at 683. In *Snyder*, Judge Chagares's partial dissent criticized the majority's reliance on the vulgarity of the website's contents at issue to support a reasonable prediction of material disruption as "disconcerting because it sounds like an application of the *Fraser* standard rather than the *Tinker* standard." 593 F.3d at 317.

504. In *Doninger IV*, the court observed that LMHS's principal had advised Avery Doninger of her "obligation to engage in *appropriate* communications in the resolution of conflict" and to serve as "a role model for others." 642 F.3d at 341 n.4 (emphasis added). The panel's conclusion that she failed in discharging those obligations underscores that she was punished because of a value-based objection to the content of her off-campus blog posting.

505. *See* Papandrea, *supra* note 5, at 1070 ("The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students' expression.").

506. More than forty years ago in *Thomas*, Chief Judge Kaufman anticipated this exact constitutional infirmity. *see* 607 F.2d at 1057 n.18 ("if the educational interest vindicated by school officials is the need 'to promote standards of decency and civility among school children,' . . . it is not apparent why educators would not be permitted to fail a student in an English course for writing a scurrilous letter to the New York Times"). More recently in *Guiles*, Judge Cardamone similarly rejected application of the "educational mission" rationale beyond *Fraser*'s context to avoid far-reaching encroachment on public students' free speech rights. *See* 461 F.3d at 329 ("we decline to adopt the position . . . that a school has broad authority under *Fraser* to prohibit speech that is 'inconsistent with its basic educational mission'") (refusing to follow *Boroff*, 220 F.3d at 470).

507. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

508. *Id.* ("The 'educational mission' of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups."). Justice Brennan made the same point relative to what he saw as the indeterminate "potential topic sensitivity" at issue in *Hazelwood*, objecting that it "invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object." 484 U.S. at 287–88 (Brennan, J., dissenting). The potential for censorship based on suppression of disfavored viewpoints applies to on-campus speech. *See id.* at 279–80, 286–87. Its exportation to off-campus digital speech as in *Doninger II* is even more problematic under the First Amendment.

occurred in *Doninger II*[509]—it amounts to a license for censorship irreconcilable with the First Amendment.[510] The invocation of this "vaporous nonstandard"[511] would allow schools to suppress a wide range of digital speech merely because it was deemed offensive or unacceptable according to prevailing political and social norms,[512] and would inevitably chill a substantial amount of student expression.[513] However, the First Amendment prohibits public school officials from censoring student expression outside of the school environment that employs objectionable or inappropriate language regarded as incompatible with the "school's official stance"[514] based on "its own perception of community values"[515]—a constitutional imperative scrupulously adhered to in *Thomas* but neglected in *Doninger II*.[516]

The second factor considered in *Doninger II*'s application of *Tinker* was LMHS's finding that the posting was punishable as false and misleading information (to the effect that Jamfest had been cancelled rather than merely postponed), the need of which to correct might have

509. *See* Fronk, *supra* note 5, at 1432 (in *Doninger II*, "the Second Circuit failed to cite or adhere to Justice Alito's concurrence in *Morse*").

510. *See Morse*, 551 U.S. at 423 (Alito, J., concurring) ("The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment."); *see also* Papandrea, *supra* note 5, at 1089 ("As Justice Alito recognized in his *Morse* concurrence, however, giving schools broad authority to suppress speech in the name of promoting their educational mission is dangerous. Given that public students already face compulsory attendance laws, the risk of improper governmental indoctrination is high.") (footnote omitted).

511. *Hazelwood*, 484 U.S. at 287 (Brennan, J., dissenting); *see also Layshock*, 650 F.3d at 216.

512. *Doninger II*'s rationale gives school officials "wide latitude in punishing students for offensive or controversial internet speech that conflicts with the morals or opinions held by the school administrators." Tuneski, *supra* note 58, at 150 (criticizing decision in Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969) for applying *Tinker* to off-campus distribution of underground student newspaper as "allow[ing] school officials a broad reach into the private lives of students"); *see also Bell*, 799 F.3d at 426 (Dennis, J., dissenting) ("[F]or purposes of the First Amendment, it is simply irrelevant whether prevailing social mores deem a child's disrespect for his teacher to be contemptible.").

513. *See* Tomain, *supra* note 5, at 145 ("Such a broad, vague standard is likely to chill free speech."); *see also* Martin, *supra* note 151, at 776 ("From the students' perspective, the lack of clarity can result in a chilling effect where students are nervous to voice opinions on important issues due to fear of being censured for 'inappropriate' language.") (footnote omitted).

514. *Hazelwood*, 484 U.S. at 280 (Brennan, J., dissenting).

515. *Id*. (noting that "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech," a wide variety of protected expression could be censored by school officials).

516. In the memorable words of Justice Jackson from a trying period in our nation's history, "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Barnette*, 319 U.S. at 641.

disrupted school operations.[517] At best, this reasoning exists in considerable tension with longstanding authority making it clear that speech on public issues is not divested of constitutional protection solely because it is untrue or "misleading."[518] According to established First Amendment principles, "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive."[519] Further, in emphasizing that the blog posting caused two school administrators "to miss or be late to school-related activities"[520] on a single day, the decision elevated relatively minor examples of administrative inconvenience as suitable cause for punishing Avery Doninger's speech.[521] This factor—attributable to school officials' performance of their job responsibilities—should be irrelevant to a determination of the constitutional status of student expression.[522] If it were in fact necessary to "dissipate misguided anger or confusion over [Jamfest's] purported cancellation,"[523] LMHS authorities presumably could simply have issued a school-wide announcement over the school's

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517. *See Doninger II*, 527 F.3d at 51. LMHS's characterization of the blog posting as false and misleading, adopted by the *Doninger II* court, is difficult to accept on its face and amounts to an exercise in semantic hairsplitting—in point of fact, Jamfest *was* cancelled for the date it was originally scheduled to take place in the school's new auditorium. *Id.* at 44.

518. The Supreme Court has repeatedly reaffirmed the "common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, 567 U.S. at 718; *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered . . . . To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration.") (internal quotations and citations omitted).

519. Reuland v. Hynes, 460 F.3d 409, 413–14 (2d Cir. 2006) ("the fact that [the plaintiff]'s statement was not literally true does not automatically deprive it of First Amendment protection") (footnote omitted).

520. *Doninger II*, 527 F.3d at 51.

521. Fronk, *supra* note 5, at 1435 ("However, receiving calls from parents and other concerned citizens on a matter of both school and community importance is an essential part of a school administrator's position.") (characterizing administrative reaction to the blog posting as a "poor excuse" for justifying punishment). *Tinker*'s strong protection of in-school expression presupposes increased administrative burdens in order to adequately protect student free speech rights. *See, e.g.*, *J.C.*, 711 F. Supp. 2d at 1117 ("[T]he record shows that the School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and that five students missed some undetermined portion of their classes . . . . This does not rise to the level of a substantial disruption.").

522. In contrast to the *Doninger II* court, the majority of an *en banc* panel in the Third Circuit summarily rejected as "irrelevant to the issues before this Court" alleged disruptions that "were the direct result of the School District's response" to the off-campus website profile at issue in that case. *Snyder*, 650 F.3d at 929 n.6; *see also id*. at 929 ("some officials rearranging their schedules to assist [school principal] in dealing with the profile" insufficient to satisfy *Tinker*); *see also J.C.*, 711 F. Supp. 2d at 1118 (*Tinker* not satisfied as a matter of law where actions taken by school officials "to resolve the situation created by the video were [not] outside the realm of ordinary school activities" because "[t]hat is what school administrators do.").

523. *Doninger II*, 527 F.3d at 51–52.

PA system (or through other means) to inform students that the event had been rescheduled[524]—the classic Brandeisan remedy of "more speech"[525] preferred as "the ordinary course in a free society."[526]

4. Penalty Sensitivity & the Chilling of Public Student Digital Speech

The third and final factor the *Doninger II* court considered in applying *Tinker* was the speech penalty meted out by LMHS, which "related to Avery's extracurricular role as a student government leader."[527] In relativizing the First Amendment inquiry in accordance with its view of the severity of the punishment imposed, the decision ignored that "even minor punishments can chill protected speech."[528] While arguably providing a basis for distinguishing future cases involving the more severe sanction of suspension or expulsion of student speakers,[529] the treatment of this

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524. In fact, LMHS's principal had "put a letter into the school newsletter laying out the resolution of the matter." *Doninger I*, 514 F. Supp. 2d at 207.

525. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, the remedy to be applied is more speech, not enforced silence.").

526. *Alvarez*, 567 U.S. at 727 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.").

527. *Doninger II*, 527 F.3d at 52; *see also Doninger IV*, 642 F.3d at 350 (". . . Doninger's discipline extended only to her role as a student government representative: she was not suspended from classes or punished in any other way."). The Third Circuit recently parted company with *Doninger II* by disavowing "any relevant distinction among the punishments" imposed on student digital speakers as determinative of their First Amendment rights, reasoning that it "was not the punishments the students received, but that those punishments were used to 'control' students' free expression in an area traditionally beyond regulation." *Levy*, 964 F.3d at 181, 183. *Doninger II*'s emphasis on this factor follows from the Supreme Court's observation in *Vernonia Sch. Dist. 47J v. Acton* that students who participate in extracurricular activities "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally" and therefore have "a reduced expectation of privacy" under the Fourth Amendment. 515 U.S. 646, 657 (1995). However, as the Third Circuit recently emphasized, whether a governmental search is constitutional under the Fourth Amendment depends on its "reasonableness," which requires weighing an individual's privacy interests against the interests asserted by the government—a balancing process anathema to the First Amendment. *Levy*, 964 F.3d at 182 ("Such a rule would revise the judgment [of] the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs.") (internal quotations, citations, and footnote omitted).

528. *Ashcroft*, 535 U.S. at 244; *see also* Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994) ("As we have recognized, even minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures."). The Second Circuit has recognized the principle that First Amendment rights may be chilled by indirect restraints on speech. *See* Zieper v. Metzinger, 474 F.3d 60, 65 (2d Cir. 2007) ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech.") (internal quotations omitted).

529. *Doninger II*, 527 F.3d at 53 ("we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns"); *see also Layshock*, 650 F.3d at 218 (McKee, C.J.) (distinguishing *Doninger* as not involving more serious penalty of student suspension); *see also* LoMonte, *supra* note 49, at 67

issue in *Doninger II* nevertheless raises significant First Amendment concerns.[530] When the government retaliates based on the content of speech, the ostensible leniency of the punishment does not control the constitutional inquiry.[531] The issue is not whether the speaker was deprived of a

("Both the district and appellate courts emphasized that the outcome was driven by the unique nature of the discipline—stripping the student of elective office but not removing her from classes or otherwise depriving her of a constitutionally protected interest. This provides a future speaker the opportunity to challenge a suspension or expulsion as distinct from Avery Doninger's punishment.").

530. *See Waldman II*, *supra* note 4, at 610 (footnote omitted) ("the notion that the free speech inquiry should be ratcheted down when the punishment relates only to an extracurricular activity" raises serious constitutional concerns). Where public student speech qualifies for First Amendment protection under the existing doctrinal framework, the nature of the discipline imposed by the school should be irrelevant to a determination of its constitutional status. *See* Tomain, *supra* note 5, at 143 n.292 ("[I]f the speech at issue is constitutionally protected and not subject to any of the current student-speech doctrines, the type of punishment—whether it is a ban on extracurricular activity, suspension, or another form of discipline—should not matter.").

531. With extremely few exceptions in the First Amendment's decisional architecture, the scope of the constitutional right is independent of the severity of the penalty imposed on its exercise so as to avoid the chilling of protected free speech. The U.S. Supreme Court has perhaps most strongly enunciated this penalty-neutrality principle in the context of government employee speech, stating that the First Amendment prohibits "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." Rutan v. Republican Party of Ill., 497 U.S. 62, 75 n.8 (1990) (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989)). According to this authority, the "degree of retaliation is immaterial" to the merits of the First Amendment claim. *See also Smith*, 28 F.3d at 649 n.3. It should be noted, however, that certain federal appellate courts (including the Second Circuit) have disregarded the strict penalty-neutral "birthday party" language in *Rutan* as *dicta*, finding that a governmental response to an employee's speech does not violate the First Amendment unless it amounts to an "adverse or detrimental employment" action against the speaker. Davidson v. Chestnut, 193 F.3d 144, 150 (2d Cir. 1999) (characterizing the "birthday party" passage as *dicta*); *see also* Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1340 (10th Cir. 2000) ("employers' acts short of dismissal may be actionable as First Amendment violations, [but] we have never ruled that *all* such acts, no matter how trivial, are sufficient to support a retaliation claim") (emphasis in original); *see also* Pierce v. Tex. Dep't of Criminal Just., 37 F.3d 1146, 1149 n.1 (5th Cir. 1984) ("We choose not to read the Supreme Court's dicta literally; rather, we apply the main analysis of *Rutan* to retaliation claims and require more than a trivial act to establish constitutional harm."). Notably, even the courts that have continued after *Rutan* to import some degree of penalty sensitivity into this area of the law have recognized that a First Amendment violation occurs when the punishment would "deter a person of ordinary firmness" from the exercise of free speech rights. *See* Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). The Second Circuit's decisions on the issue have applied the same standard. *See* Wrobel v. City of Erie, 692 F.3d 22, 31 (2d Cir. 2012) ("In the context of a First Amendment retaliation claim, we have held that only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.") (citing Zelnick v. Fashion Inst. of Tech., 464 F.3d 217, 225 (2d Cir. 2006) (internal quotation marks and alterations omitted)); Washington v. Cty. of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) (internal quotation marks and alterations omitted).

constitutional right[532] or government benefit, but whether the punishment at issue would deter a reasonable person from engaging in protected speech going forward.[533] There can be no real doubt as to the answer here given the hyper-competitive college admissions process in which applicants are distinguished by, *inter alia*, their record of extracurricular activities,[534] including participation in student government programs that, "today, [are] essential parts of the educational process."[535] In denying Avery Doninger the opportunity to run for senior class office, school officials thwarted her achievement of something that evidently mattered to her and did so solely because of what she said on her blog posting.[536] In

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532. That Avery Doninger had no constitutional right to participate in LMHS's student government was irrelevant to a determination of her First Amendment liberty to protest Jamfest's cancellation:

> The constitutional right at issue is freedom of expression, not that of participation in extracurricular activities. That there is no constitutional right to participate in . . . extracurricular activities may be pertinent to an analysis of other sorts of constitutional claims, . . . but as *Tinker* itself notes, not to a freedom of expression claim.

T.V., 807 F. Supp. 2d at 780 (footnote omitted); *see also* Hayes, *supra* note 6, at 278 ("While the court is correct in stating participation in extracurricular activities is a privilege, *the privilege cannot be revoked as a result of exercising the First Amendment right to freedom of speech.*") (emphasis in original).

533. *See* Mendocino Env't. Ctr. v. Mendocino Cty., 192 F.3d 1283, 1300 (9th Cir. 1999) ("[T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *see also* Husain v. Springer, 494 F.3d 108, 128 (2d Cir. 2007) (public college president's decision to nullify student government election because of content published in school's student newspaper created a chilling effect giving rise to First Amendment injury). Thus, the district court's averment that "Avery does not have a First Amendment right to run for a voluntary extracurricular position as a student leader" (*Doninger I*, 514 F. Supp. 2d at 216) misperceives the relevant constitutional inquiry, as did the Sixth Circuit in *Lowery*. 497 F.3d at 588 ("It is well-established that students do not have a general constitutional right to participate in extracurricular athletics.").

534. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 845 (2002) (Ginsburg, J., dissenting) ("Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience."); *see also* LoMonte, *supra* note 49, at 77 ("Even more than in the adult world, government punishment runs the risk of altering the trajectory of a student's life for the worse. A suspension may make the difference between college acceptance and rejection.").

535. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 686 (2002) (internal quotation marks omitted); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (recognizing the "importance to many students of attending and participating in extracurricular activities as part of a complete educational experience"); *see also* Tony LaCroix, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 263 (2008) ("To say that participation in extracurricular activities is optional is to ignore their central, critical importance to public education.").

536. *See Doninger IV*, 642 F.3d at 338 ("they prohibited her from running for Senior Class Secretary in response to a blog entry that [she] posted from her home during non-school hours"); *see also id.* at 357 ("Here, it is undisputed that Doninger was disqualified for running for Senior Class Secretary because of her April 24 posting on livejournal.com.").

the wake of her decidedly non-trivial punishment, an LMHS student would likely be wary of speaking out against the school's policies or administrative actions so as to avoid the risk of tarnished college admissibility.[537] Indeed, the prospect of self-censorship is particularly acute in this context, "where the speakers are younger and their First Amendment rights are already less clear and robust."[538] The assurance that Avery Doninger remained "free to express her opinions about the school administration and their decisions in any manner she wishes"[539] rings hollow indeed—not only to her, but also to her classmates as would-be speakers—in view of the penalty she suffered for exercising those free speech rights.[540]

In marked contrast to *Thomas*, consideration of the potential chilling effect on LMHS students' speech is virtually absent from *Doninger II*,[541] and the court's assimilation of the school's disciplinary response to the blog posting within *Tinker*'s application misses the constitutional mark.[542] That approach necessarily expands schools' regulatory authority in situations where student speech criticizes a school-sponsored program

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537. *See Bell*, 799 F.3d at 419 (Dennis, J., dissenting) ("Indeed, for students, whose performance at school largely determines their fate in the future, even the specter of punishment will likely deter them from engaging in off-campus expression that could be deemed controversial or hurtful to school officials."); *see also Waldman I*, *supra* note 122, at 1130 ("But given the significant role that extracurricular activities play in many students' lives, many students may well be chilled by that possibility."); *see also* Calvert, *supra* note 20, at 235 ("Such a disciplinary blemish on a high school record easily could jeopardize or threaten a potential offer of admission from a college or university."); *see also Sullivan*, 307 F. Supp. at 1338 ("One specific example of such consequences would be the increased difficulty in obtaining admission to a college or university that these students might well encounter. The severe disciplinary action taken against these students amounts to a blot on their scholastic records that might well haunt them for years to come."); *Shanley*, 462 F.2d at 964 ("All were in the process of applying for highly competitive slots in colleges or for scholarships. The three days of zeros that resulted from the suspensions substantially affected their grade averages at a critical time of their educational careers.").

538. *Waldman I*, *supra* note 122, at 1124 ("Particularly given the current uncertainty surrounding schools' jurisdiction over off-campus student speech, as well as some schools' current experimentation with new disciplinary regimes, the potential for such punishment threatens to deter an even wider swath of student speech than that which should actually be restricted.").

539. *Doninger I*, 514 F. Supp. 2d at 216.

540. *See Levy*, 964 F.3d at 183 ("Thus, whatever the school's preferred mode of discipline, it implicates the First Amendment so long as it comes in response to the student's exercise of free speech rights.").

541. The *Doninger II* opinion contains a single reference to the chilling of Avery Doninger's speech in connection with the irreparable harm element of her injunctive relief application, which the court assumed had been satisfied for purposes of the appeal. *See Doninger II*, 527 F.3d at 47 (crediting "Avery's assertion that she has limited her email and blog communications in an effort to avoid similar conflict with school administrators in the future").

542. The *Doninger II* court did not rely on the discredited right-privilege distinction in its speech penalty analysis, but factored the punishment imposed by LMHS into *Tinker*'s application. *See Doninger II*, 527 F.3d. at 52 (relation of disciplinary action "to Avery's extracurricular role as a student government leader" considered relevant "in the context of *Tinker*").

or activity—no matter how valid or legitimate the criticism—and the punishment involves disqualification from or ineligibility for that same program or activity.[543] Further, the circularity of the penalty justification in *Doninger II* negates the "essence of the *Tinker* test,"[544] given that the school can simply assert potential interference with the particular extracurricular activity in question as the basis for penalizing the speaker. As a result, student speech that "communicates substantive dissent"[545] about a school program runs a real risk of being suppressed under the guise that it is disruptive to the educational process.[546] Finally, *Doninger II*'s penalty sensitivity erroneously implies that Avery Doninger's First Amendment rights were somehow diminished under the student speech framework because of her commendable participation in student government.[547] Surely more expansive constitutional free speech protection would not be warranted had an LMHS classmate who was not a Student Council member been responsible for the blog posting. Such disparate treatment would give rise to manifest equal protection as well as First Amendment concerns.[548]

As suggested by the potential for different treatment owing to the speaker's involvement in student government, a constitutional distinction

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543. *See Waldman I*, *supra* note 122, at 1129 ("[I]f the student speech opposes some aspect of a school activity, the school—as long as the punishment relates only to the activity in question—can then justify its actions simply by pointing to the speech's potential to interfere with that particular activity. This, of course, will often be easy—almost tautological—to show.").

544. *Hazelwood*, 484 U.S. at 283 (Brennan, J., dissenting) (noting that "student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose").

545. *Waldman II*, *supra* note 4, at 605.

546. *Id*. at 657 ("Nor it is persuasive to suggest that the threshold requirement of disruptiveness or offensiveness should be ratcheted down when the only punishment is removal from an extracurricular activity. . . . This approach runs the risk of squelching any criticisms or dissent from participants in that activity, for fear that their speech will be considered disruptive and result in their dismissal.") (footnote omitted).

547. *Cf. Doninger IV*, 642 F.3d at 351 ("Doninger was not free to engage in such behavior while serving as a class representative"), *with Lowery*, 497 F.3d at 605 (Gilman, J., concurring in judgment) ("At the same time, however, a student-athlete does not, as suggested by the lead opinion, enjoy fewer First Amendment rights under *Tinker* because of his or her choice to participate in high school athletics."). For what I submit is a flawed argument premised on undue deference to school authorities that a student council member's speech is subject to judicial review under *Hazelwood*'s reasonableness standard, *see* Travis Miller, Doninger v. Niehoff: *Taking Tinker Too Far*, 5 LIBERTY UNIV. L. REV. 303, 329 (2010) ("Avery Doninger's insubordination, and her use of incendiary language to describe the school officials she was subject to, was a clear violation of her responsibility to demonstrate qualities of good citizenship at all times.").

548. *See* LaTrieste Rest. & Cabaret, Inc. v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994) (equal protection violation arises when "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as . . . intent to inhibit or punish the exercise of constitutional rights") (internal quotation omitted).

based on the speech penalty imposed by school officials as reflected in *Doninger II* would inevitably result in serious implementation problems. A penalty-sensitive approach to the merits of claims involving digital speech originating off school grounds fails to address several foundational line-drawing concerns including, first and foremost, what qualifies as an acceptable level of punishment as contemplated by that decision.[549] Does a denial of the ability to participate in any type of extracurricular activity qualify as nominal punishment such that a First Amendment violation does not materialize,[550] as turned out to be Avery Doninger's plight? For example, is removal from a school athletic team sufficiently *de minimis*?[551] What about stripping a student from a role in a school-sponsored theatrical production? Is it possible even for a brief student suspension—one-day, two-days, five-days—to fly below the First

549. Given the traditional deference by reviewing courts to student disciplinary measures undertaken by public school authorities, as a practical matter it is unlikely that judges will override the judgment of school officials unless the penalty imposed is unusually disproportionate. *See, e.g.*, *Doninger I*, 514 F. Supp. 2d at 215 ("Once school authorities made the permissible decision to punish Avery for her blog entry, the scope of that punishment lay within their discretion. The Court defers to their experience and judgment, and has no wish to insert itself into the intricacies of the school administrators' decision-making process."); *see also Cuff*, 677 F.3d at 115 (where a fifth-grade student was suspended for six days (five days out of school, one day in school) after submitting, in connection with an in-class assignment, a drawing deemed to threaten violence, the majority deferred to school administrators in summarily rejecting the argument that the "punishment was excessive under the First Amendment"); *see also id*. ("The appropriate degree of punishment is of course a matter in which we show the greatest deference to school authorities.").

550. Without suggesting any determinate limitations, *Doninger IV* pointedly backtracked from this proposition in stating that "we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities." 642 F.3d at 351.

551. Federal appellate courts applying *Tinker* have reached varying conclusions in cases where students have been removed from public high school athletic teams for communications with team members criticizing or requesting the resignation of their coach. The Sixth and Eighth Circuits have held such speech unprotected as insubordination that necessarily posed a threat to the coach's authority, with each court expressly taking into consideration on the merits of the First Amendment claim what it viewed as the minimal penalty involved. *See Lowery*, 497 F.3d at 600 (petition objecting to behavior of a coach circulated by high school football team members, whose "regular education has not been impeded" by being dismissed from the team, was materially disruptive to team unity under *Tinker*); *see also Wildman*, 249 F.3d at 772 (where a member of a school's basketball team distributed a letter to teammates critical of the girls' varsity coach, no free speech violation arose where the "school sanction only required an apology" before she would be allowed to rejoin the team and "did not interfere with [her] regular education"). In contrast, the Ninth Circuit has emphasized the value of protecting speech that detailed abusive coaching tactics even where there was evidence of material interference with a school activity under *Tinker* and remanded the case for a determination of whether the plaintiffs could establish a First Amendment retaliation claim. *See* Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 771–72 (9th Cir. 2006) (holding petition by team members requesting resignation of boys' varsity basketball coach was constitutionally protected where the record contained no evidence of "disrupted school activities" caused by the petition).

Amendment radar screen?[552] In considering the nature of the penalty as justification for its imposition,[553] *Doninger II* leaves unclear the boundaries between student speech that is fully protected, fully punishable without limitation, and—falling somewhere between these poles—subject only to nominal (in Holmesian terms) punishment. These concerns only exacerbate the chilling effect arising from the decision, as students confronted with uncertainty will be forced to steer clear of the unprotected zone.[554]

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552. When a suspension is less than ten days in duration, a school district need afford a student only "rudimentary" procedures to comply with due process requirements. *See* Goss v. Lopez, 419 U.S. 565, 581 (1975). An important factor in exacerbating the chilling effect on student speech is the typically short duration of the sanctions imposed by school districts, which in many cases makes "the promise of judicial review . . . virtually an empty one." *See also Thomas*, 607 F.2d at 1052 ("Where, as here, the punishment is virtually terminated before judicial review can be obtained, many students will be content to suffer in silence, a silence that may stifle future expression as well.").

553. Consideration of the nature of the penalty in determining whether particular student digital expression merits constitutional protection in the first instance should be distinguished from jurisprudential intimations that the First Amendment may, under certain circumstances, provide an independent limitation on the punishment of speech otherwise determined to be without such protection. As discussed above, the former conception of penalty sensitivity gives rise to serious chilling effect concerns that may well tamp down protected student speech. The latter conception, while remaining largely inchoate as a matter of constitutional doctrine, suggests an additional safeguard on expressive liberty that would prohibit the disproportionate punishment of even unprotected speech. Its origins trace to Justice Holmes's famous dissent in a World War I Espionage Act case and, less than a decade later, Justice Brandeis's celebrated concurrence in a criminal syndicalism prosecution. *See Abrams*, 250 U.S. at 629 (Holmes, J., dissenting) ("the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges *but for the creed that they avow*") (emphasis added); *see also Whitney*, 274 U.S. at 378 (Brandeis, J., concurring) ("it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so"). A prominent commentator has interpreted the passage quoted above from Holmes's *Abrams* dissent as setting forth "the novel and interesting notion that the [F]irst [A]mendment . . . limited the punishment that could be imposed even for speech not wholly protected." *See* David P. Currie, *The Constitution in the Supreme Court: 1910–1921*, 1985 DUKE L.J. 1111, 1154–55 n.225 (1985). In the public student speech case law, this approach surfaces in Justice Brennan's concurring opinion in *Fraser*. 478 U.S. at 690 n.3 (Brennan, J., concurring) (noting that, while punishment of student speaker was "somewhat severe" under the circumstances, "I cannot conclude that school officials exceeded the bounds of their disciplinary authority"). It aligns with the recommendation that courts should "review for reasonableness any punishments imposed" only *after* an assessment that the speech is regulable under the "specialized student-speech framework" in order to provide "an additional, independent source of protection for student speakers." *See Waldman I*, *supra* note 122, 1145–46.

554. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 526 (1958); *see also Waldman I*, *supra* note 122, at 1130 ("Students engaging in speech that is close to the (moving) borderline are risking not only the suppression of their speech itself, but also personal punishment. This trend will only increase if other courts follow *Doninger* . . . in holding that punishments falling short of suspension should trigger less scrutiny.").

Moreover, *Doninger II*'s reliance on *Lowery v. Euverard*[555] in rendering the school's disciplinary response material to the First Amendment claim should not obscure the constitutional deficiencies of its penalty-sensitive rationale. In *Lowery*, the plaintiffs were dismissed from their high school football team after signing a petition that stated they "hate[d]"[556] their coach and did not "want to play for him."[557] The petition included the alarming allegations that the coach had "struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate language, and required a year-round conditioning program in violation of high school rules."[558] Despite the seriousness of these claims, the *Lowery* court reversed a denial of summary judgment to the school district's officials, finding that they were entitled to a qualified immunity defense on the plaintiffs' First Amendment claim.[559]

As in *Doninger II*, the decision in *Lowery* failed to consider the obvious barriers to student speech that would result from kicking the dissenting players off the team.[560] Rather, focusing on the coach's need to preserve his authority over the team's members, the court viewed the petition as necessarily presenting a threat to team unity, which it found

555. *See* 497 F.3d 584 (6th Cir. 2007). Notably, in Lowery v. Euverard, the student speech at issue occurred in an interscholastic athletic program conducted by the school and was therefore properly subject to *Tinker*. *See Tinker*, 393 U.S. at 512–13 (material disruption standard applies to student speech "in the cafeteria, or *on the playing field*, or on the campus during the authorized hours") (emphasis supplied); *see also Pinard*, 467 F.3d at 769 (*Tinker*'s principles apply "to school activities broadly defined, including extracurricular activities"). *Doninger II*, where the public blog posting was not issued under the auspices of a school-sponsored activity or program, or while the student speaker was otherwise subject to school supervision, is therefore distinguishable. Because Avery Doninger's blog entry was "posted from her home during non-school hours," without any school supervision and without any indicia of school sponsorship or any reliance on school resources, it was outside the ambit of the public student speech framework and entitled to full First Amendment protection. *See Doninger IV*, 642 F.3d at 338 (footnote omitted)*; see also* Goldman, *supra* note 93, at 405 ("Student speech that does not occur under school supervision should receive the same First Amendment protection as non-student speech.").

556. 497 F.3d at 589.

557. *Id.*

558. *Id.* at 585.

559. *See id*. at 600–01. Circuit Judge Gilman wrote a separate opinion in *Lowery* concurring in the judgment on the ground of qualified immunity but rejecting "the lead opinion's erroneous refusal to recognize the constitutional right at issue." *See also id*. at 606.

560. Unlike the Sixth Circuit in *Lowery*, the Ninth Circuit recognized that disqualifying students from interscholastic athletic team competition for criticizing their coach would inhibit their speech. *See Pinard*, 467 F.3d at 772 ("defendant's permanent suspension of the plaintiffs would lead ordinary student athletes in the plaintiffs' position to refrain from complaining about an abusive coach in order to remain on the team").

sufficient to satisfy *Tinker*.[561] Analogizing the "greater restrictions on student athletes . . . to the greater restrictions on government employees,"[562] the *Lowery* court proclaimed that the "legal principles from the government employment context are relevant to the instant case."[563] Comparing Coach Euverard's situation to that of a government workplace supervisor, the opinion stated that "[h]igh school football coaches, as well as government employers, have a need to maintain order and discipline."[564] While that much is certainly true, this comparison overlooks that the relationship between a public high school and its students, including those who participate in interscholastic athletics, is fundamentally different from that between a government agency and its employees,[565] and therefore implicates a different set of substantive free speech considerations.[566]

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561. *See Lowery*, 497 F.3d at 593–94; *see also* Wildman v. Marshalltown Sch. Dist, 249 F.3d 768, 771 (8th Cir. 2001) (holding no First Amendment violation based on school's punishment of varsity basketball player for distributing letter criticizing head coach because it undermined the goals of "team unity," "cohesiveness," and "sportsmanship").

562. *Id.* at 597 ("student athletes have greater similarities to government employees than the general student body").

563. *Id.*

564. *Id.* at 599. This statement parallels the view of the educational function reflected in Justice Black's dissent in *Tinker*. *See Tinker*, 393 U.S. at 524 ("School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."). The *Tinker* majority, however, rejected a conception of the educational process that "elevates obedience to institutional authority into an independent educational objective." *See* Post, *supra* note 113, at 1774 n.241.

565. Unlike government employees who accept public sector employment, public high school students generally have little choice with respect to their attendance at school. *See* McDonald, *supra* note 4, at 755 ("After all, while public employees choose to work in government employment, primary and secondary school students in this country are generally compelled to attend these institutions whether they want to or not."); *see also* LaCroix, *supra* note 535, at 263 ("Students are not employees of the school, nor are they, in any realistic sense, free to choose non-participation in school activities."). Even accepting the volitional element of competing in high school sports, the *Lowery* court's equivalence of student-athletes to government employees is nevertheless flawed. *See Waldman II*, *supra* note 4, at 614 ("The problem with this analogy is that even though both government jobs and school extracurricular activities are 'voluntary,' the government employer/employee relationship is profoundly different from the school district/student relationship."); *see also Lowery*, 497 F.3d at 602 (Gilman, J., concurring in judgment) ("the fact remains that government employees and high school athletes are not similarly situated, despite the lead opinion's analysis to the contrary"); *see also* Qvyjt v. Lin, 953 F. Supp. 244, 247–48 (N.D. Ill. 1997) ("the governmental interests present in a governmental employer-employee relationship, . . . are simply not present in the state university-student relationship before this court").

566. *See Waldman II*, *supra* note 4, at 614 ("School districts are charged with educating their students and preparing them for citizenship. Government employers have no such inculcative responsibilities with respect to their employees, who are fully-formed adults hired to perform a job. As such, challenges to authority in the two contexts raise very different considerations, and courts should keep these two legal frameworks separate."). *Cf.* Erin Reeves, "*The 'Scope of a Student': How to Analyze Student Speech in the Age of the Internet*," 42 GA. L. REV. 1127, 1154 (2008) (proposing new standard to determine whether speech was within scope of

When a public school regulates student speech that is non-curricular or not school-sponsored, it is acting in a sovereign capacity[567] rather than as an institutional manager of programmatic activities delegated to government employees performing assigned responsibilities in the workplace.[568] The legitimate managerial and organizational objectives underlying the interest-balancing test[569] when the government regulates its employees' speech are simply not germane to a determination of the free speech rights of public high school students who are removed from a curricular or school-supervised setting. Further, those rights are not somehow forfeited or less deserving of protection when students are members of a school athletic team (or when they hold class office).[570] Because students are confronted with dissimilar behavioral expectations[571] and are not employees of the schools in which they are enrolled pursuant to compulsory

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speaker's status as a student that "borrows much of its reasoning from the free speech restrictions and protections that are applied to public employees").

567. *See Morse*, 551 U.S. at 424 (Alito, J., concurring) ("[w]hen public school authorities regulate student speech, they act as agents of the State").

568. The Supreme Court has emphasized that the government has "far broader powers" to limit public employee speech than that of other citizens owing to "the practical realities of government employment, and the many situations in which . . . the government must be able to restrict its employees' speech." *See* Waters v. Churchill, 511 U.S. 661, 671–72 (1984) (plurality opinion). With respect to such speech, the government's heightened regulatory interest derives from its legitimate institutional and programmatic objectives. *See id.* at 675 (O'Connor plurality) (the "key to the First Amendment analysis of government employment decisions" is that the "government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer"). Accordingly, the government can instrumentally regulate the speech of those it employs in furtherance of "the efficiency of the public services [the government] performs through its employees." Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

569. In *Connick*, the Supreme Court applied the standard established in *Pickering*, which balances a public employee's free speech rights "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568; 461 U.S. at 140 (internal quotations omitted). In order to qualify for First Amendment protection under the *Connick-Pickering* balancing test, a government employee's speech must therefore address a matter of "public concern" as distinct from "matters of only personal interest." *Id.* at 143, 147.

570. *See* Lee, *supra* note 162, at 1708 ("ideas about waiver and forfeiture have largely disappeared from the Court's contemporary First Amendment jurisprudence"). It has long been established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (footnotes omitted).

571. *See generally* Davis v. Monroe Cnty Bd. of Ed., 526 U.S. 629, 651 (1999) ("[c]ourts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults").

education requirements,[572] "the government's interest in functioning efficiently is subordinate to the students' interest in free speech."[573]

In his opinion concurring in the judgment in *Lowery*, Judge Gilman strenuously disagreed with the majority's engrafting onto *Tinker* the public concern requirement from the government employee speech context as an "an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue."[574] In addition to objecting that the majority's novel analysis "significantly alter[ed] First Amendment jurisprudence,"[575] he parted company with its application of *Tinker* as relying merely on "a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach."[576] Perhaps most significantly, the *Lowery*

572. "Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school." *Morse*, 551 U.S. at 421 (Alito, J., concurring).

573. Garcia v. SUNY Health Serv. Ctr. of Brooklyn, 280 F.3d 98, 106 (2d Cir. 2001) (internal quotations omitted). In *Garcia*, the Second Circuit held that "the public concern doctrine does not apply to student speech in the university setting, . . . but is reserved for situations where the government is acting as an employer." *Id.*; *see also Qvyjt*, 953 F. Supp. at 248 ("Thus, whether the speech touches matters of private or public concern simply is not part of the proper analysis when considering a student's claim under the First Amendment."). Given that the justifications for the *Pickering-Connick* public concern requirement similarly do not apply to the non-curricular speech of public secondary school students, there is no valid reason for affording their speech the "curtailed protection afforded [to the speech of] government employees." *Garcia*, 280 F.3d at 106.

574. *Lowery*, 497 F.3d at 601 (Gilman, J., concurring in judgment). The approach adopted by the *Lowery* majority had previously been repudiated by the Ninth Circuit in *Pinard*, which held that application of the government employee speech doctrine to the expression of public school students was unsupported by Supreme Court precedent and was therefore constitutional error. *See* 467 F.3d at 766 ("Although *Connick*'s personal matter/public concern distinction is the appropriate mechanism for determining the parameters of a public employer's need to regulate the workplace, neither we, the Supreme Court nor any other federal court of appeals has held such a distinction applicable in student speech cases, and we decline to do so here.") (footnote omitted); *see also id.* at 759 ("We hold that the district court erred in adopting from the government employment context the public concern standard for determining whether the First Amendment protects student speech."). More recently, it has been rejected by the Third Circuit in *Levy*. 964 F.3d at 183 (declining to employ government employee speech test in public student digital speech case; "The reason is simple: [a]s we have recognized, students' free speech rights are not limited to matters of public concern.").

575. *Lowery*, 497 F.3d at 601.

576. *Id.* at 603. As with the temporal delay preceding punishment of the blog posting in *Doninger II*, there was a time lapse from the players' signing of the petition until its discovery by the coach, which the concurrence cited as confirming the lack of any interference with team unity and exposing the school district's imposition of punishment as retaliatory. *See id.* at 605 ("At least half of the team signed it. Nothing else happened until Euverard found out, became upset, and retaliated against the instigators who dared to question his abilities as a coach."); *see also* Edmund Donnelly, *What Happens When Student-Athletes Are the Ones Who Blow the Whistle?: How Lowery v. Euverard Exposes A Deficiency in the First Amendment Rights of Student-Athletes*, 43 N. ENGL. L. REV. 943, 956 (2009) (*Lowery*'s finding of disruption under *Tinker* "ignores the reality that the meeting occurred because a player told the assistant coach about the

majority had dismissed without explanation the argument that the petition involved "a whistleblower situation, where players were disciplined for reporting improprieties"[577] about the school's football program. This is difficult to understand, let alone accept, in view of the charge "that the coach had engaged in abusive and intimidating behavior toward the players."[578] Although discounted by the *Lowery* court as the "equivalent of intra-office politicking,"[579] the plaintiffs' protest represented classic whistleblowing[580] where, even assuming it was applicable, the public concern element of the government employee speech standard would readily be satisfied.[581]

The students' petition in *Lowery*, a questionable decision that inadequately accounted for the serious transgressions asserted by the players against their coach[582] and reflects outmoded assumptions about team sports, is the type of speech that needs to be aired without inhibition or restraint.[583] It addresses "complex questions, centered on the appropriate conduct of adults as they supervise"[584] student athletes—questions that

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petition, not because the coaches were able to discern any difference in the team's attitude during the three days that the petition circulated amongst the players") (footnote omitted).

