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## *Tinker* Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech

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## **TINKER GONE VIRAL: DIVERGING THRESHOLD TESTS FOR ANALYZING SCHOOL REGULATION OF OFF-CAMPUS DIGITAL STUDENT SPEECH**

*Daniel Marcus-Toll\**

*In the context of students' free speech rights, courts have traditionally premised school regulatory authority on geography, deferring to school officials on campus and limiting a school's capacity to discipline students for conduct taking place beyond school hours or property. In the contemporary setting, however, where wireless devices, mobile phones, and other communicative technologies abound, a student may affect the school environment significantly without setting foot on school property. In the absence of guidance from the U.S. Supreme Court, the limits of school authority to regulate such "off-campus" student speech are uncertain.*

*Several courts have permitted school discipline in response to off-campus student speech under the "substantial disruption" test developed by the Supreme Court in *Tinker v. Des Moines Independent Community School District*. Responding to distinct situations, these courts have fashioned separate threshold tests to determine whether to apply the substantial disruption test to off-campus student speech. These threshold tests are inconsistent and risk either overly burdening students' First Amendment rights or undermining a school's ability to carry out its educational mission.*

*This Note argues that the threshold tests that courts have developed neither safeguard the rights of students nor meet the needs of schools adequately. By permitting schools to regulate off-campus student speech that may foreseeably reach school property or which bears a sufficient nexus to a school's pedagogical interests, the Second and Fourth Circuit's threshold tests fail to impose a meaningful limit on the kind or amount of speech that schools may regulate. On the other hand, by adopting a stricter threshold test based on identifiable threats of school violence, the Ninth Circuit's standard may foreclose a school's ability to protect students from other dangers. By instead redefining "substantial disruption" in accordance with the conception of student-on-student harassment that the Supreme Court has articulated in the Title IX context, courts might better*

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*serve schools' regulatory interests while protecting students' First Amendment rights in the digital age.*

TABLE OF CONTENTS

INTRODUCTION.....	3397
I. SPEECH AND SCHOOLS: REGULATION BASED ON THE SPECIAL CHARACTERISTICS OF THE SCHOOL ENVIRONMENT .....	3401
A. <i>Freedom of Speech: An Overview</i> .....	3402
1. Defining and Justifying Freedom of Speech.....	3402
2. Limiting Free Speech: Content-Based and Content-Neutral Regulations.....	3403
B. <i>A Bulwark Against Totalitarian Schools: The Tinker Test</i> .....	3405
1. The <i>Tinker</i> Majority .....	3406
2. The <i>Tinker</i> Dissent: Deference to School Officials.....	3408
3. What Speech Constitutes a Substantial Disruption?.....	3409
C. <i>Less Speech, More Regulation: The Supreme Court's Post-Tinker Jurisprudence</i> .....	3409
1. Lewd and Vulgar Speech: The <i>Fraser</i> Standard .....	3410
2. School-Sponsored Speech: The <i>Kuhlmeier</i> Standard .....	3412
3. Advocacy of Illegal Drugs: The <i>Morse</i> Standard .....	3413
4. A New School Duty: Preventing Student-on-Student Sexual Harassment .....	3414
D. <i>Where Is the Line? Distinguishing Off-Campus and On-Campus Speech</i> .....	3416
1. The Geographical Approach to Regulating Student Speech.....	3416
2. Here, There, Everywhere: The Challenge of Geography in the Digital Age .....	3418
II. UNCERTAINTY AT THE OUTER BOUNDARIES: DIFFERING APPROACHES AMONG CIRCUIT COURTS TO OFF-CAMPUS DIGITAL STUDENT SPEECH .....	3420
A. <i>The Second Circuit Standard: Reasonable Foreseeability of Speech Reaching School Property</i> .....	3420
B. <i>The Third Circuit Approach</i> .....	3422
1. The <i>Snyder</i> Majority Opinion .....	3423
2. The <i>Snyder</i> Concurring Opinion .....	3424

C. <i>The Fourth Circuit Standard:         Sufficient Nexus Between Speech and         Pedagogical Interests</i> .....	3425
D. <i>The Ninth Circuit Standard:         Speech Presenting An Identifiable         Threat of School Violence</i> .....	3427
III. UPDATING <i>TINKER</i> : A MODIFIED STANDARD FOR SCHOOL REGULATION IN THE DIGITAL AGE.....	3429
A. <i>Grading the Circuit Tests</i> .....	3430
1. <i>The Doninger Test</i> .....	3430
2. <i>The Kowalski Test</i> .....	3431
3. <i>The Wynar Test</i> .....	3432
4. <i>Common Considerations and Theory</i> .....	3432
B. <i>Redefining Substantial Disruption         in the Off-Campus Context</i> .....	3434
CONCLUSION .....	3436

#### INTRODUCTION

Online threats by students are cause for serious concern in today's schools.<sup>1</sup> For example, Landon, a tenth grader in Nevada, engaged in instant-messaging conversations with several classmates after school hours and from home.<sup>2</sup> Over several months, Landon's friends became disturbed by the content of his messages.<sup>3</sup> Increasingly violent and indicative of his access to weapons and hundreds of rounds of ammunition, Landon's messages focused on a school shooting that he seemed to be planning.<sup>4</sup> Concerned, his classmates brought the messages to the attention of their principal.<sup>5</sup> The school initially suspended and then expelled Landon for ninety days because of the online messages that he sent from his home.<sup>6</sup>

Schools are also increasingly vigilant about instances of cyberbullying.<sup>7</sup> Kara, a West Virginia high school senior, created a discussion group on a social networking website from her home computer and invited dozens of her classmates to join.<sup>8</sup> The commentary on the website focused on disparaging Shay, a classmate.<sup>9</sup> Another student posted several photographs to the website, one of which showed him holding a sign reading "Shay Has Herpes," as well as another of Shay herself, upon which

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1. *See Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013).

2. *See id.* at 1065.

3. *See id.*

4. *See id.* at 1065–66.

5. *See id.* at 1066.

6. *See id.*

7. *See Jan Hoffman, Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 28, 2010, at A1. Although "cyberbullying" may be an "imprecise label" for a "phenomenon [that] is hard to quantify," this Note adopts as a definition "willful and repeated harm" inflicted through phones, computers, and other electronic methods. *Id.*

8. *See Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

9. *See id.* at 568.

the student wrote the caption “portrait of a whore.”<sup>10</sup> After Shay’s parents filed a harassment complaint with school officials, the school suspended Kara for ten days and prohibited her from participating in extracurricular activities.<sup>11</sup>

In some instances, schools have also reacted to students’ online activity to protect school officials.<sup>12</sup> For example, J.S., an eighth-grade student from Pennsylvania, created a fake profile of her principal on MySpace.<sup>13</sup> Although the profile did not identify the principal by name, it did feature his official photograph from the school district’s website.<sup>14</sup> The profile derided the principal’s family and implied that he was a pedophile.<sup>15</sup> Although J.S. limited access to the profile by making it “private,” the principal nevertheless discovered it through conversations with another student.<sup>16</sup> The school suspended J.S. for ten days.<sup>17</sup>

Finally, schools have, in some instances, sought to limit student conduct that simply reflects poorly on the school.<sup>18</sup> During the summer before T.V. entered tenth grade in Indiana, she and her friends photographed each other in various sexually provocative poses and states of undress.<sup>19</sup> T.V. posted some of the pictures to her MySpace and Facebook accounts, where access was limited to those with “friend” status.<sup>20</sup> T.V. contended that she and her friends, athletes on the school’s volleyball team, took the photographs in jest.<sup>21</sup> When the school’s principal learned of the photographs from another student’s parent, however, T.V. was suspended from extracurricular activities, including volleyball games.<sup>22</sup>

The above examples sketch variations on a similar theme: student speech<sup>23</sup> that occurs in the off-campus context, which, due to its connection

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10. *Id.*

11. *See id.* at 568–69; *see also* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098–99 (C.D. Cal. 2010) (involving a student suspended for posting a video of her friends on YouTube using vulgar language to insult a classmate).

12. *See, e.g.,* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); *see also* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc).

13. *See Snyder*, 650 F.3d at 920.

14. *See id.*

15. *See id.*

16. *See id.* at 921.

17. *See id.* at 922; *see also* Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012) (involving a student suspended for recording and posting a rap song featuring vulgar and threatening language against two school coaches on Facebook and YouTube).

18. *See T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 773 (N.D. Ind. 2011).

19. *See id.* at 771–72.

20. *See id.* at 772.

21. *See id.* at 771–72.

22. *See id.* at 772–74. Pursuant to school policy, T.V. was suspended for “bringing discredit on [herself] and the school.” *Id.* at 774.

23. For purposes of this Note, “student speech” or “student expression” refers to a broad concept that encompasses speech, press and other literature distribution, expressive communication, and cyber communication (including blog and social networking website posts, email, instant messages, and text messages). *See* R. CHACE RAMEY, STUDENT FIRST

to the school community, generates a strong school interest in regulation. It is uncertain, however, whether and when schools may lawfully restrict speech by students that occurs “off campus.”<sup>24</sup> Notwithstanding the fact that off-campus student expression can and often does have an effect on school premises, the U.S. Supreme Court has never expressly held that schools may regulate student speech that originates or takes place beyond the “schoolhouse gate.”<sup>25</sup>

Until recent cases questioned the wisdom of the “schoolhouse gate” boundary, school regulatory authority had traditionally been drawn along geographical lines.<sup>26</sup> Although students do not forfeit their constitutional rights upon entering school property,<sup>27</sup> it is clear that they do not enjoy parallel liberties to citizens in other settings. Specifically, the Supreme Court has granted public school officials considerable authority to regulate student expression within the school community.<sup>28</sup> Indeed, school officials may prohibit many forms of student expression that would otherwise generally be protected by the First Amendment.<sup>29</sup> School authority to

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AMENDMENT SPEECH AND EXPRESSION RIGHTS 1–2 n.1 (Melvin I. Urofsky ed., 2011). As used here, “digital speech” refers to a realm within “student speech” that includes communication via the internet and mobile phones.

24. See Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. TIMES, Oct. 29, 2013, at A1; see also *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013) (noting that the U.S. Supreme Court has yet to address the applicability of its student-speech jurisprudence to off-campus speech). For purposes of this Note, “off-campus” student speech encompasses speech that “does not take place in a classroom or at a school activity,” or pursuant to a school assignment. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 407 n.92 (2011). For an argument that the Court should provide school officials with a definitive standard for off-campus student speech, see David L. Hudson, Jr., *Time for the Supreme Court To Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621 (2012).

25. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

26. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1090 (2008) (“[M]any courts facing a student speech case ask as a threshold matter whether the speech can be considered on-campus or off-campus expression.”); see also *infra* Part I.D.

27. See *Tinker*, 393 U.S. at 506. *But see* C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL’Y REV. 343, 343–44 (1989) (arguing that “the principle of freedom of speech is . . . of doubtful applicability” in the context of public schools); Richard W. Garnett, *Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 59 (2008) (“[W]e all do well to remain skeptical about the compatibility of government-run education with the freedom of speech.”).

28. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (allowing school regulation of speech advocating illegal drugs); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (permitting school regulation of school-sponsored speech); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (allowing school regulation of vulgar or lewd speech); *Tinker*, 393 U.S. at 514 (permitting school regulation of speech causing a substantial disruption of school activities).

29. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 529 (2000) [hereinafter Chemerinsky, *What’s Left of Tinker?*] (arguing that the Court’s deferential approach to decisions by public school officials concerning students’ constitutional rights resembles its approach to similar decisions by prison and military officials); see also Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999).

regulate student speech is typically justified based on the “special characteristics”<sup>30</sup> of the school environment and the unique role of public schools in developing the nation’s youth.<sup>31</sup> Courts and commentators have proposed various theories to explain why students’ constitutional rights are diminished while on school property or under school supervision.<sup>32</sup> As a general matter, however, there is much support for the notion that students enjoy more complete constitutional rights outside of school.<sup>33</sup>

Modern issues, such as the threat of mass violence in schools, cyberbullying,<sup>34</sup> and widespread youth access to telecommunications and recording devices,<sup>35</sup> have led schools to test the limits of their regulatory authority.<sup>36</sup> State legislatures have begun to respond to some of these problems by enacting cyberbullying statutes, for example.<sup>37</sup> Not every state has acted,<sup>38</sup> however, and the prospect that such statutes will comprehensively address the sundry and multiplying situations that a school may confront is unlikely.

The “substantial disruption” standard developed by the Supreme Court in *Tinker v. Des Moines Independent Community School District*<sup>39</sup> has emerged as the preferred mode of analysis to determine whether public

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30. *Tinker*, 393 U.S. at 506.

31. See, e.g., *Kuhlmeier*, 484 U.S. at 266 (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission’ . . . .” (quoting *Fraser*, 478 U.S. at 685)); see also James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000) (arguing that the Supreme Court is willing to limit students’ constitutional rights for the specific purpose of protecting a school’s academic function).

32. See Papandrea, *supra* note 26, at 1071–89 (summarizing and analyzing justifications for limiting students’ First Amendment rights); see also Ryan, *supra* note 31, at 1340. For an argument that student speech rights have no basis in the Constitution, see *Morse*, 551 U.S. at 416–22 (Thomas, J., concurring).

33. See Goldman, *supra* note 24, at 410 (“The Court has repeatedly indicated that off-campus speech receives greater protection than on-campus speech.”); Ryan, *supra* note 31, at 1338 (“Student [free speech rights] are more limited in the school setting than they are outside of that setting.”); see also *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1052 (2d Cir. 1979) (“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.”).