577. *Lowery*, 497 F.3d at 600.

578. *Id.* at 604; *see also* Donnelly, *supra* note 576, at 962 ("an examination of Coach Euverard's actions would seem to indicate they ran counter to accepted societal behaviors") (footnote omitted).

579. *Lowery*, 497 F.3d at 599.

580. *See* Donnelly, *supra* note 576, at 966 ("In effect, the speech at issue in *Lowery* could have been considered a form of whistleblower conduct.") (footnote omitted).

581. *See Pinard*, 467 F.3d at 767 n.18 ("The plaintiffs' criticisms of [the coach] were related to various issues of 'concern to the community,' including the school's performance of its duties to supervise its teachers, monitor extracurricular activities and provide a safe and appropriate learning environment for its students. These are matters of public concern.") (citations omitted); *see also* Seamons v. Snow, 84 F.3d 1226, 1237–38 (10th Cir. 1996) (holding First Amendment protected student-athlete's report of physical assault to school authorities because the speech "was responsibly tailored to the audience of school administrators, coaches, family and participants who needed to know about the incident"); *see also Bell*, 799 F.3d at 409 (Dennis, J., dissenting) (student's YouTube rap song video is "a darkly sardonic but impassioned protest of two teachers' alleged sexual misconduct" that should be protected under First Amendment as speech "address[ing] a matter of public concern").

582. *See* Donnelly, *supra* note 576, at 965 ("Throughout *Lowery*, the court tended to ignore the serious allegations at the heart of the plaintiffs' petition.") (footnote omitted).

583. *See Waldman II*, *supra* note 4, at 613 (the dissenting team members "believed that an authority figure was engaging in unfair or inappropriate behavior and protested it through non-violent, standard methods like circulating a petition"); *see also* Donnelly, *supra* note 576, at 964 (recommending modification of *Tinker* so that a reviewing court "would have to determine whether the student speech in question could be considered a form of whistleblower conduct or an attempt at whistleblower conduct, in that it seeks to report illegal or inappropriate activities that the public has a substantial interest in correcting") (footnote omitted).

584. Donnelly, *supra* note 576, at 965 (footnote omitted).

warrant public examination and dialogue.[585] In a public high school athletic context, preventing those criticisms from being raised by fear of punishment (i.e., dismissal from the team) can only lend itself to an artificial and fragile team unity enforced by silence. While it cannot be gainsaid that "respect for the coach is an important ingredient of team chemistry,"[586] such respect must be legitimate and authentic rather than the resentful byproduct of fear and intimidation. There should be no confusing the reluctant obedience and mistrust that ensues from the abusive exercise of authority with genuine mutual respect and loyalty between players and coach. The former state of affairs devalues and degrades team solidarity and leadership; the latter promotes and preserves those essential qualities.

Ideally, participation in public high school sports serves broader societal objectives than victory on the playing field,[587] which coexist uneasily with the *Lowery* majority's conclusion that the team members' challenge to the disturbing practices of their coach was inherently disruptive and therefore punishable under *Tinker*.[588] The decision's hierarchical insistence that the free speech rights of a high school athlete are necessarily truncated like those of a military service member[589] is arguably

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585. *See* Lee, *supra* note 162, at 1714 ("even when individuals express their views or report misconduct only to other institutional participants or officials, . . . they are raising awareness, informing others, and encouraging discussion, thus ultimately contributing to the ends of truth, self-government, and checking government power"); *see also* McDonald, *supra* note 4, at 753 (arguing that the potential of student speech for "informing the public about legitimate problems at the school that may require addressing should be weighed against the costs of the speech in terms of its disruptive effects on the school's educational processes").

586. *Lowery*, 497 F.3d at 595.

587. *See Waldman II*, *supra* note 4, at 613 ("Public school sports teams, however, have a purpose that goes beyond winning games, important and meaningful as that goal typically is. They are part of the broad educational programming that is offered to students. As such, silencing student dissent in favor of an exclusive focus on team success and unity is inappropriate.").

588. *See Lowery*, 497 F.3d at 598 n.5 ("We cite to *Connick* for the proposition that it is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior."). *See, e.g.*, Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 902 (W.D. Mich. 2005) ("Insubordinate speech always interrupts the educational process because it is contrary to principles of civility and respect that are fundamental to a public school education.") (applying *Fraser* to uphold ten-day suspension where student called Assistant Principal a vulgar name while in school and in the presence of other students). As the *Lowery* decision illustrates, the view that student speech that challenges school officials' authority necessarily interferes with the educational process under all circumstances and is therefore punishable as insubordination would permit the ready circumvention of *Tinker*'s requirements. In emphasizing this point, a federal appellate judge stated that "there is no authoritative doctrinal support" for the existence of "a subclass of words" that are inherently disruptive and may be banned under *Tinker* without a showing of actual material disruption. *Chandler*, 978 F.2d at 533 (Goodwin, J., concurring) ("I believe it is unwise to invite would-be censors to imagine that there may exist a category of 'inherently disruptive' words. The invention of such a category would invite future courts and litigants to circumvent the *Tinker* analysis.").

589. *See Lowery*, 497 F. Supp. at 587. The *Lowery* majority expressly compared the First Amendment rights of athletes to those of "an enlisted soldier," and also stated that the authority structure of the public school system is similar to the military's. *Id.* at 588 ("the authority

emblematic of a win-at-all-costs mentality[590] that would place even valid whistleblowing off limits in a public high school athletic context.[591] The point where acceptable criticism of high school coaches becomes unacceptable insubordination may be difficult to locate in some circumstances,[592] but that was certainly not the case in view of the serious misconduct allegations implicated in *Lowery*. Muzzling criticism of improper coaching conduct—including the demeaning treatment of players and inappropriate physical contact—in the name of preserving team unity is not only bad constitutional law but bad policy that is likely to defeat the very objectives it purports to serve. If anything might "sow disunity on the football team,"[593] it is the prospect of coerced allegiance to a tyrannical coach. On all high school athletic teams, there can be no doubt that the coaching staff has ultimate authority over team matters.[594] The exercise of that authority, however, must be accepted by the players in order to instill real team confidence, commitment, and cohesion. Under any reasoned application of *Tinker*, the peremptory preservation of authority should not insulate abusive coaching (or teaching) conduct from

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structure is not bottom-up, but top-down"). However, this comparison is inapt, as the *Tinker* Court perceived the "nature of educational authority . . . as quite different from that of military authority." Post, *supra* note 113, at 1774 (footnote omitted). While the speech of military service members is not without First Amendment protections, "'the different character of the military community and of the military mission requires a different application of those protections.' The rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty . . . .'" Brown v. Glines, 444 U.S. 348, 354 (1980) (holding prohibition of written materials on air force bases without advance official approval does not violate First Amendment); *see generally* Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

590. *See* Donnelly, *supra* note 576, at 967 ("[I]t is unlikely that the *Tinker* court envisioned a country where communities construct stadiums worth millions of dollars while struggling to hire teachers, and coaches have potentially abused millions of youth athletes.") (footnotes omitted).

591. *See Waldman II*, *supra* note 4, at 605 (noting that if "any challenges to school officials' authority can also be restricted as a disruption to the educational process" the result is constitutionally problematic because "some such speech also communicates substantive dissent").

592. The invocation of an indeterminate term such as "insubordination" as the basis for suppressing student speech requires exacting judicial review. In *Thomas*, the Second Circuit noted the importance of "mak[ing] an independent and careful examination of the record" to protect the exercise of First Amendment rights from being punished by school officials under the broad label of insubordination. *Thomas*, 607 F.2d at 1050 n.12.

593. *Lowery*, 497 F.3d at 600.

594. This authority of course includes team personnel decisions, game strategies, and play-calling, where "[e]xecution of the coach's will is paramount." Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995); *see also Lowery*, 497 F.3d at 594 ("The coach determines the strategies and plays, and 'sets the tone' for the team."). Nothing in the above analysis should be read as suggesting anything to the contrary.

scrutiny or exposure.[595] Ultimately, that can only undercut the coach's (or teacher's) ability effectively to lead the team (or class), the very factor underpinning the *Lowery* court's decision.

Just as Avery Doninger had the constitutional right to criticize her school administration's handling of Jamfest,[596] the team members' petition blowing the whistle on their coach's misconduct in *Lowery*, the team members' petition blowing the whistle on their coach's misconduct in *Lowery* was speech protected under the First Amendment. The decisions in both cases regrettably failed to support the students' free speech rights in contexts where their exercise performed a valuable social function, to the detriment of informed school communities and the larger society in which they are situated.[597] Measured against the "yardstick of our constitutional commitment to robust expression pursuant to the First Amendment,"[598] they come up wanting.

5. Doninger II*'s Devaluation & Deterrence of Digital Student Speech Rights.*

The distinctly result-oriented opinion in *Doninger II* displays troublesome analytical flaws and departs in several critical respects from established First Amendment principles.[599] First, in authorizing the exercise

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595. *Tinker* determined that achievement of the school's educational objectives did not "justify the maintenance of a pervasive and unquestioned form of authority." Post, *supra* note 113, at 1773. Further, the impact of the students' armbands on the effective operation of the school was to be assessed by searching judicial review. *See Tinker*, 393 U.S. at 514. This contrasts with and distinguishes military speech cases, where the Supreme Court's deference to the judgment of military authorities as to whether particular speech will interfere with the military's objectives effectively insulates the exercise of institutional authority in that context from independent judicial oversight. *See id.* at 1771–75; *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). The military speech cases emphasize the importance of unquestioned obedience by armed service members as integral to preservation of the authority required for the military to discharge its mission. *See Brown*, 444 U.S. at 354, 357 (capability of discharging "military mission" requires authority based on "instinctive obedience" because "the right to command and the duty to obey ordinarily must go unquestioned").

596. "A high school junior class secretary has a right to engage in online speech to communicate with citizens and call school administrators 'douchebags,' if she chooses." Tomain, *supra* note 5, at 129; *see also Bell*, 799 F.3d at 425 (Dennis, J., dissenting) (public students' first Amendment rights "indisputably include a right to express disrespect or disdain for their teachers when they are off campus"); *see also* Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007) ("A student's right to criticize his or her teachers is a right secured by the Constitution.").

597. *See Waldman II*, *supra* note 4, at 654 ("[T]here is always the potential that such criticism will actually yield educational improvements, perhaps by highlighting questionable behavior on the part of a school official.").

598. *Thomas*, 607 F.2d at 1047.

599. *See* Fronk, *supra* note 5, at 1418 (*Doninger II* "presents a dangerous application of the case law"); *see also* Calvert, *supra* note 20, at 220–21 (2009) (noting "serious flaws and

of the school's regulatory authority merely because "it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it,"[600] *Doninger II* "sets a dangerous precedent for the expansion of school jurisdiction over online student speech."[601] This expansionary dynamic makes far too much student speech in the modern public square subject to school control. Second, as a consequence of adopting a basic negligence standard to determine whether off-campus digital speech is punishable by public school districts, the decision effectively embeds content-based review as part of the threshold jurisdictional analysis—the more provocative the speech, the greater the likelihood that it will capture the attention of school officials.[602] In stepping away from content neutrality, school officials can shield a school's image by punishing student digital expression that is critical or offensive by the simple expedient of forecasting disruptive in-school consequences.[603] This represents a major shift in the controlling legal framework,[604] in which a school's evaluation of the content of student speech was previously limited to the narrow exceptions recognized in *Fraser*, *Hazelwood* and *Morse*.[605] Third, by conditioning the constitutional protection of public student speech on the nature of the punishment imposed by the school district,[606] *Doninger II* only adds to the uncertainty

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weaknesses with the approach adopted by the Second Circuit in both *Doninger* and *Wisniewski*"). In an *en banc* opinion joined by the full complement of its judges, the Third Circuit expressed misgivings about the *Doninger II* holding, stating that "*Fraser* does not allow the School District to punish [students] for expressive conduct which occurred outside of the school context." *Layshock*, 650 F.3d at 218–19 (McKee, C.J.) ("[I]n citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there.").

600. *Doninger II*, 527 F.3d at 50 (quoting *Doninger I*, 514 F. Supp. 2d at 217).

601. Tomain, *supra* note 5, at 140; Papandrea, *supra* note 5, at 1090 (reliance on reasonable foreseeability as a jurisdictional standard "gives schools far too much authority to restrict the speech of juveniles generally").

602. *See, e.g.*, *J.C.*, 711 F. Supp. 2d at 1108 ("the *content* of the video increases the foreseeability that the video would reach the School") (emphasis added); Calvert, *supra* note 20, at 228 ("It is important to note . . . that the content of the speech itself is a factor in determining whether it is reasonably foreseeable that the speech will come to the attention of school officials. The implicit relationship lurking in this formula appears to be that the more threatening or shocking the content, the more foreseeable it is that the speech will come to the attention of administrators.").

603. *See* Section V.B.2. & V.E., *infra*.

604. Reliance on a foreseeability standard to justify the punishment of student speech outside of school is "contrary to *Tinker* itself." *Snyder*, 593 F.3d at 314 (Chagares, J., dissenting in part).

605. Denning & Taylor, *supra* note 231, at 859 ("*Fraser, Kuhlmeier* and now *Morse* constitute 'exceptions' to, not applications of, *Tinker*").

606. *Doninger IV*, 642 F.3d at 350 ("Doninger's discipline extended only to her role as a student government representative: she was not suspended from classes or punished in any other way").

prevailing in this area of the law, thereby "threaten[ing] to deter an even wider swath of student speech than that which should actually be restricted."[607]

While the outcome in *Wisniewski* can perhaps be explained, if not justified, by the graphic nature of the IM icon at issue in that case, *Doninger II* has no such public safety rationale available as a limitation on its holding.[608] It is difficult to read the decision charitably[609]: by ignoring *Thomas*'s clear instruction that students outside of the school's domain and supervision are beyond the reach of *Tinker* and presumptively entitled to full First Amendment protection,[610] it upheld Avery Doninger's prohibition from pursuing elected class office for little more than using contemporary slang terms to criticize a decision made by public school officials while enlisting her classmates and citizens in the community at large to join her protest.[611] It is no exaggeration to say that, in doing so, the Second Circuit essentially held that a public school student has "no clearly established constitutional right to engage in the expressive activity of posting a blog"[612] outside of school. By exercising her First Amendment rights—on her own time, on her own computer, away from the

607. *Waldman I*, *supra* note 122, at 1124; *see also id.* at 1129 ("*Doninger* considerably expanded schools' regulatory power over all student speech—both on-campus and off-campus—by indicating that *Tinker*'s substantial disruption test should be considered relative to the particular punishment at issue").

608. LoMonte, *supra* note 28, at 10 ("[W]hen the speech presents opinions that are merely insulting or belittling of school personnel, with no undercurrent of violence, the school cannot invoke 'public safety' to validate a disciplinary decision.").

609. *Id*. ("The most egregious reach by a court seeking to rationalize school discipline of purely off-campus speech came in the case of a Connecticut high school junior who used a personal blog to seek public support for her side in a dispute with school administrators."); Tomain, *supra* note 5, at 141 ("*Doninger v. Niehoff* is a clear example of a court misapplying *Fraser*. *Doninger* is an easy case because it involves political speech.") (footnote omitted).

610. *Thomas*, 607 F.2d at 1050 ("[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."); *see also id.* at 1051 ("the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after [s]he leaves school each afternoon"); *Snyder*, 650 F.3d at 940 (Smith, J., concurring) ("Having determined that [student]'s speech took place off campus, I would apply ordinary First Amendment principles to determine whether it was protected."); *see also Sagehorn*, 122 F. Supp. 3d at 852 ("students have a clearly-established first amendment right to free speech both inside and outside a school setting").

611. LoMonte, *supra* note 49, at 66–67 ("What the student blogger in *Doninger* stood accused of doing—using harsh language to motivate the public to bombard administrators with phone calls and emails to attempt to reverse a school policy decision—would, in any other context, be regarded as 'civic participation.'") (footnote omitted).

612. *Recent Cases:* Doninger, *supra* note 458, at 811 (footnote omitted).

school's premises and beyond its supervision[613]—to "express her opinions about the school administration and their decisions,"[614] a class officer was disqualified from formal participation in her public high school's student government. The constitutional irony is as unavoidable as it is unfortunate. In refusing to enjoin her punishment, and contrary to the teaching of *Tinker*, *Doninger II* "discount[ed] important principles of our government as mere platitudes,"[615] with disquieting implications for public student speech.[616]

There is no getting around that *Doninger II* turned on the court's distaste for the blog posting's "vulgar language,"[617] which it found inimical to "the *values* that student government, as an extracurricular activity, is designed to promote."[618] In determining that the speech was unprotected because inconsonant with the "civility and good citizenship"[619] promoted by participation in student government, *Doninger II* affirmed an expressly values-based sanction by linking satisfaction of *Tinker*'s substantial disruption standard to the school district's (and the court's) view of the propriety of the digital speech at issue.[620] The decision therefore conflated *Fraser*'s promotion of the "shared values of a civilized

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613. *Cf. Shanley*, 462 F.2d at 964 ("The newspaper was authored entirely by the students, during out-of-school hours, and without using any materials or facilities owned or operated by the school system.").

614. *Doninger I*, 514 F. Supp. 2d at 216.

615. *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637).

616. "[I]f the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?" Poling v. Murphy, 872 F.2d 757, 766 (6th Cir. 1989) (Merritt, J., dissenting).

617. *Doninger II*, 527 F.3d at 46. The Third Circuit has clearly stated that *Fraser* does not extend to student digital speech like Avery Doninger's that is generated outside of the school environment. *Snyder*, 650 F.3d at 932 n.12 (Chagares, J.) ("The most logical reading of Chief Justice Roberts's statement [in *Morse*] prevents the application of *Fraser* to speech that takes place off-campus, during non-school hours, and that is in no way sponsored by the school.").

618. *Doninger II*, 527 F. 3d at 52 (emphasis supplied).

619. *Id.* at 46.

620. Whether a particular example of student digital speech is deemed "offensive" or "inappropriate" defaults to a baseline consisting of established social norms. Pike, *supra* note 4, at 987 ("In all likelihood, this perplexing inquiry boils down to societal norms regarding the nature of healthy, normal child development—which is an especially politic way of saying that 'appropriateness' is a deeply personal value judgment.") (footnote omitted). The very purpose of the First Amendment, however, is to insulate speech—including public student speech—from suppression based on majoritarian political preferences or social values. R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content."); *Hurley*, 515 U.S. at 574 ("the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful"); *Beussink*, 30 F. Supp. 2d at 1182 ("[I]t is provocative and challenging speech, . . . which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure.").

social order"[621] with *Tinker*'s protection of the "unique requirements of the educational process."[622] According to this "blended rationale,"[623] the school's educational mission—"a concept attractive on its face but necessarily elusive if not impossible to apply evenhandedly"[624]—becomes an acceptable means of regulating off-campus digital speech deemed resistant, uncivil, or offensive by school authorities. In other words, by absorbing *Fraser*'s rationale into the constitutional analysis, online student expression critical of school officials or school policies all too easily morphs into speech considered inherently disruptive[625] because it conflicts with a set of values designated by those same officials.[626] The danger to the First Amendment of this reformulation—which Justice Alito bluntly warned against in *Morse*[627]—is obvious. It risks suppressing meaningful speech concerning school affairs.[628] It grants school districts virtually unlimited discretion to convert constitutionally protected badinage into constitutionally proscribable badmouthing. And it explains what really happened in *Doninger II*: LMHS officials, upset that a student went over their heads in a public blog posting accessible to students and parents alike to challenge their decision-making relative to a school event, retaliated by seizing on the vulgar language employed to shut down criticism that they did not want exposed to the general community.[629] The

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621. *Fraser*, 478 U.S. at 683.

622. *Thomas*, 607 F.2d at 1049.

623. *Waldman II*, *supra* note 4, at 611.

624. *Thomas*, 607 F.2d at 1053 n.18.

625. *Waldman II*, *supra* note 4, at 611 (2011) ("Such reasoning endorses the migration of *Fraser*'s inculcative emphasis—that public education should inculcate the 'fundamental values of habits and manners of civility'—into *Tinker*'s original focus on protection. Indeed, this blended rationale holds that the educational mission of the schools involves teaching students to behave civilly, which includes treating school officials respectfully; therefore, hostile student speech about school officials is inherently disruptive.") (footnote omitted).

626. As noted in *Doninger II*, a public school's educational mission necessarily includes teaching "proper respect for authority." *Doninger II*, 527 F.3d at 54. Without limits, however, this concept conflicts with the democratic premises of a secondary education. Amy Gutmann, *What is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 5228 (1997) ("Teaching too much deference to authority is no less troubling on constitutional democratic grounds than teaching too little.").

627. *Morse*, 551 U.S. at 423 (Alito, J., concurring); *see* Papandrea, *supra* note 5, at 1089 ("Allowing schools to invoke their education mission as a basis for restricting their students' speech wherever it occurs would permit public schools to exercise unbridled censorship authority over youth expression.").

628. *Waldman II*, *supra* note 4, at 611 ("The risk of the blended rationale is that it can justify overly restrictive limitations that suppress legitimate student dissent."); LoMonte, *supra* note 49, at 78, 79 ("The inhibiting effect of ill-defined school punitive authority deprives the public of useful information about the effectiveness of schools from students' unique insider perspective.").

629. *Doninger I*, 514 F. Supp. 2d at 207 (LMHS's principal and superintendent "made clear to the students that appealing directly to the public was not an appropriate means of resolving complaints the students had regarding school administrators' decisions"); LoMonte, *supra*

unlikelihood of such unmediated communication recurring in the wake of *Doninger II* renders the First Amendment, and the LMHS community, much the poorer.

In the final analysis, *Doninger II* reflects an unduly parsimonious conception of public students' First Amendment digital expression rights outside of the school environment, and correspondingly of their ability to participate in the democratic process by communicating critical or opposing views about school policies and programs.[630] Whatever else may be said about it, the decision falls far short of "permit[ting] the maximum degree of unrestrained expression consistent with the maintenance of institutional integrity."[631] Although public schools are entrusted with the important task of instilling the "shared values of a civilized social order,"[632] that is not the full measure of their educational responsibility. Equally as important, they must also prepare students "to think critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens."[633] This may call for, and occasionally demands, vigorous participation in political affairs through sharp disagreement and intemperate debate.[634] Viewed through this lens, Avery

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note 49, at 80 ("[N]o matter how much judges silently identify with school administrators in factually sympathetic cases, they must be mindful that government officials are prone to use punitive authority over speech illegitimately for image-control purposes.") (footnote omitted). *Thomas* sounded a prescient warning about this exact censorship dynamic: "Indeed, if an off-campus publication includes criticism of the school itself, we assume the foreseeability of distribution within the school increases. Thus, in this not infrequent situation, this standard invites school officials 'to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views.'" *Thomas*, 607 F.2d at 1052 n.18.

630. Tomain, *supra* note 5, at 165–66 ("When a junior class secretary uses an online forum to communicate with taxpayers about the possible cancellation of a public school music festival, her use of the term 'douchebag' does not justify violating her First Amendment rights."); *see Bell*, 799 F.3d at 412 (Dennis, J., dissenting) ("the majority opinion creates a precedent that effectively inoculates school officials against off-campus criticism by students").

631. *Thomas*, 607 F.2d at 1049.

632. *Fraser*, 478 U.S. at 683.

633. Amy Gutmann, DEMOCRATIC EDUCATION 51 (Princeton Univ. Press, 1999); *see* Tomain, *supra* note 5, at 169 ("If we desire a society in which children grow up equipped to make life-affecting decisions and develop as individuals, they must be allowed to exercise their First Amendment rights outside the schoolhouse gate and in cyberspace."). *Accord, Lowery*, 497 F.3d at 589 ("One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints.").

634.

> But of course civility is only a collateral feature of political debate; the fundamental feature of political debate in a free society is disagreement—disagreement among citizens and disagreement between citizens and the government. To respond to such disagreement with suppression is a far more fundamental violation of democratic self-governance than to respond with an uncivil reply. It is an essential part of a public school's mission to prepare students for a citizen's responsibility to participate in

Doninger's blog post calling out a decision by school administrators should not be considered necessarily disruptive to the educational process because of her impudent (and imprudent) choice of language—rather, it "can be a part of that process,"[635] providing a teachable moment[636] for school officials to educate students about "challenging authority in ways that our society accepts and even sometimes expects of our citizens."[637]

It stands to reason that an opportunity to evaluate how school authorities react to student speech critical of their own official conduct can itself provide useful instruction in democratic values and the importance of rational public discourse.[638] As has been cogently observed, students

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political debates, or at least to listen to and evaluate them, and to do so vigorously as well as civilly.

Laycock, *supra* note 160, at 120.

635. *Waldman II*, *supra* note 4, at 613. In the post-secondary educational setting, the entrenched free speech conception focuses on the "need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable." Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 322 (1991) (internal quotation marks omitted). While perhaps more appropriate for a university setting, assimilating a more capacious model of student discourse would allow the public secondary education system to demonstrate "the capacity for rational deliberation to make hard choices in situations where habits and authorities do not supply clear or consistent guidance." Gutmann, *supra* note 633. According to this ideal, the inculcation of civic character (*Fraser*'s rationale) and the valuation of democratic reasoning and tolerance for the divergent viewpoints of others (*Tinker*'s rationale) are complementary rather than rivalrous components of the educational process.

636. Calvert, *supra* note 131, at 286 ("A teachable moment arises when administrators have the chance to confront students about their speech activities. They must take advantage of that opportunity."); *Recent Cases:* Doninger, *supra* note 458, at 817 ("However, teaching values cannot be accomplished in the abstract: students need concrete examples from which to learn. The example set by Niehoff is that controversy is to be avoided at all costs; however, political debate and controversy often go hand in hand.") (footnotes omitted); Papandrea, *supra* note 5, at 1098 ("[T]he primary approach that schools should take to most digital speech is not to punish their students, but to educate their students about how to use digital media responsibly."). In granting preliminary injunctive relief to a student who was suspended for ten days after posting a homepage on the Internet that used "crude and vulgar language" in criticizing his high school, a federal district court observed that the public interest would be served not only by allowing the message at issue "to be free from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work." *Beussink*, 30 F. Supp. 2d at 1177, 1182.

637. *Waldman II*, *supra* note 4, at 613. *See* Betsy Levin, *Educating Youth For Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654 (1986) ("if educational institutions are not subject to the same constitutional constraints as other governmental agencies, students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary").

638. *Waldman II*, *supra* note 4, at 654 ("[L]istening to other students' dissenting speech—and observing the way that school officials respond to it—can also be an educationally valuable experience that helps prepare students for citizenship."); *see Barber*, 286 F. Supp. 2d at 858 ("[A]s the *Tinker* Court and other courts have emphasized, students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others."); Wiel Veugelers, *Different Ways of Teaching*

"learn by fumbling their way to finding the boundaries between socially permissible, and even encouraged, forms of expression that employ exaggeration for rhetorical effect, and impermissible and offensive remarks that merely threaten and alienate those around them."[639] In relinquishing the opportunity to assist students in locating these boundaries,[640] *Doninger II* has forsaken the lesson of *Thomas* that regulating student expression by invoking the vague and indeterminate norms of "civility and good citizenship"[641] will deter a significant amount of student speech relating to school affairs.[642]

> We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice.[643]

Outside of school supervision, students like Avery Doninger "may not be confined to the expression of those sentiments that are officially approved,"[644] in language that is officially sanitized to make it palatable to public school administrators. The *Tinker* Court emphasized that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[645] Those views should not go unmentioned because expressed with words deemed unmentionable by school officials.[646] By capitulating

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Values, 52 EDUC. REV. 37, 40 (2000) ("Teachers stimulate . . . values via subject matter, chosen examples and reactions to their students. A teacher tries to influence this process of signification of meaning by providing a context and, in particular, by his/her interaction with the students").

639. *Cuff*, 677 F.3d at 124 (Pooler, J., dissenting).

640. *Cf. B.H.*, 725 F.3d at 324 ("[S]chools cannot avoid teaching our citizens-in-training how to appropriately navigate the 'marketplace of ideas.'").

641. *Doninger II*, 527 F.3d at 46.

642. Tomain, *supra* note 5, at 145 (educational mission of public schools is "a broad, vague standard [that] is likely to chill free speech"); *Waldman I*, *supra* note 122, at 1129–30 ("If schools' authority extends over all instances of student speech regarding school activities, and if schools can exclude from those activities students who express opposition to the way they are being run, students are unlikely to feel comfortable expressing such views in any forum.").

643. *Thomas*, 607 F.2d at 1051.

644. *Tinker*, 393 U.S. at 511.

645. *Id.*

646. In addition to the political speech punished in *Doninger II*, the First Amendment rights of public school students encompass a broad variety of expression in digital as well as other formats, including speech that is silly and nonsensical along with vulgar and sophomoric attempts at humor. *See, e.g.*, *Cuff*, 677 F.3d at 124 (Pooler, J., dissenting) ("But the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be."); *T.V.*, 807 F. Supp. 2d at 775 ("In fact, the humor (such as it is) derives from the fact that the [internet photographs], featuring toy props and 'joke' lollipops, [are] juvenile and silly and provocative. No

to the manifestly values-based judgment of school administrators in approving the punishment of an out-of-school blog posting that used vulgar language,[647] *Doninger II* stifled legitimate student criticism about the operation of the community's public school system.[648] Devoid of appropriate skepticism that the school district's claims could withstand constitutional scrutiny,[649] the decision disserved "our deeply held preference for free discourse over enforced silence,"[650] frustrated the processes of

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message of lofty social or political importance was conveyed, but none is required."); Tomain, *supra* note 5, at 106 ("Protecting online student speech is important—regardless of whether it involves political speech or merely offensive, juvenile humor—because it helps avoid the chilling effect on free speech and protects the value of self-realization.") (footnotes omitted). For an expansive conception of free speech rights tied to the ability of modern digital technologies to restructure the social conditions in which people communicate, and extending beyond "government and democratic deliberation about public issues" to an opportunity to participate in the creation of cultural meanings that are self-defining, *see* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 34 (2004) ("If free speech is about democracy, it is about democracy in the widest possible sense, not merely at the level of governance, or at the level of deliberation, but at the level of culture. The Internet teaches us that the free speech principle is about, and always has been about, the promotion and development of a democratic culture."); *see also id.* at 6 ("Freedom of speech is valuable because it protects important aspects of our ability to participate in the system of culture creation. Participation in culture is important because we are made of culture; the right to participate in culture is valuable because it lets us have a say in the forces that shape the world we live in and make us who we are."); *see also* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPPERDINE L. REV. 427, 438 (2009) (democratic culture "is a culture in which ordinary people can participate, both collectively and individually, in the creation and elaboration of cultural meanings that constitute them as individuals") (footnote omitted).

647. *Doninger I*, 514 F. Supp. 2d at 215 ("There can be no question that teaching students the values of civility and respect for the dignity of others is a legitimate school objective."); *see id.* at 217 (school officials were permitted to punish Avery Doninger for her offensive blog posting "to encourage the values of civility and cooperation within the school community"). The *Doninger II* court's undue deference to the judgments of LMHS officials evinces misplaced faith in their capacity for making decisions that protect the proper institutional functioning of the school rather than simply avoiding the controversy and unpleasantness associated with provocative or resistant student speech. *Thomas*, 607 F.2d at 1050–52; *see also* Lee, *supra* note 162, at 1717 ("When courts defer to school administrators, particularly those without coherent speech policies or open policymaking processes that allow for democratic participation or review, courts are not necessarily furthering democratic objectives. Rather, they are simply giving administrators a free hand to pursue their objectives in a speech-restrictive way.").

648. *Recent Cases:* Doninger, *supra* note 458, at 817 ("the court in effect suggested that student speech is not protected when it causes or perpetuates a controversy at school or when it disrupts student government"); *see* Tuneski, *supra* note 58, at 143 (student speech on the internet may "involve valuable critiques of school policies and issues impacting the lives of adolescents").

649. *Thomas*, 607 F.2d at 1047 ("Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decision making if all ideas, discoveries, and points of view are before the citizenry for its consideration. Accordingly, we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections.") (citations omitted).

650. *Thomas*, 607 F.2d at 1047.

democratic engagement,[651] and imposed an intolerable chilling effect on student speech.[652] After *Doninger II*, public high school students in New York, Vermont, and Connecticut will surely be reluctant to go online or use social media to criticize or protest official decisions impacting events in their schools.[653]

E. Cuff *ex rel*. B.C. v. Valley Central School District*: Unwarranted Judicial Deference to a Public School's "Zero Tolerance" Policy for Student Speech Deemed to Threaten Violence*

Judicial deference to school officials' punishment of student speech was not confined to the *Wisniewski* and *Doninger II* decisions. In *Cuff ex rel. B.C. v. Valley Central School District*,[654] the Second Circuit upheld the six-day suspension of a ten-year-old elementary school student identified as "B.C.,"[655] who, in a classroom exercise assigned by his fifth-grade teacher, submitted a crayon drawing of an astronaut that expressed his "wish [to] "[b]low up the school with the teachers in it."[656] Finding the student's explanation to school officials that he "did not mean what

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651. Avery Doninger's blog posting was "an effort to participate as a citizen in our unique constitutional democracy by raising awareness" of a matter of legitimate interest to LMHS students and parents alike. *Bell*, 799 F.3d at 432 (Jacobs, J., dissenting). As a consequence of her participation, the school's administration voided a democratic school election in which Avery was re-elected as Senior Class Secretary through a write-in campaign undertaken by her classmates. *Doninger IV*, 642 F.3d at 343.

652. *See* Tuneski, *supra* note 58, at 158 ("Moreover, students fearing on-campus punishment for their potentially inflammatory internet postings are likely to temper their expression, inhibiting their ability to freely communicate on websites, message boards, and even e-mail. In essence, the current state of the law threatens to chill student speech that would otherwise be protected outside the context of schools."); *Waldman I*, *supra* note 122, at 1146 ("To ensure that students have adequate room to express their opinions about important school issues and are not deterred by potential repercussions to important aspects of their lives at school, courts must hold constant the basic student speech standards, rather than ratcheting them down relative to the punishment at issue."). Notably, according to the evidence before the district court on the initial preliminary injunction application, Avery Doninger's First Amendment rights were in fact chilled by her punishment. *Doninger I*, 514 F. Supp. 2d at 211 ("she asserts that she has limited her email and blog communications in an attempt to prevent another episode such as this from occurring").

653. Fronk, *supra* note 5, at 1443 ("The administration's voiding of a democratic school election, which Doninger won through a write-in campaign, teaches students never to voice their opinion, never to attempt to mobilize their peers around what they may see as an erroneous or unjust administrative decision, and never to disagree with authority figures in any manner."); *see Bell*, 799 F.3d at 404 (Dennis, J., dissenting) ("The majority opinion thereby denigrates and undermines . . . [the] First Amendment . . . rights of untold numbers of other public school students in our jurisdiction to scrutinize the world around them and likewise express their off-campus online criticism on matters of public concern.").

654. 677 F.3d 109 (2d Cir. 2012).

655. *Id.* at 110

656. *Id.* at 111.

he had written"[657] and that "he was only kidding"[658] "irrelevant"[659] to *Tinker*'s application, two members of the panel affirmed a grant of summary judgment that dismissed the parents' challenge to their son's suspension on First Amendment grounds.[660] Granting "wide leeway"[661] to the judgment of school administrators confronted with the prospect of potentially violent speech,[662] as had the *Wisniewski* court, the *Cuff* majority concluded that "it was reasonably foreseeable that the astronaut drawing could create a substantial disruption at the school."[663] In what can only be described as a cursory application of the *Tinker* standard,[664] the majority posited an implausible "chain of events"[665] in which the drawing

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657. *Id.* at 112.

658. *Id*.

659. *Cuff*, 677 F.3d at 114. ("Whether B.C. intended his 'wish' as a joke or never intended to carry out the threat is irrelevant. Nor does it matter that B.C. lacked the capacity to carry out the threat expressed in the drawing."). The irrelevance of a student speaker's intent to *Tinker*'s application should be distinguished from the antecedent issue of a school's exercise of jurisdictional authority over off-campus digital expression, where intentionality is not only relevant but should be dispositive. *See* Sections V.B.3. and VI.A.1., *infra*.

660. *Id.* at 110. Judge Winter, who wrote the opinion, and Judge Hall formed the majority in *Cuff*. Judge Pooler dissented.

661. *Id.* at 114. The extremely deferential application in *Cuff* comports with criticism of *Tinker* as a malleable standard that insufficiently protects public school students' First Amendment rights. *See, e.g.*, Tuneski, *supra* note 58, at 171 ("the substantial disruption test has become in practice an easily satisfied threshold for courts and school officials seeking to justify punishing students for their expression"); Papandrea, *supra* note 5, at 1092–94 (*Tinker*'s application to off-campus digital speech would afford schools excessive control over student expression); LoMonte, *supra* note 49, at 59–69 (*Tinker* inadequately protects off-campus student expression, in part because of deferential application by reviewing courts).

662. The *Cuff* majority expressly acknowledged the "recent wave of school shootings that have tragically affected our nation" in deferring to school administrators who, according to the court, "are in the best position to assess the potential for harm and act accordingly." *Cuff*, 677 F.3d at 113, 115 n.1. This deference is misplaced to the extent it removes from law enforcement and mental health professionals in the community, who are best trained to make such judgments, the evaluation of whether an individual student is prone to commit acts of in-school violence—an evaluation which the *Tinker* standard was never intended to address and is incapable of addressing. Following appropriate consultation between the school and the student's parents, these professionals can play a constructive role in such behavioral assessments through their experience, expertise, and perspective. *See* Papandrea, *supra* note 5, at 1100 ("School officials should continue to report threatening or otherwise disturbing speech to law enforcement authorities who could in turn take appropriate action.").

663. *Cuff*, 677 F.3d at 113.

664. The only objective evidence of classroom disruption in the record cited by the *Cuff* majority is that a single classmate, C.P., approached the teacher in class and told her about B.C.'s illustration. *Id.* at 111. According to the dissent, however, C.P.'s motivation in reporting B.C. to their teacher was more rivalrous than fearful, because she "resented him for pushing the boundaries of acceptable conduct in class and getting away with it." *Id.* at 119 (Pooler, J., dissenting); *see id.* at 117 ("There is, however, ample evidence in the record to suggest that C.P. was anything but scared."). Thus, C.P. may have reported on B.C. "simply to see him punished"—i.e., because "she was prim, not petrified." *Id.* at 119.

665. *Cuff*, 677 F.3d at 115.

at issue, "an attention-grabbing device"[666] that could be copied by other students in the classroom, "might then have led to a substantial decrease in discipline"[667] coupled with increased "tendencies to violent acts,"[668] culminating in "a decline of parental confidence in school safety with many negative effects . . . ."[669] This entirely hypothesized and far-fetched litany of events extrapolated from a single crayon drawing handed in by a fifth-grader to his teacher[670] in a misguided attempt at humor again reflects the extreme deference courts have afforded to "school administrators disciplining students for writings or other conduct threatening violence."[671] A more sensible approach on the school's part, given the young age of the student and the innocuous classroom circumstances in which

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666. *Id.* at 114.

667. *Id.*

668. *Id.* at 115.

669. *Id.*

670. Because the drawing at issue in *Cuff* was a curricular exercise submitted in the course of a classroom assignment supervised by the teacher, *Hazelwood*'s minimum rationality standard for school-directed expression would seem to be the controlling constitutional precedent. *Hazelwood*, 484 U.S. at 271 (student newspaper articles at issue were "part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences") (footnote omitted); *Peck*, 426 F.3d at 628–29 (holding where kindergarten student's poster "was prepared . . . pursuant to a class assignment" under "highly specific parameters" given by the teacher, case "fall[s] within the core of *Hazelwood*'s framework"); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Few activities bear a school's 'imprimatur' and 'involve pedagogical interests' more significantly than speech that occurs within a classroom setting as part of a school's curriculum.") (quoting Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 924 (10th Cir. 2002)). Although *Hazelwood* is cited in passing by the *Cuff* majority, it did not factor into the court's analysis and neither did the school district offer any legitimate pedagogical reasons for punishing B.C.'s expression—a showing that arguably would have been difficult to make given the teacher's instruction to the class to write "anything you want . . . you can involve a missile . . . [y]ou can write about missiles" in completing the drawing of the astronaut. *Cuff*, 677 F.3d at 111. Unlike in *Hazelwood*, where the school based its censorship of the newspaper articles on the need to instruct students in proper journalistic standards, no demonstrable relationship to curricular goals was apparent in *Cuff*. Apparently unable to demonstrate that the drawing "ha[d] no valid educational purpose" (*Hazelwood*, 484 U.S. at 273) given the teacher's open-ended invitation to her students—as the dissent pointed out, B.C. complied with his teacher's express instruction in handing in the assignment: "his drawing was something of a riff on their teacher's own suggestion to write about missiles, which undoubtedly, at least for some fifth-graders, conjure up images of explosions and mayhem" (*Cuff*, 677 F.3d at 119)—the school district's discipline was nevertheless upheld through a tepid application of *Tinker* that more closely resembled the deferential rationality review appropriate under *Hazelwood*. *See* Miller, *supra* note 112, at 632 (*Hazelwood* "is merely a restatement of what has become known as the rational basis test").

671. *Cuff*, 677 F.3d at 114. The *Cuff* majority cited several federal appellate cases in which disciplinary action by public schools against students for speech depicting violence was upheld as constitutional. *See, e.g.*, *Ponce*, 508 F.3d 765; *Doe*, 306 F.3d 616; *LaVine*, 257 F.3d 981; *Boim*, 494 F.3d 978.

the drawing was submitted, might have called for appropriate counseling of the student through consultation with his parents.[672]

In an interesting dissent, Judge Pooler was persuaded "that there are important, if subtle, free speech values at stake in this case."[673] According to Judge Pooler's reading of the record, "B.C.'s drawing merely diverted students briefly from their schoolwork,"[674] and a proper application of the standard for appellate review of the district court's award of summary judgment[675] would allow a jury the opportunity to conclude that the drawing "barely had the potential to cause a stir at school, let alone a substantial disruption."[676] But as a consequence of its reliance on "justified fears of yet another horrific school shooting in an effort to inoculate the school's actions against constitutional scrutiny,"[677] the majority misapplied this standard in resorting to a perfunctory application of *Tinker* to rubber-stamp a denial of a First Amendment challenge to a public school district's "zero tolerance" policy for student speech viewed as threatening

672. Papandrea, *supra* note 5, at 1100 ("When there is a concern that a student might be troubled or likely to act out his violent fantasies, it would be far more productive to counsel the student, contact his parents, and, when appropriate, call in the police for assistance.").

673. *Cuff*, 677 F.3d at 123.

674. *Id.* at 119.

675. *Id.* at 118–19 (Pooler, J., dissenting) ("The question under *Tinker* is whether a reasonable jury, drawing every inference in favor of the plaintiffs, could conclude that the school did not reasonably believe that B.C.'s drawing could itself cause a 'substantial disruption' at school.") (citing *Tinker*, 393 U.S. at 514).

676. *Id.* at 115. In dissenting in *Bell*, Judge Dennis leveled the same criticism against the majority opinion in that case for failing to construe the summary judgment evidence in the light most favorable to the student speaker. 799 F.3d at 429 (Dennis, J., dissenting) ("the majority opinion . . . ignores or glosses over other relevant evidence tending to show that school officials did not consider Bell's song threatening but instead punished him merely because they did not like the content of his speech").

677. *Id.* at 123.

or violent.[678] In language equally applicable to the *Wisniewski* holding,[679] the dissent emphasized that in applying the *Tinker* standard to gauge whether the "speech might somehow forecast or predict the actions of a particular student"[680] rather than to assess whether it had the realistic potential of causing a material disruption in B.C.'s classroom, the majority addressed the wrong question,[681] with the effect of penalizing speech that "merely had the potential to cause mild amusement among his classmates—not alarm."[682]

The dissenting opinion in *Cuff* displays appropriate skepticism[683] befitting the First Amendment concerns implicated in the case by casting doubt as to whether a "young child's stab at humor"[684] in the form of a crude crayon drawing rendered while he was in the classroom and subject to the teacher's direct supervision realistically had the potential to disrupt

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678. A school policy that "did not tolerate *any* language or expression" involving a perceived threat of violence, even when the student speech did not rise to the level of a true threat and "even if the threat had no potential to cause a substantial disruption under *Tinker*," would unconstitutionally impose a *per se* ban on an entire category of speech as determined by school officials. *Cuff*, 677 F.3d at 120 (emphasis in original). *Bell*, 774 F.3d at 297 (Dennis, J.) ("*Tinker* held that school officials cannot circumvent their burden of showing that a substantial disruption occurred, or can be reasonably forecasted, by simply adopting a policy that categorizes certain speech as a severe or substantial disruption without any reasonable factual predicate that such speech would likely lead to substantial disruption of school work or discipline"), *reh'g en banc granted & opinion vacated*, 782 F.3d 712 (5th Cir. 2015), *rev'd*, 799 F.3d 379 (5th Cir. 2015) (*en banc*). Even acknowledging the obvious and serious point that a public school district's interest in preventing violent conduct by students is compelling, this would not justify a categorical prohibition on student speech. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (state's interest in protecting minor victims of sex crimes from further trauma and embarrassment, while compelling, does not justify statute mandating blanket exclusion of press and public during victims' testimony at trial, as "the circumstances of the particular case may affect the significance of the interest" in closure). Rather, the First Amendment mandates an individualized determination through application of *Tinker*'s evidentiary standard to student speech that is properly subject to a school's disciplinary authority. *Snyder*, 650 F.3d at 931 n.8 (Chagares, J.) ("Each case applying *Tinker* is decided on its own facts, . . .").

679. Judge Pooler's dissent distinguished *Wisniewski* by pointing to the three-week period during which the IM icon was circulated in that case as making it more likely to be interpreted "as a truly violent threat against a teacher." *Cuff*, 677 F.3d at 120. This distinction seems to revert to judicial disapprobation of the disturbingly violent image at issue in *Wisniewski*—access to which was restricted to students with an understanding of its context—as the lag time between the icon's dissemination and its discovery by school authorities cuts *against* satisfaction of *Tinker*'s requirements. In both *Wisniewski* and *Cuff*, apart from school officials' respective reactions to the IM icon and the crayon drawing, there was no evidence in the record that would support a reasonable prediction of material disruption to the school environment.

680. *Cuff*, 677 F.3d at 123.

681. *Id.* at 121–22 ("Indeed, the question under *Tinker* is whether this boy's speech itself had the potential to cause a disruption at school, not whether the drawing might have predicted that B.C. was planning an attack.").

682. *Id.* at 116.

683. *Thomas*, 607 F.2d at 1047 ("we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections").

684. *Cuff*, 677 F.3d at 116.

the work of the school as required by *Tinker*.[685] That is not to say that incidents of threatening or violent student speech should not be taken seriously and immediately investigated by school authorities (as they were in *Cuff* and *Wisniewski*) to ensure student safety[686]—they most certainly should be, at all times and in all cases. It is to say, however, that judicial wariness is in order where *Tinker* has been reflexively invoked to punish a speaker deemed by school authorities to have threatened violence, rather than to evaluate the reasonable probability of a significant disruption to the school environment caused *by the speech* in question.[687]

Judicial deference in upholding a categorical, zero-tolerance student speech policy divorced from careful consideration of both the impact of the speech on the educational environment and the reasons relied on by the school as justification for punishment warps *Tinker*'s contextual balancing process favoring the "fundamental rights"[688] of public school students into "a uniform, 'one size fits all' analysis"[689] that rubber-stamps

685. In First Amendment cases, an appellate court is obligated to "make an independent and searching inquiry of the entire record" to protect against the impermissible infringement of free speech rights. *Guiles*, 461 F.3d at 324; *Thomas*, 607 F.2d at 1050 n.12 ("Where First Amendment rights are involved, we are obliged to make an independent and careful examination of the record before us."); Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996) ("[W]e are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court."). In accordance with this standard of review and the dissent's view of the record that "there is sufficient evidence to suggest that . . . not a single student took [B.C.'s] threat seriously," a faithful application of *Tinker* would seem to require a reversal of the district court's determination and a grant of summary judgment in favor of B.C.'s parents because his suspension violated his First Amendment rights. *Cuff*, 677 F.3d at 117, 119 ("But this momentary interruption hardly constitutes a substantial disruption as contemplated by *Tinker*."). The constitutional concern with remitting the case to a jury for determination is the likelihood that it would result in the same exaggerated deference to the judgment of school administrators as that displayed by the *Cuff* majority. The very purpose of the First Amendment is to protect speech from majoritarian control in order to avoid the suppression of disquieting and disfavored viewpoints. *See, e.g.*, *Tinker*, 393 U.S. at 508 ("Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."). A jury may not reliably be counted on as a bulwark for the protection of expressive liberty from government overreaching under these circumstances. *See, e.g.*, Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 529 (1970) ("The jury may be an adequate reflector of the community's conscience, but that conscience is not and never has been very tolerant of dissent.").

686. *Cuff*, 677 F.3d at 123 ("But there is absolutely no question that a school, upon reading a student's journal entry or overhearing a comment made in class, can investigate—and even detain—that student in order to determine whether he poses a threat to himself of others at the school."); *see Ponce*, 508 F.3d at 771 ("Our recent history demonstrates that threats of an attack on a school and its students *must* be taken seriously.") (emphasis in original) (footnote omitted).

687. *Cuff*, 677 F.3d at 122–23 (Pooler, J., dissenting).

688. *Tinker*, 393 U.S. at 511.

689. *Lowery*, 497 F.3d at 588.

the decisions of school authorities regarding any speech deemed threatening or violent.[690] The *Cuff* majority's lack of exacting oversight nullified *Tinker*'s purpose of securing protection for even disturbing or divisive on-campus student speech absent substantial evidence supporting a reasonable forecast of "an actual break in the learning process [that would] prevent the school from performing"[691] its educational functions. In marginalizing the "causal link between the speech that school officials want to suppress and the substantial disruption that they wish to avoid,"[692] the decision insulated from meaningful First Amendment scrutiny a severe administrative overreaction[693] in the form of a six-day suspension occasioned by nothing more than an "ill-advised joke."[694]

IV. A STUDY IN CONTRAST: PUBLIC STUDENT DIGITAL SPEECH STANDARDS IN THE THIRD & NINTH CIRCUITS

While numerous courts have uncritically adopted the *Wisniewski-Doninger II* reasonable foreseeability standard as controlling in the digital speech arena, those decisions have not been the last word on the issue. Recent decisions from the Third and Ninth Circuits have charted very different courses, both from the Second Circuit and each other, in addressing school regulation of student speech outside the educational environment. To avoid chilling students' digital rights of expression in the general community, the Third Circuit—like the *Thomas* court in the analog era—has eschewed decisional incrementalism in favor of the clarity and predictability realized through a bright-line rule broadly immunizing social media speech from school punishment.[695] In contrast, the Ninth Circuit has adopted a multi-factor contextualized test that calls for an *ad hoc* balancing of interests and expressly authorizes school consideration of the content of disputed off-campus student speech. The flexible, fact-

690. Pike, *supra* note 4, at 1001 ("This has occasionally been termed the 'Columbine effect,' by which fear and suspicion transform every anomalous behavior into an act of terror worthy of zero-tolerance condemnation. Such prophylactic overreaching is unbecoming of a rational jurisprudence.").

691. Miller, *supra* note 112, at 653.

692. *Cuff*, 677 F.3d at 122 (Pooler, J., dissenting).

693. Papandrea, *supra* note 5, at 1100 ("Although it is understandable that school authorities want at all costs to avoid another Columbine massacre, punishing students for speech with any violent or threatening elements is an inappropriate—and unconstitutional—overreaction.").

694. *Cuff*, 677 F.3d at 115.

695. In other First Amendment contexts, the Supreme Court has rejected piecemeal, case-by-case adjudication because it would "lead to unpredictable results and uncertain expectations" for both speakers and reviewing courts. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974); *see also id.* at 343–44 ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities.").

specific standard introduced by the Ninth Circuit was not applied in a social media case, but the court fashioned it as a global standard intended to govern all varieties of student speech way from school, irrespective of the communications medium or format. These decisions, and the implications for public students' digital First Amendment rights of their respective approaches to constitutional adjudication, are examined below.

A. The Evolution of the Third Circuit's Rules of Decision Governing Schools' Regulation of Students' Off-Campus Social Media Expression

1. The Splintered En Banc Opinions in Snyder*: Disparate Principles, Conflicting Rationales, & Inconsistent Free Speech Outcomes*

The difference in constitutional outcomes resulting from a threshold determination of the speaker's intent is conspicuous in the Third Circuit's fractious decision in *J.S. ex rel. Snyder v. Blue Mountain School District*[696] which, along with its companion ruling in *Layshock v. Hermitage School District*,[697] present a detailed judicial examination of the scope of school authority over social media expression. The *Snyder* majority opinion acquiesced in consideration of the speaker's intent as objectively indicated by the insulation of her social media speech from exposure at school, but only after first assuming (without deciding) that *Tinker* applied to the MySpace parody profile at issue.[698] Because the plaintiff created the profile of her middle school principal "on a weekend and on her home computer,"[699] privatized its display the day after its initial posting by limiting access only to her friends, and meant it as a joke, Judge Chagares concluded that "J.S. did not even *intend* for the speech to reach the school[.]"[700] Further, the record demonstrated that access to the profile

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696. 650 F.3d 915 (3d Cir. 2011) (*en banc*).

697. 650 F.3d 205 (3d Cir. 2010) (*en banc*).

698. *Snyder*, 650 F.3d at 926 ("we will assume, without deciding, that *Tinker* applies to J.S.'s speech in this case") (footnote omitted); *see also* Shaver, *supra* note 6, at 1562 ("[t]he majority in *Snyder* avoided the central issue whether school officials have authority to discipline students for off-campus speech"). The *Snyder* majority's constitutional avoidance in declining to decide *Tinker*'s applicability to off-campus digital expression "will have much the same effect as holding that it does" because of the potential chilling effect on protected speech. *Recent Cases:* Snyder, *supra* note 121, at 1069. For this reason, "[t]he court should have addressed the issue squarely and adopted the concurrence's reasoning to hold that off-campus speech is subject to general First Amendment protections and is not limited by *Tinker*." *Id.*

699. *Snyder*, 650 F. 3d at 920.

700. *Id.* at 930 (emphasis added) ("in fact, she took specific steps to make the profile 'private' so that only her friends could access it"); *see* Sweeney, *supra* note 75, at 406–07 ("When the Third Circuit decided in *Snyder* [sic] that the fake MySpace profile of a school principal the student posted was not reasonably forecast as substantially disruptive, it considered

was blocked on the school's computer system,[701] and because the profile was "so outrageous that no one could have taken it seriously,"[702] any anticipation of a substantial disruption by the school was unreasonable.[703] The *Snyder* majority's consideration of intent was therefore absorbed into its reasonable foreseeability analysis in applying *Tinker* to the off-campus social media profile.

Judge Smith's concurrence in *Snyder* went significantly further by taking on the critical question ducked by the majority and rejecting *Tinker*'s applicability to off-campus digital speech as a matter of constitutional law because it would "empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school."[704] Unlike the majority, the concurrence did not merge consideration of the speaker's intent into *Tinker*'s application, but separated the inquiry as a threshold limitation on the exercise of school authority.[705] Affirming the reasoning in *Thomas*, Judge Smith endorsed an intent-based determination in capsulizing when a public school may assert regulatory control over off-campus digital expression—and when it may not:

> Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech. On the other hand, speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus.[706]

Focusing its jurisdictional analysis on the place and method of the website profile's dissemination, the *Snyder* concurrence renounced basic negligence principles as providing a constitutionally inadequate boundary for the protection of student speech[707]—as did the *Thomas* court three

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the steps that the speaker took to make the MySpace page available only to a limited audience.") (footnote omitted).

701. *Snyder*, 650 F.3d at 921 ("The School District's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school.").

702. *Id*.

703. *Id.* at 931 ("The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile.").

704. *Id.* at 939 (Smith, J., concurring). As noted by Professor LoMonte, Judge Smith "called for maintaining a bright jurisdictional line between on- and off-campus speech." LoMonte, *supra* note 49, at 52.

705. *Id.* at 940. *See, e.g.*, Hofheimer, *supra* note 121, at 981 (dividing digital speech decisions into "those that analyze the case using a traditional *Tinker* approach and those that apply *Tinker* only after making an important threshold determination about the geographic location from which the speech originated").

706. *Snyder*, 650 F.3d at 940 (Smith, J., concurring) (citing *Layshock*, 650 F.3d 205).

707. Judge Smith captured in a nutshell the constitutional infirmity with the jurisdictional deployment of basic negligence principles: "[a] bare foreseeability standard could be stretched

decades earlier. The social media profile was created at home outside of school hours, was never transmitted to school personnel, and the plaintiff also "took steps to limit dissemination of the profile"[708] to a select group of friends. Accordingly, Judge Smith determined that J.S. "had no reason to know"[709] that her digital expression would reach the school, concluding that "[i]f ever speech occurred outside of the school setting, J.S.'s did so."[710] It therefore followed, as directed in *Thomas*, that "ordinary First Amendment principles"[711] applied in establishing that the website qualified as protected speech.

Confronted with the imperative of providing meaningful guidance to off-campus digital speakers, and with the understanding that a reasonable foreseeability standard leads to the impermissible extension of school authority beyond the schoolhouse gate, the *Snyder* concurrence represents a momentous constitutional choice in protecting public students' freedom of speech. Judge Smith got it exactly right in embracing *Thomas*'s rationale[712] and spurning *Tinker*'s application to off-campus digital expression so as not to "create a precedent with ominous implications"[713] that would threaten even political speech protected at the heart of the First Amendment.[714] Electronic speech that is restricted by the speaker to a designated group of recipients outside of school (as in *Wisniewski* and *Snyder*), or is made accessible to the community at large (as in *Doninger*, *Layshock*, and *Bell*), is not "intentionally directed towards a school"[715] and does not interfere with the controlled setting that contributes to the effective functioning of the educational process. When the only relationship between the speech and the school is that it was created by a student, and its subject matter pertains to other students, school personnel, and/or school affairs, "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline."[716]

In sharp contrast, the *Snyder* dissent adopted a very different approach in its willingness to dispense with territorial limitations on

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too far and would risk ensnaring any off-campus expression that happened to discuss school-related matters." *Id.* (citing *Thomas*, 607 F.2d at 1053 n.18).

708. *Id.*

709. *Id.*; *see also Porter*, 393 F.3d at 615 (student's "drawing was completed in his home, stored for two years, and never *intended* by him to be brought to campus") (emphasis added).

710. *Snyder*, 650 F.3d at 940 (Smith, J., concurring).

711. *Id.*

712. *Id.* at 939 ("I agree with *Thomas* . . . and I believe that various post-*Tinker* pronouncements of the Supreme Court support [its] *ratio decidendi*.").

713. *Id.* at 939.

714. *Id.* ("*Tinker*, for example, authorizes schools to suppress political speech").

715. *Snyder*, 650 F.3d at 940 (Smith, J., concurring) (citing *Layshock*, 650 F.3d 205).

716. *Layshock*, 650 F.3d at 207.

Tinker's applicability.[717] Rejecting the boundary between on-campus and off-campus expression as an "artificial distinction" in the digital speech context,[718] and standing behind the school district's punishment of the off-campus website profile at issue, Judge Fisher dismissed the speaker's intent as "of no consequence"[719] because (according to the dissent) it was "reasonably foreseeable that her speech would cause a substantial disruption of the educational process and the classroom environment."[720] However, the dissent failed to offer a reasoned explanation for its refusal to credit the determination that J.S. never intended her website's content to reach inside the school, instead characterizing it "an unreasonable expectation that should not carry weight in our analysis."[721] This displacement of an independent jurisdictional inquiry through the rote application of *Tinker*'s balancing test not only nullifies *Thomas*'s central lesson that student speech in the public arena is endowed with full First Amendment protection, but replicates the *Wisniewski* court's error in dismissing outright the significance of a digital speaker's intent to the scope of school authority over student speech.[722] The dissent in *Snyder* lost sight of a crucial point: only *after* it is determined that *Tinker* properly applies to disputed public student speech does the test become "an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student."[723]

2. The Snyder *Dissent Expands School Authority to Networked Expression Outside the School Based on Hypothesized "Bad Effects" Inside the School—A Theory of Governmental Speech Regulation Long Discredited Under the First Amendment*

As a result of (at best) marginalizing or (at worst) disregarding consideration of intentionality, and without carefully scrutinizing the nature of the relationship of the speech to the school environment, the *Snyder* dissent typifies decisions that have permitted school authorities to exercise control over off-campus digital expression based on nothing more than unfounded perceptions that it may have a harmful impact on the

717. *Snyder*, 650 F.3d at 943 (Fisher, J., dissenting) ("I believe that the rule adopted by the Supreme Court in *Tinker* should determine the outcome of this case.").

718. *Id.* at 948 n.4.

719. *Id.* at 951.

720. *Id.*

721. *Id.* at 949.

722. *See Wisniewski*, 494 F.3d at 40 (based on finding of reasonable foreseeability of *both* communication reaching school and risk of substantial disruption, school discipline was permissible "whether or not Aaron intended his IM icon to be communicated to school authorities").

723. *Cuff*, 677 F.3d at 113. Judge Pooler's dissent in *Cuff* was mindful of the constitutional distinction ignored by Judge Fisher's dissent in *Snyder*.

school.[724] Indeed, the six appellate judges who signed on to that opinion construed *Doninger II* as holding that "off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment."[725] In other words, merely by the fact of its publication, contentious or objectionable online speech about school administrators will necessarily induce a disruption within the school that *ipso facto* satisfies *Tinker*'s evidentiary requirements. This sweeping proposition creates nothing less than a *per se* constitutional rule that would allow the punishment of any and all "hostile and offensive"[726] digital speech about school officials because of its purportedly disruptive effects, eliminating any meaningful threshold analysis of the scope of school authority and rendering chimerical students' ability to criticize their schools' administration (except, perhaps, in pristinized language).[727] It is difficult to conceive of a more open-ended threat of censorship to the First Amendments rights of public school students than that presented by this blunt and untextured interpretation of *Doninger II*.[728]

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724. Papandrea, *supra* note 5, at 1093 ("School officials frequently assert that all student speech falls within their control because it has the capacity and the potential to affect the school. Most courts have accepted this argument, and by doing so, they have extended beyond recognition the rationale for school control over student speech."); *see also* Hofheimer, *supra* note 121, at 981 ("Many lower courts have decided student speech cases involving off-campus speech by simply applying the analysis from *Tinker*, treating that standard as controlling regardless of where the speech originated.") (footnote omitted).

725. *Snyder*, 650 F.3d at 950 (Fisher, J., dissenting); *see also id.* at 951–52. An *en banc* majority opinion joined by seven judges in the Fifth Circuit has followed the Third Circuit's reasoning in *Snyder* in holding that the online dissemination of offensive speech about school officials is sufficient to support a reasonable inference that it will have a disruptive effect on the school environment and is therefore punishable under *Tinker*. *Bell*, 799 F.3d at 400; *see also Bell*, 774 F.3d at 321 (Barksdale, J., concurring in part and dissenting in part) ("even if they are made 'off-campus,' the danger and disruptiveness of the comments do not cease to have effect the moment after being made."), *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015).

726. *Snyder*, 650 F.3d at 950 (Fisher, J., dissenting).

727. For a similar argument that the regulation of networked student speech may be based on in-school effects attributable to its content without limitation by real-world geographic boundaries, *see* Klupinski, *supra* note 33, at 616 ("The ability of a school to proscribe speech depends on the content and the effect of the speech. These two factors must be considered when evaluating whether a school can proscribe speech, *regardless of where the speech originates*.") (emphasis added); *see also id*. at 648 ("certain speech created outside of the school and read widely by the community outside of the school campus can still have a substantial effect on school, even if the website is never accessed on the school campus").

728. Because of its conspicuous overbreadth, reference to potentially disruptive on-campus effects as justification for punishing off-campus digital speech would permit school regulation of a wide array of protected student expression. Brenton, *supra* note 29, at 1226–27 ("Any off-campus speech, by any speaker, may create a material and substantial disruption on campus. If Mary Beth Tinker had appeared on the evening news to protest the Vietnam War, it could have caused a greater disruption of her school than her black armband, but such speech should be no more regulable than was her silent protest.").

The *Snyder* dissent's theory that controversial or oppositional off-campus speech about school officials "disseminated online to the student body"[729] is thereby transmogrified and punishable the same as on-campus speech amounts to the disinterment of the infamous notion that the government may regulate speech based solely on a prediction of its alleged "bad effects."[730] Under the constitutionally fossilized "bad tendency" test, speech was punishable whenever it had the "natural tendency and reasonably probable effect"[731] of causing a substantive danger prohibited by the government. At the embryonic stage of the Supreme Court's First Amendment jurisprudence, however, this test was repudiated by Justice Holmes as a perilous threat to free speech.[732] When the government seeks—as with *Tinker*'s balancing test—to penalize speech based on the anticipation of prohibitable consequences, Justice Holmes recognized the doctrinal imperative of an extraordinarily strict nexus between speech and effect in order to protect the free exchange of ideas.[733] Similarly stringent protection is constitutionally required to prevent the unwarranted assertion of a school's disciplinary authority over student digital expression that originates away from campus and is not purposefully introduced into the school environment by the speaker.[734] The lessons of history, and our constitutional and cultural commitment to freedom of speech, counsel grave reservations over claims that hostile or offensive off-campus digital expression about school officials will necessarily cause disruptive effects in schools. Judicial acceptance of such claims as sufficient justification for punishing student speakers is no less an affront to the First

729. *Snyder*, 650 F.3d at 951 (Fisher, J., dissenting).

730. For an extreme example of a court's upholding a public school's jurisdictional authority over student speech posted online solely because of its purported "bad effects" without any consideration of territorial limitations, *see J.C.*, 711 F. Supp. 2d at 1107 ("any speech, *regardless of its geographic origin*, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school") (emphasis added).

731. Debs v. United States, 249 U.S. 211, 216 (1919).

732. In his famous dissent in *Abrams v. United States*—an opinion issued eight months to the day after his majority opinion in *Debs*—Justice Holmes substantially invigorated the "bad effects" test with strict temporal and substantiality elements requiring a showing of imminent and serious harm before speech can constitutionally be punished as incitement to unlawful action. *See* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (First Amendment prohibits criminal punishment of incitement unless "the expression of opinions . . . so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country").

733. "Holmes immediately realized that if speech could be suppressed merely because it tended to produce prohibited action, the marketplace of ideas could easily be savaged by state regulation." Post, *supra* note 130, at 2361 (footnote omitted).

734. *See* text accompanying notes 1015–32, *infra*.

Amendment than the discredited "bad effects" theory underpinning the Espionage Act prosecutions of World War I protestors.[735]

3. Levy*'s Establishment of a Bright-Line First Amendment Rule Prohibiting School Punishment of Public Students' Off-Campus Digital Free Speech*

The implications of uncoupling the jurisdictional and substantive determinations for the constitutional status of public student speech crystallized in *B.L. ex rel. Levy v. Mahanoy Area School District*, in which a Third Circuit panel recently broke new constitutional ground by tackling the question left open by the *Snyder* majority opinion and squarely holding that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[736] In a dramatic departure from other circuits, and building on Judge Smith's concurrence in *Snyder* by reaffirming that students are entitled to full First Amendment rights outside the public school context, the *Levy* court adopted a categorical rule rejecting *Tinker's* applicability to off-campus digital speech in order to "provide[ ] much-needed clarity to students and officials alike."[737]

Levy involved a typical off-campus digital speech situation: a student's griping on social media about a school decision. As a rising sophomore, B.L. failed to make her high school's varsity cheerleading squad, apparently having been passed over in favor of an incoming freshman,

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735. Tomain, *supra* note 5, at 153 ("merely because a student website may have an 'effect' on-campus is an insufficient basis to assert jurisdiction over a student's First Amendment activity"); LoMonte, *supra* note 28, at 9 ("Outside the school context, no one would seriously suggest that government may regulate lawful speech off government property based on the way people might react to it on government property.").

736. 964 F.3d at 189. Prior to *Levy*'s pathbreaking holding, Judge Fisher's *Snyder* dissent (joined by four judges) had vehemently disputed Judge Smith's conclusion (joined by four other judges) that *Tinker* "does not govern a student's off-campus expression" and, while agreeing with the eight-vote majority's factual determination that the website profile at issue did not give rise to a substantial disruption, nevertheless deemed its *potential* to cause disruption reasonably foreseeable and therefore an acceptable basis for punishment in that case. *Snyder*, 650 F.3d at 945 (Fisher, J., dissenting). Moreover, Judges Jordan and Vanaskie, who signed on to the *Snyder* dissent, authored a concurrence in *Layshock* which emphasized their view that *Tinker* may be applied to public student digital speech unconstrained by territorial limitations. *See Layshock*, 650 F.3d at 220–22 (Jordan, J., concurring); *id.* at 222 ("we have not declared that *Tinker* is inapplicable to off-campus speech simply because it occurs off-campus"). The previously apparent consensus among fourteen Third Circuit judges that public school authority may extend to off-campus digital expression under *Tinker* was upended by Judge Krause's announcement of a new constitutional rule in *Levy*. *See* 964 F.3d at 189 ("We hold today that *Tinker* does not apply to off-campus speech").

737.*Levy*, 964 F.3d at 189; *see also id*. at 196 (Ambro, J., concurring in the judgment) ("[O]urs is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech.").

and was instead assigned to the JV cheerleading team.[738] Venting her frustration with the decision, B.L. posted a Snapchat photo depicting her and a friend raising their middle fingers.[739] B.L.'s message also included what the court described as a "puerile caption: 'Fuck school fuck softball fuck cheer fuck everything.'"[740] B.L. sent the message to about 250 Snapchat friends, "many of whom were MAHS students and some of whom were cheerleaders[.]"[741] When a teammate forwarded a screenshot of the message to the cheerleading coach, B.L. was removed from the team for running afoul of school rules requiring team members to respect their coaches and teammates, avoid the use of profane language, and refrain from communicating online in a negative manner about the cheerleading squad.[742] B.L.'s removal as a cheerleader triggered a lawsuit on the ground that MAHS had violated her First Amendment rights. After the district court granted summary judgment in B.L.'s favor and directed that her disciplinary record be expunged, the Third Circuit framed the narrow question on appeal as whether *Tinker* applied to punish alleged "disruption in the extracurricular context—specifically, the cheerleading program B.L. decried in her snap."[743] The *Levy* court noted that this issue—the very issue addressed in *Doninger II*—"has bedeviled our sister circuits"[744] and required it to "confront the question whether *Tinker* applies to off-campus speech."[745]

Acknowledging that "the schoolyard's physical boundaries are not necessarily coextensive with the 'school context,'"[746] the *Levy* panel began with an upfront examination of whether B.L.'s snap qualified as on- or off-campus speech, thereby avoiding the "collapse[ ] [of] *Tinker*'s scope of application and rule into one analytical step."[747] The court found guidance in the Supreme Court's decisions extending full First

738. *Id*. at 175.

739. *Id*.

740. *Id*.

741. *Levy*, 964 F.3d at 175.

742. *Id*. at 175–76.

743. *Id*. at 184.

744. *Id*.

745. *Id*. at 183. While concurring in the judgment, Judge Ambro dissented on grounds of constitutional avoidance from the majority's holding that *Tinker* does not apply to off-campus speech. *Id.* at 194–95 (Ambro, J., concurring in the judgment). Judge Ambro did not think it necessary to reach that question "in a case bereft of substantial disruptions within the school." *Id*. at 197. ("The bottom line is that circuit courts facing harder and closer calls have stayed their hand and declined to rule categorically that *Tinker* does not apply to off-campus speech."). The concurrence also criticized the majority's lack of guidance in drawing a "clear and administrable line" with respect to the *per se* constitutional rule it announced. *Id*. at 195.

746. *Levy*, 964 F.3d at 178 (majority opinion) (quoting *Snyder*, 650 F.3d at 932).

747. *Id*. at 188.

Amendment protection to the "internet's 'vast democratic forums'"[748] comprising "the modern public square,"[749] emphasizing the need to resist broadened regulatory opportunities presented by new communications technologies in order to insulate digital speech from any "theoretical but unproven benefit of censorship."[750] Like the majority and concurring opinions in *Snyder*, Judge Krause's analysis focused on objective factors—where and when the snap occurred, and how it was disseminated—in concluding that B.L.'s expression was outside the schoolhouse gate:

> . . . B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school. And while the snap mentioned the school and reached MAHS students and officials, *J.S.* and *Layshock* hold that those few points of contact are not enough. B.L.'s snap, therefore, took place "off campus."[751]

After determining that B.L.'s snap did not qualify as on-campus speech, the *Levy* court turned to the constitutional question of *Tinker*'s applicability to off-campus speech, which it acknowledged "is a question we have avoided answering to date."[752] The decision advanced three reasons for immunizing B.L.'s speech from school punishment by limiting *Tinker* to on-campus expression. First, the majority reasoned that while *Tinker* had originally been applied in the digital context to off-campus speech threatening violence, it had been extended to other forms of student speech, including protests of school decisions, thereby "be[coming] a broad rule governing all off-campus expression."[753] This outcome was

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748. *Id*. at 179 (quoting *Reno*, 521 U.S. at 868).

749. *Id*. at 180 (quoting *Packingham*, 137 S. Ct. at 1736–37).

750. *Id*. at 179 (quoting *Reno*, 521 U.S. at 885).

751. *Levy*, 964 F.3d at 180–81 (footnote omitted); *id*. at 195 (Ambro, J., concurring in the judgment) ("B.L. was suspended from her school's cheerleading team as punishment for a snap that said, 'fuck cheer,' which she created on her own smartphone, on her own time on a weekend, while off-campus, and not participating in any school-sponsored activity.").

752. *Id*. at 183 (majority opinion). The *Levy* court identified three reasons that compelled it to answer the constitutional question left open by the *Snyder* majority. First, MAHS justified its punishment of B.L.'s snaps based on alleged disruption of the cheerleading program, as distinct from disruption to the general school environment—a "complex and unresolved" constitutional question that the Third Circuit had not addressed. *Id*. at 184. Second, no consensus had emerged in other circuit courts as to how to approach the issue, nor had the Supreme Court weighed in on its resolution, causing confusion in the Third Circuit's district courts. *Id*. at 185 ("we have relegated district courts in this Circuit to confronting this issue without clear guidance"). Third, the vacuum created by the absence of a clearly established decisional rule resulted in "legal uncertainty" that impermissibly chilled the speech of K-12 public school students. *Id*.

753. *Id*. at 187. In this regard, the *Levy* majority noted that "one unmistakable trend from the case law is that the most challenging fact patterns have produced rules untethered from the contexts in which they arose." *Id*.

rejected as unfaithful to both the scope and spirit of *Tinker* and as an infringement of public students' free speech rights.[754]

Second, *Levy* renounced the reasonable foreseeability standard invoked by several federal appellate courts in extending *Tinker* beyond the schoolhouse gate as failing to account for the "unprecedented interconnectivity"[755] and diversity of access fostered by digital speech platforms, thereby contributing to an "expansionary dynamic"[756] that suppressed "far too much speech"[757] of public school students in the social media age:

> Implicit in the reasonable foreseeability test, therefore, is the assumption that the internet and social media have expanded *Tinker*'s schoolhouse gate to encompass the public square. That assumption is not one we can accept, though, because it subverts the longstanding principle that heightened authority over student speech is the exception rather than the rule.[758]

Thus, in the same manner as the *Thomas* majority and the *Snyder* concurrence, *Levy* recognized that the First Amendment protects students' free speech rights in full measure external to the school environment as members of the general political community. Moreover, unlike in *Doninger II*, the court's analysis refused to ratchet down the level of constitutional scrutiny because B.L.'s punishment was tied to her participation in an extracurricular activity.[759]

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754. *Id*. at 188–89.

755. *Id*. at 187.

756. *Levy*, 964 F.3d at 187.

757. *Id*. Professor Papandrea has emphasized the same point. *See* Papandrea, *supra* note 5, at 1090–93.

758. *Levy*, 964 F. 3d at 187–88.

759. *Id*. at 182 ("we see no sound reason why we should graft an extracurricular distinction onto our case law"); *see also Waldman I*, *supra* note 122, at 1146 ("To ensure that students have adequate room to express their opinions about important school issues and are not deterred by potential repercussions to important aspects of their lives at school, courts must hold constant the basic student speech standards, rather than ratcheting them down relative to the punishment at issue."). In a case with facts remarkably similar to *Levy*, the Fifth Circuit held that a high school cheerleader's dismissal from the team based on an inappropriate series of messages posted on her personal Twitter account did not violate a clearly established First Amendment right, in part because the penalty related to her disqualification from an extracurricular activity rather than a suspension from school, and therefore that school officials were entitled to qualified immunity. *Longoria*, 942 F.3d at 268–70 ("And perhaps most notably, M.L. was dismissed from an *extracurricular activity* as a consequence of her speech—not suspended from school altogether.") (emphasis in original). The bright-line rule announced in *Levy* has presumably stripped away that immunity from school officials in Pennsylvania, New Jersey, Delaware, and the Virgin Islands. *Levy*, 964 F.3d at 185–86.

Third, the welter of sister circuit court decisions had produced confusion in the lower courts.[760] Without the benefit of guidance from the Supreme Court, the *Levy* court was compelled to establish a rule with the "distinct advantage of offering up-front clarity to students and school officials."[761] The decision stressed that "in the First Amendment context, courts must pursue *ex ante* clarity not for clarity's own sake, but to avoid chilling potential speech and to give government officials notice of the constitutional boundaries they may not cross."[762] As a consequence, students expressing themselves on social media would no longer be required to hazard predictions about whether their speech was outside the protected zone, and school officials would no longer be insecure that their punishment of student speakers fell on the wrong side of the constitutional line.[763]

While leaving a carve-out for violent or harassing speech,[764] the *Levy* majority prohibited *Tinker*'s application outside the school context, where "any effect on the school environment will depend on others' choices and reactions,"[765] to remove the threat of school punishment of student speech in the modern public square in violation of the First Amendment. This bright-line protection of student social media expression beyond the schoolhouse gate was intended to avoid the uncertainty caused by the approaches adopted in other circuits, because "[o]bscure lines between permissible and impermissible speech have an independent chilling effect on speech."[766] *Levy*'s insistence on curbing legal indeterminacy to prevent student self-censorship echoes that in *Thomas* four decades earlier.[767] By disallowing the expansion of school authority over off-campus social media speech allowed by the reasonable foreseeability test, the "historic"[768] decision in *Levy* has set the stage for Supreme Court

760. *Id*. at 188 ("[O]ther circuits' approaches have failed to provide clarity and predictability.").

761. *Id*. at 189.

762. *Id*. at 188.

763. *Levy*, 964 F.3d at 190 ("That clarity benefits students, who can better understand their rights, but it also benefits school administrators, who can better understand the limits of their authority and channel their regulatory energies in productive but lawful ways.").

764. *Id*. ("our opinion takes no position on schools' bottom-line power to discipline" violent or harassing speech); *see also id*. at 195 (Ambro, J., concurring in the judgment) (the majority "leave[s] open the door for schools to regulate off-campus student speech if it threatens violence or harasses particular students or teachers").

765. *Id*. at 189 (majority opinion).

766. *Id*. at 185.

767. *Thomas*, 607 F.2d at 1051–52.