34. See Lizette Alvarez, *Girl’s Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES, Sept. 14, 2013, at A1.

35. See Editorial, *The On-Campus Effect of Off-Campus Threats*, L.A. TIMES, Sept. 6, 2013, at A14, available at <http://articles.latimes.com/2013/sep/06/opinion/la-ed-student-speech-9th-circuit-court-20130906> (“[I]t’s now possible for a student to disrupt the learning environment by pecking out threats on his home computer or on the telephone he carries on the school bus.”).

36. See Sengupta, *supra* note 24.

37. See generally Matthew Fenn, Note, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729 (2013).

38. See *id.* at 2753–55 (noting that not all states have passed cyberbullying legislation and that there is substantial variance among the cyberbullying statutes that states have enacted); *Cyberbullying*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/education/cyberbullying.aspx> (last visited Apr. 26, 2014) (providing a summary of state cyberbullying laws).

39. 393 U.S. 503 (1969).

schools may regulate off-campus student speech.<sup>40</sup> Under that standard, if student speech causes a substantial disruption to school activities, or if school officials could reasonably predict such a disruption, then the speech may be banned.<sup>41</sup> However, in light of *Tinker*'s traditional application in the on-campus setting,<sup>42</sup> and in the absence of clear guidance from the Supreme Court, lower courts have developed several threshold standards for determining the circumstances under which the *Tinker* standard may permit school regulation of off-campus student speech. These approaches are not necessarily consistent and have inspired a considerable amount of commentary.<sup>43</sup>

This Note examines the separate threshold tests that lower courts have developed and applied to determine whether to extend *Tinker*'s substantial disruption standard to student speech that occurs in off-campus settings.<sup>44</sup> Part I examines the Free Speech Clause of the First Amendment, how the Supreme Court has adapted student free speech rights in light of the "special characteristics" of the school environment,<sup>45</sup> and how modern realities have posed novel difficulties with respect to schools' and courts' approaches to regulating student speech. Part II looks at the approaches of the Second, Third, Fourth, and Ninth Circuits, respectively, regarding a threshold test for applying *Tinker* to off-campus student speech. Part III analyzes the efficacy of the threshold tests and argues that, in place of a threshold test, redefining "substantial disruption" in the context of off-campus student speech is a more apt solution for preserving students' rights while enabling schools to regulate effectively.

#### I. SPEECH AND SCHOOLS: REGULATION BASED ON THE SPECIAL CHARACTERISTICS OF THE SCHOOL ENVIRONMENT

This Part considers free speech rights generally and the more circumscribed speech rights that schools and courts accord students. Part I.A provides a summary of the Free Speech Clause, its underlying rationales, and ways in which the state may regulate speech. Part I.B

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40. See, e.g., *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070–72 (9th Cir. 2013); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–75 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008); see also *infra* Part II.

41. See *Tinker*, 393 U.S. at 509, 513–14.

42. See, e.g., *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (finding *Tinker* inapplicable where a school suspended several students who wrote, edited, and distributed an independent newspaper outside the school).

43. See, e.g., Jessica K. Boyd, Note, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215 (2013); Nathan S. Fronk, Note, *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 (2010); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895 (2012).

44. The scope of this Note is limited to speech by primary and secondary public school students. "Private schools, by definition, are not government run and, therefore, are not subject to the demands of the First Amendment." Goldman, *supra* note 24, at 397 n.7.

45. *Tinker*, 393 U.S. at 506.



examines the Supreme Court's landmark *Tinker* decision, which established the substantial disruption standard. Part I.C looks at the Court's subsequent jurisprudence, which, in adopting an attitude of deference to school officials, permits greater regulatory authority over student speech. Part I.D analyzes the on-campus/off-campus dichotomy and explains the difficulties that lie in attempting to apply it to digital speech.

#### A. *Freedom of Speech: An Overview*

This section first looks at the scope of the Free Speech Clause and the rationales that support it. This section then focuses on speech restrictions and examines the distinction between content-based and content-neutral regulations.

##### 1. Defining and Justifying Freedom of Speech

Under the Free Speech Clause of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech."<sup>46</sup> By its express terms, the First Amendment therefore prohibits government actors from impairing the free speech rights of the public.<sup>47</sup> The First Amendment applies not only to the federal government, but also, through the Due Process Clause of the Fourteenth Amendment, to state government actors.<sup>48</sup> Protected expression under the First Amendment is not limited to oral speech, but includes conduct imbued with communicative elements.<sup>49</sup> Thus, an individual who burns an American flag<sup>50</sup> or wears a black armband<sup>51</sup> as a form of symbolic expression engages in an activity protected by the First Amendment.

Courts and commentators have advanced numerous theories to explain and justify the uniquely robust free speech doctrine in American jurisprudence.<sup>52</sup> A popular metaphor for broad free speech rights invokes the abstract "marketplace of ideas" in which all individuals may participate.<sup>53</sup> Under the "marketplace" theory, the First Amendment serves as a vehicle for personal and societal enlightenment—through the competition of each and every idea, the best ones will necessarily emerge,

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46. U.S. CONST. amend I.

47. *See id.*; *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.").

48. *See* *Virginia v. Black*, 538 U.S. 343, 358 (2003).

49. *See id.*

50. *See* *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

51. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

52. *See, e.g.*, Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 379 (arguing that because the Supreme Court has interpreted the First Amendment expansively, the "constitutional protection afforded to freedom of speech in the United States is seemingly unparalleled anywhere else in the world").

53. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 2:3–4 (3d ed. 1996).

and the truth will be discovered.<sup>54</sup> Alternatively, the “human dignity and self-fulfillment theory” of the First Amendment emphasizes the rights of the individual.<sup>55</sup> Under this theory, free speech is essential because it protects an individual’s rights to self-expression, personhood, and autonomy.<sup>56</sup> In contrast, the “democratic self-governance” theory values freedom of speech primarily for its importance to democracy.<sup>57</sup> Thus, freedom of speech is essential for democratic government because it is the vehicle through which citizens debate social policies and elect representatives.<sup>58</sup>

## 2. Limiting Free Speech: Content-Based and Content-Neutral Regulations

Despite its unequivocal language, the First Amendment does not establish absolute freedom of speech.<sup>59</sup> Laws restricting speech are usually grouped into two classes of regulations: content-based and content-neutral.<sup>60</sup>

A content-based speech regulation is based expressly on the speaker’s actual message.<sup>61</sup> The controlling consideration is the government’s purpose in adopting the regulation.<sup>62</sup> As a general matter, content-based regulations are presumptively unconstitutional.<sup>63</sup> Content-based regulation is subject to strict scrutiny judicial review.<sup>64</sup> While the class of content-

54. *See id.* § 2:4; *see also* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

55. 1 SMOLLA, *supra* note 53, § 2:5.

56. *See id.*; *see also* *Procurier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (“The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.”).

57. *See* 1 SMOLLA, *supra* note 53, § 2:6.

58. *See id.*; *see also* *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964))).

59. *See* *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The protections afforded by the First Amendment, however, are not absolute . . .”).

60. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (noting that the distinction between content-based and content-neutral restrictions is the most “pervasively employed doctrine in the jurisprudence of free expression”).

61. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”).

62. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

63. *See* *United States v. Stevens*, 559 U.S. 460, 468 (2010) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002))); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”).

64. *See* 1 SMOLLA, *supra* note 53, § 4:2; *see also* *Turner*, 512 U.S. at 642 (“Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or

based regulations includes blanket subject-matter restrictions,<sup>65</sup> the Supreme Court has identified several categories of speech that receive either diminished or virtually no protection under the First Amendment.<sup>66</sup> In contrast, the Court vigorously protects “political speech.”<sup>67</sup> Thus, courts may inquire into the “value” of the speech when reviewing the constitutionality of a particular content-based regulation.<sup>68</sup> Viewpoint discrimination, which prohibits or constrains expression by particular speakers, especially offends the First Amendment and is unlikely to survive judicial review.<sup>69</sup>

Content-neutral restrictions, in contrast, limit expression ostensibly without regard for the speaker’s message.<sup>70</sup> For example, a “time, place, or manner” regulation that imposes reasonable limits on speech rights without regard to the message may reduce the total quantity of expression as much or more than a content-based regulation,<sup>71</sup> but may nevertheless be upheld as a legitimate content-neutral restriction.<sup>72</sup> Content-neutral regulations, compared to content-based restrictions, raise fewer First Amendment

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impose differential burdens upon speech because of its content.”). A court will uphold a content-based regulation under the strict scrutiny standard only if the regulation is justified by a compelling governmental interest and the regulation is tailored narrowly to achieve that interest. *See* 1 SMOLLA, *supra* note 53, § 4:2. Applying the strict scrutiny standard of review to content-based regulations is “almost always fatal.” Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003).

65. *See* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.”).

66. *See, e.g., New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (child pornography); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (commercial speech); *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement); *Watts v. United States*, 394 U.S. 705, 708 (1969) (true threats); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“fighting” words).

67. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech . . . is ‘at the core of what the First Amendment is designed to protect.’” (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))).

68. *See* Goldman, *supra* note 24, at 421 (“While valuing speech may be inconsistent with First Amendment theory, the Court often has considered whether a regulation affects ‘core’ First Amendment speech or low-value speech that offers little contribution to the ‘marketplace of ideas.’”).

69. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination.”); Jacobs, *supra* note 64, at 600 (“Viewpoint discrimination by the government is the primary free speech clause danger.”).

70. *See* Stone, *supra* note 60, at 189–90 (listing examples of content-neutral restrictions, including laws that ban billboards in residential communities or that impose license fees for parades). For a discussion of content neutrality and speech restrictions, see Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002).

71. *See* Stone, *supra* note 60, at 193.

72. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (upholding a content-neutral city sound-amplification guideline as a reasonable place and manner regulation of expression).

concerns<sup>73</sup> and therefore typically receive an intermediate level of scrutiny from reviewing courts.<sup>74</sup> Typically, a regulation is viewed as neutral, even if it has an incidental effect on some speakers and not others, when it serves purposes unrelated to the content of the expression.<sup>75</sup>

Private parties affected by government restrictions on speech may challenge those restrictions on constitutional grounds.<sup>76</sup> Such restrictions may be challenged either facially or as applied.<sup>77</sup> Moreover, such regulations also may be challenged for vagueness.<sup>78</sup>

### *B. A Bulwark Against Totalitarian Schools: The Tinker Test*

This section analyzes *Tinker*, where the Court established that public school students enjoy constitutionally protected rights to expression.<sup>79</sup> This section first examines the majority opinion, which offered considerable protection to students' First Amendment rights and articulated the standard under which a school may justifiably curtail them. This section then looks at Justice Hugo Black's dissenting opinion, which advocated a posture of deference to school officials that influenced subsequent student speech cases. Finally, this section briefly explores the substantial disruption standard, which lower courts have not interpreted in a consistent fashion.

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73. See Goldman, *supra* note 24, at 420–21.

74. See *Ward*, 491 U.S. at 798–803. To survive intermediate scrutiny, a challenged content-neutral regulation must be narrowly tailored to serve a significant government interest and leave open adequate alternative channels of communication. See *id.* at 803.

75. See *id.* at 791.

76. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678–79 (1986) (evaluating a student's 42 U.S.C. § 1983 challenge to his suspension for violating a school rule against obscene speech).

77. See *United States v. Stevens*, 559 U.S. 460, 473–74 & n.3 (2010). In a typical facial challenge, a plaintiff seeks to have a statute declared unconstitutional in all possible applications. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 (2011). In an as-applied challenge, a plaintiff seeks to have a statute declared unconstitutional in particular, or fewer than all, applications. See *id.* at 923–24. In the First Amendment context, however, the Court will recognize an alternative kind of facial challenge whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

78. See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (finding that a regulation is vague when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement,” and further finding that vagueness is of particular concern when speech is involved (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008))); see also 1 SMOLLA, *supra* note 53, § 6:14.

79. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–13 (1969).

1. The *Tinker* Majority

*Tinker* is a landmark case and is among the Supreme Court's most important decisions in the context of the constitutional rights of students.<sup>80</sup> *Tinker* announced a broad conception of a student's rights, one from which the Court has retreated in its subsequent jurisprudence.<sup>81</sup> Significantly, *Tinker* held that students enjoy constitutional rights and first enunciated the "substantial disruption" standard that public school officials must meet to regulate student speech.<sup>82</sup>

In December 1965, John Tinker, his sister Mary Beth, and Christopher Eckhardt wore black armbands to school to demonstrate their objection to the Vietnam War.<sup>83</sup> School officials, wary of potential protests in school, had just days before adopted a policy that barred students from wearing armbands.<sup>84</sup> Any student who violated the policy risked suspension.<sup>85</sup> After John, Mary Beth, and Christopher each were sent home and suspended for wearing armbands, the Tinkers sued the school district, alleging a violation of their First Amendment rights.<sup>86</sup>

Famously declaring that students do not abandon their right to freedom of speech at the "schoolhouse gate," the Court found in favor of the Tinkers.<sup>87</sup> The Court first held that students possess fundamental constitutional rights that the State must respect.<sup>88</sup> The Court also found no evidence demonstrating that the Tinkers' armbands caused interference or disorder with school activities or the rights of others.<sup>89</sup> Accordingly, the Court held that their expression, even (or perhaps especially) on a matter of political

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80. See Chemerinsky, *What's Left of Tinker?*, *supra* note 29, at 527. At least one commentator views *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), as the first true student-speech case decided by the Court. See Ryan, *supra* note 31, at 1346. In *Barnette*, the Court struck down a statute that required students to salute the flag. *Barnette*, 319 U.S. at 642. According to the *Barnette* Court, "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual." *Id.* at 637. For purposes of this Note, *Barnette* does not have great salience, because it dealt with the issue of when a school may *compel* student speech, not *restrain* it.

81. See Papandrea, *supra* note 26, at 1045 ("[T]he Court has retreated from its broad protection of student speech rights in *Barnette* and *Tinker* and has instead become increasingly deferential to school officials who punish students for their expressive activities.").

82. See *Tinker*, 393 U.S. at 514; see also Chemerinsky, *What's Left of Tinker?*, *supra* note 29, at 545 (commenting on the significance of the principles enunciated in *Tinker* and the substantial disruption standard). For an argument advocating abandonment of *Tinker*, see R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1 (2014).

83. See *Tinker*, 393 U.S. at 504.

84. See *id.*

85. See *id.*

86. See *id.*

87. *Id.* at 506.

88. See *id.* at 511.

89. See *id.* at 508 ("There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.").

controversy, was entitled to protection under the First Amendment.<sup>90</sup> The prohibition was unconstitutional, moreover, because the school had wrongfully prohibited expression of a particular viewpoint.<sup>91</sup>

Crucially, however, while schools do not possess “absolute authority” over their students under *Tinker*, neither do students enjoy an absolute right to constitutionally protected expression.<sup>92</sup> Indeed, the Court also held that

conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>93</sup>

Thus, under *Tinker*, a school may restrict student speech or expression that would either “materially and substantially interfer[e]”<sup>94</sup> with the operation of the school or “collid[e] with” the rights of other students.<sup>95</sup> Moreover, although the *Tinker* Court found no evidence of any actual substantial disturbance, the language of the majority opinion contemplates proper school regulation of student speech in anticipation of a significant disruption.<sup>96</sup> An “undifferentiated fear” or “apprehension of disturbance,” however, is not sufficient to overcome a student’s First Amendment rights.<sup>97</sup>

*Tinker*’s wording is arguably broad enough to support its application in the off-campus setting.<sup>98</sup> The *Tinker* Court, however, did not expressly

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90. *See id.* at 514. Although the Court in its subsequent student-speech jurisprudence established several exceptions to *Tinker*, it does not appear to have limited *Tinker*’s holding to political speech only, nor have lower courts interpreted it so narrowly. *See, e.g.*, *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (discerning three distinct areas of student speech from the Supreme Court’s precedents: (1) vulgar or lewd speech, which is governed by *Fraser*; (2) school-sponsored speech, which is governed by *Kuhlmeier*; and (3) “all other speech,” which is governed by *Tinker*); Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 383 (2007) (arguing that the Court’s “baseline assumption is that—unless challenged student speech falls within the *Fraser*, *Kuhlmeier*, or *Morse* exceptions—all student speech that otherwise may not be permissibly regulated is protected by *Tinker*’s test regardless of its political content”).

91. *See Tinker*, 393 U.S. at 510–11.

92. *See id.* at 511.

93. *Id.* at 513.

94. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

95. *Id.*

96. *See id.* at 509 (“[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” (emphasis added)). Later, the Court added that the record failed to demonstrate “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Id.* at 514 (emphasis added). Lower courts have embraced this application of the *Tinker* standard. *See, e.g.*, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (“*Tinker* does not require school officials to wait until disruption actually occurs before they may act.”).

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

98. *See supra* note 93 and accompanying text.

contemplate that possibility.<sup>99</sup> Rather, the Court justified school authority to regulate student speech based on the “special characteristics” of the school environment and the role of school officials to control student conduct.<sup>100</sup> Accordingly, while students enjoy free speech rights in the classroom, cafeteria, playing field, or on campus during authorized hours, school officials may regulate student expression in those areas if it causes substantial disruption.<sup>101</sup>

## 2. The *Tinker* Dissent: Deference to School Officials

In an influential dissent,<sup>102</sup> Justice Black argued for a contrasting model of students’ First Amendment rights based on deference to the expertise of school officials in regulating speech.<sup>103</sup> As a preliminary matter, Justice Black viewed John Tinker’s expression as considerably more incendiary.<sup>104</sup> Justice Black proceeded to argue that courts should defer to school officials in determining and administering appropriate discipline.<sup>105</sup> In Justice Black’s view, increased First Amendment rights for students and decreased deference to school officials necessarily diminished discipline, thereby corroding the public school system.<sup>106</sup> Indeed, to Justice Black, the *Tinker* majority’s rule essentially ceded control of public education to students.<sup>107</sup> Unwilling to join the majority in undermining the mission of public schools, namely, “to give students an opportunity to learn, not to talk politics,” Justice Black dissented.<sup>108</sup>

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99. Numerous commentators have argued against a broad reading of *Tinker* that enables schools to regulate off-campus student speech. See Fronk, *supra* note 43, at 1420 n.21 (identifying commentators who argue that courts should apply *Tinker*’s substantial disruption standard only to on-campus student speech).

100. *Tinker*, 393 U.S. at 506–07.

101. *See id.* at 512–13.

102. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 n.4 (1988) (quoting Justice Black’s *Tinker* dissent); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (same); *see also* Chemerinsky, *What’s Left of Tinker?*, *supra* note 29, at 535 (“Supreme Court rulings subsequent to *Tinker* have almost all sided with school officials and appear to have followed an approach much closer to Justice Black’s than the majority.”).

103. *See Tinker*, 393 U.S. at 524–26 (Black, J., dissenting).

104. *See id.* at 524 (“[T]he disputes over the wisdom of the Vietnam [W]ar have disrupted and divided this country as few other issues ever have. Of course students . . . cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war . . .”).

105. *See id.* (“Here the Court should accord Iowa educational institutions the . . . right to determine for themselves to what extent free expression should be allowed in its schools . . .”).

106. *See id.* at 524–25.

107. *See id.* at 525–26.

108. *See id.* at 523–24.

### 3. What Speech Constitutes a Substantial Disruption?

The *Tinker* Court, in theory, articulated two separate prongs for regulating student speech: substantial interference with the work of the school or impingement upon the rights of other students.<sup>109</sup> The great weight of subsequent lower court school-speech jurisprudence, however, has been based on *Tinker*'s substantial disruption standard.<sup>110</sup> Courts have rarely invoked the "rights of others" prong to evaluate the merits of a school's disciplinary decision.<sup>111</sup>

In light of the context of the Vietnam War, the *Tinker* Court arguably established a moderately high threshold in finding that the students' armbands did not cause a substantial disruption.<sup>112</sup> Additionally, the Court made clear that a school's mere "undifferentiated fear" would not amount to a substantial disruption or a reasonable prediction of one.<sup>113</sup> The Court, however, did not offer much guidance on defining "substantial disruption."<sup>114</sup> Consequently, lower courts have experienced some difficulty in applying the standard consistently.<sup>115</sup> Given the vagueness of the phrase, moreover, predictions of what will constitute a substantial disruption are also likely variable and inconsistent.<sup>116</sup>

#### *C. Less Speech, More Regulation: The Supreme Court's Post-Tinker Jurisprudence*

The previous section addressed the Supreme Court's *Tinker* decision and its broad pronouncement of student-speech rights. This section examines the Court's subsequent jurisprudence, in which it has retreated from that position and deferred considerably to school officials acting in the best

109. *See id.* at 509.

110. *See* Dickler, *supra* note 90, at 363–64; Papandrea, *supra* note 26, at 1042.

111. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010) ("[L]ower courts have not often applied the 'rights of others' prong from *Tinker*."). *But see* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177–83 (9th Cir. 2006) (explicitly refusing to rely on the substantial disruption standard and holding that schools may restrict student speech that undermines another student's "right to learn"), *vacated as moot*, 549 U.S. 1262 (2007). For an argument that off-campus student speech cases may be resolved based on analysis under *Tinker*'s "rights of others" prong, *see* Boyd, *supra* note 43, at 1237–40.

112. *See supra* note 104 and accompanying text.

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

114. *See* Fronk, *supra* note 43, at 1420 ("[T]he Court did not define how or when its [substantial disruption] test would be met . . .").

115. *See* Goldman, *supra* note 24, at 405 (noting that lower court decisions "do not identify how a court should determine whether there is a 'substantial disruption' beyond almost meaningless general statements"); Papandrea, *supra* note 26, at 1065 (observing that the lower courts are "all over the map" in applying *Tinker*'s requirement that the expression cause a substantial disruption).

116. *See* Samantha M. Levin, Note, *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, 861 (2011) (arguing that *Tinker* established a vague standard for reasonably predicting substantial disruption and that "courts are unclear as to when the test should apply and how much discretion should be given to a school official's decision to discipline").



interests of the students and school.<sup>117</sup> First, this section looks at a trilogy of decisions—*Bethel School District No. 403 v. Fraser*,<sup>118</sup> *Hazelwood School District v. Kuhlmeier*,<sup>119</sup> and *Morse v. Frederick*<sup>120</sup>—where the Court carved out exceptions to the *Tinker* standard for student speech. Then, this section addresses *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,<sup>121</sup> where the Court considered the issue of school liability for student-on-student sexual harassment.

### 1. Lewd and Vulgar Speech: The *Fraser* Standard

*Tinker* stood as the lone Supreme Court decision concerning student speech until the *Fraser* decision.<sup>122</sup> In *Fraser*, the Court arguably eschewed conducting the substantial disruption test and established its first exception to *Tinker*.<sup>123</sup> Rather than champion the rights of students as the majority had in *Tinker*, the *Fraser* Court embraced a position closer to Justice Black's dissent.<sup>124</sup> The *Fraser* Court granted considerable deference to school officials in carrying out the school's basic educational mission and promoting "socially appropriate behavior."<sup>125</sup>

At a school assembly where 600 other students were present, Matthew Fraser gave a speech that employed a sexual metaphor and suggestive innuendos when nominating a classmate for elective office.<sup>126</sup> Some students in the audience responded to Fraser's speech with hoots and hollers, while others "graphically simulated" the activities to which Fraser's speech alluded.<sup>127</sup> The following day, one teacher reported that she had to devote part of her lecture to discussing Fraser's speech with her class.<sup>128</sup> The school subsequently suspended Fraser for violating school policy prohibiting "obscene" conduct and removed him from consideration for

117. See, e.g., Chemerinsky, *What's Left of Tinker?*, *supra* note 29, at 535–39 (arguing that the Supreme Court has become more deferential to school officials in student-speech cases).

118. 478 U.S. 675 (1986).

119. 484 U.S. 260 (1988).

120. 551 U.S. 393 (2007).

121. 526 U.S. 629 (1999).

122. In the interim, the Supreme Court did decide another case bearing on the constitutional rights of students. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that reasonable suspicion, not probable cause, may justify a school's search of a student's bag).

123. See Dickler, *supra* note 90, at 364–65 (arguing that "*Fraser* . . . creat[ed] an exception to *Tinker*'s 'substantial disruption' test for student speech that is lewd, vulgar, indecent, or 'plainly offensive,'" and noting that "the *Fraser* Court failed to require the school to present evidence that the speech had in fact caused a disruption as required by *Tinker*").

124. See *supra* Part I.B.2.

125. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

126. See *id.* at 677–78. An excerpt of Fraser's speech is indicative of its nature and theme: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm." *Id.* at 687 (Brennan, J., concurring).

127. *Id.* at 678.

128. See *id.*

graduation speaker.<sup>129</sup> Fraser then alleged a violation of his First Amendment rights.<sup>130</sup>

The Court distinguished the instant case from *Tinker* on the grounds that the former involved “sexual content” while the latter involved a political “message.”<sup>131</sup> Upholding Fraser’s suspension, the Court held that a school may restrict vulgar or lewd student speech.<sup>132</sup> As Justice Thurgood Marshall noted in a dissenting opinion, the *Fraser* Court deviated from *Tinker* by failing to conduct a proper substantial disruption analysis.<sup>133</sup> Instead, the Court grounded its analysis in the role of public schools as “inculcat[ors of] fundamental values necessary to the maintenance of a democratic political system.”<sup>134</sup> Accordingly, the *Fraser* Court found it appropriate to grant school officials authority to prohibit student speech that was detrimental to the school’s “basic educational mission.”<sup>135</sup> To this end, the Court granted school officials considerable deference to regulate student speech.<sup>136</sup> Given that *Fraser* imbues school officials with significant power to regulate speech, it is generally understood by the Supreme Court, as well as lower courts, as not extending to off-campus student speech.<sup>137</sup>

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129. *See id.*

130. *See id.* at 679.

131. *Id.* at 680.

132. *See id.* at 685. Thus, *Fraser* is an example of a content-based regulation of student speech. *See* Dickler, *supra* note 90, at 382; *see also id.* at 366 n.45 (arguing that the *Fraser* standard relaxes the general standard for content-based regulations).

133. *See Fraser*, 478 U.S. at 690 (Marshall, J., dissenting); *see also* Morse v. Frederick, 551 U.S. 393, 405 (2007) (“Whatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.”); Papandrea, *supra* note 26, at 1048 (“[T]he Court’s analysis [in *Fraser*] was a dramatic deviation from the Court’s treatment of First Amendment rights generally and from *Tinker* specifically.”).

134. *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)). For the *Fraser* Court, this role took on heightened significance in light of the young age of students in the audience. *See id.* at 683.