768. Sophia Cope, *In Historic Opinion, Third Circuit Protects Public School Students' Off-Campus Social Media Speech*, ELECTRONIC FRONTIER FOUNDATION (July 31, 2020), https://tinyurl.com/y6arw4ej ("The Third Circuit's opinion is historic because it is the first federal appellate court to affirm that the substantial disruption exception from *Tinker* does not apply to off-campus speech.").

review of a looming First Amendment issue with significant implications for the social reality inhabited by public school students that has been percolating in the federal court system for more than a decade.[769]

Levy presents an ideal case for a speech-protective outcome that merits affirmance by the Supreme Court—as the concurring opinion acknowledged, "B.L.'s Snap is not close to the line of student speech that schools may regulate."[770] The ephemeral snaps at issue, while profane, represent the type of school-related grievances routinely expressed by students that, had they not been displayed on a social media platform, would fail to justify the exercise of disciplinary authority beyond the schoolhouse gate. The decision correctly rejects the impermissible encroachment of school authority into the modern public square, and the corresponding erosion of students' digital free speech rights, that have resulted from the public student speech framework's distortion through the incorporation of basic negligence principles. Moreover, the school district's regulatory interest seems incidental and insubstantial given that B.L.'s snaps did not cause any disruption, actual or foreseeable, to the school environment.[771] Thus, the justification for *Tinker*'s application shrunk to the asserted need to control speech that challenges "the 'team morale' and 'chemistry' on which the cheerleading program depends"[772]—subjective and amorphous value-laden judgments constitutionally unavailable to school authorities except in *Fraser*'s narrow context and expressly warned against by Justice Alito in *Morse* as exceeding the limits of the First Amendment.[773]

Despite its obvious significance as the first federal appellate decision prohibiting *Tinker*'s application to non-violent off-campus digital student expression, important questions remain in the wake of *Levy*, which will perhaps now be clarified by the Supreme Court. These include whether a speaker's intent factors into an evaluation of the limits of school authority over out-of-school social media speech. The *Snyder* majority and concurrence indicate the Third Circuit's apparent willingness to consider a student's intent as a central factor in assessing whether digital expression qualifies as off-campus speech eligible for First Amendment protection under the broad immunity principle announced in

769. The Supreme Court granted certiorari in *Levy* on January 8, 2021. *Levy*, 964 F.3d 170, *cert. granted*, 141 S. Ct. 976 (Jan. 8, 2021).

770. *Levy*, 964 F.3d at 195 (Ambro, J., concurring in the judgment).

771. *Id*. at 176 (majority opinion); *see also id*. at 195 (Ambro, J., concurring in the judgment) ("It caused complaints by a few other cheerleaders but no 'substantial disruptions,' and the coaches testified that they did not expect the Snap would substantially disrupt any activities in the future.") (footnote omitted).

772. *Id*. at 184 n.10 (majority opinion).

773. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

Levy.[774] The analytical significance of intentionality as a restriction on the scope of school authority remains unclear, however, because it was not considered by the *Levy* court. Further, both its muddled absorption within *Tinker*'s application by the *Snyder* majority and the array of judicial approaches reflected in the splintered en banc opinions in the *Snyder* and *Layshock* cases raise uncertainty about the status of an intent-based jurisdictional inquiry in the public student speech framework.

B. The Ninth Circuit's Fact-Sensitive "Sufficient Nexus" Test—Public Schools as Private Thought Police

In derogation of *Levy*'s insistence on a bright-line rule of decision to avoid chilling students' speech outside of public schools, the Ninth Circuit adopted a flexible and fact-sensitive standard to govern off-campus speech in *McNeil v. Sherwood School District 88J*,[775] which involved difficult and unusual facts.[776] CLM, a member of the sophomore class, "created a 'hit list' in his personal journal, naming 22 Sherwood High students and one former employee, and stating 'I am *God*' and 'All These People *Must* Die.'"[777] Several months later, after CLM had entered his junior year, his mother discovered his journal on his nightstand while cleaning his room and reviewed the hit list, along with "additional entries containing graphic depictions of violence."[778] She then showed copies of the journal entries to her therapist who, in turn, notified the Sherwood Police Department pursuant to mandatory reporting requirements.[779] This caused the police to conduct a same-day search of the family's residence, where they "confiscated several weapons, including a .22 caliber rifle and 525 rounds of ammunition belonging to CLM,"[780] but found "nothing 'to indicate any planning had gone into following through with the hit list.'"[781] After CLM and his parents were questioned at the police station

774. Marcus-Toll, *supra* note 4, at 3423 ("In considering the possibility of finding a substantial disruption in the off-campus context, however, the *Snyder* majority emphasized that the speaker's intent would be an inquiry of primary significance. In the absence of an express showing that the speaker both meant for her speech to reach the school and be taken seriously, the Third Circuit indicated that school regulation of off-campus student speech would not likely be valid.") (footnotes omitted).

775. 918 F.3d 700 (9th Cir. 2019) (per curiam).

776. Although *McNeil* was not cited in *Levy*, it certainly fits within the category of cases "sprung from trying circumstances" described in the latter in which "challenging fact patterns have produced rules untethered from the contexts in which they arose." *Levy*, 964 F.3d at 186, 187.

777. *McNeil*, 918 F.3d at 704.

778. *Id*.

779. *Id*.

780. *Id*.

781. *Id*.

on a voluntary basis, where he was Mirandized, no criminal charges were filed against him.[782]

When the police informed Sherwood High School (SHS) of the hit list and, further, that guns had been removed from CLM's house, the situation escalated. Under Oregon law, school authorities were required "to notify the parents of students found on a hit list within 12 hours of discovery."[783] SHS's discharge of this obligation provoked media inquiries and the posting of CLM's picture on social media accounts.[784] The school's subsequent transmission of a "recorded voice message to all parents of students in the School District"[785] to notify them about the hit list, accompanied by a press release, fueled the frenzy as SHS was besieged with inquiries from parents, the press, and the public "about the hit list, CLM's identity, and whether CLM posed a threat to others."[786]

Under these challenging circumstances, the school district expelled CLM for making a threat of violence that significantly disrupted the learning environment.[787] The district court upheld the one-year expulsion, finding that CLM's First Amendment rights were not violated because of the disruptive effects his journal entries had on the school community, "particularly in light of Oregon's statutory notification requirement."[788] On appeal, the Ninth Circuit agreed and formulated a "flexible and fact-specific"[789] three-part test for determining whether off-campus speech has a "sufficient nexus"[790] to the school such that it can be constitutionally regulated by school authorities: "(1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school."[791] According to the decision, the factors conduce to a per se rule allowing punishment in all cases where a student's off-campus speech is reasonably determined to present an identifiable threat of school violence.[792]

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782. *McNeil*, 918 F.3d at 704.

783. *Id*.

784. *Id*.

785. *Id*. The voice message informed the school community that "the list contained no specific threats and the home in which the student resided was safe." *Id*. at 705.

786. *Id*.

787. *McNeil*, 918 F.3d at 705.

788. *Id*. at 706.

789. *Id*. at 707.

790. *Id*.

791. *Id*. (footnote omitted).

792. *McNeil*, 918 F.3d at 707–08. In dissenting in *Doe*, six judges in the Eighth Circuit objected to such a categorical rule where a student lacked the requisite intent to communicate a true threat. 306 F.3d at 627 ("The majority ignores the school context analysis and creates

The *McNeil* court did not hesitate in upholding CLM's expulsion under that categorical rule. First, the initial prong of the "nexus test"[793] was deemed satisfied because SHS officials reasonably concluded that CLM's personal diary entries "presented a credible threat of severe harm to the school community."[794] This element of the test seems to consist of a crude balancing process in which the gravity of the harm attributable to the speech is amplified by its probability, allowing school officials to curb students' free speech rights whenever off-campus speech is adjudged sufficiently menacing. Reminiscent of a discredited First Amendment standard that surfaced in the Communist Party scare cases in the aftermath of World War II, it is precisely the approach rejected in *Levy* as an open invitation to school censorship whenever the perceived harm of student speech is deemed to outweigh its benefits.[795]

Second, in view of Oregon's statutory notification requirement,[796] *McNeil* found it reasonably foreseeable that "news of the threat would reach and impact the school and disrupt the school environment"[797] by causing students to fear for their safety. According to this reasoning, the mandatory legal notice obligation renders the reasonable foreseeability requirement a self-fulfilling prophecy in every case where off-campus speech by a student in Oregon's public school system employs violent imagery or threatening language in reference to identified individuals.[798]

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dangerously broad precedent by holding that *any* private utterance of an intent to injure another person is not entitled to First Amendment protection.") (Heaney, J., dissenting) (emphasis in original). In dissenting in *Cuff*, Judge Pooler pointed out that public school zero tolerance policies pertaining to violent speech distort *Tinker*'s requirements by relying on assumptions about a student's behavior rather than a reasonable assessment of the disruptive impact of a student's speech on the school environment. 677 F.3d at 122–23 (Pooler, J., dissenting).

793. *McNeil*, 918 F.3d at 709.

794. *Id*.

795. *Levy*, 964 F.3d at 182. In *Dennis*, the Supreme Court upheld the Smith Act prosecution of Communist Party leaders for advocating the overthrow of the United States government by force or violence on the basis that "[i]n each case, courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. at 510 (internal quotations omitted).

796. The Oregon statute mandated notification when a school district superintendent "has reasonable cause to believe that a person, *while in a school*, is or has been in possession of a list that threatens harm to other persons" and that includes the name of any student. OR. REV. STAT. § 339.327(1) (1999) (amended 2005) (emphasis added). The *McNeil* court apparently misconstrued the law, which by its terms is limited to situations where an enrolled student has brought a hit list onto school property, either presently or previously—not when such a list has at all times been kept away from school grounds and maintained in the privacy of a student's home. This strained interpretation ignored the traditional boundary imposed on school authority by *Tinker*'s schoolhouse gate.

797. *McNeil*, 918 F.3d at 709.

798. Owing to various social and cultural factors, teenagers' use of violent images and language on social media is anything but uncommon. "Today's teenagers witness, experience, and hear violence on television, in music, in movies, in video games, and for some, in abusive relationships at home. It is hardly surprising that such violence is reflected in the way they

By accepting the sound and fury predictably unleashed on social media once word spread about CLM's interrogation by the police as contributing to a material disruption of the learning environment, *McNeil* authorized the punishment of CLM's speech based on the reaction to it by others in the community—a paradigmatic example of the "heckler's veto" prohibited by the First Amendment.[799]

Third, the panel held that "the *content* of the speech involved the school,"[800] meaning that it pertained to CLM's schoolmates and personnel at SHS—as student speech, from notebook scribblings to TikTok vignettes, has done for as long as students have been going to public schools. In *McNeil*, this factor's application collapsed back into an evaluation of the seriousness of the harm threatened by the speech owing to the school's obligation "to address a credible threat of violence involving the school community."[801] Although a school's custodial duty to protect the safety of its students is incontestable, SHS's determination that CLM presented a security threat was countered by his explanation to police that his journal was a source for personal venting and "that 'he would never carry out' such thoughts."[802]

It is clear from the facts in *McNeil* that CLM never intended to communicate *to anyone*—inside or outside the schoolhouse gate—what he had written in his personal diary and never took any steps to do so, preventing his speech from rising to the level of a true threat as a matter of law.[803] While giving lip service to the relevance of intentionality to the constitutional status of off-campus student speech, the decision cast it aside in cases where a school district reasonably construes the speech as

express themselves and communicate with their peers, particularly where adult supervision is lacking." *Doe*, 306 F.3d at 631 (Heaney, J., dissenting).

799. The "heckler's veto," long recognized in First Amendment doctrine, prohibits the government from shutting down or punishing a speaker or demonstrator based on a threatened or anticipated violent reaction from the audience. The term was first used by the Supreme Court in *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *see also Reno*, 521 U.S. at 847. Allowing bellicose listeners to legitimize censorship would perversely incentivize violence rather than the confrontation of opposing ideas with more speech, thereby stifling public discourse. The government's obligation in such circumstances is to prevent hecklers from drowning out the speaker's message. LoMonte, *supra* note 49, at 44 ("If the government anticipates the content of a speaker's message will provoke a violent audience backlash, the legally correct response is to protect the speaker from the hecklers.").

800. *McNeil*, 918 F.3d at 710.

801. *Id*.

802. *Id*. at 704.

803. *Porter*, 393 F.3d at 618 ("Because Adam's drawing cannot be considered a true threat as it was not intentionally communicated, the state was without authority to sanction him for the message it contained."); *Doe*, 306 F.3d at 636 ("J.M.'s statement made in the privacy of his home was protected speech. That statement was not a true threat.") (McMillian, J., dissenting).

involving an identifiable and credible threat of school violence.[804] That reasoning flouts the principle that "the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it."[805] Further, it placed the decision on a collision course with *Porter v. Ascension Parish School Board*, where the Fifth Circuit invalidated a student's suspension because he "took no action that would increase the chances that his drawing would find its way to school[.]"[806] The same could certainly be said about CLM's personal journal entries, which he at all times secreted away in his bedroom. Despite acknowledging that CLM could not have foreseen his journal entries reaching SHS,[807] and unable to distinguish *Porter* on a principled basis, the *McNeil* court deemed the sketchpad drawing in *Porter* unpunishable because it "was two years old, highly fantastical, unspecific and unaccompanied by other indicia of a violent intent."[808] In other words, the decision affirmed CLM's expulsion based on his uncommunicated thoughts, unremoved from his bedroom and unconnected to the school environment, owing to school officials' scrutiny of the *content* of his journal entries several months after they had been written—i.e., the court viewed his journal entries as more threatening than the student's drawing at issue in *Porter*. The decision's licensing of school authorities to act as thought police based on inherently subjective and arbitrary evaluations, bestowing approval on expression considered abstract and imaginative but withholding it when concrete and specific, reduces

804. *McNeil*, 918 F.3d at 708 ("regardless of the speaker's intent or how speech comes to a school district's attention, a school district may take disciplinary action in response to off-campus speech" that is reasonably determined to present an identifiable threat of violence).

805. *Doe*, 306 F.3d at 624.

806. *Porter*, 393 F.3d at 615; Black & Shaver, *supra* note 6, at 33–34 ("The decision in *McNeil* seems directly at odds with the Fifth Circuit's decision in *Porter*, where the court determined that school officials lacked the authority to discipline a student for a sketch that depicted violence at school.").

807. *McNeil*, 918 F.3d at 710 ("Although it was not foreseeable *to CLM* that his speech would reach the school, a lack of intent to share speech is of minimal weight when, as here, the speech contains a credible threat of violence directed at the school.") (emphasis in original).

808. *Id*. at 709. The sketchpad drawing at issue in *Porter* was perhaps less innocuous and more specific than portrayed in *McNeil*. *Porter*, 393 F.3d at 611 ("The sketch also contained obscenities and racial epithets directed at characters in the drawing, a disparaging remark about EAHS principal Conrad Braud, and a brick being hurled at him."). The *Porter* court further noted that "[s]chool officials . . . searched [the student's] book bag and his person and found a box cutter with a one-half inch exposed blade in his wallet. The officials also found notebooks in [his] bag containing references to death, drugs, sex, depictions of gang symbols, and a fake ID." *Id*. at 612. Considered as part of the "totality of the circumstances" (*McNeil*, 918 F.3d at 707) in applying *McNeil*'s multi-factor test, these facts would seem to indicate a "sufficient nexus" to the school to have allowed the student's punishment in *Porter*.

constitutional protection for public student expression that incorporates violent themes or imagery to an evanescent commodity.[809]

McNeil illustrates the difficulties confronting public school districts attempting to balance their responsibility to provide a safe custodial setting with the constitutional rights of individual students in a social context where mass school shootings have become a pressing concern. Perhaps animated by the conviction that the First Amendment should not be allowed to become an alluring abstraction that allows the perpetuation of violent tragedies in our nation's public school system, the decision falls in line with the violent student expression cases canvassed in *Levy* in which "bad facts make bad law."[810] However, its three-pronged test was fashioned as a broad rule of general applicability; there is nothing in the opinion limiting its application to cases involving student speech threatening violence, yet no explanation is provided as to how it is to be applied in non-violent speech cases.[811] The decision's adoption of a fact-sensitive global standard to be applied "based on the totality of the circumstances"[812] affords school officials excessive discretion by permitting consideration of seemingly any number of extraneous facts to justify a speaker's punishment in a given case.[813] Further, by expressly authorizing a content-based review of student expression forbidden under the constitutional public student speech framework other than by the limited exceptions in *Fraser*, *Hazelwood*, and *Morse,* it risks becoming a means for the far-reaching suppression of off-campus expression.[814] An apparent

809. Jones, *supra* note 85, at 168 ("Giving schools the right under *Tinker* to punish off-campus threats would likely lead to punishing speech of the kind . . . identified in *Bell*—hyperbolic statements made out of frustration by children who are using what they think is a safe outlet for their personal feelings.").

810. 964 F.3d at 187. Federal courts have uniformly agreed that student speech—whether on-or off-campus, and irrespective of its format and mode of transmission—regarded as threatening violence to the school community can be punished by schools without violating the First Amendment. *See, e.g.*, J.R. *ex rel.* Redden v. Penns Manor Area Sch. Dist., 373 F. Supp. 3d 550, 559 (W.D. Pa. 2019) ("[F]ederal courts have uniformly agreed that language reasonably perceived as threatening school violence is not constitutionally protected—whether such language is written or oral, and whether it occurs at school or elsewhere.").

811. Black & Shaver, *supra* note 6, at 35 ("However, the Ninth Circuit's broad definition of 'nexus' as any speech that involves school, together with a rejection of the argument that private speech is beyond school authority, raises the thorny question of how this newly described nexus test is to be appropriately applied in cases of non-violent student speech.") (footnote omitted).

812. *McNeil*, 918 F.3d at 707.

813. In addition to the "nature of the hit list," the analysis in *McNeil* considered whether CLM had the capacity to enact the fantasies depicted in his journal entries by taking into account the availability of firearms in his home and the "close proximity" of his home to SHS. *Id.* at 704. These factors did not persuade local law enforcement to file criminal charges against CLM. *Id.*

814. On its face, *McNeil*'s third prong authorizes public school officials to make distinctions based on the content of off-campus speech. *Id.* at 707 (schools may evaluate "the relation between the *content* and context of the speech and the school") (emphasis added). The

amalgamation of the tests formulated by other circuits, *McNeil*'s multi-factor pastiche will only exacerbate the confusion and unpredictability denounced by the *Levy* court as leading to the unconstitutional chilling of public student speech.[815]

McNeil is essentially a criminal attempt case where law enforcement authorities concluded, after conducting an immediate investigation that included both a residential search and a custodial interrogation of CLM and his parents, that no crime occurred because CLM had taken no steps in planning the enactment of his private journal entries.[816] Yet, the decision allows school districts in the Ninth Circuit to expel a student for out-of-school speech that contains violent fantasies or threatens other students, notwithstanding that the student never intended for anyone to know about and never communicated the disturbing information. While recognizing the tragic reality that public schools must be equipped to deal with the devastating possibility of in-school shooting incidents, *McNeil*'s accommodation of that unsubstantiated interest and peremptory dismissal of CLM's intent never to show anyone his journal entries, let alone bring them to school, is difficult to reconcile with constitutional free speech principles.[817] In the final analysis, the decision enforced CLM's punishment for expressing his private thoughts in his personal diary in the privacy of his own bedroom. The Eighth Circuit has elaborated the

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government's content-based abridgement of speech is presumptively invalid under the First Amendment. Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive"); McCullen v. Coakley, 573 U.S. 464, 479 (2014) (a speech regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred"); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993). This is a far cry from *Tinker*'s "substantial and material disruption" test, which is ostensibly content-neutral in application. Hofheimer, *supra* note 121, at 974 ("The *Tinker* Court indicated that striking such a balance should be based on the effect of the student speech rather than its message.") (footnote omitted).

815. Black & Shaver, *supra* note 6, at 46 (describing multi-factored nexus test as "a 'kitchen sink' approach where a court will adopt all varieties of threshold tests and apply them to the facts") (footnote omitted). The constitutional gallimaufry adopted as the controlling standard in *McNeil* parallels the "*Tinker-Bell*" standard designated, apparently tongue-in-cheek, by Judge Graves in his dissenting opinion in *Bell*, which similarly combined disparate elements by which to assess whether school regulation of off-campus digital speech passes First Amendment muster. *Bell*, 799 F.3d at 435–36 (Graves, Jr., J., dissenting) (proposing test that considers elements of substantial disruption, reasonable foreseeability, nexus with school's pedagogical interests, and the speech's "predominant message").

816. *McNeil*, 913 F.3d at 704; *see Doe*, 306 F.3d at 631 (Heaney, J., dissenting) ("Proof of actual intent to carry out the threat is needed to demonstrate the reality of the threat itself. Any other rule vests far too much power in the government at the expense of the individual.").

817. *Doe*, 306 F.3d at 624 (majority opinion) ("It is only when a threatening idea or thought is communicated that the government's interest in alleviating the fear of violence and disruption associated with a threat engages.").

principles compelling the rejection of this result as prohibited by the First Amendment:

> Requiring less than an intent to communicate the purported threat would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts. In *Stanley*, the Supreme Court recognized that the First Amendment means, at a minimum, that the government has no business telling an individual what he may read or view in the privacy of his own home. The government similarly has no valid interest in the contents of a writing that a person, . . . might prepare in the confines of his own bedroom. After all, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control" the moral contents of our minds.[818]

V. THE PREVAILING DIGITAL STUDENT SPEECH FRAMEWORK'S CONSTITUTIONAL INFIRMITIES

A. First Amendment Fault Lines

The Second Circuit's decisions reveal persistent First Amendment fault lines with both doctrinal and theoretical implications for public student digital speech. These fissures are apparent as well in varying degrees in the Third Circuit's *Levy* and Ninth Circuit's *McNeil* opinions. They include, first, whether the absorption of basic negligence principles to examine the relationship between digital speech and the school environment adequately protects students' expressive rights, both procedurally and substantively, in the modern public square; second, whether the constitutional status of a student's speech as on- or off-campus should be determined independently of *Tinker*'s application; third, whether public schools can designate values derived from their educational mission as a basis for disciplining students' off-campus speech found disruptive because deemed to conflict with those values in the context of extracurricular activities; fourth, whether *Tinker*'s narrow accommodation of the "special characteristics of the school environment"[819] with the free speech rights of students enrolled in public schools may be constitutionally exported to expression beyond the schoolhouse gate; and fifth, whether the exercise of school authority is justified by the claim that off-campus social media speech has "targeted" the school or is "aimed" at the school—terminology tracing to outdated e-commerce personal jurisdiction case law—because it includes information about school students, personnel, or affairs.

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818. *Id*.

819. *Tinker*, 393 U.S. at 506.

The Supreme Court's review of *Levy* provides an opportunity to clarify these issues by affirming the constitutional rule of general applicability endorsed by the Third Circuit in order to prevent the chilling of students' protected free speech rights in this context, while disclaiming undue judicial deference to the judgments of public school officials with respect to their interpretation of both the language at issue and the competing interests that may be implicated in a particular digital speech controversy. This section takes a closer look at this bundle of interrelated issues.

B. A Reasonable Foreseeability Standard Insufficiently Protects Public Students' Digital Expression Rights

Levy's reasoning confirms that judicial reconsideration was long overdue of the paternalistic and irresolute *Wisniewski-Doninger II* negligence-based rubric as insufficiently protective of constitutional free speech interests.[820] With the acceptance of *Levy* for review by the Supreme Court, that prospect is now at hand. The reasonable foreseeability standard adumbrated in the final footnote to Judge Newman's *Thomas* concurrence, which has become the dominant benchmark relied on by federal courts[821] in dramatically increasing the scope of public schools' censorial power over students' digital expression, "is far from an inevitable rule or a foregone conclusion."[822] If it survives examination by the Supreme Court, its continued application will have far-reaching and debilitating effects in the public student digital speech arena.[823]

In holding that *Tinker* applies to students' off-campus online speech merely because it will foreseeably reach the school environment and potentially cause a disruption, the *Wisniewski* and *Doninger II* courts

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820. Fronk, *supra* note 5, at 1418 ("[*Doninger II*] presents a dangerous application of the case law that needs to be reassessed and clarified."); Tuneski, *supra* note 58, at 176 ("a 'reasonable foreseeability' standard fails to adequately protect off-campus speech").

821. *Waldman II*, *supra* note 4, at 623 ("[t]he 'reasonably likely to reach the school and cause a substantial disturbance there' standard is becoming the dominant test for school authority over off-campus speech") (footnote omitted); McDonald, *supra* note 4, at 729 ("most [federal] courts of appeals that have weighed in to date have decided student speech rules apply" based on reasonable foreseeability standard); Rosario v. Clark Cty. Sch. Dist., 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, *12 (D. Nev. July 3, 2013) ("The test that has emerged from the circuit courts when considering off-campus student speech, including online social networking speech, is that school officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption.") (collecting authorities).

822. Calvert, *supra* note 20, at 233; *see also id.* at 233–34 ("Negligence need not be adopted here and, indeed, as illustrated above, it has been rejected by courts in other contexts in which constitutional concerns for freedom of expression were at stake.").

823. Jett, *supra* note 171, at 898 (the Second Circuit's reasonable foreseeability standard "carries wide-ranging and negative consequences for students' First Amendment expressive-rights jurisprudence") (footnote omitted).

elevated Judge Newman's suggestion to a constitutional rule of decision.[824] Judge Newman proposed that, at least with respect to the distribution of indecent material outside of school, schools should have the ability to regulate student publications based on their "reasonably foreseeable consequences[.]"[825] This "traditional standard of the law"[826] entails the application of basic negligence principles, which are anything but traditional in First Amendment doctrine because insufficiently protective of speech.[827] While Judge Newman's willingness to dispense with territorial limitations may have been justifiable in the narrow circumstances originally contemplated—when students distribute an indecent publication in tangible format in immediate physical proximity to the school knowing that it will be brought onto school grounds[828]—the adoption of a minimum foreseeability standard in the digital speech context is irreconcilable with First Amendment doctrine and theory.[829] The *Wisniewski-Doninger II* proximate cause test fails to provide constitutionally sufficient notice to students either of when their digital

824. Hoder, *supra* note 19, at 1577 ("In his concurrence in *Thomas*, Judge Newman argued that geography should not be a limit on a school's ability to regulate student speech or activity that concerns the school.") (footnote omitted); *Wynar*, 728 F.3d at 1068–69 ("But at least where it is reasonably foreseeable that off-campus speech meeting the *Tinker* test will wind up at school, the Second Circuit has permitted schools to impose discipline based on the speech.").

825. In a footnote that was dicta in *Thomas* but has profoundly influenced the subsequent trajectory of public student speech jurisprudence, Judge Newman suggested that where an indecent student publication was distributed at the perimeter of the schoolyard, "the traditional standard of the law that holds a person responsible for the natural and reasonably foreseeable consequences of his action might have some pertinent applicability to the issue." *Thomas*, 607 F.2d at 1058 n.13.

826. *Id.*

827. *Bell*, 799 F.3d at 421 (Dennis, J., dissenting) ("The majority opinion's test effectively amounts to the very kind of negligence standard that the Supreme Court has rejected for determining whether a speaker may be held liable on the basis of his words."); *see also* Calvert, *supra* note 20, at 232 ("some courts have expressed a strong presumption against employing negligence principles that relate to the reasonable foreseeability of a result occurring in speech-based cases"). In rejecting an "objective" interpretation of the federal law criminalizing threats against the President of the United States because it "embodies a negligence standard," Justice Marshall observed that "we should be particularly wary of adopting such a standard for a statute that regulates pure speech." Rogers v. U.S., 422 U.S. 35, 47 (1975) (Marshall, J., concurring).

828. *Thomas*, 607 F.2d at 1058 n.13 ("Other courts have upheld school discipline for distribution occurring just off school grounds, where circulation on school property was *intended* and predictable.") (emphasis added).

829. McDonald, *supra* note 4, at 730 ("a 'reaching the campus' foreseeability standard for off campus speech is . . . incompatible with First Amendment jurisprudence, as well as with desirable constitutional policy"); Fronk, *supra* note 5, at 1418–19 ("the Second Circuit misinterpreted and misapplied Supreme Court precedent and lower court decisions by developing and relying upon an erroneous standard").

expression will fall within the school's regulatory purview[830] or when it transgresses the boundary separating protected from unprotected speech.[831] Further, by allowing governmental authority to reach into private homes and other off-campus locations where students create and post digital content, it expands beyond recognition schools' power to control the speech of their students.[832] The procedural and substantive deficiencies with the reasonable foreseeability formulation are addressed below.

1. Procedural Due Process Requires Adequate Prior Notice to Public School Students Before Their Off-Campus Digital Speech Can Be Punished

The *Thomas* court underscored the importance of procedural due process safeguards when public schools seek to regulate student expression, including the assurances provided to the plaintiffs in that case that their publication activities would be immunized from disciplinary action if kept off-campus.[833] Amplifying the same point in his *Fraser* dissent, Justice Stevens subsequently noted that *both* First Amendment and due process considerations mandate adequate prior notice before a student's speech may be punished.[834] An important component of this hybridized

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830. *Levy*, 964 F.3d at 187–89 (reasonable foreseeability standard's overbreadth impermissibly chills public students' speech); Hoder, *supra* note 19, at 1600 (a negligence standard "does not provide students fair notice of when they may be punished by the school") (footnote omitted). Professor Waldman has termed this "jurisdictional notice," which requires public schools to provide students with clear advance notice that their off-campus digital expression may be subject to punishment. *Waldman I*, *supra* note 122, at 1138 ("given the current uncertainty regarding schools' jurisdiction over off-campus speech (particularly cyber-speech), it is crucial that any school seeking to punish students for such speech has clearly communicated this possibility to students").

831. Professor Waldman denominates this aspect of due process "substantive notice," which "requires schools to provide students with sufficient substantive guidance about the types of speech that are prohibited." *Waldman I*, *supra* note 122, at 1139; *see also Bell*, 779 F.3d at 417 (Dennis, J., dissenting) ("the majority opinion's framework contains defects that fail to provide students, . . . with adequate notice of when their off-campus speech crosses the critical line between protected and punishable expression").

832. Calvert, *supra* note 20, at 251 ("In particular, an approach like that adopted by the Second Circuit that relies solely on whether it is reasonably foreseeable that the speech in question will come to the attention of school authorities gives schools sweeping off-campus jurisdictional power."); *see also Porter*, 393 F.3d at 617–18; *Doe*, 306 F.3d at 624.

833. *Thomas*, 607 F.2d at 1050–51; *see also id.* at 1053 ("The school authorities had explicitly informed the students that no disciplinary action would be taken if the students kept their publishing activities off school property.") (Newman, J., concurring in the result); *see also Waldman I*, *supra* note 122, at 1131 ("After-the-fact punishments of student speakers without adequate prior notice also raise due process concerns."). Due process concerns also include the lack of an "independent, impartial, decisionmaker" when schools punish speakers and the effective insulation of the disciplinary process from judicial review attributable to the typically "short duration of most sanctions imposed by school officials." *Thomas*, 607 F.2d at 1050, 1052.

834. *Fraser*, 478 U.S. at 691–92 (Stevens, J., dissenting) ("It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the

requirement is therefore that students are suitably informed ahead of time and understand when their digital expression will be considered subject to the school's disciplinary authority. Without such protection, and particularly because of the practical difficulty in obtaining judicial review before the expiration of a student speaker's punishment, "many students will be content to suffer in silence, a silence that may stifle future expression as well."[835]

The current state of the law disregards the due process limitations identified in *Thomas* and allows for severe regulatory overreach by authorizing punishment in situations where digital student speakers "ha[ve] no reason to anticipate punitive consequences"[836] from their speech. First, as discussed above, a legal standard based on the reasonable foreseeability of speech coming to the attention of school authorities will burden a wide array of online student expression because of the permanence, pervasiveness, and accessibility of the electronic public square.[837] For

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scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion."); *see also LaVine*, 279 F.3d at 727 (Kleinfeld, J., dissenting from denial of rehearing *en banc*) (students must receive "clear notice that the speech was prohibited and would be punished").

835. *Thomas*, 607 F.2d at 1052. The *Thomas* court pointed out the asymmetrical burdens imposed on student speakers absent a school district's compliance with procedural due process requirements. *Id.* ("Further, although students must absorb considerable expense to challenge a suspension in court, school officials can mete out punishment without incurring the costs of procedural safeguards a conventional prosecution would require."); *see also* Goldman, *supra* note 93, at 396 n.4 ("Given the reluctance of students and parents to incur the costs of litigation for suspensions that are often served before they can be effectively reviewed, the number of litigated cases vastly underestimates the number of student speech controversies.").

836. *Fraser*, 478 U.S. at 693 (Stevens, J., dissenting); *see also Waldman I*, *supra* note 122, at 1139 ("a reasonable student in [Avery Doninger's] position would not have recognized that her livejournal.com blog posting was subject to the school's jurisdiction and potentially punishable"). The due process mandate of adequate prior notice was arguably satisfied in *Tinker*, *Fraser*, and *Morse*. In *Tinker*, the ban on student armbands was promulgated by the school board before they were worn in school as symbols of protest, and the students "were aware of the regulation that the school authorities adopted." 393 U.S. at 504. In *Fraser*, the Court dismissed the student's due process argument as "wholly without merit" because the "prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions." 478 U.S. at 686. In *Morse*, the student was punished only after he had disregarded the principal's specific command to take down his "BONG HiTS 4 JESUS" banner. 551 U.S. at 398. *See Waldman I*, *supra* note 122, at 1140 ("The clearest form of such notice will occur when the school responds to a particular instance of speech, either by warning the student speaker in advance not to engage in the specific speech in question (as in *Tinker* and *Fraser*) and/or by telling the student to stop speaking (as in *Morse*). In either case, if the student speaker proceeds with the speech despite such direct admonitions, it will be very difficult for him to argue that he lacked adequate prior notice that he might face punishment for it.").

837. *See* text accompanying notes 464–85, *supra*; *see also Levy*, 964 F.3d at 188; Tuneski, *supra* note 58, at 177 n.148. ("It is important that a speaker not be held liable for off-campus speech even when it is reasonably foreseeable that the expression may be received on campus. Because a website is available worldwide and the internet has become a pervasive

students attempting to discern whether schools can penalize their digital speech, this amounts to no standard at all for the simple reason that virtually all online speech is capable of reaching the school community.[838] Even with respect to indecent print publications, Chief Judge Kaufman's majority opinion in *Thomas* squarely rejected a foreseeability test as an unconstrained basis for the exercise of school regulatory authority over student expression in the general community.[839] As similarly emphasized in *Levy*, the expansion of school authority to allow for the punishment of online student speech that might foreseeably come to the attention of school officials and result in a disruption which has not yet occurred is unprecedented.[840] A student confronted with the likelihood that her digital speech—especially when it is controversial or critical—will be discovered by school officials will err on the side of caution to avoid risking such punishment.[841]

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presence in schools, it is reasonably foreseeable that any site created by a student that has provocative content relevant to the student body would be viewed by another student from a school computer. Thus, a foreseeability standard would effectively subject all student internet speech to the jurisdiction of schools.").

838. *Levy*, 964 F.3d at 187 ("it is a virtual certainty" that social media messages "will be viewed by fellow students and accessible from school"); *see also* Hoder, *supra* note 19, at 1598 ("The foreseeability test potentially expands school authority to all online student speech because it is arguably foreseeable that any online speech will reach schools grounds.") (footnote omitted); *see also* Jessica K. Boyd, *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) ("Almost all communication created through the Internet and other instant means can foreseeably make its way to a school campus and to the attention of school authorities due to the pervasive nature of electronic communication.").

839. The *Thomas* court's reasoning is only reinforced by the instantaneous connectivity provided by social media platforms:

> Nevertheless, we believe that this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result. If this is to be the standard, we cannot avoid asking if the proprietor of . . . the store adjacent to Granville High School, could be punished by the Board of Education for selling the National Lampoon so close to the school? Surely, it is "reasonably foreseeable" that the magazine would find its way into the school.

607 F.2d at 1053 n.18.

840. *Levy*, 964 F.3d at 187–88; *see also Bell*, 799 F.3d at 422 (Dennis, J., dissenting) (applying negligence standard to off-campus student digital speech "simply cannot be squared with the foregoing First Amendment precedents").

841. In the wake of *Doninger II*, public high school students in New York, Connecticut, and Vermont will curtail their digital expression as a risk management strategy:

> The vague and unpredictable standards currently applied in online student speech cases do not give students any guidance on when their expression is beyond the school's reach. Instead, current case law sends students the message that the only way to definitely prevent discipline at school is to avoid speaking on the Internet altogether. Thus, until there is a simple and unambiguous limit on school authority over the Internet, students' online speech may be substantially chilled.

2. A Reasonable Foreseeability Test Burdens Protected Speech in Violation of the First Amendment

Thomas also emphasized the need for "precise and narrow boundaries"[842] when government regulations impact public students' First Amendment interests, a principle recently reinforced in *Levy*.[843] Regulatory precision assumes heightened importance relative to their digital expression "to ensure that ambiguity does not chill speech."[844] *Tinker*'s application in this context contravenes this principle because its vagueness and indeterminacy burden students with predicting how school officials will react to their online expression,[845] first by requiring a prophecy as to whether school administrators might "reasonably" forecast the occurrence of a disruption, and second by requiring a prediction as to whether any such anticipated disruption would be "substantial."[846] The

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Hoder, *supra* note 19, at 1600 (footnotes omitted).

842. *Id.* at 1048. In case law addressing the constitutionality of government licensing restrictions, the Second Circuit has repeatedly held that a lack of "narrow, objective and definitive standards" renders a regulation facially invalid under the First Amendment. *Amidon*, 508 F.3d at 103 (quoting *Forsyth Cty.*, 505 U.S. at 131). "This principle protects against two relevant risks; first, self-censorship by 'timid speakers who are worried that officials will discriminate against their unorthodox views,' and second, that lacking governing standards, a government official may 'suppress viewpoints in surreptitious ways that are difficult to detect.'" Children First Found., Inc. v. Fiala, 790 F.3d 328, 357 (2d Cir. 2015) (Livingston, J., dissenting).

843. 964 F.3d at 188–90.

844. FCC v. Fox Television Stations, 567 U.S. 239, 240, 132 S. Ct. 2307, 2310 (2012). The Supreme Court has emphasized in a variety of contexts that when free speech rights are implicated, "government may regulate in the area only with narrow specificity" (NAACP v. Button, 371 U.S. 415, 432–33 (1963)), "extreme care" (NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982)), and "exacting proof requirements" (Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003)).

845. S*ee Bell*, 779 F.3d at 417 (Dennis, J., dissenting) ("the majority opinion's ill-devised framework for regulating minors' off-campus Internet speech would be too vague altogether for the First Amendment to tolerate"); *see* Farrell v. Burke, 449 F.3d 470, 485 (2d Cir. 2006) (Sotomayor, J.) ("vagueness in the law is particularly troubling when First Amendment rights are involved"); *see also Reno*, 521 U.S. at 871–72 ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.").

846. Judge Dennis explained why predicting future disruption attributable to off-campus speech is constitutionally problematic:

> If this standard were applied off campus, how can a student or a student's parents know with any degree of certainty when off-campus online speech can be 'forecasted' to cause a 'substantial disruption'? Although *Tinker* is not a completely toothless standard, . . . its framework inherently requires guesswork about how a third-party school official will prophesize over the effect of speech. Thus, . . . before a student drafts an email or writes a blog entry, he hereinafter will be required to conjecture over whether his online speech *might* cause a 'disruption' that is 'substantial' in the eyes of school officials, or, alternatively, whether a school official *might* reasonably portend that a substantial disruption *might* happen."

Bell, 779 F.3d at 419 (Dennis, J., dissenting) (emphasis in original); *see also* Shaver, *supra* note 6, at 1600–01 ("[s]tudents' constitutional right to speak freely when they are not at school

uncertainty inherent in these prognostications will, again, operate to squelch student expression as timid speakers, confronted with the prospect of school officials exercising standardless discretion to punish their digital speech, revert to self-censorship.[847]

Doninger II's adoption of a basic negligence test as the constitutional baseline for regulating public student digital expression allows students like Avery Doninger who criticize school officials to be punished for misperceiving the reactions of those same officials.[848] Further, it allows students like B.L. who criticize a school's extracurricular programs to be penalized for the supposedly disruptive effect of the speech on those programs, a tautological justification that would squelch student dissent.[849] The diminished protection of a "reasonableness" standard may be defensible when applied to speech occurring within the schoolhouse gate because of the demonstrable need to protect an orderly educational environment, but should have no place in restricting student digital speech originating away from school without school supervision or the use of school resources and independent of any school-sponsored activity.[850] It is asking far too much under the First Amendment to burden students with forecasting whether their online speech might "reasonably" result in

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should not be subject to second-guessing by a school official about the potential future impact on the school environment.").

847. A commentator has elaborated the serious constitutional problems with applying a "reasonable foreseeability" liability standard, rooted in the substantive law of negligence, because of the dampening effect it will have on student speech outside of the school environment:

> [A] "reasonable foreseeability" standard fails to adequately protect off-campus student speech. Advocates of this proposal would argue that a student should be subject to punishment by school officials only if a reasonable student could reasonably foresee that his or her expression would cause a substantial disruption within a school. The imprecision of the substantial disruption part of this test, however, would undoubtedly lead to the chilling of speech that should be fully protected outside of the context of schools. Given the difficulty that courts and administrators have had defining what constitutes a substantial disruption, it is inconceivable that a high school student would be able to predict that his expression would be viewed at school and cause a disruption, and that the disruption would be substantial enough to warrant the punishment of the school. Hence, cautious students would instead censor their speech out of fear that it may cause another student to disrupt the classroom environment.

Tuneski, *supra* note 58, at 176.

848. *See Bell*, 799 F.3d at 422 (Dennis, J., dissenting) ("[T]he majority opinion announces a constitutional rule whereby students, like Bell, may be held liable for their off-campus speech that criticizes official misconduct based largely on the reactions of the very officials in question or the perception of the majority opinion's invented 'layperson.'").

849. *Levy*, 964 F.3d at 188.

850. *See Bell*, 799 F.3d at 419 (Dennis, J., dissenting) ("Supreme Court case law . . . demands a more burdensome showing upon the government before levying penalties upon a speaker based on the content of his speech" than the perception of a reasonable layperson); *see also* Shaver, *supra* note 6, at 1601 ("Constitutional rights should not depend on the extent to which a particular school official undertakes a crystal ball inquiry about the potential future effect of a student's off-campus speech.") (footnote omitted).

a "substantial" disruption at school, an imprecise and speculative inquiry that has proven elusive even for courts to apply.[851] The plasticity of a reasonableness standard deprives student cyber-speakers of certainty as to whether their expression inhabits the protected zone—a powerful disincentive to free and open communication.[852]

As warned against in *Thomas*, and as occurred in *Doninger II*, this "flimsy standard"[853] risks punishment based on mere disagreements over choice of language where a student has misjudged how her digital expression would be regarded by members of the school community.[854] It amounts to an open-ended invitation to school officials to impose their personal attitudes and beliefs about what speech is acceptable, apparently even weeks after the expression has been introduced online without any disruption to the school environment or learning process.[855] It is inhospitable to the unfettered exchange of information and ideas among those seeking to become digitally responsible participants in a democratic society. The negligence principles culled from Judge Newman's *Thomas* concurrence and installed as the controlling standard in *Wisniewski* and *Doninger II* cede an alarming degree of authority to public schools over

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851. A foreseeability test "presents the difficult task of determining to what extent one can expect adolescents to predict the consequences of their online activity." Hoder, *supra* note 19, at 1600 (footnote omitted); *see also* Tuneski, *supra* note 58, at 175 ("Students could not be confident whether their off-campus speech might cause unforeseen disruptions on-campus which could subject them to school punishments."). For a survey of cases involving public school officials' forecasts of materially disruptive consequences attributed to students' off-campus digital speech, *see* Samantha M. Levin, *School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students' Online Speech*, 38 FORDHAM URB. L.J. 859 (2011).

852. *Levy*, 964 F.3d at 188 (Second Circuit's "reasonable foreseeability" test has "made it difficult for students speaking off-campus to predict when they enjoy full or limited free speech rights"); *see Grayned*, 408 U.S. at 109("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.") (internal citations and quotations omitted); *see also* Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 794 (1988) (state statutory scheme requiring speaker to prove "reasonableness" of professional fundraising fees "must necessarily chill speech in direct contravention of the First Amendment's dictates").

853. *Bell*, 799 F.3d at 422 (Dennis, J., dissenting).

854. *Thomas*, 607 F.2d at 1053 n.18 ("this standard invites school officials 'to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views' ") (quoting *Cohen*, 403 U.S. at 26); *see also Bell*, 799 F.3d at 405–06 (Dennis, J., dissenting) ("If left uncorrected, the majority opinion inevitably will encourage school officials to silence student speakers, . . . solely because they disagree with the content and form of their speech, particularly when such off-campus speech criticizes school personnel."); *see also* Hayes, *supra* note 6, at 280 ("The school and the judiciary's condemnation of Avery's word choice should not be enough to elicit censure under *Tinker*.") (footnote omitted); Fronk, *supra* note 5, at 1435 ("Niehoff was merely punishing Doninger because she did not like what Doninger had posted on the website.").

855. *Doninger II*, 527 F.3d at 46; *see also* Miller, *supra* note 547, at 324 ("The variation of the *Tinker* test used in *Doninger* is backward-looking, and is thus contrary to *Tinker*.").

the free speech rights of their students by failing to impose meaningful limits on school regulation of a wide array of digital speech.[856] According to *Levy*'s persuasive reasoning, the First Amendment does not tolerate such an "expansionary dynamic,"[857] a constitutional judgment now subject to evaluation by the Supreme Court. To ensure meaningful protection for those rights, the Supreme Court should reject the reasonable foreseeability standard and instead embrace the reasoning of *Thomas* and *Levy* by establishing that school punishment of digital speech created and distributed outside the schoolhouse gate is presumptively invalid under the First Amendment.[858]

C. Levy *Correctly Uncoupled* Tinker*'s Scope of Applicability from Its Substantive Requirements*

As demonstrated by the case law canvassed in *Levy*, the government's reach all too easily extends to off-campus social media communications that can reasonably be foreseen to come to the attention of school officials and deemed disruptive, particularly when the speech is sexualized, resistant, or otherwise offends school administrators or challenges their authority.[859] As applied in *Doninger II*, this standard actually permits school administrators to troll the Internet as a means of discovering, and then retaliating against—long after a claim of disruption has failed to materialize—off-campus digital speech critical of their decision-making.[860] The danger to the First Amendment of such a precedent is self-evident.[861]

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856. *See* Hoder, *supra* note 19, at 1600 ("the 'foreseeability' standard advocated by Judge Newman in *Thomas*, and used by the Second Circuit in *Wisniewski v. Board of Education* and *Doninger*, gives the school too much authority to intervene in off-campus speech") (footnote omitted).

857. 964 F.3d at 187.

858. Fronk, *supra* note 5, at 1441 ("the courts should place a presumption of unconstitutionality on the censorship of off-campus student speech even before conducting a *Tinker* analysis").

859. Calvert, *supra* note 20, at 234 ("In a nutshell, it obviously is much easier for a school to obtain disciplinary jurisdiction when the question is whether it was reasonably foreseeable that a student's off-campus-created website, web page or IM icon would come to the attention of school authorities."); *see also* Fronk, *supra* note 5, at 1438 ("The *Doninger* decision implies that any criticism or foul language that occurs off campus is punishable once, and no matter how, it is communicated to the school administration.").

860. Fronk, *supra* note 5, at 1435 ("The court conveniently ignored the fact that the dispute had been easily defused and resolved weeks prior to Doninger's punishment. In this light it becomes clear that Doninger's punishment was an act of retribution.") (footnote omitted) (characterizing school official's actions in *Doninger II* as a "witch hunt"); *see also* Hayes, *supra* note 6, at 279; ("Principal Niehoff did not inform Avery of her punishment until May 17, 23 days after her LiveJournal post. The risk of disruption surely would have vanished in that time.") (footnote omitted).

861. Fronk, *supra* note 5, at 1437–38 ("This decision sets a dangerous precedent by essentially permitting administrators to conduct limitless, 'random' Internet searches whose results

In contrast, a determination of the constitutional status of digital expression that carefully separates the application of *Tinker*'s balancing test from a determination of whether it applies in the first instance would lead to more speech-protective outcomes as required by the First Amendment.[862] In *Levy*, Judge Krause warned against collapsing those distinct inquiries into a single analytical step as leading to the overbroad regulation of student speech.[863] A critically important step in preventing school censorship of off-campus digital expression therefore mandates the strict disaggregation of the threshold jurisdictional inquiry from the application of substantive principles under the public student speech framework.[864] *Tinker*'s balancing test presupposes that the expression at issue is within the schoolhouse gate—i.e., it governs the speech of a *student* subject to the special characteristics of the public educational system, not that of a *citizen* as a member of the general political community.[865] *Tinker* should not be conscripted to determine upfront whether digital expression qualifies as student speech subject to a school's disciplinary authority—simply put, that is using "the wrong tool for the wrong job."[866] Nor is the *Tinker* standard a repository for after-the-fact rationalizations of speech penalties through recourse to improbable forecasts of disruption to the learning environment whenever school officials find online speech disagreeable, distasteful, or disputatious.[867] In all cases, reviewing courts

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can be used to punish students who have voiced their displeasure with school administration while off campus.").

862. Professor Calvert has been an early and strong proponent of distinguishing the threshold jur isdictional determination from *Tinker*'s substantive application in digital free speech cases. *See* Calvert, *supra* note 131, at 265 ("critical" step in threshold jurisdictional determination is whether student "intentionally and knowingly" introduced off-campus speech into campus environment).

863. *See Levy*, 964 F.3d at 188 (3d Cir. 2020).

864. Fronk, *supra* note 5, at 1441 ("the first question that should be asked in situations involving the censorship of student Internet speech is whether the speech occurred on or off campus"); *see also* Brenton, *supra* note 29, at 1244 ("Supreme Court student-speech precedent, therefore, should not apply to off-campus cyberspeech until and unless a court determines that the school's power to regulate extends far enough to encompass it.") (footnote omitted); *see also* Calvert, *supra* note 20, at 213 (urging separate consideration of jurisdictional and substantive determinations; "[T]he threshold question addressed here is whether the jurisdictional authority of schools properly extends outside and beyond the geographic boundary of 'the schoolhouse gate' referred to in *Tinker* and reaches into private homes and other off-campus venues where students create, post and transmit internet messages.") (footnote omitted).

865. Brenton, *supra* note 29, at 1226 ("The *Tinker* test is designed to determine whether expression that is unambiguously student speech may be censored.").

866. *Id*. at 1227 ("To employ the *Tinker* test to answer the threshold question of when cyberspeech is student speech is to use the wrong tool for the wrong job.").

867. *See* Dauksas, *supra* note 308, at 457 ("The present landscape, as set forth by lower federal and state courts, shows that a student's punishment for offensive online expression depends almost entirely on the level of tolerance of presiding judges and justices for the language being used.") (footnote omitted); *see also* Papandrea, *supra* note 5, at 1093 ("Most student

should carefully scrutinize upfront whether school authority properly extends to disputed digital speech without deferring to *Tinker*'s reflexive incantation by school officials, an analytical bifurcation strictly adhered to in *Levy* but otherwise seldom evident in the case law.[868]

The pattern of courts glossing over whether networked speech falls within a school's disciplinary purview not only "belies a fundamental misunderstanding of both *Tinker* and technology"[869] but is ordinarily outcome determinative.[870] When, as in *Wisniewski* and *Doninger II*, the question of whether school authority may extend to a particular example of digital expression is conflated with *Tinker*'s application in upholding a speaker's punishment, the risk that public school districts are

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speech does not involve unprotected speech but rather unpleasant speech that offends school officials or makes them uncomfortable.") (footnote omitted).

868. *Levy* correctly separated the jurisdictional and substantive inquiries by first examining whether the plaintiff's Snapchat photo qualified as an on- or off-campus speech before holding that, as the latter, it could not be punished under *Tinker* without violating the First Amendment. *See* 964 F.3d at 178–81. *C.R. v. Eugene Sch. Dist. 4J*, which upheld a student suspension based on repeated oral sexual harassment occurring at a schoolyard's border at the end of the school day in a case which did not involve student Internet speech, similarly exemplifies the correct analytical separation:

> To determine whether a school properly disciplined a student for off-campus speech requires us to answer two questions: First, we consider the threshold question of whether the school could permissibly regulate the student's off-campus speech at *all*. Next, we consider the question of whether the school's regulation of the student's speech complied with the First Amendment's requirements.

835 F.3d 1142, 1148 (9th Cir. 2016) (emphasis in original). *See also Recent Cases:* Snyder, *supra* note 121, at 1064("Before proceeding with the *Tinker* inquiry, the court should have reached the issue of the constitutional status of off-campus student speech and held that it should not be subject to on-campus discipline."); Pike, *supra* note 4, at 973–74 ("Lower courts challenged by the nuances of technologically enabled speech, or 'cyber-speech,' focus almost by default on whether student speech 'materially and substantially' disrupted the educational process without analyzing whether that speech actually occurred within the school's purview.") (footnotes omitted); Papandrea, *supra* note 5, at 1064 ("Although some courts ask as a threshold matter whether the student speech at issue constitutes on-campus or off-campus expression, others skip this inquiry and simply apply *Tinker*'s material disruption test directly.").

869. Pike, *supra* note 4, at 974.

870. Brenton, *supra* note 29, at 1226. The question of whether a school's disciplinary authority extends to contested digital expression determines which set of free speech principles applies, the more deferential functional standards reflecting the institutional interests of the school in protecting the learning process and educational environment or the more rigorous First Amendment standards applicable to the speech of citizens in the general community. The threshold jurisdictional determination is therefore usually outcome determinative to the extent it leads to diminished constitutional protection for off-campus student digital speech. *See* McDonald, *supra* note 4, at 729 ("This question is critical because, as in many other areas of free speech analysis, the doctrinal rules applicable to a given dispute often dictate the outcome.") (footnote omitted); *see also* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773, 776 (8th Cir. 2012) (acknowledging that success on merits of plaintiffs' application for preliminary injunction challenging their 180-day suspension for creating a website "to discuss, satirize, and 'vent' about events" at their high school turned on selection between general First Amendment principles and *Tinker* standard).

suppressing student speech based on its content becomes all too real.[871] This risk is magnified when *Tinker* is invoked to penalize speech based merely on a remote prediction of disruptive consequences that are unlikely to materialize,[872] a manipulable approach that invites school officials to engineer hindsight justifications for the punishment of digital speech critical of their deportment or decisions.[873] Through implausible projections of disruption to the school environment fashioned to bolster *Tinker*'s application, any student who disses a teacher or classmate on social media, vents about a homework assignment in a text message, or trashes a school decision in a blog posting risks exposure to punishment. Reliance on *Tinker* in this manner functions not as a means of accommodating the exercise of students' free speech rights with the legitimate educational interests of the public school system, but as a proxy for *sub rosa* and arbitrary governmental judgments as to the acceptability of their off-campus digital expression. The erasure of any principled dividing line between in-school and out-of-school speech, and the accompanying erosion of public students' First Amendment rights evident in the case law, is the inevitable result.[874]

D. The Overbroad "Targeting" Rationale Misappropriated by the Public Student Digital Speech Jurisprudence

1. An Instructive Analogy: The Evolution of Personal Jurisdiction in E-Commerce Cases

A useful parallel to assess the validity of a public school's exercise of disciplinary control over student expression on digital platforms can be found in the evolution of the case law addressing specific personal jurisdiction based on an out-of-state defendant's use of an Internet website for commercial purposes.[875] Early in the development of this line of

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871. Indeed, this suppression becomes justified by mere tautology: "[s]chools can regulate off-campus speech under *Tinker* when the speech would satisfy *Tinker*." *Levy*, 964 F.3d at 188.

872. *Recent Cases:* J.S., *supra* note 698, at 1070 ("Because the determination of a substantial disruption depends almost entirely on the facts of the case at issue, students will often have no basis on which to predict whether their speech would fall within *Tinker*'s ambit. These concerns apply *a fortiori* to cases where the school official need show only a reasonable fear of substantial disruption, rather than its actual occurrence.").

873. *See* Fronk, *supra* note 5, at 1441 ("if courts proceed directly to *Tinker*, . . . situations like *Doninger* can easily be manipulated *post hoc* by the school to justify their punishment of any student for voicing displeasure with administrative decisions").

874. *See Levy*, 964 F.3d at 188.

875. In this context, "the Courts have had to re-evaluate traditional concepts of personal jurisdiction in the light of the increasing globalization of the economy." Digital Equip. Corp. v. Alta Vista Tech., 960 F.Supp. 456, 462 (D. Mass 1997). The due process issue in these cases has been framed as whether "an out-of-state citizen, through electronic contacts, has

authority that emerged from the intersection of commerce and technology, the so-called "passive versus active" test spawned by *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[876] gained considerable traction. Under this test, foreign "passive" websites offering minimal opportunities for user interactivity were deemed not subject to personal jurisdiction, whereas "active" websites allowing greater interactivity and information exchange could be sued in distant fora ostensibly without violating due process requirements.[877] The uncertainty stemming from an evaluation of the "level of interactivity"[878] and "nature and quality of commercial activity"[879] conducted by a putative defendant on the Internet provided courts and parties with marginal guidance and also significantly increased the scope of potential liability exposure for businesses looking to take advantage of the global market opportunities introduced by e-commerce.[880] As a result, courts have shifted away from *Zippo*'s "sliding scale"[881] examination of a particular commercial website's relative degree of interactivity in favor of a jurisdictional approach focused on a non-resident defendant's online tortious activity that is expressly directed at and causes harm in the forum state.[882] This progression in the law entailed a rejection of the

conceptually 'entered' the State via the Internet for jurisdictional purposes." ALS Scan v. Digital Service Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002).

876. 952 F. Supp. 1119 (W.D. Pa. 1997).

877. *Id.* at 1124.

878. *Id.*

879. *Id.*

880. "Courts have reached differing conclusions with respect to those cases falling into the middle 'interactive' category identified in *Zippo*." Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 916 (D. Or. 1999). According to the *Millennium* court's warning, "[t]he possibility of such overreaching jurisdiction raises the specter of 'dramatically chilling what may well be the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.' Businesses offering products through the Internet, particularly small businesses, might forego this efficient and accessible avenue of commerce if faced with the 'litigious nightmare of being subject to suit' in every jurisdiction in this country." 33 F. Supp. 2d at 923.

881. *Zippo Mfg Co.*, 952 F. Supp. at 1124. The "sliding scale" analysis of interactive websites as outlined in *Zippo* has been further limited to situations where the defendant owns or operates the website, and therefore rejected as inapplicable where an individual merely posts on a social media site. *See, e.g.*, Binion v. O'Neal, 95 F.Supp. 3d 1055, 1060 (E.D. Mich. 2015); Hyperbaric Options, LLC v. Oxy-Health, LLC, 2013 U.S. Dist. LEXIS 140347, *16 (E.D. Mich. Sept. 30, 2013) (holding social media postings on sites like YouTube and Twitter "do not lend themselves to the *Zippo* interactivity test for several reasons," including that the defendants do not own or operate the website).

882. *See, e.g.*, *Millennium Enters.*, 33 F. Supp. 2d at 921 ("[T]he court finds that the middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: 'deliberate action' within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."); *ALS Scan*, 293 F.3d at 714 (modifying *Zippo* standard to require "directing electronic activity into the State with the manifested intent of engaging [in] business or other interactions" within the forum state); IMO Indus. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998) (personal jurisdiction based on

foreseeability element implicit in the *Zippo* formulation as an insufficient predicate for jurisdiction based on the operation of a commercial website.[883]

These developments in Internet-based personal jurisdiction jurisprudence, informed by the recognition that "when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction[,]"[884] are instructive with respect to cabining public school authority over students' off-campus digital speech.[885] By obvious analogy, and in the language used to describe traditional due process restrictions, a public school should be prohibited from asserting disciplinary control over the digital communications of its students away from school and without school supervision or the use of school resources unless a student speaker deliberately makes the speech "present" in a school-controlled "forum" or event.[886] As explained below, this would occur, for example, by using a school's computer system to transmit information or by purposefully directing the speech to members of the school community while they are at school or involved in a school-sponsored program or activity.[887] On the other hand, a student cannot be said to have intentionally availed herself of the school environment for

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Internet activity is established by "contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity") (emphasis in original); *see also* Triple Up Ltd. v. Youku Tudou Inc., 235 F. Supp. 3d 15, 28 (D.D.C. 2017) ("In this Circuit, a website's 'interactivity' is generally relevant to the constitutional issue only insofar as it illustrates whether the website allows its operator to engage in real-time transactions with District of Columbia residents.").

883. As summarized in *Millennium Enters., Inc. v. Millennium Music, LP*, "it is well-established that foreseeability alone cannot serve as the constitutional benchmark for personal jurisdiction." 33 F. Supp. 2d at 921. The *Millennium* court elaborated:

> [D]efendants have published information on an Internet Web site that is accessible to whomever may find it. The fact that someone who accesses defendants' Web site can purchase a [product] does not render defendants' actions "purposefully directed" at this forum.

Id.

884. *ALS Scan*, 294 F.3d at 712.

885. For an argument analogizing to the application of personal jurisdiction principles in commercial website cases in evaluating the amenability of student cyberspeech to public school regulation, *see* Brenton, *supra* note 29, at 1231 ("[C]ourts should first consider, by analogy to the rules of personal jurisdiction, the threshold question of whether a particular exercise of school authority is supported by minimum contacts with the school environment such that the authority does not offend notions of fair play and substantial justice.") (footnote omitted).

886. Brenton, *supra* note 29, at 1234 ("Presence in the forum, or on campus, is as compelling a basis for school authority over student cyberspeech as it is for personal jurisdiction.") (footnote omitted).

887. *See* text accompanying notes1060–74, *infra*. The purposeful availment analysis focuses on the defendant's deliberate contacts with the forum state, which "must be voluntary—not based on the unilateral actions of another party or a third person." *Dig. Equip. Corp.*, 960 F. Supp. at 468 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

purposes of communicating online, and the school does not have a greater license to suppress speech, merely because it is disseminated on a publicly accessible social media platform.[888]

It follows that whether particular digital expression is reasonably likely to come to the attention of school authorities—a test derived from the nature of the medium rather than the purposeful communicative engagement of the student with the school[889]—should be of no moment in the controlling analysis. Rather, what matters in this context is the student's intentional communication of digital speech within a school setting by manifestly taking steps to direct the speech to an audience situated at school or subject to school supervision such that the speech is properly considered as coming within the schoolhouse gate.[890] Consistent with fundamental due process limitations, a student may not be haled before school authorities based merely on the foreseeability of her online speech coming to their attention.[891]

In a similar vein, *Doninger II*'s conclusion that the foreseeable discovery of digital expression by public school officials enables their assertion of authority over such expression unconstitutionally elasticizes the jurisdictional boundary imposed by *Tinker*'s schoolhouse gate.[892] A

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888. Again, the analogous limitation is clearly established in the e-commerce personal jurisdiction case law. *See ALS Scan*, 293 F.3d at 712 (rejecting position that "the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State"); *see also* Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) ("The mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

889. *See Millennium Enter.*, 33 F. Supp. 2d at 921 ("It is the conduct of the defendants, *rather than the medium utilized by them*, to which the parameters of specific jurisdiction apply.") (emphasis added).

890. In terminology reminiscent of that employed in the early e-commerce personal jurisdiction cases, a commentator has labeled the dispositive constitutional distinction in the public student digital speech context as that between a "passive telepresence" and an "active telepresence." Pike, *supra* note 4, at 1002. The former, which is immunized from school punishment, "refer[s] to student use of technology that has the same impact as any other off-campus speech" because any effect on the school environment "is not the active or intended result of the challenged expression." *Id.*; *see also* Tuneski, *supra* note 58, at 178 ("Merely posting a web page or comments online would be a passive act that would be insufficient to make the expression fit into the category of on-campus speech."). The latter, which is potentially punishable by school districts, involves the use of technology outside the schoolhouse gate where the student intends the digital speech "to directly impact the campus environment[.]" *Id.*

891. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

892. *See* Brenton, *supra* note 29, at 1239 ("[P]ermitting censorship of instant messages based on mere foreseeability swallows any meaningful protections of student cyberspeech.

necessary corollary of the reasonable foreseeability standard is that the mere public availability of information posted by a student on a digital platform renders the posting potentially punishable by a school district, which would "allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[893] The public student speech framework's absorption of the basic negligence principles relied on in *Doninger II* is the First Amendment equivalent of a return to the overly expansive stream-of-commerce theory of personal jurisdiction that has been rejected on the ground that foreseeability alone is insufficient to satisfy constitutional due process requirements.[894] In jurisdictional terms, it would mean that the "Internet's electronic signals are surrogates for the person"[895] and that a purposeful availment of the school environment as a forum for expressive activity can be found any time a student comments or cajoles about school affairs or school personnel on social media. As with the case law that developed in reaction to the overreaching in the embryonic wave of decisions that upheld personal jurisdiction over e-commerce websites operated by nonresident defendants, it should be rejected as contrary to "traditional notions of fair play and substantial justice"[896] as well as to the First Amendment.

When all online speech might eventually make it onto school grounds, all speech becomes fair game for suppression by the school.").

893. *Layshock*, 650 F.3d at 216.

894. *World-Wide Volkswagen Corp*., 444 U.S. at 295 ("[f]oreseeability 'alone has never been a sufficient benchmark for personal jurisdiction'"); *see also Millennium Enter.*, 33 F. Supp. 2d at 923 ("The timeliness and fundamental bedrock of personal jurisdiction assures us all that a defendant will not be 'haled' into a court of a foreign jurisdiction based on nothing more than the foreseeability or potentiality of commercial activity with the forum state.") Under the stream-of-commerce theory, a foreign defendant was subject to personal jurisdiction merely by the placement of its products in the stream of interstate commerce based on the foreseeability of their entering the forum state. *See ALS Scan*, 293 F.3d at 713 ("The convergence of commerce and technology thus tends to push the analysis to include a 'stream-of-commerce' concept, under which each person who puts an article into commerce is held to anticipate suit in any jurisdiction where the stream takes the article."). In rejecting this theory as constitutionally insufficient to support the exercise of personal jurisdiction, the Supreme Court has focused on conduct by the defendant intentionally designed to take advantage of opportunities provided by the forum state. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987) (O'Connor, J.) (plurality op.) ("placement of a product in the stream of commerce, without more, is not an act the defendant purposefully directed toward the forum State"); *see also ALS Scan*, 293 F.3d at 713 ("But the 'stream-of-commerce' concept, although considered, has never been adopted by the Supreme Court as the controlling principle for defining the reach of a State's judicial power."); *see also Bensusan Rest. Corp.*, 937 F. Supp. at 301 ("Creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide but without more, it is not an act purposefully directed toward the forum state.").

895. *ALS Scan*, 293 F.3d at 712.

896. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see ALS Scan*, 293 F.3d at 712, 713 (if "Internet users conceptually

2. Public Student Expression on Social Media Is Not "Targeted" or "Directed" or "Aimed" at the School

A clear principle emanating from the e-commerce decisional law is that, standing alone, the operation of a website that makes product or service information available to the general public is insufficient to confer personal jurisdiction in an out-of-state forum.[897] This principle has also become entrenched in the even more closely analogous context in which a plaintiff has sued a nonresident defendant for alleged defamation based on an online publication, where it is equally clear that the simple posting of information on social media does not, without more, subject a nonresident defendant to personal jurisdiction in each state into which electronic signals are transmitted to the public.[898] In reconciling social media jurisdictional contacts with standard due process principles in defamation cases, many courts have drawn on the "effects test" articulated in *Calder v. Jones*, where the Supreme Court found personal jurisdiction over a foreign defendant whose newsgathering and publishing activities were "expressly aimed" at the plaintiff's state of residence.[899] To satisfy due process concerns under that standard, the challenged publication must

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enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received[,]" then "State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated").

897. Notably, even under the *Zippo* formulation "[a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." 952 F. Supp. at 1124; *see also* GTE New Media Serv's Inc. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000) (rejecting claim that "mere accessibility of the defendants' websites establishes the necessary 'minimum contacts' " because "personal jurisdiction in Internet-related cases would almost always be found in any forum in the country"); *see also* Spacey v. Burgar, 207 F. Supp. 2d 1037, 1046 (C.D. Cal. 2001) (no personal jurisdiction based on website that misappropriated actor's name as part of its domain name when website was aimed at fans "all over the world" and was not specifically aimed at California).

898. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002) ("Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed their activity in a substantial way to the forum state[.]'"); Revell v. Lidov, 317 F.3d 467, 476 (5th Cir. 2002) ("[a] more direct aim is required" than the defendants' knowledge that "the harm of the article would hit home wherever Revell resided"); Cadle Co. v. Schlichtman, 123 F. App'x 675, 679 (6th Cir. 2005) (no jurisdiction in Ohio because "while the 'content' of the publication was about an Ohio resident," the website did not specifically target Ohio readers); Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010) (no jurisdiction because "[t]here is no evidence that the . . . website specifically targets Missouri, or that the content of [defendant's] alleged postings specifically targeted Missouri"); Shrader v. Biddinger, 633 F.3d 1235, 1245–46 (10th Cir. 2011) (no jurisdiction because every indication was that the defendant targeted the post at a nation-wide or world-wide audience).

899. 465 U.S. 783, 789 (1984). This reconciliation of traditional due process considerations with the assertion of personal jurisdiction over Internet content providers was expressly acknowledged in *Shrader v. Biddinger*. *See* 633 F.3d at 1241 ("this emphasis on intentionally directing internet content or operations at the forum state has its grounding in the 'express aiming' requirement the Supreme Court developed in *Calder* to deal with the somewhat analogous question of specific jurisdiction based on content in nationally distributed print media").

"manifest an intent to target and focus"[900] readers in a particular forum state. The same limitation should govern off-campus public student digital speech, irrespective of whether the speech foreseeably comes to the attention of or is projected as disruptive by school officials. A student who disparages a school official on a website unaffiliated with the school and created on a personal computer while at home, or who criticizes a school decision in a social media post outside of school time, has not "targeted" or "directed" or "aimed" her communication at a school-supervised audience in the sense required for the school to exercise control over her digital expression.[901]

Fastening on nomenclature taken from *Calder* and its progeny, schools often premise the assertion of their authority over off-campus student digital speech on the claim that the speech has "targeted" or is "directed" at the school, which is invariably followed by the cessation of any meaningful evaluation of the relationship between the speech at issue and the school environment.[902] This claim adopts *Calder*'s "express aiming"[903] requirement while ignoring that courts applying it in Internet defamation cases have repeatedly concluded that the mere posting and accessibility of social media information are insufficient to establish personal jurisdiction

900. *Young*, 315 F.3d at 263; *see also Shrader*, 633 F.3d at 1240 ("[I]t is necessary to adapt the analysis of personal jurisdiction to this unique circumstance [of electronic communications] by placing emphasis on the internet user or site *intentionally directing* his/her/its activity or operation *at* the forum state rather than just having the activity or operation accessible there.") (emphasis in original). The Connecticut newspaper website article alleged to be defamatory in *Young* examined the harsh conditions at a Virginia correctional facility where the plaintiff was the warden. *See* 315 F.3d. at 264. The report mentioned the plaintiff, a Virginia resident, by name. *Id*. Nevertheless, the Fourth Circuit determined that it was not posted on the Internet "with the manifest intent of targeting Virginia readers" and reversed the lower court's denial of a motion to dismiss for lack of personal jurisdiction over the defendants. *Id*.

901. The most recent U.S. Supreme Court decision on the issue of specific personal jurisdiction over intentional tort claims emphasized that "the defendant's suit-related conduct must create a substantial connection with the forum State." Walden v. Fiore, 571 U.S. 277, 284 (2014). This "relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State," and the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 284 (emphasis in original). *Walden* therefore analogously supports that off-campus student digital speech is not subject to school authority—that is, to school jurisdiction—merely because it is *about* fellow students or school affairs.

902. *Young*, 315 F.3d at 262–63 (requiring proof that "the out-of-state defendant's Internet activity is expressly *targeted at or directed to* the forum state") (emphasis added); *see also* Papandrea, *supra* note 5, at 1059 ("Other courts have been willing to conclude that student speech constitutes on-campus speech whenever the student has *directed* his speech to campus . . . ") (emphasis added). The habitual incantation of this terminology is perhaps a misfortunate example "of the law that ideas become encysted in phrases, and thereafter for a long time cease to provide further analysis." Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

903. 465 U.S. at 789.

over a non-resident defendant.[904] It also superficially comports with Judge Newman's footnoted supposition in *Thomas* that public school authorities may regulate printed material published off-campus that "is *aimed* at students of a particular school, is sold exclusively to students of that school, and is distributed near the school grounds."[905] However, the narrow suggestion that territoriality may not prevent schools from punishing a vulgar publication "aimed" at a school audience when it is circulated at the periphery of the schoolyard and *intended* to reach school property has assumed a very different meaning in connection with the prevailing judicial conception of digital speech. Once the "targeting" notion is dissected in the case law, it no longer refers to an intentional communication within the school environment, as contemplated by Judge Newman's example. Rather, it broadly designates speech about other students, school officials, or school affairs that is communicated on an open digital platform and is therefore accessible to the speaker's classmates and the school community in the same manner as it is to the public at large.[906] As Professor LoMonte has noted, "[i]t is one thing to say that a school may interfere with a student's communication with fellow students" within the school environment, "but it is quite another to say that the school may interfere with a student's ability to communicate with the general public."[907]

The overbroad "targeting" rationale employed in recent cases distorts *Calder*'s rationale, expands Judge Newman's original proposal beyond its purpose, and effaces the dispositive constitutional distinction between speech that the digital speaker disseminates for public exposure in the marketplace of ideas and speech intentionally directed to the school environment or to a school-supervised audience—with profoundly damaging outcomes for digital free speech.[908] By misappropriating the due process

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904. *See generally, Young*, 315 F.3d 256 (holding mere posting and accessibility of social media information insufficient to establish personal jurisdiction over the non-resident defendant); *Revell*, 317 F.3d 467 (same); *Cadle Co.*, 123 F. App'x 675 (same); *Johnson*, 614 F.3d 785 (same); *Schrader*, 633 F.3d 1235 (same).

905. *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring) (emphasis added).

906. *Bell*, 799 F.3d at 385 ("A screenshot of Bell's Facebook profile page, . . . including the rap recording, was open to, and viewable by, the public. In other words, anyone could listen to it."); *see also* Calvert, *supra* note 20, at 250 (student website profile "aimed" at school official "simply suggests that any off-campus speech that targets or merely is about someone on campus falls within the jurisdictional reach of the school").

907. LoMonte, *supra* note 49, at 60.

908. This unbounded "targeting" rationale, which has even been adopted in a case involving a "private Instagram account" where "[o]nly the express invitees were able to see or react to the posts by commenting or by liking them," pervades public student digital speech jurisprudence in the federal courts. Shen v. Albany Unified Sch. Dist., 2017 U.S. Dist. LEXIS 196340, 3:17-cv-02478-JD, slip. op. at 2–3 (N.D. Cal. Nov. 29, 2017). *See, e.g.*, *Snyder*, 650 F.3d at 947 n.4 (Fisher, J., dissenting) ("Student speech that targets school officials, is publicly broadcasted to the school community, and has a reasonably foreseeable disruption on the classroom environment is regulable by schools, whether it occurs on- or off-campus."); *S.J.W.*, 696

principles that govern in the personal jurisdiction realm, this flawed approach—that, standing alone, the reasonable likelihood of students' social media speech about school affairs reaching school officials subjects it to school authority—all too easily collapses into the substantive determination that the speech will have disruptive effects on the school, rendering it punishable under *Tinker*.[909] As a result, even when students have taken extraordinary measures to block their digital expression from being accessible to an in-school audience—for example, by the extreme precaution of registering their website at a foreign domain to make it inaccessible through a search engine in the United States[910]—they have nevertheless been found subject to school punishment through *Tinker*'s application.

The position that schools may penalize digital speech whenever it concerns school affairs and is published on an open source network capsizes the First Amendment.[911] A desire to focus attention on a school-

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F.3d at 778 ("[W]e expect *Tinker* will apply here because the Wilsons' speech was, in the District Court's words, 'targeted at' Lee's Summit North. The parties dispute the extent to which the Wilsons' speech was 'off-campus,' but the location from which the Wilsons spoke may be less important than the District Court's finding that the posts were directed at Lee's Summit North."); *Bell*, 774 F.3d at 315 (Barksdale, J., concurring in part and dissenting in part) (where student "posted the rap recording to his *open* Facebook account, accessible to anyone with a Facebook account," he "intentionally targeted the rap recording" to classmates and school administrators) (emphasis in original); *Bell*, 799 F.3d at 399 ("*Bell* admitted he intended the speech to be public and to reach members of the school community, which is further evidenced by his posting the recording to Facebook and YouTube").

909. *See S.J.W.*, 696 F.3d at 773, 777 (finding that speech on students' Dutch-registered website "was 'targeted at' Lee's Summit North" and therefore "it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting"); *see also Bell*, 774 F.3d at 397 (Barksdale, J., concurring in part and dissenting in part) (constant student access to social media sites makes it reasonable for schools to foresee a substantial disruption when offensive speech concerning school officials is disseminated online and therefore available to the student body); *see also J.C.*, 711 F. Supp. 2d at 1108 (sufficient regulatory nexus "exists where speech over the Internet is involved").

910. *See S.J.W.*, 696 F.3d at 773 (reversing grant of preliminary injunction to the plaintiffs suspended for 180 days for creating a website at Dutch domain site, which prevented users in the United States from finding the website through a Google search, where the website contained racist posts and "sexually explicit and degrading comments about particular female classmates"); *see also* Medjuck, *supra* note 74 ("Nonetheless, the brothers had taken evident effort to *prevent* the website from making its way to the school—they registered the site at a Dutch domain, preventing users from accessing the page via a Google search, and told only five or six friends about the site.") (emphasis in original) (footnote omitted).

911. The controlling constitutional point is straightforward: "[t]he notion that speech can be punishable merely because it 'targets' a school audience is untenable. There is a meaningful difference between speech that is *about* the school and speech that is *intended to be read at* the school during school hours." LoMonte, *supra* note 28, at 16 (emphasis in original); *see also* Pike, *supra* note 4, at 1006 (emphasizing that "[a]n undifferentiated desire for one's classmates or even one's teachers to be among the audience is insufficient" to support the exercise of public school regulatory authority over student cyberspeech, and distinguishing between "school-related' expression" and "expression 'intended for on-campus access").

related issue by posting on a social media site accessible to members of the school community included among a general public audience does not mean that the speaker is "targeting" the school in the sense of purposefully introducing the speech into the school environment[912]—as it would be, for example, if transmitted to participants in a class listserv or if directed to a school-supervised audience. Student speech "discussing school events, or criticizing classmates or school personnel"[913] in the modern public square provided by social media does not come anywhere near satisfying the intentionality required for the exercise of school authority over off-campus expression. For First Amendment purposes, it is no different than public picketing or protesting, or a student's letter to the editor published in a community newspaper (whether in print or online), and merits the same level of constitutional protection.[914] A student's complaint about a school

912. Certain courts, most prominently the Third Circuit, have recognized that the expansionary "targeting" rationale is unacceptable as a basis for a public school's assertion of disciplinary authority over off-campus digital speech. The *Layshock* majority rejected the school district's argument that *Tinker* applied to the website parody profile at issue in that case because it was "aimed at the School District community and the Principal" and was therefore "reasonably foreseeable . . . [to] come to the attention of the School District and the Principal." 650 F.3d at 214, 216. The *Snyder* majority similarly disclaimed the inclusion of classmates among a satirical website profile's audience as an insufficient jurisdictional predicate. *See* 650 F.3d at 930–31 ("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."). Thus, "*J.S.* and *Layshock* yield the insight that a student's online speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment." *Levy*, 964 F.3d at 180. *See also* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (overturning student suspension based on website created and hosted off-campus "[a]lthough the intended audience was undoubtedly connected to Kentlake High School" because "the speech was entirely outside of the school's supervision or control"); *Nixon*, 988 F. Supp. 2d at 839 ("Here, the speech had no connection to HCMS whatever other than the fact that both the speaker and the target of the speech studied there."); Tomain, *supra* note 5, at 135, 136 (rejecting expansion of "school jurisdiction over online speech when it relates to the school" or "is directed toward the school community") (footnote omitted). In a striking departure from the above decisions, the *Snyder* dissent repeatedly referenced the overbroad "targeting" rationale described above in the text as justification for applying *Tinker* based on what it deemed a reasonably foreseeable potential for disruption attributable to the student website at issue. 650 F.3d at 941, 942, 944 (Fisher, J., dissenting); *S.J.W.*, 696 F.3d at 778 (where two students used a Dutch domain site to prevent access to their blog through a Google search, court nevertheless found that it was reasonably foreseeable the blog might reach the school because it "targeted" the school).