135. *Id.* at 685 (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”). Moreover, the Court found that it was the school’s prerogative to “disassociate” itself from speech not compatible with the fundamental values of public education. *See id.* at 685–86.

136. *See id.* at 683. The *Fraser* Court expressly embraced the proposition that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Id.* at 682. Indeed, “the First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket.” *Id.* (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)). In *Cohen v. California*, 403 U.S. 15–16, 18, 26 (1971), the Court held that the First Amendment protected the speech on the back of Paul Robert Cohen’s jacket, which read “Fuck the Draft,” notwithstanding the possibility that the speech might offend others.

137. *See* Morse v. Frederick, 551 U.S. 393, 405 (2007) (“Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.”); J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932–33 (3d Cir. 2011) (en banc) (rejecting application of the *Fraser* standard to off-campus speech); Steve Varel, Note, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 440 (2013) (“[C]ourts and commentators generally agree that *Fraser* does not apply to off-campus speech.”). *But see* Doninger v. Niehoff, 527 F.3d 41, 49–50 (2d Cir. 2008) (suggesting uncertainty as to whether *Fraser* applies to off-campus speech and declining to decide the issue).

## 2. School-Sponsored Speech: The *Kuhlmeier* Standard

In *Kuhlmeier*, the Supreme Court declined to apply either *Tinker*'s substantial disruption standard or *Fraser*'s exception for lewd and vulgar speech and instead established a new, separate test for school-sponsored expressive activities.<sup>138</sup> The Court determined that school officials may regulate school-sponsored speech so long as such regulations bear a reasonable relationship to "legitimate pedagogical concerns."<sup>139</sup> As it did in *Fraser*, the Court again gave considerable deference to school officials in making this determination.<sup>140</sup>

In *Kuhlmeier*, Robert Reynolds, the principal of Hazelwood East High School, objected to two articles authored and submitted by students for publication in the school newspaper.<sup>141</sup> Reynolds opposed publishing the articles, one about teen pregnancy and the other about the impact of divorce on children, on several grounds.<sup>142</sup> Reynolds elected to delete the two pages of the newspaper on which the articles would have appeared and to print the remainder of the issue.<sup>143</sup> Three student staff members subsequently brought suit alleging a violation of their First Amendment rights.<sup>144</sup>

The *Kuhlmeier* Court viewed the issue, which it framed as whether the First Amendment required a school "affirmatively to promote particular student speech," as analytically distinct from the issue in *Tinker*.<sup>145</sup> Whereas *Tinker* addressed student expression that simply happened to take place on school premises, the Court reasoned that the student speech at issue in *Kuhlmeier* was essentially curricular in nature.<sup>146</sup> In the curricular context, the Court found that schools are entitled to exercise greater control over student expression to ensure that students learn the intended academic lessons and that educational content and materials are age appropriate.<sup>147</sup> Moreover, as in *Fraser*, the Court recognized a school's interest in disassociating itself from student speech that would cause substantial

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138. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) ("[T]he 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."); see also Dickler, *supra* note 90, at 367 (describing *Kuhlmeier* as "yet another exception to *Tinker*'s 'substantial disruption' test").

139. See *Kuhlmeier*, 484 U.S. at 273.

140. See *id.* ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.")

141. See *id.* at 263. Established practice dictated that the journalism teacher would submit page proofs to Reynolds for his review prior to publication of each issue. See *id.*

142. See *id.*

143. See *id.* at 264.

144. See *id.* at 262, 264.

145. *Id.* at 270–71. In contrast, the *Kuhlmeier* Court viewed the inquiry in *Tinker* as whether the first Amendment required schools to "tolerate" student speech. *Id.* at 270.

146. See *id.* at 271. The Court was persuaded that the students' speech was curricular, because it was supervised and designed to impart particular skills to participating students. See *id.*

147. See *id.*

disruption, fail to meet minimum standards of quality, or otherwise interfere with a school's educational mission.<sup>148</sup> Accordingly, the *Kuhlmeier* Court held that school officials have the authority to restrict student speech in school-sponsored activities, provided that the regulations are reasonably related to "legitimate pedagogical concerns."<sup>149</sup>

### 3. Advocacy of Illegal Drugs: The *Morse* Standard

In *Morse*, the Supreme Court, in its most recent ruling on student speech, established a third exception to *Tinker*'s substantial disruption standard.<sup>150</sup> As a preliminary matter, the Court avoided an opportunity to rule definitively on a school's off-campus regulatory authority.<sup>151</sup> Further, in reliance on *Tinker*'s special notion of the school environment and the state's interest in deterring student drug use, the Court held that school officials may restrict student expression that they reasonably regard as encouraging illegal drug use.<sup>152</sup> The Court's ruling in *Morse* further demonstrated its shift toward greater deference to school officials when evaluating regulations of student speech.<sup>153</sup>

In January 2002, the day the Olympic Torch Relay passed through Juneau, Alaska, Deborah Morse, the principal of Juneau-Douglas High School, permitted staff and students to attend the event as an approved social event or class trip.<sup>154</sup> The relay was to take place during school hours and along a street in front of the school.<sup>155</sup> The school permitted students to leave class and observe the relay from either side of the street, and teachers and administrative officials monitored the students.<sup>156</sup> As torchbearers and camera crews passed by, Joseph Frederick, a high school senior, and his friends held up a fourteen-foot banner.<sup>157</sup> Clearly visible to students across the street, the banner bore the phrase "BONG HiTS 4 JESUS."<sup>158</sup> Believing that the banner encouraged illegal drug use, Morse immediately demanded that it be taken down; she then confiscated it and

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148. *See id.* at 271–72. For an argument that the *Kuhlmeier* Court broadened *Fraser*'s "educational mission" language by taking it out of context, see Dickler, *supra* note 90, at 368.

149. *Kuhlmeier*, 484 U.S. at 272–73.

150. *See Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("[T]he mode of analysis set forth in *Tinker* is not absolute."); *see also* Goldman, *supra* note 24, at 404 (stating that courts view *Fraser*, *Kuhlmeier*, and *Morse* as "exceptions to *Tinker*'s general rule").

151. *See Morse*, 551 U.S. at 400–01 (finding that a student who attended a school-approved event away from school property nevertheless could not claim that he was "not at school," and finding further that he was subject to school regulatory authority (internal quotation mark omitted)).

152. *See id.* at 408.

153. *See* Goldman, *supra* note 24, at 401; Papandrea, *supra* note 26, at 1030.

154. *See Morse*, 551 U.S. at 397.

155. *See id.*

156. *See id.*

157. *See id.*

158. *Id.*

suspended Frederick for ten days.<sup>159</sup> Frederick then filed suit, alleging that the school had violated his First Amendment rights.<sup>160</sup>

The Court first found that Frederick's case was a "school speech case," notwithstanding the fact that the expression in question did not actually occur on school grounds.<sup>161</sup> Noting that there "is some uncertainty at the outer boundaries" with respect to when courts should apply school-speech precedents, the *Morse* Court found its student-speech jurisprudence applicable because Frederick was standing among fellow students, during normal school hours, at an event sanctioned and monitored by school officials.<sup>162</sup> Under such circumstances, the Court found that Frederick could not claim that his speech was completely off campus and therefore protected.<sup>163</sup>

Starting from the proposition, well-established in its jurisprudence, that students at school do not enjoy the same constitutional rights as adults in other settings,<sup>164</sup> the Court analyzed the school's interest in banning Frederick's speech. The Court recognized that deterring drug use by schoolchildren is an important—"perhaps compelling"—state interest.<sup>165</sup> Thus, student speech encouraging illegal drug use at a school event inherently conflicts with school officials' duty to protect students "entrusted to their care" from the dangers of drug abuse.<sup>166</sup> Accordingly, the Court held that school officials are permitted to restrict student expression that they reasonably regard as promoting illegal drug use.<sup>167</sup>

#### 4. A New School Duty: Preventing Student-on-Student Sexual Harassment

In *Davis*, the Supreme Court ruled that a school could be held liable for its deliberate indifference to one student's sexual harassment of another on school premises.<sup>168</sup> Thus, under certain conditions, *Davis* imposes a duty on schools to prevent student-on-student sexual harassment.<sup>169</sup> *Davis*, however, did not arise in the school-speech context, but rather in the

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159. *See id.* at 398.

160. *See id.* at 399.

161. *See id.* at 400–01.

162. *Id.* at 401.

163. *See id.*

164. *See id.* at 406–07 (collecting Supreme Court cases discussing the nature of students' constitutional rights in school).

165. *Id.* at 407 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)). Moreover, the Court found it significant that Congress "has declared that part of a school's job is educating students about the dangers of illegal drug use" and has provided substantial funding for drug-prevention programs. *Id.* at 408.

166. *Id.* In his concurring opinion, Justice Samuel Alito emphasized the narrow scope of the *Morse* decision but also argued that, because parents cannot physically protect their children during school hours, school officials must have greater authority to intervene before speech causes violence among students. *See id.* at 424–25 (Alito, J., concurring).

167. *See id.* at 408.

168. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

169. *See id.*

statutory context of Title IX.<sup>170</sup> Nevertheless, *Davis* has important implications for a school's regulatory role, including the realm of off-campus student speech.<sup>171</sup>

Over several months, LaShonda, a fifth-grade student, allegedly experienced repeated incidents of harassment by G.F., a classmate.<sup>172</sup> Although LaShonda contended that she reported G.F.'s abuse to several school officials, the administration purportedly took no disciplinary action.<sup>173</sup> As a consequence of enduring G.F.'s harassment, LaShonda allegedly became depressed, and her academic performance suffered.<sup>174</sup> Ultimately, G.F. was charged with and pleaded guilty to sexual battery for his misconduct, and LaShonda's mother sued the school for failing to take any action.<sup>175</sup>

Relying on Title IX, the *Davis* Court articulated a test for when a school may be held liable for peer-to-peer harassment.<sup>176</sup> First, a school must have had adequate notice of its potential liability for a student's harassing conduct.<sup>177</sup> Second, the school must have acted with "deliberate indifference" toward incidents of harassment.<sup>178</sup> Third, the school must exercise some control over both the individual harasser and the context where harassment occurs.<sup>179</sup> Finally, a reviewing court must find the harassment to be "so severe, pervasive, and objectively offensive" that it effectively deprives the victim of access to the educational opportunities or benefits provided by the school.<sup>180</sup>

Accordingly, because it imposes liability on schools for inaction in the face of student-on-student harassment, the *Davis* standard is a difficult burden for plaintiffs to meet.<sup>181</sup> Given this high bar, no court has yet addressed whether a school can be held liable under *Davis* for harassment that takes the form of digital speech.<sup>182</sup> Nevertheless, the *Davis* decision, like *Fraser*, *Kuhlmeier*, and *Morse*, signals that the Court, in the wake of

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170. Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012).

171. See Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905 (2001) (considering whether schools may be held liable under Title IX for online harassment among students).

172. See *Davis*, 526 U.S. at 633–35 (summarizing harassment, which included sexual comments and physical contact).

173. See *id.*

174. See *id.* at 634.

175. See *id.* at 633–35.

176. See Papandrea, *supra* note 26, at 1095.

177. See *Davis*, 526 U.S. at 643–44.

178. See *id.* at 644–45.

179. See *id.*

180. *Id.* at 650.

181. See Papandrea, *supra* note 26, at 1095–96 (arguing that, in *Davis*, "[t]he Court made clear that [a] school could be held liable [for student-on-student harassment] only in the most extreme circumstances").

182. See *id.*

*Tinker*, has come to view schools as having increased authority and responsibility to regulate student conduct.<sup>183</sup>

*D. Where Is the Line?  
Distinguishing Off-Campus and On-Campus Speech*

The Supreme Court student-speech precedent comes from events that either take place on school property or that are sponsored by the school.<sup>184</sup> Consequently, the Court has not had the opportunity to provide much guidance on the concept of off-campus student speech.<sup>185</sup> With the rise of the internet and telecommunications technology, however, schools today have an increasing interest in regulating speech by students that takes place outside the school setting.<sup>186</sup> This section first looks at the territorial approach that courts have taken when analyzing school regulations of off-campus student speech. This section then discusses the difficulty in applying this approach to student speech that takes place in the age of digital speech.

1. The Geographical Approach to Regulating Student Speech

The *Tinker* Court justified school officials' authority to regulate student speech, at least in part, based on the "special characteristics of the school environment."<sup>187</sup> In its subsequent student-speech jurisprudence, the Court reinforced its reliance on territorial boundaries, lest school regulatory authority exceed constitutional limits.<sup>188</sup> In the context of nondigital speech, schools nevertheless have had occasion to contemplate regulating speech by students that occurs in the off-campus setting.<sup>189</sup> Generally concluding that school authority to regulate student speech under *Fraser*, *Kuhlmeier*, and *Morse* is geographically limited, lower courts have instead considered the propriety of applying *Tinker*'s substantial disruption

183. See *supra* Part I.C.1–3.

184. See *supra* Part I.B–C.

185. See, e.g., *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013) ("The Supreme Court has not yet addressed the applicability of its school speech cases to speech originating off campus . . .").

186. See Sengupta, *supra* note 24.

187. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

188. See *Morse v. Frederick*, 551 U.S. 393, 405–06 (2007) ("*Kuhlmeier* acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school.'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized."); see also Papandrea, *supra* note 26, at 1090 ("[M]any courts facing a student speech case ask as a threshold matter whether the speech can be considered on-campus or off-campus expression"). But see *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring) ("[T]erritoriality is not necessarily a useful concept in determining the limit of [school officials'] authority.").