913. Pike, *supra* note 4, at 1004.

914. *Bell*, 799 F.3d at 410 (Dennis, J., dissenting) ("By releasing his song on the Internet, Bell sought to bring attention to the coaches' sexual misconduct against his female classmates, just as the Westboro group in *Snyder* sought to bring attention to its protest by picketing in public."); *Levy*, 964 F.3d at 190 (noting "no constitutional difference" between "online" off-campus speech and "a student who advocated a controversial position on a placard in a public park one Saturday"); Papandrea, *supra* note 5, at 1092 ("Permitting school officials broad authority to punish student speech whenever it comes to their attention would grant them the power to punish students who engage in a political protest in the town square, write a letter to the editor in the local newspaper, or simply speak to their friends while walking around the mall.").

or its personnel on Twitter or Snapchat is not the constitutional equivalent of the same speech shouted in the cafeteria during lunch period or posted on a classroom bulletin board. Treating such expression as on-campus speech essentially erases any meaningful boundary limiting the exercise of school authority over student social media speech.

The problematic conception of "targeting" as encompassing communications about the public school system that are available to all comers on social media is writ large in the Fifth Circuit's en banc decision in *Bell v. Itawamba County School Board*,[915] which upheld a student's suspension and placement in an alternative school for posting a rap recording on Facebook and YouTube that criticized two male high school teachers who were also athletic coaches for inappropriate sexual conduct with female students.[916] Curiously, Judge Barksdale's majority opinion began by unequivocally endorsing the significance of intentionality as a threshold condition for *Tinker*'s applicability to off-campus student expression, but then failed to distinguish between digital speech addressing matters of concern to the school community posted to a general public audience and digital speech knowingly introduced into the school environment.[917] *Bell*'s extension of *Tinker* to off-campus online speech, because the speaker "knew it would be viewed and heard by students"[918] and wanted to promote public awareness of the issues addressed by the speech, is insupportable as a matter of constitutional doctrine and indefensible as a

915. 799 F.3d at 396.

916. *Id.* at 383.

917. *Bell*, 799 F.3d at 395 (Barksdale, J.) ("[A] speaker's intent matters when determining whether the off-campus speech being addressed is subject to *Tinker*. A speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*'s school-speech standard to that speech."). However, the *Bell* majority opinion went on to find that "Bell intended his rap recording to reach the school community" because he posted it on Facebook and YouTube where classmates and school administrators—along with the general public—could listen to it. *Id.* at 396. This fundamental misapprehension of the inquiry ignores that the rap recording was never intentionally introduced into the school environment so as to divest it of First Amendment protection. According to this flawed reasoning, school officials would not be without authority to punish the same expression had Taylor Bell instead published his song lyrics in a letter to the editor of the local newspaper or, indeed, without authority to punish the Tinkers for wearing black armbands during a weekend anti-war protest in downtown Des Moines. As these examples underscore, the First Amendment's application in the public student speech framework distinguishes between speech that is intended to address school constituencies as part of the general political community and speech that is purposefully disseminated within the school environment.

918. *Id.* at 385; *see also id.* at 396 (Barksdale, J.) ("In short, Bell produced and disseminated the rap recording knowing students, and hoping administrators, would listen to it."); *Bell*, 774 F.3d at 319 (Barksdale, J., concurring in part and dissenting in part) ("Here, Bell targeted his rap recording at the school by posting it on Facebook and YouTube, admittedly *knowing* students, and admittedly hoping administrators, would listen to it.") (emphasis in original), *reh'g en banc granted*, 782 F.3d 712, 712 (5th Cir. 2015).

matter of constitutional policy.[919] Treating off-campus social media postings as the "functional equivalent of on-campus speech,"[920] because they communicate information about school affairs to members of the community at large, dramatically enlarges the power of school authorities to control the speech of their students.[921] Indeed, it is not too much to say that it "grant[s] schools virtually unbridled discretion to restrict juvenile speech generally,"[922] and effectively amounts to restricting speech on an entire communications medium that impairs the "legitimate exercise of First Amendment rights."[923] The government cannot regulate the digital speech of those it is entrusted with teaching whenever the speech is said to "target" the school in the unbounded sense prescribed by the *Bell* majority, or students will be reluctant to discuss topics related to the public

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919. For an elaboration of the First Amendment precedent and policy reasons mandating protection for student digital speech about the operations of a public school, see *Bell*, 799 F.3d at 406–12 (Dennis, J., dissenting); *see also* Tomain, *supra* note 5, at 153–54 ("Offensive speech receives First Amendment protection, and schools cannot put cyberspace within the schoolhouse gate merely because the speech has an 'effect' on, or is 'aimed at,' the school." (footnotes omitted)).

920. *Bell*, 774 F.3d at 318.

921. Calvert, *supra* note 20, at 246–47 (asserting jurisdiction when "a student's off-campus-created speech targets a school official and its intended audience is comprised of fellow students" will "give schools authority over almost all the off-campus-created speech that now is generating controversies"); Shaver, *supra* note 6, at 1597 ("[T]he threshold for imposition of authority is quite low if a student's intentional direction is determined by the extent to which the student spoke on a matter of interest to the school community and intended that other students would consider the speech" (footnote omitted)); Papandrea, *supra* note 5, at 1091–92.

922. Papandrea, *supra* note 5, at 1091.

923. *Packingham*, 137 S. Ct. at 1737 ("In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."). The Supreme Court has warned about the threat to the First Amendment raised by medium-based restrictions on speech. City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."); *see also FCC*, 512 U.S. at 659 ("Regulations that discriminate among media, . . . often present serious First Amendment concerns."); *Levy*, 964 F.3d at 180 (emphasizing the need for fidelity to First Amendment principles with respect to social media speech "because each new communicative technology provides an opportunity for 'unprecedented' regulation" (quoting *Packingham*, 137 S. Ct. at 1737)); Pike, *supra* note 4, at 994 (arguing that a medium-based restriction on communication "simply because that medium is available on-campus challenges the feeblest of reasoning"). Placing off limits public student social media speech addressing legitimate matters of concern to the school community may even compromise the legitimacy of judicial authority. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 326 (2010) (Kennedy, J.) ("While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority.").

educational process.[924] The First Amendment demands just the opposite.[925]

E. Fraser*'s Rationale Does Not Justify School Punishment of Off-Campus Social Media Expression; Public Educators Are Not Roaming Enforcers of Civility*

Doninger II reflects *Fraser*'s values-inculcation rationale masquerading as *Tinker*'s material disruption test,[926] notwithstanding the Second Circuit's attempt to distance itself from the district court's reliance on *Fraser* as the source of school authority to punish the "plainly offensive" speech at issue.[927] Although *Doninger II* declined to decide "whether *Fraser* governs such off-campus student expression,"[928] it is difficult to imagine the decision coming out the same way if the blog posting had used the word "dirtballs" instead of "douchebags." The conclusion is inescapable that Avery Doninger "was really punished because of the posting's uncivil language about school administrators, rather than because of any potential disruption at school."[929] By uncabining *Fraser* as a basis

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924. *Bell*, 799 F.3d at 418 (Dennis, J., dissenting) ("How, then, can a student be certain that his off-campus blog posting will not be read by members of the school community and thereby be deemed by school officials to be 'intentionally direct[ed] at the school community'? As a result of the ambiguities in the majority opinion's framework, he simply cannot."); Pike, *supra* note 4, at 994 (when "all school-related speech falls into the on-campus category [it] potentially spawns a significant chilling effect with regard to online speech about school-related topics" (emphasis omitted)).

925. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (noting that speech on "matters of public concern" is "at the heart of the First Amendment's protection").

926. *See* Fronk, *supra* note 5, at 1431 ("[T]he opinion improperly, implicitly extends *Fraser* to off-campus speech."); Dauksas, *supra* note 308, at 455 ("[T]he Second Circuit analyzed what certainly appeared to be a *Fraser* issue under *Tinker*'s framework."); Tomain, *supra* note 5, at 141 ("*Doninger [II]* is a clear example of a court misapplying *Fraser*." (footnote omitted)).

927. *Doninger II*, 527 F.3d at 49–50. While finding the question "less than entirely clear," the district court concluded in *Doninger I* that "this case is closer to *Fraser* than to *Tinker*," and adopted the former as the framework for its decision. *Doninger I*, 514 F. Supp. 2d at 216, *aff'd*, 527 F.3d 41 (2d Cir. 2008). Despite its initial hesitancy, the district court ended up eradicating any distinction between the on-campus and off-campus application of *Fraser*. *Id.* at 216 n.11 (the court "sees no reason to deny the application of *Fraser* to off-campus speech that affects the school in a reasonably foreseeable manner and that would otherwise be analyzed under *Fraser* had it actually occurred on-campus").

928. 527 F.3d at 50.

929. *Waldman II*, *supra* note 4, at 632 (footnote omitted). In support of her cross-motion for summary judgment after remand from *Doninger II*, the plaintiff argued that her punishment under the guise of *Tinker* was pretextual. *Doninger III*, 594 F. Supp. 2d at 219 ("Rather, Ms. Doninger argues, they were offended by the language she used in [the] blog entry, particularly the word 'douchebag,' and therefore they punished Ms. Doninger for her speech, not for the potential for disruption."), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir. 2011). In partially denying summary judgment to the school district, the district court agreed that evidence in the

for the regulation of online expression, the Second Circuit "adopt[ed] a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority."[930] The censorial potential of this destabilizing extension of *Fraser*, which would enable public educators to become roaming enforcers of civility[931] by punishing student speakers judged to have violated community standards of decorum and decency away from the school environment, poses a disturbing threat to the digital First Amendment rights of public school students.[932]

The *Doninger II* court's pronouncement that it is unclear whether "*Fraser* applies to off-campus speech"[933] was refuted by the Third Circuit in both the *Snyder* and *Layshock* decisions, and again more recently in the *Levy* decision.[934] Any extension of *Fraser* to off-campus expressive activity (whether digital or other forms of student speech) ignores both its narrow rationale[935] and Justice Brennan's concurrence in that case, which noted that "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[936] A reading of *Fraser* as reaching out-of-school student expression is also directly at odds with the unequivocal statement in Chief Justice Roberts's

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record suggested that Avery Doninger may have been punished "because the blog entry was offensive and uncivil and not because of any potential disruption at school." *Id.*

930. *Snyder*, 650 F.3d at 933 (Chagares, J.); *see also Evans*, 684 F. Supp. 2d at 1374 ("For the Court to equate a school assembly to the entire internet would set a precedent too far reaching.").

931. *Waldman II*, *supra* note 4, at 654 ("[I]f public schools were permitted to restrict off-campus speech on this basis, they would essentially be acting as roving inspectors of decency, encroaching on familial and individual prerogatives to determine what type of lewd, vulgar, or offensive language is appropriate in non-school settings.").

932. *See Snyder*, 650 F.3d at 933 (exporting *Fraser* to off-campus digital expression "would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion."); *see also* Tomain, *supra* note 5, at 104 ("Such an interpretation of *Fraser* would permit school jurisdiction over student speech wherever it occurs and whenever the school finds the content uncivil, without due regard for students' First Amendment rights." (footnote omitted)).

933. *Doninger II*, 527 F.3d at 49.

934. The Third Circuit has refused to extend *Fraser* to student digital expression outside of the school environment. *Levy*, 964 F.3d at 181 ("But the District's argument runs aground on our precedent holding that *Fraser* does not apply to off-campus speech."), *cert. granted*, 141 S. Ct. 976 (Jan. 8, 2021); *Layshock*, 650 F.3d at 219 (McKee, C.J.) ("*Fraser* does not allow the School District to punish Justin for expressive conduct which occurred outside of the school context."); *Snyder*, 650 F.3d at 933 ("[W]e conclude that the *Fraser* decision did not give the School District the authority to punish J.S. for her off-campus speech.").

935. *See* Section II.B., *supra*; *see also* Tomain, *supra* note 5, at 116 ("Logically, if a school cannot punish lewd and indecent speech at school when there is no captive audience, a school cannot punish the same speech that occurs off campus.").

936. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

majority opinion in *Morse* that "[h]ad *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected."[937] The *Doninger II* court's suggestion that *Fraser*'s scope has not been "conclusively determine[d]"[938] therefore "fails at the outset because *Fraser* does not apply to off-campus speech.[939]

In *Levy*, Judge Krause correctly dismissed the school district's argument that it could punish the cheerleader's vulgar expression on Snapchat to enforce socially appropriate behavioral norms, and refused to extend *Fraser* to "students' free expression in an area traditionally beyond regulation."[940] If presented with an opportunity to revisit the question in the course of deciding *Levy*, the Supreme Court should establish, clearly and conclusively, that *Fraser* does not apply to out-of-school student digital speech because it employs profane, sexualized, or otherwise offensive language concerning an extracurricular program.[941] Otherwise, schools can tautologically justify the punishment of student speech critical of an extracurricular activity by claiming that the speech undermines the values sought to be promoted by participation in and is therefore disruptive of that activity. Any attempt to export *Fraser* to online student expression, where participants make volitional choices about the information they access and the content cannot reasonably be associated with the school,[942]

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937. *Morse*, 551 U.S. at 405.

938. 527 F.3d at 49. This suggestion was repeated in *Doninger IV* in the course of the court's analysis that school officials were entitled to qualified immunity from Avery Doninger's claim that they violated her First Amendment rights by prohibiting her from seeking election as Senior Class Secretary. *Doninger IV*, 642 F.3d at 348 ("Indeed, in the previous iteration of this case before this Court, we specifically noted that the applicability of *Fraser* to plainly offensive off-campus speech is uncertain."), *cert. denied*, 565 U.S. 976 (2011). The erroneous notion that *Fraser* might extend to off-campus expression "will only confuse courts in the future." *Recent Cases:* Doninger, *supra* note 458, at 816.

939. *Snyder*, 650 F.3d at 932; *see also J.C.*, 711 F. Supp. 2d at 1109 ("[T]he rule in *Fraser* is limited to speech that occurs in school"); *Sagehorn*, 122 F. Supp. 3d at 859 ("While *Fraser* offers school officials significant discretion to define 'vulgar' speech delivered on school grounds, *Fraser* is clearly limited to on-campus speech.").

940. *Levy*, 964 F.3d at 183; *see also id.* at 194 ("The heart of the School District's arguments is that it has a duty to inculcate the habits and manners of civility in its students." (internal quotations omitted)).

941. Tomain, *supra* note 5, at 150 ("The court should create a border between cyberspace and the physical world by holding that *Fraser* does not apply to online speech, regardless of where it is created or accessed."); *see also id.* at 159 ("[C]ourts can clarify this uncertainty by . . . creating a bright-line rule that *Fraser* does not apply to online speech.").

942. *Id.* at 159 ("[C]aselaw shows a faithful application of *Fraser* does not create school jurisdiction over online speech—regardless of whether it is created or accessed on or off campus—because there is no captive audience and no need for a school to disassociate itself from the speech"); *T.V.*, 807 F. Supp. 2d at 779 ("The speech being made by the student in *Fraser* was at a school assembly. M.K. and T.V.'s photographs were taken inside the privacy of their own homes and were published to the internet from outside of school."); *Coy*, 205 F. Supp. 2d at 799 ("But of course, *Fraser* involved graphic and explicit sexual speech to a group of 600 students, not a student accessing a website he had created.").

would be a worrisome step towards making schools "keepers of the public mind,"[943] contrary to the admonition in *Morse* that a public school's punishment of student expression may not be justified by the blanket invocation of its self-defined educational mission.[944] To the extent the school districts' arguments in *Doninger II* and *Levy* rest on the implicit but incorrect assumption that *Fraser* applies to student digital speech away from the school setting, it would permit the state's intrusion into expressive activity demarcated as off-limits to the government under the First Amendment.[945]

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943. Tomain, *supra* note 5, at 106 (footnote omitted); *see also Hazelwood,* 484 U.S. at 286 (Brennan, J., dissenting) ("Even in its capacity as educator the State may not assume an Orwellian 'guardianship of the public mind.'" (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

944. *Morse*, 551 U.S. at 409 (Roberts, C.J.) ("We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"); *see also Guiles,* 461 F.3d at 330 (Cardamone, J.) ("Moreover, the phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides that a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern."), *cert. denied,* Marineau v. Guiles *ex rel.* Guiles, 551 U.S. 1162 (2007). Even prior to the decision in *Levy*, the Third Circuit had "reject[ed] out of hand any suggestion that schools can police students' out-of-school speech by patrolling 'the public discourse'" through recourse to *Fraser*. *Layshock*, 650 F.3d at 217 n.16 (McKee, C.J.), *cert. denied,* 565 U.S. 1156 (2012); *see also id.* at 219 ("*Fraser* does not allow the School District to punish [a student] for expressive conduct which occurred outside of the school context."); *Snyder*, 650 F.3d at 932 ("*Fraser*'s 'lewdness' standard cannot be extended to justify a school's punishment of [a student] for use of profane language outside the school, during non-school hours" (footnote omitted)); *see also Beverly Hills*, 711 F. Supp. 2d at 1109 ("*Fraser* is also inapplicable. Although [the student's] video certainly contains language that is lewd, vulgar, and plainly offensive, the rule in *Fraser* is limited to speech that occurs in school." (footnote omitted)).

945. The Third Circuit has forcefully disavowed such a far-reaching application of *Fraser*:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish [a student] for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to [a student's] expressive conduct violated the First Amendment guarantee of free expression.

Layshock, 650 F.3d at 216. *See also* Martin, *supra* note 151, at 793 ("To extend *Fraser* to all cases where students use offensive or sexual language in relation to a school issue would give schools virtually limitless authority to regulate student expression, even within the sanctity of the home." (footnote omitted)); Dauksas, *supra* note 308, at 456 (*Doninger II* may be a vehicle for "simply appl[y]ing *Fraser*'s analysis to uphold a student's punishment for non-disruptive, yet purely offensive off-campus online expression" (footnotes omitted)).

F. Tinker *Is Unsuited for Application to Student Speech Outside the School Environment*

The *Doninger II* decision also epitomizes, he "undesirable subjectivity"[946] of exporting *Tinker* to off-campus online expression, where its application erodes First Amendment protection by allowing public school authorities to regulate student digital speech of which they disapprove while allowing that which they find tolerable.[947] The decision is marred by its tepid and deferential application of *Tinker*'s evidentiary balancing standard, which places a formidable burden on officials who would suppress student expression even inside the school,[948] to punish criticism of the school's administration from outside the school. The law is clear that a faithful application of "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."[949] In *Doninger II*, "there was no evidence to support a particularized reasonable fear of such interference."[950] That is unsurprising; the resolution of the Jamfest scheduling precluded a finding of likelihood of disruption.[951]

946.McDonald, *supra* note 4, at 752. *See generally Beverly Hills*, 711 F. Supp. 2d at 1111 ("[E]xisting case law has not provided clear guidelines as to when a substantial disruption is reasonably foreseeable").

947. McDonald, *supra* note 4, at 752 ("But in truth, the problem of determining when a sufficient disruption has occurred, or, in the absence of one, whether school officials nonetheless reasonably forecasted that the speech could have caused a substantial disruption, as the basis for sanctioning it, has created a situation where courts seem to be permitting or disallowing cyberspeech according to their subjective views of whether students should be allowed to engage in it or not. Stated bluntly, the key question seems to be, 'Was it bad enough to warrant punishment?'"); LoMonte, *supra* note 28, at 18 ("As we have seen, administrators frequently invoke 'disruption' as a pretext to suppress speech that is merely factual and critical.").

948. *See Doninger II*, 527 F.3d at 49; Harpaz, *supra* note 103, at 128 (*Tinker* "imposed a significant burden on the school to justify silencing student speech despite the need for school authorities to exercise substantial control over students during the school day"). The *Doninger II* court's focus on the nature of the speech penalty imposed by the school district contributed to the lassitude of its *Tinker* application. Klupinski, *supra* note 33, at 615–16 n.23 ("In cases involving speech, then, courts tend to defer more heavily to a school's decision to remove students from extracurricular activities, without requiring that a substantial disruption occurred or could have occurred.").

949. *Saxe*, 240 F.3d at 211 (Alito, J.); *Beverly Hills*, 711 F. Supp. 2d at 1111 ("[T]he decision to discipline speech must be supported by the existence of *specific facts* that could reasonably lead school officials to forecast disruption") (emphasis in original); *Tinker*, 393 U.S. at 509 (stating that a school must show that regulation of student speech "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

950. *Beussink*, 30 F. Supp. 2d at 1181; *Shanley*, 462 F.2d at 974 ("We emphasize . . . that there must be demonstrable factors that would give rise to any reasonable forecast by the school administration of 'substantial and material' disruption of school activities before expression may be constitutionally restrained.").

951. Tomain, *supra* note 5, at 143–44 n.293 ("The school resolved the music-festival-scheduling issue prior to discovering the existence of Doninger's blog post. Failing to discover the blog post prior to resolution of the scheduling issue leans heavily, if not dispositively, in

Indeed, the court glossed over the fact that nearly two weeks had passed between Avery Doninger's blog posting and her punishment by LMHS, with no evidence in the interim of potential (let alone real) interference with the school's operations or educational environment as required by *Tinker*.[952] LMHS officials made no showing "that the student expression at issue did cause or could have caused an actual break in the learning process"[953] or otherwise impaired the school's performance of its educational functions. Simply put, "[t]he facts in th[e] case do not support the conclusion that a forecast of substantial disruption was reasonable."[954]

The contrived explanations proffered by LMHS administrators concerning the "need to manage the growing dispute"[955] and contain the "burgeoning controversy"[956] are little more than *post hoc* justificatory fig leafs.[957] The school district's reverse-engineered claims in *Doninger II* are belied by the record—again, because Jamfest's scheduling had been resolved there was no longer any dispute in the offing; any "ongoing school controversy"[958] had dissipated—and trample the principle that an

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favor of finding Doninger's blog post did not cause a substantial disruption to the school environment." (citing *Doninger I*, 514 F. Supp. 2d at 207)); Miller, *supra* note 547, at 323–24 ("In *Doninger*, the opportunity for Avery's speech to be a possible substantial disruption had already passed once school administrators discovered the speech." (footnote omitted)).

952. *Doninger III*, 594 F. Supp. 2d at 220 ("However, Defendants did not even discover the blog entry until weeks after the Jamfest incident had been resolved, at which point there was no longer any potential for disruption."), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir. 2011). On remand from *Doninger II*, the district court determined that the dilatoriness of the school district's response gave rise to a disputed factual issue over the reason for its imposition of punishment. *Id.* ("However, the timing of Ms. Doninger's punishment in this case, . . . creates a disputed issue of material fact as to Defendants' true motivation for punishing Ms. Doninger.").

953. Miller, *supra* note 112, at 652–53.

954. *Snyder*, 650 F.3d at 928 (Chagares, J.), *cert. denied*, 565 U.S. 1156 (2012); *see also id.* at 920 ("Because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District's actions violated J.S.'s First Amendment free speech rights."). In *Lowery v. Euverard*, the concurrence issued the same criticism of the majority opinion, stating that "[i]t gives lip service to the correct standard under *Tinker*—that the forecast of substantial disruption be reasonable—but then fails to apply the standard correctly." 497 F.3d at 603 (Gilman, J., concurring), *cert. denied*, 555 U.S. 825 (2008).

955. *Doninger II*, 527 F.3d at 51.

956. *Id.*

957. *See Thomas*, 607 F.2d at 1052 n.17 ("No forecast of possible interference with the operation of the school was made until litigation had commenced."), *cert. denied*, 444 U.S. 1081 (1980). The after-the-fact justifications trotted out by LMHS administrators have a manufactured feel about them and, in any event, do not rise to the level of material disruption contemplated by *Tinker*. "[S]ome disruptions—and perhaps some far more substantial than the one[s] at issue in this case—must no doubt be tolerated, lest the slightest flicker of frustration . . . could justify sanctioning a student's speech. Some amount of nominal discord and discomfort is the cost of our 'hazardous freedom.'" *Cuff*, 677 F.3d at 120 (Pooler, J., dissenting) (quoting *Tinker*, 393 U.S. at 508).

958. *Doninger IV*, 642 F.3d at 350–51, *cert. denied*, 565 U.S. 976 (2011). The *Thomas* court rejected the speech penalty at issue in that case in part because of a similarly delayed

"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[959] Because of the court's watered-down and dilatory application of *Tinker* based on nothing more than "theoretical disruptions to [the] school's atmosphere,"[960] it upheld a retaliatory punishment of a blog posting that, while vulgar and inappropriate, presented no threat whatsoever to the work, order, or discipline of the school.[961]

The fundamental defect with *Doninger II* "is that it improperly makes a value judgment on the speech itself, something that is not part of the *Tinker* analysis"[962] and—outside of the narrow exceptions established

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finding of disruption, noting that "school officials were content to do nothing at all for six full days, until called to action by the school board president." 607 F.2d at 1052 n.17. This demonstrated that punishment had been imposed not because of a reasonable fear of disruption to academic functions but because the content of the students' underground newspaper was deemed morally offensive by school authorities. *Id.* The belated imposition of punishment in the absence of material disruption in *Doninger II* indicates that *Tinker*'s application was pretextual in violation of the First Amendment. *See, e.g.*, Locurto v. Giuliani, 447 F.3d 159, 180 (2d Cir. 2006) (First Amendment requires that "concern for disruption, rather than some other, impermissible motive, [be] the actual reason" for adverse employment action based on government employees' speech); *see also* Sheppard v. Beerman, 317 F.3d 351, 355 (2d Cir. 2003) (government may not retaliate against employee for exercising free speech rights), *cert. denied*, 540 U.S. 822 (2003).

959. *Tinker*, 393 U.S. at 508; *see also J.C.*, 711 F. Supp. 2d at 1115 ("he Court must consider whether the school's decision to discipline is based on *evidence* or *facts* indicating a foreseeable risk of disruption, rather than undifferentiated fears or mere disapproval of the speech") (emphasis in original); Amy Landwehr, *A Student's Right to Freedom of Speech in Light of* Henerey v. City of St. Charles School District, 29 J.L. & EDUC. 393, 393 (2000) ("When schools act on the basis of fear of controversy and disruption, rather than real disruption, then speech is being unlawfully curtailed.").

960. *Waldman II*, *supra* note 4, at 611; *cf.* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1271–72 (11th Cir. 2004) ("[I]n assessing the reasonableness of regulations that tread upon expression, we cannot simply defer to the specter of disruption or the mere theoretical possibility of discord, or even some *de minimis*, insubstantial impact on classroom decorum . . . [S]tudent expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to 'a showing of mild curiosity' by other students, 'discussion and comment' among students, or even some 'hostile remarks' or 'discussion outside of the classrooms' by other students." (first quoting Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966); then quoting Reineke v. Cobb Cty. Sch. Dist., 484 F. Supp. 1252, 1261 (N.D. Ga. 1980); and then quoting Tinker, 393 U.S. at 508).

961. LoMonte, *supra* note 28, at 11 ("In the [*Doninger II*] court's view, *Tinker* permits not merely preemptive action to stop a potential disruption, but after-the-fact punishment of a potential disruption that never came to pass."). For a court's rejection of a similarly retaliatory application of *Tinker*, *see Evans*, 684 F. Supp. 2d at 1376 ("[T]he potential spark of disruption had sputtered out, and all that remained was the opportunity to punish.").

962. *Lowery*, 497 F.3d at 605 (Gilman, J., concurring), *cert. denied*, 555 U.S. 825 (2008). The First Amendment mandates that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." *Beussink*, 30 F. Supp. 2d at 1180; *Ponce*, 508 F.3d at 770 ("*Tinker*'s focus on the result of speech *rather than its content* remains the prevailing norm" (emphasis added)). *See generally Snyder*, 650 F.3d at 941 (Smith, J., concurring) ("But courts have long disclaimed the ability to draw a principled distinction between 'worthless' and 'valuable' speech.").

in *Fraser*,[963] *Hazelwood*[964] and *Morse*[965]—prohibited by the First Amendment under the public student speech framework, as in other contexts.[966] The court's result-driven application reduced *Tinker* from "a protective standard for student speech under which it *cannot be suppressed based on its content*, but only because it is substantially disruptive,"[967] to a diaphanous standard incapable of providing protection to digital expression that challenged the decision-making of school officials about a school function—i.e., "speech that matters"[968] under the First Amendment. By distorting *Tinker*'s requirements and approving the punishment of online speech found objectionable by LMHS's administration,[969] the decision stripped Avery Doninger of her free speech rights based on little more than her status as a student.[970] Both LMHS and the *Doninger II*

963. *See* Tomain, *supra* note 5, at 115–19 (explaining that *Fraser*'s application was limited to lewd sexual speech delivered to a captive audience, in which the school needs to dissociate itself from the content).

964. *Hazelwood*, 484 U.S. at 270 (1988) (holding that public schools may restrict school-sponsored speech "in any reasonable manner").

965. *Morse*, 551 U.S. at 397 (holding that student speech occurring at school-sponsored event that can reasonably be interpreted as promoting illegal drug use may be regulated).

966. *T.V.*, 807 F. Supp. 2d at 784 ("And while the crass foolishness that is the subject of the protected speech in this case makes one long for important substantive expressions like the black armbands of *Tinker*, such a distinction between the worthwhile and unworthy is exactly what the First Amendment does not permit."); *Saxe*, 240 F.3d at 215 (Alito, J.) ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."); *Snyder*, 650 F.3d at 939 (Smith, J., concurring) ("There is no First Amendment exception for offensive speech or for speech that lacks a certain quantum of social value."). *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (alteration in original) (internal quotation marks omitted)).

967. *Guiles*, 461 F.3d at 326 (emphasis added); *Thomas*, 607 F.2d at 1050 n.12 (noting that "by premising the imposition of discipline on their evaluation of the content of an off-campus publication rather than on in-school conduct," school administrators transgressed First Amendment boundary).

968. *Gertz*, 418 U.S. at 341; Tomain, *supra* note 5, at 151 ("*Doninger* involves political speech that clearly has value"); *see also Barnette*, 319 U.S. at 642 ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.").

969. Tomain, *supra* note 5, at 159 (arguing that courts should "not resort[ ] to tortured applications of *Tinker* to reach an outcome-determinative result that restricts First Amendment free speech rights merely because speech is vulgar or offensive"); Fronk, *supra* note 5, at 1431 ("[T]he Second Circuit rests heavily on flawed reasoning, misstatements of precedent, and faulty analogy to support its proposition that *Tinker* does not require an actual showing of disruption.").

970. Mattus, *supra* note 8, at 335 ("A student does not and should not lose his or her personal constitutional rights by virtue of his or her student status."); LoMonte, *supra* note 28, at 1 ("[S]o long as the impact of students' words may foreseeably reach school grounds, courts are increasingly willing to tolerate school punishment for the content of online speech that would enjoy full First Amendment protection if written by anyone not enrolled in school."). *See also Bell*, 799 F.3d at 415 (Dennis, J., dissenting) ("But the Supreme Court has never suggested that minors' constitutional rights *outside of school* are somehow qualified if they coincidentally are

court conveyed an incorrect understanding of the First Amendment,[971] which protects students' digital speech coextensively with that of other citizens when the special characteristics of the school environment are not applicable.[972] As *Thomas* cautioned, when public educators seek to administer discipline for student expression outside of school, they "must answer to the same constitutional commands that bind all other institutions of government."[973] This principle precludes *Tinker*'s application to digital speech away from the school environment.

Perhaps concerned about the implications of *Doninger II*'s holding, the *Doninger IV* court backpedaled and ultimately refrained from deciding the question of *Tinker*'s applicability to student digital speech originating outside of school by affording LMHS officials qualified immunity on Avery Doninger's First Amendment claims[974]—an example of "unnecessary doctrinal muddling"[975] that has perpetuated the chilling of off-campus digital speech by allowing the governing law to remain unclear in the Second Circuit. In the absence of guidance from the Supreme Court, a majority of courts have defaulted to *Tinker* as the controlling standard in such cases.[976] This is perhaps "at least in part because cyber-

enrolled in a public school."), *cert. denied*, 136 S. Ct. 1166 (2016); *Wynar*, 728 F.3d at 1068 ("[A]n individual's free speech rights are [not] diminished simply by virtue of being a student.").

971. Tomain, *supra* note 5, at 165–66 ("When a junior class secretary uses an online forum to communicate with taxpayers about the possible cancellation of a public school music festival, her use of the term 'douchebag' does not justify violating her First Amendment rights.").

972. *Snyder*, 650 F.3d at 936 (Smith, J., concurring) ("I would hold that [*Tinker*] does not [apply], and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.").

973. *Thomas*, 607 F.2d at 1045.

974. *Doninger IV*, 642 F.3d at 346 ("We do not reach the question whether school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary.").

975. *Recent Cases:* Doninger, *supra* note 458, at 816; *see also id.* at 815 ("In light of the lack of precedential guidance in the emerging area of online student speech, the Second Circuit should have reached the constitutional issues to help guide lower courts." (footnote omitted)).

976. *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (reasoning that court need not consider the plaintiff's argument that heightened standard applies to speech originating off school grounds because "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*"); *J.C.*, 711 F. Supp. 2d at 1103 (noting that courts "apply the substantial disruption test from *Tinker* without regard to the location where the speech originated (off campus or on campus)" (collecting authorities)); *see also* McDonald, *supra* note 4, at 733 ("[W]henever courts determine that student speech rules apply to a dispute about sanctioned cyberspeech, they are uniformly and indiscriminately applying the 'substantial disruption' standard from *Tinker* to resolve it." (footnote omitted)); Hoder, *supra* note 19, at 1580 ("[T]he majority of courts have applied the *Tinker* analysis without considering where the online speech in controversy originated or how it reached campus."); Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH L.J. 727, 730 (2006) ("[M]ost lower courts have applied the Supreme Court's *Tinker* standard to off-campus speech." (footnote omitted)); Goldman, *supra* note 93, at 405 ("More recent lower courts,

speech is difficult to see as factually congruent with *Fraser* or *Kuhlmeier*."[977] Nonetheless, *Tinker* was never intended to apply beyond the unique environment of public schools[978] and is "ill-suited to deal with

possibly reacting to the development of new media such as the Internet, cell phones, and social networking sites, generally have applied the 'substantial disruption' standard to off-campus speech and find such speech unprotected when it reasonably may cause substantial disruption at the school.") (footnotes omitted)); Papandrea, *supra* note 5, at 1056 ("most courts to confront student speech cases . . . have suggested that they might be willing to apply *Tinker* in any student expression case, even if the student speech is plainly off campus, as long as the speech causes a substantial disruption at the school" (footnote omitted)); Calvert, *supra* note 131, at 270 ("It is the material disruption and substantial disorder component of the Court's decision that schools seem most likely to use as precedent to justify the punishment of home-created, Web-based expression, and that courts, in turn, seem most likely to apply in their legal analyses." (footnote omitted)).

977. Pike, *supra* note 4, at 990; *see also* Williams, *supra* note 151, at 719 (because "student Internet speech is usually created from a home computer" and therefore not subject to *Fraser* or *Hazelwood*, "almost every student Internet speech case is analyzed under *Tinker*" (footnote omitted)). As have other federal appellate courts, the Second Circuit has described *Fraser* and *Hazelwood* as exceptions and *Tinker* as the prevailing general standard in the public student speech framework. *Guiles*, 461 F.3d at 325 ("[F]or all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school."); *Saxe*, 240 F.3d at 214 ("Speech falling outside of these [*Fraser* and *Hazelwood*] categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations."); Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008) (stating that *Tinker* applies to all other student speech that does not fall under *Fraser* or *Hazelwood*), *cert. denied*, 558 U.S. 817 (2009); *Chandler*, 978 F.2d at 529 ("We conclude . . . that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*." (first citing *Fraser*, 478 U.S. at 683–85; then citing *Hazelwood*, 484 U.S. at 273; and then citing *Tinker*, 393 U.S. at 513–14). *See also Morse*, 551 U.S. at 422 (Thomas, J., concurring) (describing post-*Tinker* Supreme Court decisions as "adding to the patchwork of exceptions to the *Tinker* standard"). Commentators have similarly described *Tinker* as the presumptively controlling standard, with *Morse* now added to the list of exceptions. Goldman, *supra* note 93, at 404 ("Lower courts generally have concluded that *Tinker*'s 'substantial disruption' standard remains the basic rule when analyzing student speech issues unless the speech is lewd, advocates drug use, or bears the school's imprimatur. That is, *Fraser*, *Kuhlmeier*, and *Morse* are seen as mere exceptions to *Tinker*'s general rule." (footnote omitted)); Miller, *supra* note 112, at 654 ("If student expression is neither lewd nor school-sponsored, then the school cannot regulate it without satisfying *Tinker*'s substantial and material disruption test.").

978. Justice Alito's concurrence in *Morse* implicitly affirmed that *Tinker*'s material disruption test does not extend to student expression away from the school environment. 551 U.S. at 422 (Alito, J., concurring) (*Tinker* permits schools to regulate "in-school student speech . . . in a way that would not be constitutional in other settings"). *See also Bell*, 774 F.3d at 293 (Dennis, J.) ("the *Tinker* Court did not intend that its holding would allow a public school to regulate students' freedom of speech at home and off campus" (footnote omitted)), *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015), *aff'd on reh'g*, 799 F.3d 379, 394 (5th Cir. 2015) (*en banc*) ("Therefore, based on our court's precedent and guided by that of our sister circuits, *Tinker* applies to off-campus speech in certain situations."); *contra id.* at 435 (Graves, Jr., J., dissenting) ("[M]y view is that the *Tinker* framework was not intended to apply to off-campus speech."); *see also* Hoder, *supra* note 19, at 1582 ("*Tinker*'s test does not apply to off-campus speech." (footnote omitted)).

off-campus expression."[979] The exportation of *Tinker* to online speech inadequately protects the First Amendment rights of public school students,[980] and its application in this context is constitutionally problematic for two reasons. First, it enables courts to skirt over the critical determination, with little in the way of meaningful analysis, of whether a student's digital speech is properly subject to the school's disciplinary authority in the first instance.[981] Second, reviewing courts have unwarrantedly deferred to school officials' findings that *Tinker*'s requirements have been satisfied in digital expression cases, thereby permitting schools to "engag[e] in the sort of standardless discretion that is anathema to the First Amendment"[982] and chills student speech. Through *Tinker*'s invocation in the absence of rigorous judicial oversight, school districts have a readily available means of penalizing off-campus digital student speech based on disapproval of its content rather than on a realistic prediction of interference with the educational environment.[983] The endgame

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979. Papandrea, *supra* note 5, at 1093; *see also* King, *supra* note 246, at 876 ("[T]he current *Tinker* standard . . . is ill-suited for the online context"); Dauksas, *supra* note 308, at 461 ("As Avery Doninger's case exemplifies, *Tinker*'s 'material and substantial interference' standard subjects purely offensive online speech to an overbroad rationale attempting to do a job for which it is ill prepared."); Sweeney, *supra* note 75, at 368–69 ("Schools and courts cannot continue to stretch a fifty-year-old standard to fit speech that it was never meant to encompass." (footnote omitted)).

980. Tuneski, *supra* note 58, at 166 ("[T]he substantial disruption test, while appropriate to regulate speech on-campus, does not provide adequate protection for off-campus expression, and the lower court decisions that have endorsed the *Tinker* test for off-campus speech have significant flaws in their rationales. . . . An examination of the case law demonstrates that the [*Tinker*] standard can be easily manipulated to reach desired results and consequently provides little protection or guidance to off-campus speakers."); Papandrea, *supra* note 5, at 1093 ("More fundamentally, applying *Tinker*'s disruption standard to digital speech permits school officials to exercise too much control over juvenile expression generally."); Goldman, *supra* note 93, at 408–09 (criticizing application of *Tinker*'s "substantial disruption" test to off-campus speech as resulting in the punishment of protected student expression).