189. See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983–84 (9th Cir. 2001); *Boucher v. Sch. Bd.*, 134 F.3d 821, 828–29 (7th Cir. 1998); *Thomas*, 607 F.2d at 1045–46; see also *infra* notes 191, 199–200 and accompanying text.

standard to analyze the constitutionality of school regulations of off-campus student speech.<sup>190</sup> In doing so, lower courts have not abandoned the concept of territoriality, but rather, have considered it with differing levels of nuance.

Several courts, for example, have found that *Tinker* is not implicated when reviewing a school's regulation of speech that originates beyond school premises and control.<sup>191</sup> In *Thomas v. Board of Education, Granville Central School District*,<sup>192</sup> the Second Circuit declined to apply the *Tinker* standard to off-campus speech and refused to uphold a school's decision to suspend students who created and distributed a satirical publication off campus.<sup>193</sup> Although the newspaper did reach school property, the court found that any on-campus student activity related to the publication was "*de minimis*."<sup>194</sup> The *Thomas* court concluded that *Tinker*'s significant grant of regulatory authority to school officials was conditioned on its territorial limit.<sup>195</sup> Under the traditional First Amendment standard, the court held that the school had exceeded its authority in suspending the students.<sup>196</sup>

Other courts have applied *Tinker*'s substantial disruption standard to school regulations of speech that originated off campus but subsequently arrived on campus.<sup>197</sup> Courts have, however, taken different approaches by considering the identity of the individual who brings the speech to campus.<sup>198</sup> The Ninth Circuit, for example, found that *Tinker* authorized regulation of a student's violent poem written off campus but subsequently brought on school premises by the author.<sup>199</sup> The Seventh Circuit, meanwhile, applied the *Tinker* standard to evaluate a school's decision to expel a student who wrote an article published in an "underground" newspaper that described how to hack school computers and that

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190. See Goldman, *supra* note 24, at 405.

191. See, e.g., *Thomas*, 607 F.2d at 1050–51; *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986) (rejecting application of *Tinker* to uphold a school's suspension of a student who raised his middle finger at a teacher while off campus). But see *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 837–38 (N.D. Miss. 2012) ("[T]he U.S. Supreme Court in *Tinker* specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school."); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) ("[T]he geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech.").

192. *Thomas*, 607 F.2d at 1043.

193. See *id.* at 1050–51.

194. *Id.* at 1050.

195. See *id.* at 1052 ("[O]ur 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.").

196. See *id.* at 1045.

197. See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Boucher v. Sch. Bd.*, 134 F.3d 821, 828 (7th Cir. 1998); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454–55 (W.D. Pa. 2001).

198. See, e.g., *LaVine*, 257 F.3d at 984; *Boucher*, 134 F.3d at 829.

199. See *LaVine*, 257 F.3d at 989; see also *infra* note 311 (discussing *LaVine*). Moreover, the *LaVine* court found that the school's forecast of a substantial disruption was reasonable and upheld the student's expulsion. See *LaVine*, 257 F.3d at 992.



subsequently was brought to campus by a third party.<sup>200</sup> Alternatively, other courts, also confronting instances of off-campus speech that arrived on campus via persons other than the speaker, have declined to apply *Tinker*, instead analyzing regulations of such speech by considering whether the speech at issue constituted a “true threat.”<sup>201</sup>

Thus, with respect to more traditional forms of student speech that originate outside of school, lower courts have tended to adhere to the dichotomy between off-campus and on-campus speech when analyzing *Tinker*’s applicability.<sup>202</sup> Although they have developed different fact-dependent standards for determining whether student speech technically occurs on or off campus,<sup>203</sup> many courts, until recently, have declined to extend school regulatory authority under *Tinker* to student speech deemed to be off campus.<sup>204</sup>

## 2. Here, There, Everywhere: The Challenge of Geography in the Digital Age

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*.<sup>205</sup> In early cases involving digital student speech, courts sought to maintain the dichotomy.<sup>206</sup> Indeed, under the Supreme Court’s student-speech jurisprudence, schools arguably already possess authority to regulate digital speech that is either created or

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200. See *Boucher*, 134 F.3d at 821, 829; see also *Killion*, 136 F. Supp. 2d at 448, 455 (applying *Tinker* to a school’s decision to suspend a student who created a “top ten” list off campus that was later brought to campus by a third party and concluding that the student’s suspension was unconstitutional in the absence of a substantial disruption).

201. See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621–27 (8th Cir. 2002) (en banc); see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616–18 (5th Cir. 2004). The First Amendment does not protect “true threats” of violence. See *Virginia v. Black*, 538 U.S. 343, 359 (2003). To constitute a true threat, the speaker must first intentionally or knowingly communicate the purported threat to either the object of the threat or a third person. See *Porter*, 393 F.3d at 616–17. Courts have generally adopted an objective test that evaluates whether a reasonable person would interpret the alleged threat as a serious expression of the speaker’s intent to cause present or future harm. See *Pulaski*, 306 F.3d at 622. Courts, however, are divided on the issue of the proper viewpoint from which to interpret the statement. See *id.* (observing that some courts evaluate the “reasonable person” standard from the speaker’s perspective while others evaluate it from the recipient’s perspective).

202. See *supra* notes 191–200 and accompanying text.

203. See *supra* notes 197–200 and accompanying text.

204. See, e.g., *supra* notes 195, 201 and accompanying text.

205. See *Papandrea*, *supra* note 26, at 1090 (arguing that application of a territorial approach to digital speech is problematic).

206. See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 783–84 (E.D. Mich. 2002) (rejecting a school’s authority to suspend a student who created an offensive website because none of the conduct related to creating the website occurred on school property). For a thorough review of lower courts’ geographical approach to early cases involving digital student speech, see Benjamin F. Heidlage, Note, *A Relational Approach to Schools’ Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 580–83 (2009).

accessed by students while on campus.<sup>207</sup> This approach necessarily cabins school regulatory authority to its territorial and temporal boundaries.

Yet, as technology continues to proliferate and to facilitate communication, some courts have taken the position that rigid adherence to the on-campus/off-campus dichotomy is unwise, if not untenable.<sup>208</sup> Unlike traditional modes of expression, digital speech is uniquely pervasive and accessible.<sup>209</sup> Therefore, determining where digital speech “takes place” for purposes of school regulations can be an arbitrary exercise.<sup>210</sup> Further, digital speech is easily circulated among students and, significantly, creates a record.<sup>211</sup> The communication enabled by modern technology, moreover, is an integral aspect of life among America’s youth.<sup>212</sup> In the interests of student safety and security, schools increasingly seek to justify surveillance of, and discipline for, objectionable student digital speech.<sup>213</sup> As the reality of digital speech has challenged the continued viability of the on-campus/off-campus distinction and schools have become more aggressive in their regulatory approach, lower courts have confronted the issues of whether and when schools may reach student speech that previously would likely have been off-limits.<sup>214</sup>

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207. See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 266 (2001) (arguing that schools may properly punish student expression “only when a student [creates or] ‘brings’ his . . . off-campus Web site to school”).

208. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220–21 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (“[W]ireless 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.”).

209. See Papandrea, *supra* note 26, at 1090.

210. See *id.* at 1090–91; see also David R. Johnson & David Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (“Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location.”).

211. See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) (“[O]utside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically . . .”).

212. See Heidlage, *supra* note 206, at 589 (“There is no real separation between the way youths approach interactions through traditional methods of communication (including face-to-face) and those that occur through Internet technology.”); see also Fronk, *supra* note 43, at 1438 (“[T]he current forms of digital expression that occur . . . are no different from the protected speech that occurs at malls, movie theaters, or other public venues where students congregate.”).

213. See Sengupta, *supra* note 24; see also *Wynar*, 728 F.3d at 1064 (noting that off-campus electronic communications among students may sometimes concern “subjects that threaten the safety of the school environment”).

214. See *infra* Part II.

## II. UNCERTAINTY AT THE OUTER BOUNDARIES: DIFFERING APPROACHES AMONG CIRCUIT COURTS TO OFF-CAMPUS DIGITAL STUDENT SPEECH

There is a split among the federal courts of appeals with respect to whether, and under what circumstances, *Tinker* extends to off-campus student speech. This Part considers the different modes of analysis employed by the Second, Third, Fourth, and Ninth Circuits. This Part first examines the Second Circuit's test, which asks whether it is reasonably foreseeable that a student's off-campus speech will reach school premises.<sup>215</sup> Next, this Part looks at the Third Circuit's approach, which does not involve a preliminary inquiry.<sup>216</sup> This Part then addresses the Fourth Circuit's test, which considers whether off-campus student speech has a sufficiently strong connection to a school's pedagogical interests.<sup>217</sup> Finally, this Part describes the Ninth Circuit's test, under which *Tinker* is implicated if off-campus student speech presents an identifiable threat of school violence.<sup>218</sup>

### A. *The Second Circuit Standard: Reasonable Foreseeability of Speech Reaching School Property*

In *Doninger v. Niehoff*,<sup>219</sup> the school disciplined a student named Avery Doninger for writing a blog post containing vulgar language about the supposed cancellation of a school event.<sup>220</sup> In light of the off-campus nature of Avery's speech, the Second Circuit employed the threshold test developed in *Wisniewski v. Board of Education*.<sup>221</sup> Applying this test, which asks whether it is reasonably foreseeable that off-campus student speech will reach school property, the *Doninger* court focused on the content of Avery's speech and her expressive intent.<sup>222</sup> The court rejected territoriality as an express limit on school regulatory authority.<sup>223</sup>

As a high school junior and student council member, Avery became involved in a dispute with the school administration about scheduling a music event at the school.<sup>224</sup> To garner attention, Avery and three other student council members sent, from the school's computer lab, an email to students and parents encouraging them to contact Pamela Schwartz, the district superintendent.<sup>225</sup> Schwartz and the school's principal subsequently received an influx of concerned calls and emails, prompting the principal to cancel her planned training day away from her office.<sup>226</sup> Avery then, from

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

216. See J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (assuming *Tinker*'s applicability).

217. See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).

218. See *Wynar*, 728 F.3d at 1069.

219. 527 F.3d 41.

220. See *id.* at 43.

221. 494 F.3d 34 (2d Cir. 2007).

222. See *Doninger*, 527 F.3d at 50.

223. See *id.* at 48–49.

224. See *id.* at 44.

225. See *id.*

226. See *id.*

home, posted a message on her publicly accessible blog claiming that “douchebags in central office” had canceled the music event and encouraging people to call Schwartz to “piss her off.”<sup>227</sup> When the principal later learned about the blog post, she disciplined Avery by disqualifying her from running for senior class secretary.<sup>228</sup> Avery’s mother subsequently brought an action on her behalf, alleging violations of Avery’s First Amendment rights.<sup>229</sup>

Because Avery’s blog post occurred in an off-campus setting, the Second Circuit applied the threshold test established in *Wisniewski*.<sup>230</sup> In evaluating whether it was reasonably foreseeable that Avery’s blog post would reach school property, the court considered several factors.<sup>231</sup> First, the content of Avery’s speech—the purportedly canceled music event and her frustration with the school administration—directly pertained to school matters.<sup>232</sup> Second, the court found that Avery knew her classmates would likely view her blog post, presumably because of its content and public nature.<sup>233</sup> Third, the Second Circuit agreed with the district court’s finding that it was Avery’s specific intent to encourage her classmates to read and respond to her blog post, and that, in fact, several classmates did so.<sup>234</sup> Thus, on the basis of the content of the blog post, as well as Avery’s intent for it to reach campus, the Second Circuit held that Avery’s speech satisfied the threshold inquiry.<sup>235</sup>

Having established that it was reasonably foreseeable that Avery’s speech would reach school property, the court proceeded to apply *Tinker*’s substantial disruption standard. As an initial matter, the court determined

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227. *Id.* at 45. Additionally, one student posted a comment to Avery’s blog that referred to Schwartz as a “dirty whore.” *Id.*

228. *See id.*

229. *See id.* at 46–47.

230. In *Wisniewski*, the Second Circuit considered whether a school district violated Aaron Wisniewski’s First Amendment rights by suspending him for creating and using an AOL Instant Messaging icon on his parents’ home computer. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007). The icon consisted of a small drawing of a pistol firing a bullet at a person’s head, with dots above representing splattered blood and, below, the words “Kill Mr. VanderMolen,” Aaron’s English teacher. *Id.* at 36. Aaron sent messages displaying the icon to several classmates, one of whom informed VanderMolen of the icon. *See id.* The school suspended Aaron first for five days, then for one semester. *See id.* at 36–37. The Second Circuit concluded that the off-campus nature of Aaron’s speech did not necessarily “insulate” him from school regulation. *Id.* at 39. The court held that *Tinker* applied to off-campus speech where it is reasonably foreseeable both that the speech will reach school authorities and that the speech will create a risk of substantial disruption within the school environment. *See id.* at 39–40.

231. *Doninger*, 527 F.3d at 50. The court appeared to view the questions of whether it was reasonably foreseeable that Avery’s speech would “come to the attention of school authorities” and whether it was reasonably foreseeable that Avery’s speech would “reach school property” as one and the same. *See id.* For a critique of the *Doninger* court’s formulation of its test as excessively broad, see Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1128 (2010).

232. *See Doninger*, 527 F.3d at 50.

233. *See id.*

234. *See id.*

235. *See id.*

that the “plainly offensive” language Avery used in her blog post indicated a risk of disruption.<sup>236</sup> Arguably more persuasive to the court was the fact that Avery’s blog post contained either misleading or false information regarding cancellation of the music event.<sup>237</sup> Such misinformation was likely to prompt the school to respond, further disrupting operations.<sup>238</sup> Finally, the court determined that the discipline imposed, which was limited to Avery’s extracurricular opportunities, was appropriate.<sup>239</sup> Thus, under *Tinker*, Avery’s speech created a foreseeable risk of substantial disruption.<sup>240</sup> Accordingly, the Second Circuit held that Avery failed to show that the discipline imposed by the school violated her First Amendment rights.<sup>241</sup>

### B. The Third Circuit Approach

In June 2011, the Third Circuit, sitting en banc, issued two decisions regarding school discipline for off-campus student speech: *J.S. ex rel. Snyder v. Blue Mountain School District*<sup>242</sup> and *Layshock ex rel. Layshock v. Hermitage School District*.<sup>243</sup> This section first examines the majority opinion in *Snyder*, which did not utilize or propose a threshold test for applying *Tinker* to off-campus student speech, but did indicate that the speaker’s intent bore significantly on its analysis.<sup>244</sup> This section then looks at a separate concurrence in which five judges asserted that, under current Supreme Court jurisprudence, *Tinker* does not extend to off-campus student speech.<sup>245</sup>

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236. *Id.* at 50–51. In light of the vulgar speech at issue, the court contemplated whether to apply the *Fraser* standard as well. *See id.* at 49–50. The Second Circuit noted that Avery’s blog post contained the sort of language that, under *Fraser*, schools may prohibit, but observed that *Fraser* does not clearly apply to off-campus speech, and, ultimately, declined to decide the issue. *See id.*

237. *See id.* at 51.

238. *See id.*

239. *See id.* at 52–53.

240. *See id.* at 53.

241. *See id.* The Eighth Circuit has also extended *Tinker* by applying a threshold test similar to the Second Circuit’s. *See S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (reversing the district court’s order of a preliminary injunction in favor of the plaintiffs, who were suspended by the school district for creating and sharing with several classmates a website containing racist and sexually disparaging references to other classmates, because it was reasonably foreseeable that (1) the plaintiffs’ speech would reach the school environment and (2) the speech would create a substantial disruption); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (applying same analysis). The Eighth Circuit has also held that schools may prohibit violent off-campus student speech that presents a “true threat.” *See supra* note 201 and accompanying text.

242. 650 F.3d 915 (3d Cir. 2011) (en banc).

243. 650 F.3d 205 (3d Cir. 2011) (en banc).

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

245. *See id.* at 936 (Smith, J., concurring).

### 1. The *Snyder* Majority Opinion

Like the Second Circuit in *Doninger*, the Third Circuit in *Snyder* confronted a contested suspension regarding a student's objectionable speech about school officials.<sup>246</sup> Unlike the *Doninger* court,<sup>247</sup> however, the *Snyder* majority did not use a threshold test to determine the applicability of *Tinker*'s substantial disruption standard to off-campus student speech. Indeed, the *Snyder* majority had no reason to fashion such a rule because it simply assumed *Tinker*'s applicability.<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup>

J.S., an eighth-grade honor roll student, created a fake profile of her principal on MySpace.<sup>251</sup> The profile did not identify the principal by name, school, or location, however it did feature his official photograph, which J.S. had taken from the school district's website.<sup>252</sup> The profile derided the principal and his family and implied that he was a pedophile.<sup>253</sup> Although the profile initially was available to the public, J.S. made the profile "private" the day after she created it, thereby limiting access only to people whom she and her friend K.L. invited.<sup>254</sup> Upon learning of the profile's existence—and that J.S. had created it—from another student, the principal suspended J.S. for ten days.<sup>255</sup> J.S. and her parents sued the school district, alleging a violation of J.S.'s First Amendment rights.<sup>256</sup>

Assuming *Tinker*'s applicability,<sup>257</sup> the *Snyder* majority found no record of a substantial disruption at the school despite the affront to the principal.<sup>258</sup> Moreover, the court found no support for the conclusion that

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246. See *Doninger v. Niehoff*, 527 F.3d 41, 45 (2d Cir. 2008).

247. See *supra* note 222 and accompanying text.

248. See *Snyder*, 650 F.3d at 926; see also Recent Case, J.S. *ex rel.* *Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (*en banc*), 125 HARV. L. REV. 1064, 1069–71 (2012) (criticizing the *Snyder* court for not deciding whether *Tinker* applied to off-campus speech).

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

250. See *id.*

251. See *id.* at 920.

252. See *id.*

253. See *id.*

254. See *id.* at 921. J.S. and K.L. granted access to approximately twenty-two classmates. See *id.* No student viewed the profile at school because the school district's computers blocked access to MySpace. See *id.*

255. See *id.* at 921–22.

256. See *id.* at 920.

257. See *supra* note 248 and accompanying text.

258. See *Snyder*, 650 F.3d at 928. Additionally, the *Snyder* majority expressly found *Fraser* inapplicable to student use of "profane language outside the school, during non-school hours." *Id.* at 932.

the school could have reasonably anticipated a disruption.<sup>259</sup> The *Snyder* majority distinguished the instant case from other off-campus student-speech cases by focusing on the fact that J.S.'s speech did not "target[] the school."<sup>260</sup> J.S. created the profile as a joke, and the court found the profile too outrageous to be taken seriously.<sup>261</sup> Moreover, the profile did not identify the principal by name and, because of school policy, no student could have viewed it from school computers.<sup>262</sup> Furthermore, the *Snyder* majority emphasized that J.S. took affirmative steps to limit access to the profile.<sup>263</sup> The court therefore concluded that J.S., unlike the student in *Doninger*, had not intended for the profile to reach the school's property.<sup>264</sup> Thus, to demonstrate a substantial disruption in the context of off-campus student speech, it appears that a majority of the Third Circuit would require at least that a student direct her speech toward campus or otherwise manifest an intention that it reach school property.<sup>265</sup>

## 2. The *Snyder* Concurring Opinion

In a concurring opinion joined by four others, Judge D. Brooks Smith wrote separately to address whether *Tinker*'s substantial disruption standard applies to off-campus speech, an issue the *Snyder* majority did not reach.<sup>266</sup> While acknowledging the divide among lower courts on this issue,<sup>267</sup> Judge Smith departed from the *Snyder* majority as well as the *Doninger* court. He assailed the proposition that *Tinker* applied to off-campus student speech and stated that such an application would have "ominous implications."<sup>268</sup> Accordingly, Judge Smith would have held that student speech in the off-campus context is entitled to the same protection under the First Amendment as speech by citizens in the community at large.<sup>269</sup>

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259. *See id.* at 931.

260. *Id.* at 930–31.

261. *See id.* at 929.

262. *See id.*

263. *See id.* at 930.

264. *See id.* The court even faulted the principal for exacerbating a potential disruption by requesting that another student bring a printed copy of the profile to the school. *See id.* at 921, 931.

265. As one commentator has noted, "Although it is unclear whether the Second Circuit [in *Doninger*] relied on intent as a necessary factor in determining whether it is reasonably foreseeable that speech will cause a substantial disruption, the Third Circuit [in *Snyder*] explicitly looked at the student's intent as a factor to be examined." Boyd, *supra* note 43, at 1225 (citation omitted).

266. *See Snyder*, 650 F.3d at 936 (Smith, J., concurring).

267. *See id.* at 937.

268. *Id.* at 939.

269. *See id.* at 936. Numerous commentators support Judge Smith's position. *See, e.g.*, Calvert, *supra* note 207, at 279 ("[O]ff-campus-created Web sites raise new issues and require new rules; they are not addressed either well or adequately by existing Supreme Court precedent, especially when a student does not 'bring' the site on campus."); Goldman, *supra* note 24, at 430 ("When student speech occurs outside of school supervision, the speech should receive the same First Amendment protection as a non-student's speech."); Papandrea, *supra* note 26, at 1093 ("[T]he *Tinker* approach to student speech is ill-suited to deal with off-campus expression.").

Instead, according to the *Snyder* concurrence, *Tinker* is best understood as applying to on-campus student speech only.<sup>270</sup> Judge Smith noted that the *Tinker* Court grounded its decision in the “special characteristics of the school environment.”<sup>271</sup> For example, the need for control by school officials is implicated by the fact that students at school essentially constitute a captive audience.<sup>272</sup> Extending *Tinker* to off-campus student speech, in Judge Smith’s view, would invite schools to regulate speech without regard to its time, place, manner, or content, so long as it entailed the possibility of causing a substantial disruption.<sup>273</sup> Thus, the concurrence would have held that J.S.’s off-campus speech, although objectionable, was entitled to as much protection under the First Amendment as other ostensibly “worthless” speech in the marketplace of ideas.<sup>274</sup>

*C. The Fourth Circuit Standard:  
Sufficient Nexus Between Speech and Pedagogical Interests*

In *Kowalski v. Berkeley County Schools*,<sup>275</sup> the school suspended Kara Kowalski for creating a webpage on MySpace devoted to disparaging a classmate.<sup>276</sup> Before determining that *Tinker* applied to Kara’s off-campus speech, the Fourth Circuit implemented a threshold inquiry, asking whether there was a sufficient nexus between her speech and the school’s pedagogical interests.<sup>277</sup> Unlike the Second Circuit’s reliance on foreseeability or the Third Circuit’s emphasis on intent, the Fourth Circuit grounded its inquiry in the school’s broad educational mission and duty to its students.<sup>278</sup> Like the Second Circuit, however, the Fourth Circuit

270. See *Snyder*, 650 F.3d at 936–41 (Smith, J., concurring).

271. *Id.* at 937 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

272. See *id.* at 937–38.

273. See *id.* at 939. For example, Judge Smith hypothesized that if a student were to author a blog post defending gay marriage from his home, and if his classmates were to learn of the post and object to it, the school might reasonably forecast a substantial disruption at school and punish the student for his off-campus speech. See *id.*

274. See *id.* at 941. Judge Smith, however, conceded that he would have “no difficulty” applying *Tinker* to a case where, for example, a student sent a disruptive email to a teacher or other school official from her home computer. *Id.* at 940. Judge Smith based this retreat from his otherwise rigid position on *Tinker*’s limitations on his view that “[r]egardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech.” *Id.* Thus, intentionality, which the *Snyder* majority contemplated and found lacking, also represented an essential consideration for the concurring judges.

275. 652 F.3d 565 (4th Cir. 2011).

276. See *id.* at 567.

277. See *id.* at 573; see also *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (noting that the Fourth Circuit “requires that the speech have a sufficient ‘nexus’ to the school” before applying *Tinker* to off-campus speech).

278. See *Kowalski*, 652 F.3d at 571–72. Moreover, the court’s threshold test echoes language from the Supreme Court’s student-speech precedents. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over . . . student speech . . . so long as their actions are reasonably related to *legitimate pedagogical concerns*.” (emphasis added)).



additionally considered whether it was reasonably foreseeable that Kara's off-campus speech would reach the school environment.<sup>279</sup>

On December 1, 2005, Kara, a high school senior, created a MySpace discussion with the heading "S.A.S.H." from her home computer.<sup>280</sup> She invited approximately one hundred people to join the group, and about two dozen of her classmates joined.<sup>281</sup> Much of the commentary on the webpage ridiculed Shay, a classmate.<sup>282</sup> One student uploaded several photographs to the webpage: one of himself and a friend displaying a sign that read, "Shay Has Herpes," and two others of Shay herself, to which he had added disparaging marks and signs.<sup>283</sup> Numerous other students posted comments voicing their approval of the webpage and Kara, its creator.<sup>284</sup> The next day, Shay and her parents filed a harassment complaint with the school, and Shay did not attend class.<sup>285</sup> The school suspended Kara for five days and prohibited her from participating in certain social and extracurricular events.<sup>286</sup> Kara then sued the school district, alleging a violation of her First Amendment rights.<sup>287</sup>

In contrast to the approaches taken by the Second and Third Circuits, the Fourth Circuit primarily focused on the "nexus" between Kara's off-campus speech and the school's pedagogical interests.<sup>288</sup> Channeling *Fraser*, the *Kowalski* court grounded its analysis in the role of school officials as "trustees of the student body's well-being" and the mission of schools as educators of fundamental values.<sup>289</sup> Here, the pedagogical interest at issue was the school's duty to provide a safe learning environment—one free from bullying.<sup>290</sup> The court reasoned that regardless of where it originated, Kara's speech interfered with the school's interest in providing a safe learning environment.<sup>291</sup> Therefore, Kara's speech was sufficiently connected to one of the school's pedagogical interests to justify application of *Tinker*.<sup>292</sup>

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279. *See Kowalski*, 652 F.3d at 574.

280. *See id.* at 567. While Kara claimed that "S.A.S.H." was an acronym for "Students Against Sluts Herpes," a classmate stated that the acronym actually stood for "Students Against Shay's Herpes," referring to the student who was the main subject of discussion on the webpage. *See id.*

281. *See id.* at 568.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

286. *See id.* at 569.

287. *See id.* at 570.

288. *See id.* at 573. The court instructively phrased the issue as "whether [Kara's] activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students." *Id.* at 571.

289. *Id.* at 573.

290. *See id.* at 572.

291. *See id.* at 573–74.

292. *See id.* at 572–73.