981. See text accompanying notes 862–74, *supra*; Pike, *supra* note 4, at 973–74 ("Lower courts challenged by the nuances of technologically enabled speech, or 'cyber-speech,' focus almost by default on whether student speech 'materially and substantially' disrupted the educational process without analyzing whether that speech actually occurred within the school's purview." (footnotes omitted)).

982. Papandrea, *supra* note 5, at 1092; *see also id.* at 1067 ("Unfortunately, most courts that apply the *Tinker* standard are far too deferential to the schools' claims that the speech at issue caused a reasonable fear of a substantial disruption." (footnote omitted)); Hayes, *supra* note 6, at 285 ("The *Tinker* standard is unworkable in the Internet age because many courts are far too deferential to the schools' claims that the student speech caused substantial disruption without applying their own independent analysis." (footnote omitted)); *Waldman II*, *supra* note 4, at 624 ("*any* threatening language about school officials—even if in attempted humor—can be considered substantially disruptive"); Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1300 (2008) (discussing that lower courts "allow speech restrictions under *Tinker* with relatively minimal showings of interference").

983. Tuneski, *supra* note 58, at 173:

is that public schools are exercising impermissibly broad authority in the digital speech arena at the expense of students' First Amendment rights.[984]

Consider a public school board's employment termination of a popular varsity high school athletic coach, provoking an outpouring of support from team members and others in the community, and prompting the athletic director to visit the team's locker room and warn that anyone who posted on social media about the decision would lose their eligibility to participate in interscholastic sports during the following season. In defiance of this warning, several team members criticized the coach's firing on social media, and urged both schoolmates and their parents to contact the school's administration in order to protest the decision and request its reversal. Under the circumstances, the team's social media comments are without question reasonably likely to come to the attention of school authorities, who may have to spend time and effort responding to inquiries and defusing the situation. Further, school district officials may be compelled to address the coach's termination with parents who have requested an explanation for the decision. Nevertheless, this student speech about an important school personnel issue merits constitutional protection that should not be jeopardized because school administrators receive a barrage of emails and text messages and telephone calls complaining about (or supporting) the coach's termination.[985] Yet, after *Doninger II*, it is no longer clear in the Second Circuit that the student-athletes who stood by their coach on social media would be immunized from punishment by the First Amendment[986]—particularly given that their

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> The flexibility and vagueness of the standard allow courts and school officials ample room to justify punishing a wide array of student expression. In practice, nearly any controversial or offensive expression that stirs debate or humors students could cause enough of a classroom interruption to satisfy the substantial disruption test. In the unique context of on-campus speech, it may be appropriate to provide schools and courts with such broad discretion, but in the context of off-campus speech, such an easily manipulated standard is clearly not rigorous enough to satisfy the needs of the First Amendment.

984. *Bell*, 799 F.3d at 435 (Haynes, J., dissenting in part) ("[T]he majority opinion greatly and unnecessarily expands *Tinker* to the detriment of Bell's First Amendment rights."), *cert. denied*, 136 S. Ct. 1166 (2016); Papandrea, *supra* note 5, at 1028 (public schools are exerting "far too much authority to restrict juvenile speech rights" through application of *Tinker* to digital expression); Goldman, *supra* note 93, at 408 ("The problem with the 'substantial disruption' test as applied to off-campus speech, however, is that it covers too much.").

985. Martin, *supra* note 151, at 792 ("While, in some cases, angry students, phone calls, and e-mails to the school administration may appear to present the potential for a substantial disruption, these actions do not pose any threat to the school, as they are merely peaceful ways to express dissatisfaction with a particular school position.").

986. *See, e.g.*, Goldman, *supra* note 93, at 408–09 ("It is not even clear that truthful speech accusing a teacher of sexual harassment or school officials of providing answers to standardized tests would be protected under the 'substantial disruption' test." (footnote omitted)).

punishment falls short of a suspension from school. This uncertainty underscores the unsuitability of *Tinker*'s application to digital speech originating outside the schoolhouse gate. The sole point of departure in the hypothetical is that, unlike in *Doninger II*, the social media posts did not use vulgar or offensive language—but if that factor is determinative, it only confirms that *Fraser*'s rationale was impermissibly extended to the out-of-school blog posting in *Doninger II* to shut down student speech that offended educators' sensibilities.[987]

VI. BACK TO THE FUTURE: FIRST AMENDMENT PROTECTION FOR PUBLIC STUDENT SPEECH IN THE MODERN PUBLIC SQUARE

A. Thomas *&* Levy *Got It Right: The First Amendment Presumptively Immunizes Student Expression Beyond the Schoolhouse Gate from School Punishment*

Public school secondary students exercising their digital free speech rights outside of school are not communicating *qua* students or with the apparent authority of the school, are not interfering with instructional methods or compromising curricular integrity, and are not impeding the school's ability to communicate its own message.[988] Nor is the school sponsoring, providing resources to, or wielding supervisory control over any students tapping their thoughts onto a computer keyboard or smart phone screen on their own time away from school.[989] Further, social media communications external to and unaffiliated with the school are not tangibly present in the classroom and do not require educators to make snap judgments about inappropriate or unacceptable speech in a school setting.[990] In short, none of the special characteristics of the educational environment that justify increased regulation of in-school speech apply to networked expression beyond the schoolhouse gate.[991]

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987. The same criticism applies to the school district's punishment of the cheerleader in *Levy*, where her vulgar snaps did not disrupt the school environment in any way but allegedly impaired the squad's morale, chemistry, and unity. *Levy*, 964 F.3d at 185 n.10, *cert. granted*, 141 S. Ct. 976 (Jan. 8, 2021).

988. Tuneski, *supra* note 58, at 164 ("[A] student who creates a website or an e-mail from a location away from campus using computers, servers and accounts that are not related to their school is acting in a capacity unrelated to his or her status as a student.").

989. Calvert, *supra* note 131, at 273 (explaining that student websites "are more akin to a modern version of an underground newspaper completely unaffiliated with anything that carries the imprimatur of school authority").

990. *See* Papandrea, *supra* note 5, at 1035, 10 (explaining that the intangible nature of digital communications makes them less disruptive to the educational process).

991. LoMonte, *supra* note 49, at 38 ("When a K-12 student speaks on campus, the student is: 1) Using government property as a platform for speech that is[;] 2) Directed exclusively to a school audience made up of students who are; 3) Legally compelled to be there. When a student speaks on personal time on social media, none of these things is true.").

For students' online speech to be stripped of full constitutional protection should require much more than its reasonably foreseeable exposure to the school community on social media sites followed by an unfounded, speculative, or remote prediction of disruption by school authorities.[992] A foreseeability standard surrenders the regulatory precision necessary "to preserve ample breathing space in which expression may flourish"[993] by reaching protected off-campus speech in the modern public square.[994] In *Thomas*, a case involving an independent school newspaper, the Second Circuit ratified that the First Amendment prohibits, based on the same principles that protect the speech of all citizens, governmental regulation of student speech in the community at large.[995] In *Levy*, a case involving an ephemeral Snapchat message, a Third Circuit panel recently reaffirmed those same principles in rejecting *Tinker*'s expanded application to student expression on social media outside the schoolhouse gate.[996] As a result—following from *Tinker*'s emphasis that public high schools are not state incubators designed to "foster a homogeneous people"[997]—students are free to contribute to the unchecked diversity of ideas comprising the at times unruly discourse of a free and open society.[998] By enabling robust student participation in a democratic

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992. For a decision employing such an elastic approach to school jurisdiction through the application of basic negligence principles resulting in unconstitutionally broad exposure of off-campus student digital speech to potential punishment, see *J.C.*, 711 F. Supp. 2d at 1108 ("Further, it was reasonably foreseeable that Plaintiff's video would make its way to campus. Plaintiff posted her video on the Internet, on a site readily accessible to the general public.").

993. *Thomas*, 607 F.2d at 1048.

994. *Recent Cases:* Snyder, *supra* note 121, at 1068 ("Nevertheless, it would not be enough that speech might foreseeably reach an on-campus audience, if it were not intentionally targeted at the school, since such a foreseeability standard could be stretched to cover otherwise protected speech." (footnote omitted)).

995. *Thomas*, 607 F.2d at 1045 ("When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government."); *see also Snyder*, 650 F.3d at 938–39 (Smith, J., concurring) ("The [*Thomas*] court . . . applied general First Amendment law, determined that the school's actions were unconstitutional, and invalidated the students' suspensions."); Hoder, *supra* note 19, at 1577 ("The Second Circuit applied general First Amendment principles and held that . . . the school's discipline was unconstitutional." (footnote omitted)).

996. *Levy*, 964 F.3d at 187–89.

997. *Tinker*, 393 U.S. at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

998. Early decisions applying *Tinker* emphasized the public education system's vital role in affording students broad exposure to the marketplace of ideas:

> Perhaps newer educational theories have become in vogue since our day, but our recollection of the learning process is that the purpose of education is to spread, not to stifle, ideas and views. Ideas in their pure and pristine form, touching only the minds and hearts of school children, must be freed from despotic dispensation by all men, be they robed as academicians or judges or citizen members of a board of education.

Shanley, 462 F.2d at 972.

political system consistent with the goals of public education,[999] and allowing the community to be informed about public school affairs from the constituents most directly involved,[1000] renunciation of *Doninger II*'s basic negligence principles in favor of *Thomas*'s presumptive protection for speech that students do not intend to reach inside the school environment would provide a salutary constitutional blueprint for digital speech cases where the challenged expression originates and is disseminated off-campus.[1001] Thus, the law needs to go back to the future: rather than dismiss *Thomas* as a precedential anachronism unsuited to modern communication methods, its powerful articulation of free speech principles should be embraced as the First Amendment benchmark in public school digital expression cases.[1002] Whether in 1969 (when *Tinker* was

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999. Holden, *supra* note 6, at 289 n.325 ("The Supreme Court has repeatedly held that a main purpose of a public school system is reinforcing the values of free thought, Democracy, and self-governance."); Papandrea, *supra* note 5, at 1077 ("[O]ne goal of public education should be to prepare minors to be political actors by training them to think rationally."); *Recent Cases:* Doninger, *supra* note 458, at 817 ("Civic republicanism emphasizes free and open deliberation and political participation as a way of achieving our fullest potential. These values form the core of our political system, and the state must ensure that they are passed on to the next generation. Public schools thus fulfill a key role: teaching the value of deliberation and participation in political life." (footnotes omitted)).

1000. LoMonte, *supra* note 49, at 69–70 ("A foreseeability-based standard will, as a practical matter, make all speech *about* the school punishable by the school, thus discouraging students from speaking about the educational policies of greatest immediate impact on their lives and about which they are uniquely knowledgeable." (footnote omitted)); Papandrea, *supra* note 5, at 1077 ("Students are particularly likely to provide their parents and other adults with useful information regarding the operation of their schools and their educational experience.").

1001. Calvert, *supra* note 131, at 277 ("The Second Circuit's logic [in *Thomas*] is fundamentally sound and should be considered by courts facing the same or similar issues today involving student Web sites.").

1002. LoMonte, *supra* note 49, at 82 ("There is a temptation to believe that the advent of the Internet has so fundamentally 'changed the game' that lofty pronouncements about the importance of students' off-campus First Amendment rights, like those of the Second Circuit in *Thomas*, are outmoded. But courts should look beyond myths and phobias about the Internet to the reality." (footnote omitted)). In relinquishing territoriality as a limitation on *Tinker*'s applicability, the *Doninger II* court dismissed the presumptive constitutional protection ordained by *Thomas* for off-campus student speech as no longer sustainable in the digital age. 527 F.3d at 49 ("True enough in 1979, this observation is even more apt today, when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication."). On remand, the district court did exactly the same thing. *Doninger III*, 594 F. Supp. 2d at 223 ("As the case before us demonstrates, we are decidedly not in the world confronted by the Second Circuit in *Thomas*."); *see also Bell*, 799 F.3d at 401(Jolly, J., concurring) ("Ever since *Morse*, the use, the extent and the effect of the online speech seem to have multiplied geometrically."). In rejecting *Thomas*'s rationale as antiquated, these decisions fail to acknowledge that the reasonable foreseeability standard prevailing in the current landscape, which they have embraced as an alternative, itself traces its origin to Judge Newman's concurrence in *Thomas* and was formulated to address the narrow issue of an indecent print publication distributed by students on the periphery of the schoolyard under circumstances "where circulation

decided),[1003] 1979 (when *Thomas* was decided),[1004] or 2019 (when "speaking and listening in the modern public square"[1005] occurs predominantly via social media), our commitment to the Constitution must inform our conception of public students' free speech rights.[1006] Protection for speech that is "integral to the fabric of our modern society and culture"[1007] cannot be rendered provisional or contingent owing to the evolving technological practices and changing social conditions through which First Amendment rights are exercised, nor can it be diluted when public students express themselves on digital platforms outside the school environment.[1008]

Social media sites unquestionably function as electronic public squares through which individuals "engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"[1009] The reasonable foreseeability test expands the schoolhouse gate to student speech in the virtual public arena, allowing for increased school authority well beyond *Tinker*'s narrow accommodation of the functional interests appropriate to an educational setting.[1010] Contrary to the view espoused in several federal appellate court opinions addressed in this article, pervasive social media engagement by public school students is no

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on school property was *intended* and predictable." *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring) (emphasis added).

1003. *Bell*, 799 F.3d at 401 (Jolly, J., concurring) ("When *Tinker* was written in 1969, the use of the Internet as a medium for student speech was not within the Court's mind.").

1004. *J.C.*, 711 F. Supp. 2d at 1106 ("Finally, *Thomas* was decided in 1979, before schools were confronted by the unique problems presented by student expression conducted over the Internet.").

1005. *Packingham*, 137 S. Ct. at 1737 (Kennedy, J.).

1006. LoMonte, *supra* note 28, at 16 ("[W]hile it is fashionable to assert that 'the internet has changed everything' in American culture, the foundational rules of our Constitution remain. It is our view of the nature of speech, not the Constitution, that must change to keep pace with technology.").

1007. *Packingham*, 137 S. Ct. at 1738.

1008. *Levy*, 964 F.3d at 188 ("[I]t contradicts the Supreme Court's instruction, in cases like *Packingham* and *Reno*, to apply legal precedent faithfully even when confronted with new technologies." (footnote omitted)). The U.S. Supreme Court has stated that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)). The Second Circuit has similarly recognized the unvarying applicability of foundational free speech principles to evolving communications technologies. *Corley*, 273 F.3d at 434 ("When the Framers of the First Amendment prohibited Congress from making any law 'abridging the freedom of speech,' they were not thinking about computers, computer programs, or the Internet. But neither were they thinking about radio, television, or movies. Just as the inventions at the beginning and middle of the 20th century presented new First Amendment issues, so does the cyber revolution at the end of that century.").

1009. *Packingham*, 137 S. Ct. at 1735–36 (citing *Reno*, 521 U.S. at 870).

1010. *Levy*, 964 F.3d at 187–88.

reason to abandon the schoolhouse gate concept as a limitation on *Tinker*'s applicability.[1011] While that traditional boundary has perhaps to some degree assumed a metaphorical aspect owing to the omnipresence of digital expression,[1012] the location of that expression—the real-world, geo-physical place where it is composed and from which it originates—retains constitutional salience for the compelling reason that "the concept of the 'schoolyard' is not without boundaries and the reach of school authorities is not without limits."[1013] Indeed, the First Amendment demands judicial vigilance to prevent arbitrary incursions by school authorities on students' digital free speech rights notwithstanding the extent to which that speech is conceptualized as occupying the metaphoric construction of cyberspace.[1014]

1. The First Amendment Restricts School Regulation to Digital Speech Intentionally Communicated Within the Educational Environment

Judge Krause clarified in *Levy* that a careful threshold evaluation of the relationship of digital speech with the school environment, along with meaningful consideration of the First Amendment interests and values animating dialogue in the public square, support the assimilation of digital expression cases into the existing public student speech framework without an accompanying distortion or displacement of established constitutional principles.[1015] In order to ensure adequate protection when a

1011. LoMonte, *supra* note 28, at 16 ("The pervasiveness of digital communications cuts against unbridled expansion of state authority, not in favor of it."); Papandrea, *supra* note 5, at 1093 ("Students use electronic technology to express themselves. Allowing schools to restrict speech there is akin to allowing schools to restrict speech anywhere.").

1012. *Kowalski*, 652 F.3d at 573 ("This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as the medium.").

1013. *Layshock*, 650 F. 3d at 216 (McKee, C.J.); *see, e.g.*, *Kowalski*, 652 F.3d at 573 ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate."); *see also* LoMonte, *supra* note 49, at 85 ("Notwithstanding simplistic pronouncements that the Internet makes the location of student speech irrelevant, location matters quite a bit. Location is decisive, in fact, when it comes to the jurisdiction of government agencies to punish behavior, and doubly so when the punishment is preventative on the anticipation of a localized impact." (footnote omitted)).

1014. Importantly, and following from Supreme Court precedent, irrespective of whether a social media platform "is a forum more in a metaphysical than in a spatial or geographic sense, . . . the same [free speech] principles are applicable." Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 1937 n.2 (2019) (Sotomayor, J., dissenting) (quoting *Rosenberger*, 515 U.S. at 830 (treating "Student Activities Fund" as the forum at issue and citing cases in which a school's mail system and a charity drive were the relevant forums)).

1015. *Levy*, 964 F.3d at 179 ("In applying the First Amendment to the [internet], the [Supreme] Court was careful not to discard existing doctrines. Instead, it applied those doctrines faithfully[.]"); *see also* Pike, *supra* note 4, at 1002 ("But an understanding of technology makes it possible to draw analogies between 'material world' practices and cyber-speech, demonstrating

student communicates outside of school, without school supervision or sponsorship, the speech is presumptively sheltered under the First Amendment and subject only to parental control—the central principle established in *Thomas*, and invigorated in the social media context in *Levy*.[1016] This presumption may be overcome only when a student intentionally introduces digital speech into the school environment by communicating it to a school-supervised audience, at a school-sponsored event, or on a school-controlled network or forum, in which case the expression is within the schoolhouse gate and subject to school regulation, irrespective of its place of dissemination.[1017] Thus, if digital expression "is directed toward a specific audience who will view the expression from on-campus, [it] should be considered on-campus speech."[1018] Similarly, "if a student sends an e-mail to other students on school computers, texts other students using his cell phone during school time, or posts offensive content on a school-sponsored website, a school should have authority to restrict that expression."[1019]

The return to an intentionality baseline (which is subject to the agency of the speaker) in place of a foreseeability standard (where "any effect on the school environment will depend on others' choices and reactions")[1020] will enable courts readily to distinguish off-campus from on-campus digital speech in all but the most exceptional cases,[1021] and does

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that certain uses of technology are more like on-campus speech, while other uses of technology more closely resemble true off-campus speech.").

1016. *Thomas*, 607 F.2d at 1050–51; *Levy*, 964 F.3d at 191 ("[W]e hold that *Tinker* does not apply to off-campus speech"); Tuneski, *supra* note 58, at 141 ("Student internet speech that is created outside of the school without using school resources should be considered off-campus speech."); Goldman, *supra* note 93, at 405 ("Student speech that does not occur under school supervision should receive the same First Amendment protection as non-student speech.").

1017. Roberts, *supra* note 266, at 1192 ("When a student speaks online, requiring that school officials and administrators look at the student's intent to bring that speech on school grounds prevents them from overstepping their boundaries and curtailing students' First Amendment rights."); Calvert, *supra* note 131, at 252–53 ("It is only when students deliberately bring their expression on campus . . . that schools may properly redress and punish the speech."); Tuneski, *supra* note 58, at 164.

1018. Tuneski, *supra* note 58, at 164.

1019. Papandrea, *supra* note 5, at 1091.

1020. *Levy*, 964 F.3d at 188–89 ("After all, a student can control how and where she speaks but exercises little to no control over how her speech may come to the attention of the school authorities[.]" (internal quotations omitted)).

1021. *Levy*, 964 F.3d at 190 ("But a test based on whether the speech occurs in a context owned, controlled, or sponsored by the school is much more easily applied and understood."); Pike, *supra* note 4, at 975 n.20 ("[A]n on-campus and off-campus distinction is easily made even with Internet speech."); Medjuck, *supra* note 74, at 6 ("A survey of the cases makes clear that this standard could be reasonably and efficiently applied by courts and school administrators alike. Often it is simple to determine whether speech was intentionally directed towards the school."); *see also* Brenton, *supra* note 29, at 1243 ("[T]he total universe of possible factual scenarios of school censorship of student cyberspeech is vastly smaller than that of individuals and their relationships with the laws of the various states. Therefore, under this approach, a body of law should

not require the formulation of new substantive constitutional standards.[1022] Public student speech doctrine has long recognized that "[o]nce a student has purposefully brought writings created off-campus into the schoolhouse during the school day, the rules change."[1023] This principle, which controlled in a previous generation of underground student newspaper cases decided post-*Tinker*,[1024] is undiminished in the digital age: by

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quickly develop to give administrators a ready set of rules for making these types of decisions." (footnote omitted)).

1022. *Levy*, 964 F.3d at 180 ("The lesson from *Reno* and *Packingham* is that faced with new technologies, we must carefully adjust and apply—but not discard—our existing precedent."). My analysis disagrees with the recommendations, of which there are no shortage, that the First Amendment's requirements must be reformulated in the public student digital speech context. *See, e.g.*, Hoder, *supra* note 19, at 1594–95 (proposing a "control and supervision test" pursuant to which student speech "would be considered within the school's authority only when the student accesses and shows the online speech to others, or creates the online speech while that student is under the assumed control and supervision of the school" (footnote omitted)); Louis John Seminski, Jr., *Note: Tinkering with Student Free Speech: The Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 182 (2001) ("Applying old standards to such an interactive medium is improper; what is necessary is some new constitutional standard, not merely a new way in which current standards are portrayed."); John T. Ceglia, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 979 (2012) (proposing "uniform standard" for off-campus student speech that "collid[es] with the rights of others" under *Tinker*); Holden, *supra* note 6, at 240, 288 (recommending "uniform national standard" in the form of a "multi-part legal standard for courts to apply when reviewing public school discipline decisions against First Amendment scrutiny" called the "*Tinker*-Cyberbully Test")); Reeves, *supra* note 566, at 1154 (proposing "a type of 'but-for' test, which borrows ideas from the rules regarding free speech rights of public employees"); Martin, *supra* note 151, at 797 ("Because of the unique characteristics of the Internet, the Court should formulate a new standard establishing cyberspace as a unique location instead of forcing lower courts to struggle in applying the traditional student-speech framework, which focuses on the on-campus/off-campus distinction, to the Internet."); Sweeney, *supra* note 75, at 419 (proposing that off-campus online student speech be subject to school punishment if it "(1) touches and concerns the school community or a member of the school community" and "(2) interferes with the rights of members of the school community to be secure and to be let alone" (internal quotations and footnote omitted)); Hofheimer, *supra* note 121, at 989 (arguing that the "most appropriate standard" for application to off-campus student speech cases would be one similar to the "clear and present danger" test articulated in Justice Holmes's famous dissent from *Abrams v. United States* (footnote omitted)); Benjamin T. Bradford, *Is It Really MySpace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L.J. 323, 340, 346–49 (2010) (proposing that schools may punish Internet speech "when a reasonable observer would attribute the speech as occurring under the auspices of the school" (footnote omitted)); Shannon M. Raley, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 786–95 (2011) (proposing the elimination of the "on-campus-" requirement as a limit to *Tinker*'s applicability).

1023. LoMonte, *supra* note 28, at 5; *see, e.g.*, *Boim*, 494 F.3d at 984 (holding that the First Amendment was not violated where a student was disciplined for bringing a notebook containing a violent journal entry into class and showing it to classmate).

1024. *See, e.g.*, *Sullivan*, 307 F. Supp. at1331, 1342 (discussing the punishment of students for off-campus distribution of newspaper "which criticized school officials" prohibited by the Constitution); *Shanley*, 462 F.2d at 975 ("[T]he exercise of disciplinary authority by the school board . . . was unconstitutionally applied to prohibit and punish presumptively-protected First Amendment expression that took place entirely off-campus."); *see also Porter*, 393 F.3d at

taking affirmative measures to have the speech reach an in-school audience or impact a school-supervised setting, a digital speaker is electing to proceed subject to the potential exercise of school discipline.[1025] Absent the requisite intentionality, allowing a school district to punish a student for online speech created and distributed outside of the educational environment is an illegitimate governmental encroachment on core First Amendment liberties[1026]—even if it was reasonably foreseeable that school personnel would learn about the speech,[1027] and even if it results in a disruption at school.[1028]

Although public school students' freedom of speech receives less protection in the school environment or at a school-sponsored event, the Supreme Court has never suggested that the suzerainty of school officials

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617–18 (explaining that the First Amendment prohibits punishing a student for a writing not intentionally introduced into school environment).

1025. *Levy*, 964 F.3d at 189 n.12 ("A student who brings a printed story into campus and shows it to fellow students has expressed herself inside the school context regardless [of] whether she wrote the story at home or in class. So too with a student who opens his cellphone and shows a classmate a Facebook post from the night before."). Tuneski, *supra* note 58, at 177 ("Authors of controversial or offensive material created and disseminated off school grounds should only be subjected to the jurisdiction of school authorities when they take additional steps to bring the material to a school campus. By taking this additional step, a speaker decides whether she wishes to subject herself to the jurisdiction of school officials.").

1026. *Bell*, 799 F.3d at 406 (Dennis, J., dissenting) ("[T]he majority opinion's undue deference to a public school board's assertion of authority to censor the speech of students while not within its custody impinges the very core of our Constitution's fundamental right to free speech"); *Snyder*, 650 F.3d at 939 (Smith, J., concurring) (discussing that extension of school authority through application of *Tinker* to off-campus student expression would allow suppression of political speech protected at the core of the First Amendment).

1027. *Thomas*, 607 F.2d at 1053 n.18; *Levy*, 964 F.3d at 187–89; Papandrea, *supra* note 5, at 1090 (arguing that student digital speech may not be restricted "because it was reasonably foreseeable that it would come to the attention of school officials").

1028. Tuneski, *supra* note 58, at 142 ("[W]ebsites created off-campus would not make the publisher liable to school officials, *even if the sites caused a disruption when viewed by other students at school*" (emphasis added)); LoMonte, *supra* note 49, at 66 ("But the same speech that might distract from learning when interjected into instructional time must be protected when delivered off-campus, *even if it is foreseen . . . to provoke a reaction interfering with the school's normal routine*." (emphasis added)). For the reasons elaborated above in the text, I disagree with the argument that the First Amendment permits the extension of school authority to punish off-campus digital speech that results in an actual in-school disruption, which abandons territorial limitations on *Tinker*'s applicability. For a strong version of this argument, see Shaver, *supra* note 6, at 1597 ("[S]tudent speech, no matter where it is created, that causes an *actual* substantial disruption within the school environment should be subject to discipline. If a student's speech actually disrupts the school environment, the student should not be shielded from discipline by the excuse that the speech was created off campus." (footnote omitted)). In my judgment, allowing for the punishment of off-campus speech because of its disruptive in-school effects will provide a convenient excuse for public school officials to suppress speech that is controversial and provocative, particularly when it is critical of faculty performance or school operations. *See, e.g.*, *Bell*, 799 F.3d at 402 (Elrod, J., concurring) ("the First Amendment does not, for example, allow a public school to punish a student for 'writ[ing] a blog entry defending gay marriage' from his home computer, *even if the blog entry causes a substantial disruption at the school*" (emphasis added) (quoting *Snyder*, 650 F.3d at 939 (Smith, J., concurring))).

extends beyond the realm of their educational responsibilities to off-campus expression.[1029] As *Thomas* illustrates, an intent-based standard prevents unbounded school authority over digital expression without compromising the institutional interests necessary for the effective functioning of the secondary education process. Otherwise, students will never cease to be students for First Amendment purposes,[1030] and will be deprived of full participatory status in the marketplace of ideas[1031]—a result inimical to both informed civic engagement and constitutional free speech principles. Moreover, the unrestricted reach of schools will supplant other formative social institutions—including religious groups, community organizations and, most importantly, families—in directing the exercise of students' digital expressive rights.[1032]

2. *Incidental "Downstream" Exposure Does Not Render Social Media Expression Subject to* Tinker

Levy correctly held that *Tinker* does not apply to social media expression that reaches the school campus either because of its inherent virality or through the conduct of third parties other than the student speaker.[1033] In contrast, the punishment of digital speakers through such "downstream"[1034] exposure when their speech has independently or inadvertently entered the school domain through the actions of other individuals is a recurring pattern in the case law applying the reasonable

1029. *Snyder*, 650 F.3d at 933 ("[T]he Supreme Court . . . has [n]ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.").

1030. Judge Dennis's dissent in *Bell* criticized the majority opinion for assuming that public school students are speaking in their capacity as students whenever their expression is related to school affairs or school personnel. *See Bell*, 799 F.3d at 415 (Dennis, J., dissenting); *see also* Calvert, *supra* note 131, at 271 ("When minors are engaged in off-campus, non-school-related activities during non-school hours, they are not students. They are, instead, people—people, in particular, outside the control of the school.").

1031. Hofheimer, *supra* note 121, at 989 ("Given the minimally intrusive nature of the Internet and its ability to promote self-expression and contribute to the marketplace of ideas, the [Supreme] Court should protect students' First Amendment rights and establish the narrow circumstances that warrant school regulation of students' online, off-campus speech.").

1032. *Bell*, 799 F.3d at 426 (Dennis, J., dissenting) ("The majority opinion's extension of the *Tinker* framework will inevitably frustrate this constitutional right, because school officials will hereinafter be empowered to supplant parents' control over their children's off-campus speech that is critical of their teachers."); *Levy*, 964 F.3d at 194 ("But the primary responsibility for teaching civility rests with parents and other members of the community."); *see, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[T]he custody, care and nurture of the child reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (internal quotations and citations omitted)).

1033. *See Levy*, 964 F.3d at 188 n.11.

1034. *Id.*

foreseeability standard.[1035] As one scholar has aptly described the phenomenon, "[t]he offensive language is tweeted, posted to Facebook, texted, or blogged to classmates, the language becomes a 'thing' with other students, the principal finds out, the student is suspended, the parents sue, and the courts cite to *Tinker* and flip a coin."[1036] These decisions fail to take account of the speaker's intentionality as a requirement for a school's assertion of authority over online expression. Digital speech that is brought to school or turned over to school officials by another student or agitated parent, or that is downloaded or accessed at school by the speaker's classmates or school personnel without the speaker's encouragement or participation, does not qualify as on-campus speech and should not forfeit its constitutional protection through those occurrences.[1037] In *Porter v. Ascension Parish School Board*, the Fifth Circuit held that a sketchpad drawing of a military style attack on a high school, found in a closet and brought to school by a student's younger brother two years after it had been created, was not "*intentionally or knowingly communicate[d]* . . . in a way sufficient to remove it from the protection of the First Amendment."[1038] The *Porter* court explained that student speech receives "diminished First Amendment protection when composed by a student on-campus, or [is] *purposefully brought onto a school campus* where [it] become[s] on-campus speech subject to special

1035. *See, e.g.*, *Wisniewski*, 494 F.3d 34 (classmate delivered printout of instant messaging icon to teacher), *cert. denied*, 552 U.S. 1296 (2008); *Doninger II*, 527 F.3d 41 (school district superintendent's son discovered blog posting by using Internet search engine); *Bell*, 799 F.3d at 385 (coach criticized in YouTube rap song listened to recording on another student's smartphone); *McNeil*, 918 F.3d 700 (student's private journal entries made public through disclosure to police by mother's therapist); *see also* McDonald, *supra* note 4, at 735–36 ("Most of these cases involved communications that originated off school campuses and found their way onto them through the action of parties other than the student speaker—mainly complaining parents, informing students, or school officials investigating allegations of inappropriate cyberspeech." (footnote omitted)).

1036. Holden, *supra* note 6, at 287–88.

1037. Brenton, *supra* note 29, at 1237 ("A student should likewise not be subject to the power of a school to censor speech merely because a third party brings that speech inside the schoolhouse gates." (footnote omitted)); Papandrea, *supra* note 5, at 1057 ("In other words, . . . the speech cannot become on-campus speech simply whenever a third party or a school official brings or accesses the material on the Internet at school." (footnote omitted)); Denning & Taylor, *supra* note 213, at 882 ("[W]e think that students should *not*, without more, be held responsible for speech or expressive activity engaged in off-campus, but which made its way to school inadvertently or through the actions of third persons."). For a decision indicating that the introduction of digital speech into the school environment by a party other than the speaker does not qualify as on-campus speech, *see T.V.*, 807 F. Supp. 2d at 779 ("Defendants contend that 'it is undisputed that the photographs did in fact make it into the school.' While this may be true, it's beside the point. Neither M.K. nor T.V. brought the material into the school environment. Others did.")

1038. 393 F.3d at 617 (emphasis added). The court described the sketch as "crudely drawn, depicting the school under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons." *Id.* at 611.

limitations."[1039] Thus, it takes more than "accidental and unintentional exposure to public scrutiny"[1040] to justify *Tinker*'s application to student expression. This established restriction on the exercise of school authority should be no different with respect to public school students who communicate on social media rather than on printed paper.[1041]

When school officials download and review student digital speech while at school, or otherwise cause the speech to be brought onto campus, the student has not knowingly communicated the speech within the school environment.[1042] Rather, in this situation it is the school itself that is responsible for bringing the speech inside the schoolhouse gate, without any purposeful attempt to do so by the speaker, who may even have adopted measures to prevent discovery of the speech by school authorities.[1043] School districts may not unilaterally exert increased control over their students' off-campus expression by searching for it on the Internet and reviewing it at school, which amounts to transparent bootstrapping.[1044] In all cases, a school's independent receipt of digital speech from a third party that was not intended by the speaker, or exposure to online speech through the school's own search activities, should be insufficient to justify *Tinker*'s application.[1045] Suffice to say, "[t]his is not exactly speech on campus or even speech directed at the campus."[1046]

1039. *Id.* at 618–19 (emphasis added) (footnote omitted). Thus, the rule from the *Porter* case "is that offensive speech *inadvertently* transmitted to the school environment is beyond the reach of school administrative discipline." Holden, *supra* note 6, at 270.

1040. 393 F.3d at 618.

1041. Holden, *supra* note 6, at 269 ("The [*Porter*] court's reasoning was simple, elegant, and instructive for courts now deciding cases in the social media era.").

1042. *Snyder*, 650 F.3d at 932 (Chagares, J.) ("However, the fact that [middle school principal] caused a copy of the profile to be brought to school does not transform J.S.'s off-campus speech into school speech."); Calvert, *supra* note 131, at 266 ("When a teacher or principal hears about a student's off-campus-created Web site and then downloads it to a school computer for review, this act does not constitute the intentional downloading of the site in school by the student. The student has not brought the speech on campus. In this case, instead, it is the school administration that has brought the speech on campus.").

1043. Calvert, *supra* note 20, at 234 (criticizing the reasonable foreseeability standard as inadequate to protect from school disciplinary authority "a student who not only does not subjectively intend for his off-campus website to come to the attention of school authorities, but who actually posts messages on the home page that objectively indicate that he does not want it coming to the school's attention").

1044. Calvert, *supra* note 131, at 266 ("[T]he school must not be able to bootstrap jurisdiction over the speech with its own acts."); *Shanley*, 462 F.2d at 966 (criticizing the "school board's bootstrap transmogrification into Super-Parent" for levying three-day suspensions where copies of off-campus student newspaper turned up at school).

1045. Tuneski, *supra* note 58, at 177 ("If, however, the off-campus expression reaches the school passively without any intentional efforts by the author to disseminate the speech on campus, schools would be prevented from sanctioning the student for the effects of the speech, even if it was reasonably foreseeable that it would reach the school." (footnote omitted)).

1046. *Porter*, 393 F.3d at 615 (footnote omitted).

B. A Communicative Intent Jurisdictional Standard Will Avoid Chilling Students' Digital Speech

As *Levy* correctly emphasized, the clear separation of speech that a student does not introduce into the school environment from speech that is potentially punishable by the school is necessary to avoid silencing digital speakers and will "ensure that the First Amendment rights of students are afforded complete protection,"[1047] particularly with respect to speech about school affairs.[1048] In forceful terms, *Levy* assigned constitutional priority to the "up-front clarity"[1049] required to safeguard students' free speech rights and explained why it is undermined by a negligence standard:

> To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to a schools' authority and when not. A test based on the likelihood that speech will reach the school environment—even leaving aside doubts about what it means to "reach" the "school environment"—fails to provide that clarity.[1050]

To achieve the necessary clarity, a "more rigorous and definite rule"[1051] can be realized by focusing on two principal factors: where the digital expression is created and how it is disseminated.[1052] These are

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1047. Tuneski, *supra* note 58, at 140; *see also id.* at 141 ("[T]here is no justification for allowing schools to abridge what would otherwise be constitutionally protected expression."); *Levy*, 964 F.3d at 188 (explaining that "other circuits' approaches have failed to provide clarity and predictability" to off-campus digital speakers).

1048. LoMonte, *supra* note 49, at 78 ("More importantly than its impact on the outcome of any particular case, maintaining a firm distinction between on- and off-campus speech will provide students the reassurance they deserve as citizens that they may safely comment on school issues without fear of reprisal.").

1049. *Levy*, 964 F.3d at 189.

1050. *Id.* at 189–90; *see also id.* at 188 ("And in the First Amendment context, courts must pursue ex ante clarity not for clarity's own sake, but to avoid chilling potential speech and to give government officials notice of the constitutional boundaries they may not cross.").

1051. Tuneski, *supra* note 58, at 170. To prevent the exercise of digital free speech rights from being impermissibly chilled, commentators anticipated the analysis in *Levy* by emphasizing the necessity of a "bright-line rule [that] would provide clear guidelines for students to follow in order to avoid on-campus liability for their off-campus expression." *Id.* at 142; *see also id.* at 177 ("In order to protect the First Amendment rights of students, courts should establish a clear rule that off-campus speech is not subject to the jurisdiction of school officials."); Papandrea, *supra* note 5, at 1090 ("As a bright-line rule, courts should continue to declare that speech that lacks any sort of physical connection to the school should fall outside the school's jurisdiction."); *see also* LoMonte, *supra* 49, at 37 ("Although federal courts historically have recognized a bright line separating schools' authority over off-campus versus on-campus speech, recent decisions have blurred that line."); *Porter*, 393 F.3d at 619–20 ("[C]ommentators have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation" (footnote omitted)).

1052. An insightful early examination of the limitation of public school authority over student expression in the digital arena focused on these two factors. Tuneski, *supra* note 58, at 142 ("[C]ourts should employ a bright-line rule clearly distinguishing between on- and off-campus speech by focusing on the place of origination and dissemination"); *see also* Calvert, *supra*

"historical facts"[1053] evident in all digital speech disputes, and are capable of ready determination by "typical fact-finding techniques."[1054] They are reliable constitutional signifiers that demarcate the scope of protection for student digital expression, and the primacy of their consideration will reinvigorate the schoolhouse gate concept as a limitation on public schools' authority over their students' speech. A decisional framework that "undoubtedly supports a threshold consideration of the origin of the speech and its relationship to on-campus activity"[1055] will prevent the chilling of public student digital expression by eliminating the overbroad and amorphous reasonable foreseeability standard that was disavowed in *Thomas* and again in *Levy* but has otherwise infiltrated current law.[1056]

By returning to a more speech protective intent-based approach, only a digital speaker who purposefully avails herself of the school environment or school resources in communicating on a digital platform would be subject to the relaxed protection afforded under the public student speech doctrine.[1057] Because of the impermissible latitude it confers on school boards to regulate the ideas expressed by students on "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard"[1058] in contemporary society, the reasonable foreseeability of the speech coming to the attention of school officials should be rejected as "subvert[ing] the longstanding principle that heightened authority over student speech is the exception rather than the rule."[1059] In all

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note 131, at 264 (arguing courts need to examine the "place of origin of the speech" among other factors).

1053. *Layshock*, 650 F.3d at 221 (Jordan, J., concurring).

1054. *Id.*

1055. *J.C.*, 711 F. Supp. 2d at 1106.

1056. *Levy*, 964 F.3d at 188 ("In layering a foreseeability requirement on top of *Tinker*, the Second and Eighth Circuits have made it difficult for students speaking off campus to predict when they enjoy full or limited free speech rights."); *Thomas*, 607 F.2d at 1051 ("The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression."); Tuneski, *supra* note 58, at 158 ("Moreover, students fearing on-campus punishment for their potentially inflammatory internet postings are likely to temper their expression, inhibiting their ability to freely communicate on websites, message boards, and even e-mail. In essence, the current state of the law threatens to chill student speech that would otherwise be protected outside the context of schools."); *Recent Cases:* Snyder, *supra* note 121, at 1070 ("Students are particularly vulnerable to having their speech chilled in this manner.").

1057. Calvert, *supra* note 20, at 234 ("On the other hand, a jurisdictional standard that focuses solely on the intent of the student—whether the student intended for the message to come to school officials' attention—would clearly be more protective of speech."); Fronk, *supra* note 5, at 1440–41 ("Off-campus criticism of school officials and administrative decisions, even using vulgar and profane language, should be constitutionally protected unless the student intentionally causes the vulgar language itself to be distributed on campus.").

1058. *Packingham*, 137 S. Ct. at 1737.

1059. *Levy*, 964 F.3d at 187–88; *see also* Brenton, *supra* note 29, at 1238 ("Similarly, *mere foreseeability that a particular online expression might reach the schoolhouse gates should not suffice to justify censorship of that speech*, absent additional conduct by the student that

cases, the controlling constitutional inquiry—the same inquiry employed in *Thomas* four decades ago—"boils down to asking whether the student manifested a particular desire for his or her expression to be seen, heard, read, or to otherwise take place on campus."[1060]The answer to this First Amendment-mandated question leaves public schools ample authority to regulate digital speech—including speech emanating from beyond the campus boundary—that is intentionally introduced into the educational environment and proves materially disruptive to the learning process or substantially interferes with school order and discipline. The following digital speech examples would all be potentially punishable by school districts under an intent-to-communicate standard:

- posting, downloading, or displaying digital content during school hours while in the school building or on school premises[1061]

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indicates an intent to partake of the school environment." (emphasis added)); Tuneski, *supra* note 58, at 177 ("If, however, the off-campus expression reaches the school passively without any intentional efforts by the author to disseminate the speech on-campus, schools would be prevented from sanctioning the student for the effects of the speech, *even if it was reasonably foreseeable that it would reach the school*." (emphasis added) (footnote omitted)).

1060. Pike, *supra* note 4, at 1006; *see also* Calvert, *supra* note 131, at 265 ("The question, in other words, asks: *Did the student in question 'bring' the off-campus speech on to campus?*" (emphasis added)).

1061. This includes situations involving a student's in-school solicitation of other students to view, display, or download the student's networked speech. Calvert, *supra* note 131, at 266 ("The *Tinker* case . . . would control the situation in which a student, while in school, downloads or encourages other students to download his or her personal Web site . . . during school hours."); Goldman, *supra* note 93, at 424 ("To consider the student as having published a site under school supervision, the student should have to access the site at school and show others or tell others to access the site while they are at school."). Notably, however, Professor Papandrea cautions against permitting schools to regulate their students' digital expression whenever it is "somehow physically present on campus" as an approach that "concedes too much" owing to the "uniquely pervasive" nature of the Internet as a communications medium. Papandrea, *supra* note 5, at 1090. Pursuant to the "incidental-use analysis" she prescribes, "[t]he mere fact that a student can retrieve his expression on campus, without more, should not grant school authorities the power to control his off-campus expressive activities." *Id.* at 1091. But even if the incidental use of smart phones or other electronic devices within the physical confines of school property to transmit or retrieve digital content is not exempt from school authority, a faithful application of *Tinker* should distinguish between on-campus digital expression during and after school hours, and/or at various in-school locations and contexts, that present improbable scenarios for disruption. Thus, for example, a student who is posting on social media while alone in the hallway after the school day ends is far less likely to cause a substantial disruption than if the same expression is shared with a group of classmates while class is in session. Goldman, *supra* note 93, at 420 ("Speech that takes place in the classroom or during an assembly more clearly threatens a disruption than speech uttered in the halls or the cafeteria."). Where the in-school context indicates that the occurrence of a material disruption is implausible, *Tinker*'s application risks spilling over into a *sub rosa* invocation of *Fraser* based on school officials' disapproval of the content of the speech. *See id.* at 420–21.

- disseminating, directing, or displaying a digital communication to an on-campus audience, whether composed of students or school personnel[1062]
- displaying or communicating digital information to an audience attending, or during the course of, a school-sponsored program, activity, or event[1063]
- displaying or communicating digital expression as part of coursework or class/school assignments[1064]
- using any school computer server or network system to disseminate digital expression[1065]
- transmitting messages through school email accounts or class listservs[1066]

1062. A student's intent may be constructively determined when she is aware of a strong likelihood that speech electronically communicated from outside of school to an in-school audience will be accessed by recipients. McDonald, *supra* note 4, at 744 (communication may be "purposefully directed . . . to school grounds . . . by transmitting [the] content to an audience comprised principally of co-students at the school under circumstances where [the speaker] knew it was highly likely it would be accessed there"). The scope of communicative exposure will also necessarily impact the constitutional analysis in this instance. Thus, if digital speech originating off-campus is transmitted to an individual or limited group of recipients within the school, the likelihood of satisfying *Tinker*'s evidentiary requirements would seemingly be diminished. The greater the simultaneous collective exposure of the digital speech, the greater the potential for a material disruption on campus.

1063. Professor Papandrea's "incidental-use" qualification applies in this instance as well, where *Tinker*'s application should again be informed by the scope of communicative exposure—a text message spouting profanity about a teacher or homework assignment shared privately between two classmates who happen to be away on a field trip stands on very different footing for First Amendment purposes than a tweet successfully imploring students attending math class to chant "Black Lives Matter" or "All Lives Matter" in the midst of a trigonometry lesson. *See* Papandrea, *supra* note 5, at 1091.

1064. Shaver, *supra* note 6, at 1593–94 ("direct student-to-school communications" in connection with coursework "are not out-of-school communications simply because the student is not physically at school"). Where a student's off-campus digital expression is curricular or part of an assigned school project, it would be subject to restrictions that are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273; David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. M.S.U.-D.C.L. 199, 204 (2000) ("[I]f a student created inappropriate material on the school's web server as part of a class project, the *Kuhlmeier* standard would apply.").

1065. Brenton, *supra* note 29, at 1234 ("When a student uses school computers during school hours to create online speech, the school should have the authority to regulate that speech, subject to the limits laid out in the *Tinker* line of cases."); Calvert, *supra* note 131, at 264 ("If the Web site was created using school facilities and computers, then the school should be able to exercise greater control and authority over the speech because it controls the property that is used by the student." (footnote omitted)); Tuneski, *supra* note 58, at 164 (suggesting that digital expression "that originates from an on-campus computer" qualifies as "on-campus speech").

1066. Any time a student's digital speech is intentionally transmitted to an IP address registered by the school, the speech will qualify as on-campus speech subject to regulation under *Tinker*, no matter the actual location of the speaker or the time the speech is accessed by the recipient. Pike, *supra* note 4, at 1003 ("While not necessarily instantaneous in transmission, an

Each of the illustrations above involves "the use of technology to create a direct virtual presence"[1067] on campus or in a school-supervised domain, including situations where the digital speech originates or is communicated from outside the schoolhouse gate. A student who emails a disruptive or threatening message to a teacher's official email address or a class listserv maintained by the school district may be punished under *Tinker*, no matter where and when the email is transmitted and where and when it is read by the teacher or classmates.[1068] *Tinker* would also govern any form of materially disruptive electronic communication that is "deliberately transmitted . . . directly to the school's network"[1069] or to a school-supervised audience, as well as any social media posting intentionally communicated inside the school that provokes a disturbance despite originating "beyond the campus boundary."[1070]

When a student's social media speech is purposefully injected into a "school-sanctioned and school-supervised"[1071] setting, or knowingly disseminated to an in-school audience, it comes within the school's regulatory authority and is punishable upon satisfaction of *Tinker*'s evidentiary requirements.[1072] In contrast, when the communication, as objectively manifested by the place where the speech originates and its method of dissemination, is independent of any school function, control, or supervision and does not have an intentional connection with the educational environment, it violates the First Amendment for public schools to discipline the student speaker merely because the speech is published on a digital platform and is deemed reasonably likely to come to the attention of school authorities and reasonably likely to cause a disruption.[1073] A deferential negligence-based standard that upholds school officials'

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email sent to a teacher's district-provided email address appears commensurate with a call to a teacher's desk phone—even when that teacher is checking his or her email from home."); Tuneski, *supra* note 58, at 164 (suggesting that digital expression that "is disseminated using school accounts" is "on-campus speech").

1067. Pike, *supra* note 4, at 1003.

1068. *Snyder*, 650 F.3d at 940 (Smith, J., concurring) ("I would have no difficulty applying *Tinker* to a case where a student sent a disruptive email to school faculty from his home computer.").

1069. Pike, *supra* note 4, at 1004.

1070. *Layshock*, 650 F.3d at 222 (Jordan, J., concurring).

1071. *Morse*, 551 U.S. at 396.

1072. This analysis is substantively analogous to Professor Goldman's thoughtful "school supervision" approach, which assigns significance to the speech's location in determining whether it "should be classified as under school supervision" and therefore subject to regulation. Goldman, *supra* note 93, at 423–24. Thus, "[i]f the challenge is to the message's posting, *where and under what circumstances* the message was published determine whether the message should be considered communicated under school supervision." *Id.* at 424 (emphasis added).

1073. Brenton, *supra* note 29, at 1239 ("Absent purposeful activity connecting this speech with the school environment, there is no reason why a school should be any freer to censor speech just because it appears on the Internet." (footnote omitted)).

regulation of digital speech no matter where or when it is communicated, while discounting or disregarding the speaker's intent, presents the risk of uncurbed school censorship of student expression. Nothing in the Supreme Court's quartet of public student speech cases supports such an incautious expansion of schools' authority over their students' expression in the general community through abandonment of the territorial limitations acknowledged in those decisions, which has eroded the constitutional status of public students' digital speech, impeded the free flow of information about school affairs, and sacrificed clarity in the law.[1074]

C. An Intent-Based Jurisdictional Standard Would Authorize School Regulation of Social Media Expression That Deliberately Provokes an In-School Disruption

The strongest expression of support for *Tinker*'s application to off-campus digital speech can be found in the two-judge concurrence in *Layshock ex rel. Layshock v. Hermitage School District*, which urged dismantlement of the schoolhouse gate in claiming that "any effort to trace First Amendment boundaries along the physical boundaries of a school campus [is] a recipe for serious problems in our public schools."[1075] However, the concerns underlying the *Layshock* concurrence are fully addressed by an intent-based jurisdictional standard, which "is not incapable of distinguishing between activity that concerns the school community and activity that does not."[1076] For example, in situations where indecent speech in a tangible format (e.g., a website page printout) was distributed to students in close physical proximity to a schoolyard in circumstances "where circulation on school property was *intended* and predictable"[1077]—the narrow context underlying Judge Newman's suggestion in *Thomas* that school authority may permissibly extend to off-campus speech—and caused a material disruption in the school environment, *Tinker*'s application would be authorized and punishment of the speech would be justifiable.[1078] The exercise of school authority would

1074. LoMonte, *supra* note 49, at 44 ("Nowhere did the Court suggest that schools' punitive authority over 'disruptive' speech extended into students' offhours, nor has the Court made any such suggestion in the 46 years since *Tinker* was decided."); Hoder, *supra* note 131, at 1581 ("[T]he school speech jurisprudence does not apply unless the speech occurred on campus or while the student was under the control and supervision of the school." (footnote omitted)).

1075. 650 F.3d at 221 (Jordan, J., concurring).

1076. *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).

1077. *Id.* (emphasis added); *see also* Tuneski, *supra* note 58, at 180 ("Applying the proposed rule, distributing a newspaper just outside the schoolhouse gates before school starts would clearly be an effort to disseminate the material on grounds.").

1078. An important qualification to Judge Newman's proposal is that punishment would not be warranted unless the publication's distribution at the schoolyard's perimeter resulted in a substantial and material disruption to the school environment. *Cf. Thomas*, 607 F.2d at 1058 n.13

similarly be permitted when the speaker fomented a disruption by intentionally directing expression on a social media site to an in-school audience with "her cellphone while standing one foot outside school property."[1079] These and comparable examples of a "deliberate disturbance"[1080] engineered by purposefully introducing disruptive

(Newman, J., concurring) ("Though the issue need not now be decided, it may be seriously doubted whether, unless the *Tinker* standard is met, school authority to discipline students for circulating vulgar material to high school students ends at the perimeter of the school grounds."). Without such a disruption or a factual predicate supporting a reasonable forecast thereof, the distribution of printed information at the school's periphery is protected by the First Amendment, even if the publication reaches inside the school's premises. *See, e.g.*, *Sullivan*, 307 F. Supp. at 1331, 1333, 1340 (reasoning that distribution of newspaper criticizing school officials in a park across the street from a high school "[a]s students passed by on their way to classes" is protected under the First Amendment because "freedom of speech . . . may be exercised to its fullest potential *on school premises* so long as it does not unreasonably interfere with normal school activities").

1079. *Layshock*, 650 F.3d at 221 (Jordan, J., concurring).

1080. *Id.* at 222. Notably, the technophobic specter of "egregiously disruptive events" postulated in the *Layshock* concurrence by reference to what may be the most misconstrued analogy in the annals of First Amendment jurisprudence would not evade regulation under the intent-based jurisdictional standard prescribed above in the text. *See id.* at 221–22. Apparently as shorthand for the uncontroversial proposition that protection of speech (including public student digital speech) must necessarily have limits, Judge Jordan extrapolated from the canonical statement in *Schenck v. United States* that the First Amendment does ". . . 'not protect a man in falsely shouting fire in a theater and causing a panic'" by noting that "no one supposes that the rule would be different if the man were standing *outside* the theater, shouting in." *Layshock*, 650 F.3d at 221–22 (emphasis added) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.)). While it is inarguable that Justice Holmes's oft-cited illustration of unprotected speech would apply in equal measure to a speaker on the theater's periphery, it is also unilluminating in failing to address the constitutionally salient jurisdictional question presented in the digital speech context. As Professor Chafee wrote not long after *Schenck* was decided, intricate free speech issues "cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 944 (1919). *Schenck*'s "shouting fire" example is inapposite to online expression because the only plausible interpretation of such a knowingly false statement is an intent to cause panic among the assembled theater audience. By intentionally directing a deliberate falsehood to physically confined theater-goers, the speaker is exploiting a uniquely vulnerable audience in a captive location at the time the speech is uttered—irrespective of whether the speaker is located inside or on the outer perimeter of the theater. No similar audience captivity or vulnerability exists with respect to off-campus digital speech that is not intentionally introduced into the school environment or purposefully directed to an in-school audience, just as it would not if the speech in Holmes's example was temporally and/or physically removed from an assembly of theater-goers—*e.g.*, if it had been uttered on a public street corner several blocks distant from the theater. *Shanley*, 462 F.2d at 974 ("the now proverbial 'fire' might be constitutionally yelled on the street corner, but not within the theater"). Further, the outbreak of panic among the audience would present a grave and immediate threat to the theater-goers' physical safety that could not be countered through more speech. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). Student expression available without restriction on social media sites poses no comparable risk of imminent physical harm and, unlike the Holmes example where the false fire alarm is immediately aurally received by an audience congregated within the theater, does not cross the schoolhouse gate in the sense required by the First Amendment. Holmes's example is therefore

digital speech within the school environment or communicating it to an audience subject to school supervision would not be protected under the First Amendment, whether the speaker is situated ten feet or ten miles outside of the school's curtilage. Accordingly, a digital communication intended to "cause pandemonium in a public school"[1081] and disseminated to an in-school audience is punishable by school authorities notwithstanding that it may "be controlled by someone beyond the campus boundary."[1082] In those instances where "a student seeks to directly impact the campus environment through remote means"[1083] of digital expression, or is responsible for "off-campus cyberspeech that intentionally causes harm within the school environment,"[1084] *Tinker*'s application would be warranted.

VII. CONCLUSION

A. Student Internet Speech Is Not "Different" for First Amendment Purposes

The *Levy* majority refused to accept the notion that, by their nature, communications in cyberspace are inherently and essentially different from those in the analog realm.[1085] This assumption of difference, often manifest in the opinions of federal courts,[1086] has a substantive dimension by enabling a conception of digital speech as a domain paradoxically subject to increased regulatory control by the state notwithstanding—or perhaps because of—its omnipresence and intangibility. The irony arising from this conception is unmistakable: originally envisioned as a democratizing technological advance that would allow the decentralized and unmediated flow of digital information to flourish through a multiplicity of applications, the Internet has increasingly become subject to centralized

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contingent upon a particular set of circumstances in no way replicated by or relevant to online speech generally accessible to the community at large.

1081. *Layshock*, 650 F.3d at 222.

1082. *Id.*

1083. Pike, *supra* note 4, at 1002.

1084. Brenton, *supra* note 29, at 1235 ("It is conceivable that a student could create a web page entirely off campus with the intent that it be read at school and thus cause harm to a student, teacher, or the educational process itself." (footnote omitted)).

1085. 964 F.3d at 180 ("That was true in the analog era, and it remains true in the digital age.") (first citing *Thomas*, 607 F.2d at 1050–52; and then citing *Porter*, 393 F.3d at 608, 611–12, 616–17).

1086. *See, e.g.*, *Layshock*, 650 F.3d at 222 ("Modern communications technology, for all its positive applications, can be a potent tool for distraction and fomenting disruption.") (Jordan, J., concurring); *Snyder*, 650 F.3d at 951–52 (Fisher, J., dissenting); *Doninger III*, 594 F. Supp. 2d at 223.

systems of government control and surveillance.[1087] As important human interactions—including secondary educational processes—are increasingly played out on digital information networks, methods of government regulation seem to have infiltrated our collective communicative experience. The prevailing public student digital speech architecture represents a disturbing point on this continuum, as students in our public schools have suffered the continuing erosion of their online First Amendment rights.

There is no reason for that to be the case. Courts can recognize and accept that the transmission of student speech across digital platforms offers low access barriers, relatively permanent communicative opportunities, and instantaneous global connectivity without arriving at the conclusion that expanded school authority is necessary to preserve the effective functioning of the public education system. Indeed, that conclusion is belied by what actually happened in every student digital speech case that has reached a federal appellate court, in each of which public schools carried out the vitally important business of educating their students without missing a beat after the allegedly threatening or disruptive speech at issue had been disseminated through digital technology and brought to the attention of school authorities. Rather than isolating digital speech as a regulatory domain subject to diminished First Amendment protection, a more realistic conception of students' rights of expression in the modern public square should focus on accommodating their robust exercise as required by the Constitution.[1088] The allocation and securing of those rights will determine the scope of expressive liberty, frame the conditions of democratic participation, and promote individual self-realization as contemplated by the First Amendment for the nation's future generations of K-12 public school students.[1089]

1087. The scholarship of Professor Balkin is insightful on this issue. *See, e.g.*, Balkin, *supra* note 30, at 2297, 2308 (explaining that "[t]he very forces that have democratized and decentralized the production and transmission of information in the digital era have also led to new techniques and tools of speech regulation and surveillance that use the same infrastructure" and identifying "collateral censorship" as method by which the government regulates a first-party speaker through, among other things, the exercise of "soft power" over second-party private infrastructure owners).

1088. *Reno*, 521 U.S. at 870 (agreeing that "our cases provide no basis for qualifying the level of First Amendment scrutiny" applied to speech on the Internet); *Packingham*, 137 S. Ct. at 1735–36 ("[S]ocial media users . . . engage in a wide array of protected First Amendment activity on topics as diverse as human thought") (quoting *Reno*, 521 U.S. at 870 (internal quotations omitted)).

1089. *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 201 (Brennan, J., dissenting) ("The First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media."); *Mosley*, 408 U.S. at 95–96 (Marshall, J.) ("To permit the continued building of our politics and culture,

B. Alternative Remedies Are Available

Restricting the exercise of a public school's authority to instances where students intentionally communicate their digital expression within the school, to a school-supervised audience, or at a school-controlled event leaves schools ample ability to undertake measures necessary to preserve an orderly learning environment.[1090] As a first step, even when they cannot invoke formal disciplinary processes, schools can notify parents about offensive or inappropriate online speech that is communicated away from school.[1091] In a significant number of cases, this should achieve an effective resolution because, once they have learned of the situation, responsible parents can be expected to have their child remove or modify the speech.[1092] Privatizing the issue in this manner reinforces the *Thomas* court's recognition that, once a student leaves school, the First Amendment prohibits governmental intrusion into her expressive activities, which are then remitted to parental control.[1093] Outside of the

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and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."). For an informative analysis of the intersection of the First Amendment's self-realization theory and public students' free speech rights, see Tomain, *supra* note 5, at 159–76.

1090. Calvert, *supra* note 131, at 245–46 ("The bottom line is that sufficient remedies and redress in the civil, criminal, and juvenile justice systems already exist for off-campus expression that causes harm.").

1091. In *Morse*, Justice Alito noted that, when students are away from the school environment, "parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate." 551 U.S. at 424 (Alito, J., concurring); *see also* Pike, *supra* note 4, at 1005 ("When protected but disconcerting speech is brought to the attention of school officials, they should work closely with parents to determine how best to address a student's needs before the situation escalates."); Shaver, *supra* note 6, at 1594 ("School officials also can bring the student's speech to the attention of the student's parents.").

1092. Tuneski, *supra* note 58, at 184 ("By notifying parents about the content of their children's websites, many situations would immediately be resolved. Once aware of the problem, parents have the discretion and ability to restrict internet access and punish their children for producing offensive websites."); Hayes, *supra* note 6, at 287 ("[P]arents are far better served to monitor and regulate their child's online behavior" (footnote omitted)); Brenton, *supra* note 29, at 1244 ("The most effective way to ensure that troubled students receive the help they need is not for schools to zealously police their every online encounter. That responsibility, rather, should rest with their parents, who are far better suited to monitor and shape their children's activities on the Internet." (footnote omitted)); Hofheimer, *supra* note 121, at 992 ("Parents may be the most effective and comprehensive solution to the problem of regulating online off-campus student speech because they can monitor and restrict most, if not all, avenues of expression.").

1093. *Thomas*, 607 F.2d at 1053 n.18 ("Equally disturbing is the unavoidable interference with the proper role of parents contemplated by Judge Newman's approach."); *see also Bell*, 799 F.3d at 426 (Dennis, J., dissenting) ("Moreover, the majority opinion's extension of *Tinker* to off-campus speech additionally burdens the long-established constitutional interest of parents in the rearing of their children."); Fronk, *supra* note 5, at 1433 ("[O]nly Doninger's parents should have the right to punish her for inappropriate language and non-constructive means of resolving a dispute because Doninger wrote the 'offensive' post entirely off campus . . ."); Papandrea, *supra* note 5, at 1084 ("But granting schools authority to restrict the expression of children in digital

schoolhouse gate, the authority of the school may not override the authority of parents, as occurs when the reasonable foreseeability standard is applied to determine the constitutional status of student digital expression.[1094]

Second, schools would retain the authority under *Tinker* to balance the online speech rights of students with the unique requirements of the educational system and punish on-campus speech that materially disrupts the school environment or substantially interferes with the learning process.[1095] As a practical matter, digital speech that poses a realistic threat to school discipline, or that is most likely to interfere with the pursuit of pedagogical goals, is that which is disseminated within the school itself.

Third, in the problematic realm of threatening speech or speech portending violence, it is important to note that digital expression rising to the level of a "true threat" is not protected by the First Amendment under any circumstances—whether communicated inside or outside of the schoolhouse gate—and is ordinarily subject to criminal prosecution.[1096] In today's necessarily vigilant environment, there can be no real doubt that law enforcement authorities will zealously investigate and prosecute true threats on social media where the speech involves a school, its students, or its personnel.[1097] Although public schools would continue to have the authority to punish students responsible for threatening or violent online speech when it has been deliberately injected into the school environment, a second layer of punishment by schools seems an unnecessary overlay in this context.[1098] In short, if law enforcement does its job

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media is a much greater intrusion on parental rights because it limits the ability of parents to direct their children's upbringing even when they are at home.").

1094. LoMonte, *supra* note 49, at 70 ("To equate off-campus speech with on-campus speech because of its potential to reach the school completely substitutes school authority for the child rearing authority of the family . . .").

1095. *Recent Cases:* Snyder, *supra* note 121, at 1071 ("[S]chools would retain the authority to punish any disruptive speech that took place on campus. If one assumes that an off-campus controversy would very often require some on-campus speech act to reignite the dispute in the school setting, the school would retain the power to suppress the problem at its point of entry and to punish any speech that sustained the disruption at school.").

1096. Brenton, *supra* note 29, at 1244 (explaining that the juvenile justice system is available for prosecution of "true threats"); Shaver, *supra* note 6, at 1584 ("Such student speech is subject to discipline regardless of where it was created [or] the means by which it was communicated to school officials . . .").

1097. LoMonte, *supra* note 49, at 72–73 ("[R]ealistic threats of violence are constitutionally unprotected anyway, so schools need not resort to *Tinker* to regulate that limited subset of speech."); Jones, *supra* note 85, at 167 (explaining that under established First Amendment carve-outs, threatening speech "would be curtailed by a broader exception that applies to all Americans, not just students").

1098. The constitutionality of allowing school districts to punish student expression that originates off-campus when it comes within an unprotected speech category, including true threats, seems difficult to justify in view of *Thomas*'s comprehensive prohibition of school authority over student speech beyond the schoolhouse gate. In dissenting from a decision that a

in true threat cases involving students, school districts should not have to expend administrative or legal resources supplementing the punishment administered by the juvenile justice system. Public schools are educational institutions ill equipped to undertake the complex psychological and behavioral assessment of whether a student is prone to commit an act of violence. And they are not arms of the state's criminal justice apparatus.

Undoubtedly, and understandably, because of the tragic wave of mass school shootings that have afflicted our nation,[1099] the case law in this area reveals a pattern of predictable overreaction by school authorities and excessive deference by reviewing courts.[1100] However, given popular culture's saturation with portrayals of violence and the prevalence of violent imagery in video games and other forms of digital entertainment popular with students, it should hardly come as a surprise that violent language and themes permeate digital exchanges among peers. School districts can immediately detain a student when looking into whether a particular example of violent online expression requires the student's separation from the school environment. And in all cases where a school becomes aware of a student's threatening speech, school officials should immediately notify law enforcement authorities to request an appropriate investigation.[1101] If warranted by the circumstances, a student may be administratively removed from school while the investigative process runs its course. After an investigation by law enforcement and (if necessary) mental health professionals is conducted, schools can defer to

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sexually graphic and violent letter composed in the privacy of a student's home—"not at school or during school hours or using school equipment"—constituted a true threat punishable by the school, Judge McMillian considered the issue a police matter removed from the school's authority because it was committed solely to the prosecutorial discretion of criminal law authorities. *Doe*, 306 F.3d at 636 (McMillian, J., dissenting) ("If anything, the statement was arguably a police matter, for which, I note, the local prosecuting attorney refused to issue any charges.").

1099. *See, e.g.*, *Wynar*, 728 F.3d at 1064 ("With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights.").

1100. Papandrea, *supra* note 5, at 1100 ("[S]chools have shown little tolerance for student speech that contains even the slightest reference to or depiction of violence, even when law enforcement has declared it innocuous. Permitting schools to punish violent digital speech would expand school authority over juvenile speech exponentially."); LoMonte, *supra* note 49, at 72 ("[S]chools are prone to justify, and courts are prone to rationalize, control over online speech on the grounds that it is necessary to head off on-campus violence."); Jones, *supra* note 85, at 167 ("This reasoning, however, ignores current First Amendment law, which already has recourse to punish speech which threatens the safety of students and administrators.").

1101. Papandrea, *supra* note 5, at 1100 ("School officials should continue to report threatening or otherwise disturbing speech to law enforcement authorities who could in turn take appropriate action."). Depending on the circumstances, an administrative, as distinct from disciplinary, suspension may be immediately imposed, and the student may even be detained from the inception of the investigation. *Cuff*, 677 F.3d at 123 (Pooler, J., dissenting).

those authorities for the punishment of digital expression that has been determined to present an actual threat to the safety of a school's premises, personnel, or students. This affords public schools appropriate latitude to act preventatively in protecting students from "warning signs"[1102] that present a credible security risk without encroaching on the First Amendment rights of those who—like eighth-grade student Aaron Wisniewski and the ten-year-old plaintiff in *Cuff*—engage in ill-advised attempts at online humor that appear facially threatening but in reality are innocuous.[1103]

Fourth, individuals—including public school teachers and administrators—aggrieved by off-campus student speech published on digital platforms are not otherwise bereft of remedies. In the same year that *Tinker* was decided, a federal district court noted that "[a] student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus."[1104] Where the speech results in legally cognizable injury, the subject has the full range of remedies and penalties available in the civil (and perhaps criminal) justice system notwithstanding the school district's constitutional inability to punish the student speaker.[1105] For example, in the event a social media post conveying false information causes provable reputational injury, the subject can pursue a defamation claim against the student speaker.[1106] And again, the criminal justice system allows for the prosecution of speech that constitutes a "true threat." Thus, established legal remedies

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1102. *LaVine*, 257 F.3d at 987.

1103. LoMonte, *supra* note 49, at 72 ("[S]chool punishment often follows a determination that the speaker is *not* dangerous and had *no* intention of acting on social-media posts about violence . . .").

1104. *Sullivan*, 307 F. Supp. at 1341; *see also Shanley*, 462 F.2d at 974 ("A student acting entirely outside school property is potentially subject to the laws of disturbing the peace, inciting to riot, littering, and so forth, whether or not he is potentially subject to a school regulation that the school board wishes to extend to off-campus activity."); Calvert, *supra* note 131, at 285 ("If the speech remains outside the proverbial schoolhouse gate, then administrators should not view juvenile Web site creators as students but, rather, as citizens who face the same legal repercussions in the civil and criminal justice systems as adults.").

1105. Hoder, *supra* note 19, at 1604 ("[I]f school staff or students are harmed by online speech, they may have recourse using civil torts, such as defamation or slander, or in criminal statutes prohibiting true threats or harassment." (footnote omitted)); *Recent Cases:* Snyder, *supra* note 121, at 1071 ("Just as speech by adults may fall foul of state tort law or harassment statutes, off-campus student speech would also be subject to such constraints." (footnote omitted)); Calvert, *supra* note 131, at 281 ("Individual teachers, however, who feel aggrieved, possess remedies through the civil justice system to compensate for injuries to reputation and emotional well-being they might have suffered."); Hayes, *supra* note 6, at 287 ("If speech is so endangering as to become actionable, the courts provide an adequate remedy that is sufficient to punish truly threatening behavior." (footnote omitted)).

1106. Shaver, *supra* note 6, at 1594 ("[I]f the particular school employee finds the speech to be libelous or defamatory, the employee could avail himself or herself of civil remedies.").

are available to redress the demonstrable harm caused by students' unprotected digital speech that is not punishable by the school, just as they are with respect to the actionable speech of adults in the general community. Indeed, being named as a defendant in a defamation lawsuit is likely to impart an unforgettable lesson and have a lasting impact far beyond platitudinous and trumped-up incantations of the need to protect schools' order and authority.[1107] If the concern is that standard legal remedies are unlikely to prove effective because of the First Amendment interests involved, this reservation only underscores the impropriety of public schools' efforts in reaching beyond the schoolhouse gate to penalize their students' digital speech.

C. #TeachYourChildren

> *Teach your children well*
> *Their father's hell did slowly go by*
> *And feed them on your dreams*
> *The one they pick's the one you'll know by*[1108]

The opening sentence in *Thomas* announced propitiously that "[p]ublic education in America enables our nation's youth to become responsible participants in a self-governing society."[1109] The *Tinker* court valued communications shared by students as "an important part of the educational process,"[1110] emphasizing that our nation's public schools afford students an opportunity to sift through competing information and to confront unfamiliar and even antagonistic beliefs, learning about the scope of their own free speech rights in the process.[1111] If that constitutional vision is to be realized, public schools cannot be allowed to

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1107. Calvert, *supra* note 20, at 225 ("Minors learn a very important lesson—one more profound than any possible classroom lecture on the subject—when they are sued for defamation or a related cause of action. These facts, of course, raise a very important question: why should schools be able to punish students for off-campus-created expression when the victims of that expression already have off-campus remedies for any harm they may suffer?"); Dauksas, *supra* note 308, at 460 ("A libel or defamation suit brought against a student would provide an adequate remedy to a truly injured party, demonstrate to students the 'real world' consequences of creating grossly offensive online expression, and offer parents or guardians an incentive to adequately monitor their adolescent student's Internet activities.").

1108. CROSBY, STILLS, NASH & YOUNG, TEACH YOUR CHILDREN (Atlantic Recording Corp. 1970).

1109. 607 F.2d at 1044; *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.").

1110. 393 U.S. at 512.

1111. *See id.* at 512–13; Chemerinsky, *supra* note 114, at 532 (discussing *Tinker*'s protection of in-school speech as "a crucial part of educating students about the Constitution"); Papandrea, *supra* note 5, at 1078 ("Allowing the marketplace of ideas to flourish at school and on the Internet helps prepare students to be participants in [a] democracy that cherishes the free exchange of ideas and diversity of viewpoint." (footnote omitted)).

extinguish their students' social media expression by claiming that suppression is necessary to prevent an anticipated disruption to the school environment. As Justice Stevens pointed out about the formative role of public schools, the classroom provides "the first opportunity most citizens have to experience the power of government[,]" and "[t]he values they learn there, they take with them in life."[1112] And as Professor LoMonte has cautioned, if we place controversial, provocative, or resistant off-campus speech off limits to high school students, then we are instructing them that "free speech is too dangerous for them, and that it must be parceled out stingily, by the same government that the students wish to criticize. Nothing could disrupt the educational mission more."[1113]

School districts that punish their students' speech are taking the easy, and wasteful, way out.[1114] Rather than expend resources enforcing, and at times litigating, the punishment of off-campus expression, public high schools should educate students about the responsible exercise of their free speech rights on digital platforms, including the advantages of thoughtful and constructive dialogue and the disadvantages of intolerant and offensive expression.[1115] Simply put, "[p]unishing students for exercising constitutional rights is not as beneficial as educating students that discretion is the better part of valor and legal does not inherently equal right."[1116] By providing guidance and instruction to students as they navigate the electronic marketplace of ideas, schools will perform an important role in preparing them for democratic self-governance without curtailing their digital speech rights outside the school environment.[1117]

1112. New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Stevens, J., dissenting).

1113. LoMonte, *supra* note 49, at 81 (footnote omitted).

1114. *See* Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993) ("School districts seeking an easy way out try to suppress [student] speech.").

1115. Public secondary schools can play a valuable role in teaching their students the "fundamentals of digital citizenship." DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 227 (2014); *see also id.* at 194 ("The Internet holds great promise for *digital citizenship*, by which I mean the various ways online activities deepen civic engagement, political and cultural participation, and public conversation."); *see also* Hofheimer, *supra* note 121, at 991 ("Schools should educate both parents and students on a wide variety of issues posed by the Internet, including cyberbullying, Internet safety, dangers of the Internet, potential negative ramifications of posting indecent pictures or offensive speech, and more. They should similarly educate parents and students about tolerance, etiquette, civility, and positive forms of expression.").

1116. Tomain, *supra* note 5, at 173.

1117. Hofheimer, *supra* note 121, at 991 ("Educating parents and students about these issues is a potentially thorough and effective way to deal with the problems created by online speech. This is also a desirable approach because it lacks the detrimental effects of many other solutions in that it is unlikely to chill speech or inhibit student expression."); Sweeney, *supra* note 75, at 418 ("To silence children absolutely cannot possibly be the best way to prepare them to become contributing members of civilized society."); *Waldman II*, *supra* note 4, at 653 ("[E]ngaging in . . . dissenting speech can help prepare students to assume their role as adult citizens."); Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 89 (2005) ("[I]f schools fail to teach students the

This modeling of constitutional principles is undoubtedly a difficult and perhaps even aspirational task in dealing with today's online information ecosystem where the bar of viciousness is seemingly lowered every day, but no less worth striving for as befitting the objectives of public education.[1118] The important question is what the information communicated by students on social media will look like. Racist, sexist, homophobic, and misogynistic tropes will undoubtedly persist in that messaging, just as they do in society at large. But through instruction in responsible digital citizenship, examples of such intolerance will only be part of the story. With audacity borne by hope, an important counter-narrative has emerged through the use of social media in empowering student voices as instruments of social justice and political reform, at both the local and national levels, as they work to improve their communities.[1119]

Judge Newman was certainly correct in noting in *Thomas* that whether a school "condemns or tolerates"[1120] student speech "will have significance for the future of that school and of its students."[1121] It will also have consequences for the society those students live in, and for the political system that shapes their lives. Protecting public students' digital freedom of speech is no guarantee that the social animosities among us will be overcome, or that political divisions will be bridged, or that national unity will be restored.[1122] It does guarantee, however, that social media platforms will provide a legitimate forum for the routine contestation of ideas, beliefs, and values to be expected in an open pluralistic society. In this manner, students can participate in and contribute to what

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value of free expression, then these students will fail to appreciate the participatory character of a democratic society and will instead feel alienated, thinking the government is being arbitrary.").

1118. *Recent Cases:* Doninger, *supra* note 458, at 818 ("For the next generation to be politically engaged, schools must ensure that they pass on the civic republican values underlying the First Amendment. These concerns are heightened when off-campus speech is involved because such speech is subject to school authority only if it has some connection to school." (footnote omitted)).

1119. Stacy A. Smith, *If Dr. Martin Luther King, Jr. Had a Twitter Account: A Look at Collective Action, Social Media, and Social Change*, 12 SEATTLE J. FOR SOC. JUST. 165, 167 (2013) ("[T]he use of social media for social justice has evolved as one of the primary tools individuals and organizations leverage as a means to collectively affect [sic] social change.").

1120. 607 F.2d at 1057 (Newman, J., concurring).

1121. *Id.*

1122. *See, e.g.*, Bible Believers v. Wayne Cty., 805 F.3d 228, 233–34 (6th Cir. 2015) (*en banc*) ("But even when communication fails to bridge the gap in understanding, or when understanding fails to heal the divide between us, the First Amendment demands that we tolerate the viewpoints of others with whom we may disagree.If the Constitution were to allow for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom.").

Frederick Douglass called the "awful roar"[1123] of our collective social and political progress. That progress may be halting and incomplete, unable ever fully to reach or satisfy the ideals of a fair, just, and democratic polity. Nevertheless, the open and unimpeded exchange of information in the modern public square, without interference from our nation's public schools, is instrumental to the conditions required for its achievement.

There are no doubt many who will deride this prescription as naïve and outdated, or even as misguided and ineffectual, citing the Internet's malignant spreading of disinformation, magnification of cultural grievances, and capacity for generating viral social outrage. But government restrictions on the speech of youthful participants in the modern public square is no answer. To those who dismiss out of hand the possibility of responsible digital citizenship through education—a code we can live by—not only the words but the wisdom of Judge Krause supply a powerful antidote:

> As arms of the state, public schools have an interest in teaching civility by example, persuasion, and encouragement, but they may not leverage the coercive power with which they have been entrusted to do so. Otherwise, we give school administrators the power to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism. Instead, by enforcing the Constitution's limits and upholding free speech rights, we teach a deeper and more enduring version of respect for civility and the "hazardous freedom" that is our national treasure and "the basis of our national strength."[1124]

That is the abiding First Amendment lesson bequeathed by *Tinker*, amplified by *Thomas*, and reaffirmed in *Levy*. It resonates today perhaps more than ever.[1125]

1123. Frederick Douglas, Address on West India Emancipation: If There Is No Struggle, There Is No Progress (Aug. 4, 1857).

1124. *Levy*, 964 F.3d at 194 (quoting *Tinker*, 393 U.S. at 508–09).

1125. *Thomas*, 607 F.2d at 1047 ("Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decision making if all ideas, discoveries, and points of view are before the citizenry for its consideration. Accordingly, we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections." (first citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); and then citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.)).