The *Kowalski* court's analysis also borrowed from, and appeared to conflate, the Second Circuit's approach in *Doninger*.<sup>293</sup> In addition to its "sufficient nexus" analysis, the court indicated that applying *Tinker* was proper because Kara knew, or could reasonably have expected, that her off-campus speech would ultimately reach the school or otherwise impact the school environment.<sup>294</sup> Given the webpage's name and the fact that a majority of its members were classmates of Kara and Shay, the court noted that Kara could anticipate that Shay would view the attack as having been made in the school context.<sup>295</sup>

Thus, the court concluded that *Tinker* should apply because Kara's off-campus speech had a sufficiently strong nexus to a legitimate pedagogical interest and because it was reasonably foreseeable that her speech would reach the school.<sup>296</sup> Accordingly, the Fourth Circuit held that it was reasonably foreseeable that Kara's speech would create a substantial disruption at school, and that, therefore, the school's punishment did not infringe on her First Amendment rights.<sup>297</sup>

*D. The Ninth Circuit Standard:  
Speech Presenting An Identifiable Threat of School Violence*

In *Wynar v. Douglas County School District*,<sup>298</sup> the school suspended Landon Wynar for sending instant messages to classmates that threatened a school shooting.<sup>299</sup> The Ninth Circuit explicitly declined to adopt either the Second or Fourth Circuit standard, instead holding that *Tinker* applied to off-campus student speech that presented an "identifiable threat of school violence."<sup>300</sup> Like the Fourth Circuit, the Ninth Circuit emphasized the school's interest in, and duty to provide for, student safety.<sup>301</sup> As demonstrated by the *Wynar* court's references to Columbine, Sandy Hook, and other school shootings,<sup>302</sup> however, the standard it articulated is premised more on physical security and the school's custodial role.

Landon regularly exchanged instant messages with friends on MySpace.<sup>303</sup> Over several months during Landon's sophomore year, his messages became increasingly violent and disturbing.<sup>304</sup> To his friends,

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293. *See id.* at 574 ("[I]t was foreseeable in this case that [Kara's] conduct would reach the school via computers, smartphones, and other electronic devices . . ."); *cf. Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) ("[I]t was reasonably foreseeable that Avery's [blog] posting would reach school property.").

294. *See Kowalski*, 652 F.3d at 573.

295. *See id.*

296. *See id.* at 572–73.

297. *See id.* at 574 (finding that Kara's conduct "created a reasonably foreseeable substantial disruption" at school).

298. 728 F.3d 1062 (9th Cir. 2013).

299. *See id.* at 1065–66.

300. *Id.* at 1069.

301. *See id.* at 1069–70.

302. *See id.* at 1069–70 & n.6.

303. *See id.* at 1065.

304. *See id.* Landon's messages contained references to his "sweet gun," "500 rounds" of ammunition, his "hit list," and his aspiration to "get" more than fifty people. *Id.* at 1065–66.

Landon appeared to be contemplating a school shooting to take place on April 20.<sup>305</sup> Concerned, Landon's friends eventually brought his messages to the attention of the principal, which, in turn, led to a police investigation.<sup>306</sup> Although Landon claimed the messages were a joke, the school district suspended and then expelled him.<sup>307</sup> Landon and his father sued the school district and its officials for violations of Landon's First Amendment rights.<sup>308</sup>

The *Wynar* court began its analysis by reviewing the threshold tests imposed by its sister courts, noting that off-campus student speech as a general matter resists a "global standard."<sup>309</sup> Declining to adopt either the Second or Fourth Circuit's threshold standard, the court nevertheless indicated that Landon's messages would readily satisfy either test.<sup>310</sup> The court proceeded to revisit its decision in *LaVine v. Blaine School District*,<sup>311</sup> holding that, "when faced with an identifiable threat of school violence," schools may take disciplinary action in response to off-campus student speech that complies with the *Tinker* standard.<sup>312</sup> Focused on school officials' duty to provide a safe school environment and against the backdrop of mass shootings at Columbine and Sandy Hook, the *Wynar* court asserted that a school's ability to protect its students from violence should not necessarily yield to a student's First Amendment rights.<sup>313</sup> Thus, the court concluded that Landon's messages constituted an identifiable threat of school violence and found that the *Tinker* standard was

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305. *See id.* at 1065. The court noted that April 20 is the date of Hitler's birth and the Columbine massacre, as well as within days of the anniversary of a mass shooting at Virginia Tech. *See id.*

306. *See id.* at 1066.

307. *See id.*

308. *See id.*

309. *Id.* at 1069. Nevertheless, the court distinguished speech such as that at issue in *Snyder* from Landon's speech in the instant case. *See id.* ("A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting . . .").

310. *See id.* at 1069.

311. 257 F.3d 981 (9th Cir. 2001). In *LaVine*, the Ninth Circuit held that a school did not violate the First Amendment rights of a student for expelling him on an emergency basis because of a first-person poem about a school shooting and suicide that the student wrote at home and later showed to a teacher during class. *See id.* at 988. Applying the *Tinker* standard to the school's actions, the court concluded that the school could have reasonably predicted a substantial disruption—"specifically, that [the student] was intending to inflict injury upon himself or others." *Id.* at 990. The *Wynar* court noted, with some disapprobation, that several other courts have interpreted *LaVine* as an example of a case applying *Tinker* to off-campus student speech. *See Wynar*, 728 F.3d at 1068. In *Wynar*, however, the Ninth Circuit asserted that it did not view *LaVine* as standing for the proposition that the geographic origin of student speech was immaterial. *See id.* In contrast to the off-campus speech at issue in *Wynar*, which was brought to campus by someone other than the speaker, the court distinguished *LaVine* as a case dealing with "speech created off campus but brought to the school by the speaker." *Id.*; *see also supra* note 199.

312. *Wynar*, 728 F.3d at 1069; *see also* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, No. 6:12-cv-1042-TC, 2013 WL 5102848, at \*6 (D. Or. Sept. 12, 2013) ("[O]ff-campus speech is within the reach of school officials. When faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker* [sic]." (citation omitted)).

313. *See Wynar*, 728 F.3d at 1069–70 & n.6.

appropriate.<sup>314</sup> The *Wynar* court analyzed Landon's speech under both the substantial disruption prong and the invasion of the rights of others prong.<sup>315</sup>

Given the inflammatory nature of the threats in Landon's messages, the court held that it was reasonable for the school to view them as a risk and to forecast a substantial disruption.<sup>316</sup> The court noted that Landon had identified a possible date and described how he would kill several specific students.<sup>317</sup> Moreover, because Landon had access to weapons and ammunition, both his friends and the school had reason to believe he had the ability to carry out a shooting.<sup>318</sup> The *Wynar* court expressly rejected a comparison between Landon's messages and the fake profile at issue in *Snyder*, which the Third Circuit had dismissed as too outrageous to be taken seriously.<sup>319</sup>

The *Wynar* court also analyzed Landon's messages under *Tinker*'s invasion of the rights of others prong, which it acknowledged was not a popular mode of analysis in other circuits.<sup>320</sup> Without endeavoring to define the scope of the language, the court found that the threat of a school shooting undoubtedly constituted an invasion of the rights of others under *Tinker*.<sup>321</sup> Indeed, the court concluded that Landon's messages represented the "quintessential harm" to the rights of other students to be secure because they not only threatened the entire student body, but also targeted certain students by name.<sup>322</sup>

### III. UPDATING *TINKER*: A MODIFIED STANDARD FOR SCHOOL REGULATION IN THE DIGITAL AGE

No consensus has emerged among the lower courts for how to approach the issue of school regulation of off-campus student speech.<sup>323</sup> While similar in some aspects, the threshold tests developed by the Second, Fourth, and Ninth Circuits respond to different events, are guided by different principles, and, moreover, are likely to yield different results. Part III of this Note compares the threshold tests, and, finding that they inadequately serve the rights and needs of students and schools, recommends an alternative. Part III.A evaluates the *Doninger*, *Kowalski*, and *Wynar* tests for effectiveness and common elements. Part III.B then proposes that courts address the issue by adopting a new definition of

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314. *See id.* at 1069–70.

315. *See id.* at 1070–72.

316. *See id.* at 1070.

317. *See id.* at 1071.

318. *See id.*

319. *See id.*

320. *See id.* at 1071–72.

321. *See id.* at 1072.

322. *See id.*

323. *See supra* Part II; *see also* Barry P. McDonald, *Regulating Student Cyberspeech*, 77 *Mo. L. REV.* 727, 737 (2012) (“[T]he courts’ positions . . . are currently in disarray.”).

“substantial disruption” for specific application to off-campus digital speech.

### A. *Grading the Circuit Tests*

This section compares the approaches taken by the Second, Third, Fourth, and Ninth Circuits to the issue of school regulation of off-campus student speech. It argues that the courts’ approaches do not adequately protect student speech and fail to guide schools toward meaningful policies and enforcement. This section then examines common elements and values underlying the threshold tests that have led courts to authorize school regulation of off-campus student speech in appropriate cases.

#### 1. The *Doninger* Test

The *Doninger* test, which predicates *Tinker*’s applicability to off-campus student speech on whether it is reasonably foreseeable that the speech will reach school grounds or school officials,<sup>324</sup> suffers from several weaknesses. First, while the controversy before the court involved a student’s blog post, the Second Circuit did not unambiguously limit its test only to circumstances involving off-campus digital student speech.<sup>325</sup> Consequently, this approach entails a considerable risk of chilling protected speech. Second, assuming that the court, in fact, did intend to fashion a threshold inquiry for exclusive application to off-campus digital speech, the *Doninger* test, as articulated, fails to define or otherwise qualify the content within its intended scope. For example, to borrow Judge Smith’s hypothetical,<sup>326</sup> if it is reasonably foreseeable that a student’s blog post defending—or repudiating—gay marriage would reach the school, and the *Tinker* substantial disruption standard could also be met or predicted, could the school lawfully take disciplinary action? Because nothing in the court’s opinion precludes it from reaching such off-campus student political speech, the *Doninger* test seems overly broad. Third, in the context of digital speech, the *Doninger* test fails to create a meaningful threshold.<sup>327</sup> In a modern culture where mobile phones, tablets, social networking websites, and other instruments of expression are ubiquitous, virtually any online or digital communication may foreseeably—if not inevitably—make its way to school premises.<sup>328</sup> Thus, the *Doninger* test does not impose a

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324. See generally *supra* Part II.A.

325. In light of *Thomas*, which hewed to the traditional on-campus/off-campus dichotomy for applying the *Tinker* standard and which the Second Circuit never expressly overruled, the *Doninger* court could more clearly have cabined the scope of its holding. See generally *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979).

326. See *supra* note 273.

327. See Papandrea, *supra* note 26, at 1091–92.

328. See Boyd, *supra* note 43, at 1236 (“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.”); Waldman, *supra* note 231, at 1128.

useful limit on the quality or quantity of digital speech that a school may ostensibly regulate.

## 2. The *Kowalski* Test

The *Kowalski* test, under which a school may reach off-campus speech that has a sufficiently strong nexus to the school's pedagogical interests,<sup>329</sup> is also subject to criticism. Like the *Doninger* test, the *Kowalski* test is articulated in quite broad terms. Unlike the *Doninger* court, the *Kowalski* court was responding to an instance of cyberbullying.<sup>330</sup> In granting considerable authority to school officials, the *Kowalski* test draws on the latter Supreme Court student-speech decisions, whose methodology is rooted in a school's pedagogical interests and broad educational purpose.<sup>331</sup>

The *Kowalski* court, however, declined to offer guidance on the types of pedagogical interests that would permit jurisdiction.<sup>332</sup> Assuming that the provision of a safe learning environment is a sufficiently important school interest to justify discipline for off-campus student speech, the scope of the *Kowalski* test remains uncertain. For example, would a school's interest in shielding its faculty be sufficient?<sup>333</sup> Or a school's interest in preserving institutional integrity?<sup>334</sup> Like the *Doninger* test, therefore, the *Kowalski* test is also potentially overbroad.<sup>335</sup>

Moreover, the *Kowalski* court left unresolved the methodology for determining when or whether the nexus between off-campus student speech and a school's pedagogical interests is "sufficiently strong."<sup>336</sup> If mere reasonable foreseeability that the speech could reach school property would establish a sufficient connection between off-campus student speech and pedagogical interests, then that standard is susceptible to the same criticism that the *Doninger* test warrants.<sup>337</sup> If the court instead meant to establish another standard, then it failed to do so in an adequately clear manner.

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329. See generally *supra* Part II.C.

330. See *supra* notes 280–83.

331. See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); see also *supra* note 278.

332. Indeed, while the structure of the *Kowalski* court's opinion suggests that the pedagogical interest at stake was student health and safety (*vis à vis* freedom from bullying), the court did not explicitly connect any specific interest with school authority to regulate off-campus speech. See *Kowalski*, 652 F.3d at 572.

333. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920–21 (3d Cir. 2011) (*en banc*); *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

334. See, e.g., *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772–74 (N.D. Ind. 2011).

335. See *supra* Part III.A.1.

336. *Kowalski*, 652 F.3d at 573.

337. See *supra* Part III.A.1; *supra* note 328.

### 3. The *Wynar* Test

Compared to the *Doninger* and *Kowalski* tests, the *Wynar* test, which permits application of the *Tinker* standard to off-campus student speech that constitutes an identifiable threat of school violence,<sup>338</sup> is arguably more speech protective. Based on the reasoning of the Ninth Circuit's opinion and the language of its test,<sup>339</sup> it is unlikely, for example, that school discipline for the speech at issue in *Doninger*, which was only indecent and possibly inciting, would be tolerated under the *Wynar* test. Responding to the danger of school shootings and resting on a school's duty to protect student safety,<sup>340</sup> the *Wynar* test focuses expressly on violence but does not offer a definition for the violence contemplated.

Under *Wynar*, it is therefore unclear whether a school may regulate only a student's threats of death or serious bodily harm, or if a school could reach instances of cyberbullying.<sup>341</sup> If the *Wynar* test is intended to encompass only threats of serious bodily harm, it is uncertain why the line should arbitrarily be drawn there. While a school shooting is an incomparable tragedy, cyberbullying is arguably a more common issue,<sup>342</sup> as the *Kowalski* court realized. Moreover, the *Wynar* test arguably discounts the emotional value in "blowing off steam" and may therefore be overinclusive with respect to allegedly violent student threats.<sup>343</sup> Finally, the *Wynar* test is ambiguous as to severity: would one threat be enough, or must it be numerous threats made over an extended period of time?

### 4. Common Considerations and Theory

Although the circuits deal with the problem of off-campus digital student speech by applying different tests, the threshold tests and their justifications reflect some common elements and concerns. As a preliminary matter, the courts agree that the internet and the proliferation of digital speech challenge the continued viability of the traditionally geography-based regulation of student speech and expressive conduct.<sup>344</sup> Thus, notwithstanding the differences in the threshold tests they established, each court—except for the Third Circuit, which simply assumed the matter—expressly found that the *Tinker* standard was applicable to off-campus speech under certain circumstances.<sup>345</sup>

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338. See generally *supra* Part II.D.

339. See *supra* notes 312–13 and accompanying text.

340. See *supra* notes 312–13 and accompanying text; see also *supra* note 166 and accompanying text.

341. For example, the speech at issue in *Kowalski* was mean spirited and degrading, but arguably not threatening. See *supra* notes 280–82 and accompanying text.

342. See Hoffman, *supra* note 7 (citing a study finding that cyberbullying affects one in five middle school students).

343. See Calvert, *supra* note 207, at 282 (noting the important function of speech as a passive method for venting frustration).

344. See generally *supra* Part II.A–B.1, II.C–D.

345. See *supra* notes 222, 248, 277, 300 and accompanying text; see also McDonald, *supra* note 323, at 736–37.

Moreover, each circuit court premised its test on a similar understanding of the Supreme Court's entire student speech canon, as well as a common conception of the modern role of public schools. Thus, they are wont to accept a limited vision of students' constitutional rights and, based on the Court's latter student-speech jurisprudence, expanded school regulatory authority. For example, the *Doninger* and *Kowalski* courts arguably relied on *Fraser* and *Kuhlmeier* for the proposition that schools play an important role in teaching fundamental values.<sup>346</sup> The *Kowalski* and *Wynar* tests, in particular, reflect and embrace a robust regulatory role for schools that is not inconsistent with recent Supreme Court precedent.<sup>347</sup> The courts' perceived need for a threshold test, however, indicates their continued rejection of plenary school regulatory authority.

Further undergirding several opinions is the notion of intentionality—that is, whether the student intended her off-campus speech to reach school property or otherwise targeted the school in some meaningful way.<sup>348</sup> As for other potential factors, their role in the analysis is less than clear. Both *Doninger* and *Kowalski* involved student speech that reached numerous other students,<sup>349</sup> which arguably may have influenced the courts to find *Tinker* applicable in those cases. The role of a student's age is also unclear, although it is worth noting that while the *Doninger*, *Kowalski*, and *Wynar* courts found that school discipline did not violate the Constitution in cases involving high school students,<sup>350</sup> the *Snyder* court, considering a case concerning a middle school student, found the school's discipline unconstitutional.<sup>351</sup>

Significantly, however, the courts have not enunciated a clear or coherent definition of “substantial disruption” in the off-campus context. In *Snyder*, the Third Circuit concluded that a mock profile disparaging a principal and his family did not rise to the level of substantial disruption.<sup>352</sup> In *Wisniewski* and *Doninger*, however, the Second Circuit found that student speech against school faculty either did or might reasonably cause a substantial disruption,<sup>353</sup> even though the contested speech in those cases was arguably less objectionable than that at issue in *Snyder*. The *Wynar* court, meanwhile, was persuaded that a student's violent instant messages constituted a potentially substantial disruption, notwithstanding the fact that

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346. See *supra* notes 236, 278, 288–89 and accompanying text; see also Heidlage, *supra* note 206, at 603.

347. See *supra* Part I.C; see also Ryan, *supra* note 31, at 1340 (arguing that the Supreme Court is more likely to uphold school policies that serve academic functions, rather than social ones, even if the policy truncates a constitutional right).

348. See *supra* notes 234, 265 and accompanying text. Even Judge Smith, who, in his concurring opinion in *Snyder*, rejected the proposition that *Tinker* ever applied beyond a school's physical boundaries, conceded that he would find school regulation proper where a student willfully directed disturbing speech at the school from an off-campus location. See *supra* note 274.

349. See *supra* notes 234, 281.

350. See *supra* notes 224, 280, 304 and accompanying text.

351. See *supra* note 251 and accompanying text.

352. See *supra* notes 258–59.

353. See *supra* notes 230, 240 and accompanying text.



they were unaccompanied by any actual violence and were distributed only to several peers.<sup>354</sup> The *Kowalski* court noted the ongoing nature of cyberbullying and found a substantial disruption where the victim of Kara's abuse missed a day of school to avoid further humiliation.<sup>355</sup>

*B. Redefining Substantial Disruption in the Off-Campus Context*

Given the inadequacies of the threshold tests applied in *Doninger*, *Kowalski*, and *Wynar*,<sup>356</sup> this Note recommends addressing the issue of school regulation of off-campus student speech by redefining "substantial disruption" in this context. It is evident that, even in the traditional context, whether student speech causes (or reasonably may be predicted to cause) a substantial disruption is a determination that has vexed courts.<sup>357</sup> While the phrase's vagueness provides courts with flexibility, it likely also contributes to the sensible concern that, without adequate safeguards, liberal extension of the *Tinker* standard may unduly encroach on constitutional rights.

Accordingly, this Note proposes that, in the limited context of off-campus digital student speech, courts define "substantial disruption" according to the parameters set forth by the Supreme Court in *Davis* in the Title IX context.<sup>358</sup> That is, to be sufficient to justify school discipline under *Tinker*, a student's off-campus speech must be sufficiently severe, pervasive, and objectively offensive to deprive another student (or students) of access to an educational opportunity or benefit.<sup>359</sup> Redefining the substantial disruption standard in this context would abolish the need for vague threshold tests and instead protect both schools and students without unduly burdening free speech rights.

Adapting the *Davis* approach to school regulation of off-campus student speech is consistent with the interests outlined above.<sup>360</sup> First, it would serve a school's interest in regulating appropriate cases of off-campus speech, eradicating the rigid geographical approach to *Tinker* that has become arbitrary and outmoded in the digital world.<sup>361</sup> Second, by focusing only on speech that interferes with a student's educational opportunities, it aligns with the broad educational mission of schools. Moreover, it is consistent with the protective role of schools that courts

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354. See *supra* notes 316–19 and accompanying text.

355. See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011).

356. See *supra* Part III.A.1–3.

357. See *supra* Part I.B.3.

358. See *supra* Part I.C.4.

359. See *supra* note 180 and accompanying text. In analyzing whether harassment meets the standard of severe, pervasive, and objectively offensive, the *Davis* Court noted that the ages of the harasser and victim, and number of individuals involved, are particularly salient considerations. See *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). These considerations seem equally relevant in the context of off-campus student speech. See *supra* Part III.A.4.

360. See *supra* Part III.A.4.

361. Moreover, as noted above, the broad language of *Tinker* is arguably open to an interpretation that is not based merely on geography. See *supra* note 93 and accompanying text.

have inferred from latter Supreme Court school-speech jurisprudence, and which schools have embraced in the interest of providing a safe learning environment.<sup>362</sup> Thus, while establishing a high threshold for regulation, the *Davis* approach would not foreclose schools from responding to the modern reality of violence in schools. Third, given its requirements of severity and pervasiveness, the *Davis* approach would not likely justify regulation in response to conduct that is merely accidental or incidental. Thus, the *Davis* approach would likely satisfy the intent evaluation that a reviewing court might conduct in the context of off-campus student speech.<sup>363</sup> Finally, this approach has the advantage of introducing a consistent, predictable, and practicable standard without sacrificing judicial flexibility.

Under the *Davis* approach to school regulation, the *Wynar* and *Kowalski* decisions would likely stand. In *Wynar*, Landon's violent messages over several months likely meet the requirements for severity, pervasiveness, and objective offensiveness.<sup>364</sup> A closer question would be whether Landon's speech effectively barred his classmates' access to an educational opportunity. However, threats of a school shooting that other students find so concerning that they feel compelled to notify school officials arguably distract those students from schoolwork and damage their sense of security at school.<sup>365</sup> Similarly, in *Kowalski*, Kara's derogatory webpage would likely satisfy the requirements of severity and objective offensiveness.<sup>366</sup> Arguably, a court could support a finding of pervasiveness based on the number of classmates Kara's webpage reached.<sup>367</sup> Moreover, because cyberbullying—like that at issue in *Kowalski*—may have devastating effects not only on a student's academic performance, but also on her mental health,<sup>368</sup> deprivation of an educational opportunity may be found in appropriate cases. Meanwhile, the *Davis* approach would be unlikely to authorize the discipline imposed in *Doninger* and *Snyder*. Because the student speech at issue in those cases concerned school faculty<sup>369</sup>—not fellow students—the likelihood of a lost educational opportunity is low.

Critics of this approach are likely to contend that the *Davis* standard arose in a different context; there, the issue concerned potential school liability for inaction in the face of student-on-student harassment,<sup>370</sup> whereas, in the student-speech context, the issue is whether schools

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362. See, e.g., *supra* Part I.C.4; *supra* note 313 and accompanying text.

363. See *supra* Part III.A.4; see also *supra* note 348.

364. See generally *supra* Part II.D.

365. See *supra* notes 306, 316.

366. See generally *supra* Part II.C.

367. See *supra* note 281 and accompanying text (noting the involvement of many students); see also *supra* note 359.

368. See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011) (discussing harms); see also Hoffman, *supra* note 7.

369. See *supra* notes 227, 251–53 and accompanying text.

370. See, e.g., Papandrea, *supra* note 26, at 1095–97 (arguing it is unlikely that schools can be held liable for civil damages under *Davis* for failing to punish student-on-student cyberbullying).

lawfully may take voluntary disciplinary action. Although the distinction between issues of liability and authority to regulate is not insignificant, the *Davis* opinion and the Supreme Court's student-speech jurisprudence protect a similar interest: ensuring a student's ability to receive an education.<sup>371</sup> Critics may also argue that adopting the *Davis* approach entails the risk of sweeping up too much speech. Lower courts, however, have already determined that school regulation of off-campus student speech is appropriate in some cases and have done so under standards that are arguably more vague and less speech protective than the *Davis* approach proposed here.<sup>372</sup> Finally, critics may claim that state civil and criminal laws currently provide sufficient remedies,<sup>373</sup> and that school regulation of off-campus speech therefore is not only unconstitutional, but also unnecessary. Developing state legislation may one day vindicate that argument, but today it is evident that state law does not cover all off-campus student speech capable of affecting the school environment, therefore provoking school interest in regulation.<sup>374</sup>

#### CONCLUSION

The proliferation of the internet, wireless devices, and mobile phones has significantly altered the methods, forms, and venues of communication. In the context of student speech, the effects of modern technology have been especially profound, because courts have generally sanctioned school regulatory authority on the basis of geography, granting considerable deference to school officials on campus, while protecting students' constitutional rights off campus. In the contemporary setting, where a student may cause significant harm to the school environment without setting foot on school premises, courts have molded different threshold tests to authorize school regulation of off-campus student speech under *Tinker*'s substantial disruption standard. These tests, however, are inconsistent and arguably do not serve the rights and needs of students and schools.

Failure to articulate a uniform test entails the risk of subjecting students to different school policies that may be either overly broad or restrictive with respect to their First Amendment and other rights. Moreover, failure

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371. In *Davis*, the Court was concerned with ensuring the "equal access to education that Title IX is designed to protect." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999). Similarly, in *Tinker*, the Court crafted the substantial disruption standard to limit undue interference with classwork. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). To be clear, this Note does not take the position that schools ought to be held liable under *Davis* for failure to regulate off-campus student speech; rather, it argues that merging the *Davis* standard with *Tinker*'s substantial disruption inquiry would provide a suitable and preferable basis for permitting school regulation in appropriate cases.

372. *See supra* Part III.A.1–3; *see also supra* notes 328, 332, 341, 343 and accompanying text.

373. *See Calvert, supra* note 207, at 245–46.

374. *See Lizette Alvarez, Charges Dropped in Florida Cyberbullying Death, but Sheriff Isn't Backing Down*, N.Y. TIMES, Nov. 22, 2013, at A14 (indicating that cyberbullying by a student that led to the victim's suicide did not rise to a criminal level); *see also Alvarez, supra* note 34.

to identify a clear and adequate standard risks ineffective enforcement of school policies promoting important pedagogical interests, such as ensuring meaningful educational opportunities and a safe school environment. By redefining “substantial disruption” in accordance with the conception of harassment articulated in *Davis* in the Title IX context, courts might better serve schools’ regulatory interests while protecting students’ First Amendment rights.