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Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2008, Georgia State University. The author wishes to thank Professor William Wagner for his invaluable insight and guidance in picking apart this complex issue in the law, along with the staff and editors of the Catholic University Law Review for their tireless efforts during the editing process. The author also wishes to thank his mother, Julie, and the rest of his family, for their unwavering support and kind encouragement throughout his time in law school.

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THE REACH OF THE SCHOOLHOUSE GATE: THE FATE OF *TINKER* IN THE AGE OF DIGITAL SOCIAL MEDIA

Mickey Lee Jett[+]

Anyone reflecting on his or her days in secondary school will probably recall a teacher or administrator whom students ridiculed. Students may have whispered comments about this person during lunch and passed notes behind his or her back during class. Fast forward to the present. Today a student has the ability to create a social-media website profile about a school administrator, allowing the student to ridicule that principal or teacher within a digital social environment.[1] Access and exposure to such online student speech is no longer restricted to the "live" interaction of passing classmates in school corridors, but instead moves in virtual channels that can instantly reach a wide audience.

Although in a broader social world protected by the First Amendment, "one man's vulgarity is another's lyric,"[2] how far should the freedom of speech extend in schools? Should a student acceptance speech imbued with sexual innuendo and given before an audience of young teenagers enjoy First Amendment protection?[3] Should lewd or otherwise offensive speech directed at a classmate or teacher be protected?[4] Now that the Internet is an influential and integral part of everyday life, social media sites have evolved into expansive forums that students depend on to connect with their peers.[5] When

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1. *See* Bryan Starrett, *Tinker's Facebook Profile: A New Test for Protecting Student Cyber Speech*, 14 VA. J.L. & TECH. 212, 213–16 (2009) (describing the growing use of social-networking sites such as Facebook to provide a new platform through which students can communicate).

2. Cohen v. California, 403 U.S. 15, 25–26 (1971) (stating that the word "fuck" should be protected even though it is perhaps more distasteful than other swear words, because words have the ability to communicate ideas and concepts, as well as to convey inexpressible emotions).

3. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986) (holding that lewd and sexually explicit speech is not protected under the First Amendment).

4. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920, 932 (3d Cir. 2011) (en banc) (holding that the First Amendment protects offensive comments about a principal originating online and off campus), *cert. denied*, 132 S. Ct. 1097 (2012).

5. *See Facebook Statistics, Stats & Facts for 2011*, DIGITAL BUZZ BLOG (Jan. 18, 2011), http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/ ("[Forty-eight percent] of 18–34 year olds check Facebook when they wake up, with 28% doing so before even getting out

are these new Internet technologies understood as offering channels for free expression, and when are they seen as introducing new avenues for schoolyard bullying?[6] If freedom of expression is limited upon entering the schoolhouse gate, how far do these restrictions extend when students engage in expression about school-related matters through digital means?[7]

The right to speak one's mind is one of our nation's most fundamental rights.[8] In certain contexts, this right extends to a student's criticism of his teachers.[9] The exact contours of students' First Amendment rights however, remain ambiguous.[10] The fountainhead of the Supreme Court's student-speech jurisprudence is *Tinker v. Des Moines Independent Community School District*, a landmark Warren-Court decision giving students substantial freedom of speech rights.[11] Subsequent cases narrowed *Tinker*'s holding to provide greater deference to school officials' decisions to restrict student speech.[12]

The Supreme Court has yet to address the issue of Internet speech generated outside of school.[13] Without any guidance or direction from the Supreme

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of bed."); *see also* Kaitlin M. Gurney, Comment, *Myspace, Your Reputation: A Call to Change Libel Laws for Juveniles Using Social Networking Sites*, 82 TEMP. L. REV. 241, 246 (2009) (stating that social-networking sites attract a younger demographic).

6. Robin M. Kowalski, *Cyber Bullying: Recognizing and Treating Victim and Aggressor*, PSYCHIATRIC TIMES (Oct. 1, 2008), http://www.psychiatrictimes.com/display/article/ 10168/1336550.

7. *See* Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES, June 28, 2010, at A1 (discussing the reluctance of school officials to assert authority over cyber bullying that occurs off campus).

8. DAVID J. BODENHAMER, OUR RIGHTS 65 (2007).

9. Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007) (noting that while "[a] student's right to criticize his or her teachers is a right secured by the Constitution," criticism occurring in a classroom environment is not protected).

10. *See* Starrett, *supra* note 1, at 221 (emphasizing that the Court has yet to address off-campus, online student speech); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 594, 617–18 (2011) (noting that the Supreme Court has created only a "general student speech framework," and explicating that off-campus student speech has only been mentioned in passing).

11. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1304 (2008) (noting that, among scholars, *Tinker* represents the "high-water mark" for student speech).

12. Nathan S. Fronk, Doninger v. Niehoff*: An Example of Public Schools' Paternalism and the Off-Campus Restriction of Students' First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1418 (2010).

13. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 603–04 (W.D. Pa. 2007) (recognizing that the Supreme Court has not developed a standard for assessing off-campus speech), *aff'd,* 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 98 (2010) ("Although the United States Supreme Court has not yet considered whether schools have jurisdiction over online student speech, its opportunity may be fast approaching.").

Court, lower courts have differed in their analyses of whether school officials have the authority to subject off-campus cyberspeech to disciplinary action.[14] Inherent in these lower court opinions is the difficulty in applying traditional school-speech jurisprudence to cyberspeech.[15]

Recently, the Second and Third Circuit Courts of Appeal have attempted to resolve this dilemma by offering interpretations of *Tinker* that extend its constitutional doctrine to off-campus cyberspeech.[16] Although both circuits applied the substantial disruption test identified in *Tinker*,[17] the underlying principles governing the circuits' decisions differed greatly.[18] The Third Circuit treated *Tinker* as an appropriate foundation for providing off-campus student speech protection under the First Amendment.[19] By contrast, the Second Circuit displaced *Tinker*'s doctrinal matrix in favor of a balancing

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14. *See, e.g.*, D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 765–66 (8th Cir. 2011) (applying *Tinker* when analyzing whether the school was authorized to suspend a student who threatened to kill classmates through an instant message to another classmate); Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007) (holding that because it was reasonably foreseeable that the school administration would discover the off-campus speech, the speech would cause a substantial disruption in the school environment); J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) (applying *Tinker* to regulate off-campus speech by upholding a student's two-day suspension for ridiculing another student on YouTube); Evans v. Bayer, 684 F. Supp. 2d 1365, 1371–72 (S.D. Fla. 2010) (noting that off-campus speech, when specifically directed at the school, can be treated as on-campus speech); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 781–82, 784 (E.D. Mich. 2002) (noting that even if the online speech in question occurred on-campus, disciplinary action is only appropriate if it substantially interferes with the school's educational efforts); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (finding that a student-created website featuring mock obituaries of his friends was off-campus speech that was outside the school's disciplinary purview); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002) (analyzing whether speech could be classified as on-campus by using a geographic standard based on where the speech occurred).

15. *See Bethlehem Area Sch. Dist.*, 807 A.2d at 864–66 (basing the analysis of whether to apply *Tinker* and other Supreme Court student-expression jurisprudence on whether the speech in question was "on-campus"). *But see Wisniewski*, 494 F.3d at 38–39 (applying *Tinker*'s substantial-disruption test to off-campus speech); s*ee also* Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1235–36 (noting that spatial boundaries for the Internet are nonexistent and thus "geographical distinction[s] [are] no longer a logical border to school jurisdiction over student speech").

16. *See* Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S.Ct. 499 (2011); *Layshock*, 650 F.3d at 205; J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *see also infra* Part III.A.

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 514 (1969) (holding that students wearing black armbands to protest the Vietnam war did not "forecast substantial disruption of or material interference with school activities," thus barring school officials from restraining the expression).

18. *See infra* Part III.A.

19. *See infra* notes 141–45 and accompanying text.

approach that carries wide-ranging and negative consequences for students' First Amendment expressive-rights jurisprudence.[20]

This Note examines whether the *Tinker* doctrine has a continuing role in establishing the contours of First Amendment protection for student expression by examining the recent cases in the Second and Third Circuits. This Note first roadmaps relevant past law, charting the general doctrinal basis defining First Amendment protection before *Tinker* and setting the stage for *Tinker*'s narrower pronouncements on student expression. It also discusses the *Tinker* doctrine and addresses relevant post-*Tinker* precedent. Next, this Note examines the Second and Third Circuits' respective reframing of *Tinker* in light of these intervening precedents. In particular, this Note addresses the attempts by both circuits to resolve the difficulties in applying *Tinker* in the context of the new digitized social media. Finally, this Note analyzes the implications of the Second and Third Circuit opinions for the constitutional status of student expression, and examines the current reach of First Amendment protection in the broader context of off-campus student expression.

I. A ROADMAP AND DIRECTIONS FOR REACHING THE "SCHOOLHOUSE GATE"

A. *First Amendment Jurisprudence Before the Warren Court's* Tinker *Decision*

The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[21] Protected speech includes not only spoken words, but also conduct imbued with elements of communication.[22] In 1942, Justices Oliver Holmes and Louis Brandeis

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20. *See infra* notes 136–39 and accompanying text; *see also infra* Part III.C.

21. U.S. CONST. amend. I. Although freedom of speech is a fundamental cornerstone of American democracy, this right is not absolute. For example, the government may restrict the time, place, and manner of speech so long as: (1) the restriction placed on it serves an important government interest, (2) the interest served by the regulation is unrelated to the suppression of the particular message, (3) the regulation is narrowly tailored to the interest, and (4) the regulation leaves open alternative means for communicating messages. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The Court has also permitted limited regulation of speech without regard to the speech's content; however, such content-based regulation is subject to the highest degree of judicial scrutiny. Cohen v. California, 403 U.S. 15, 24–26 (1971). Additionally, there is speech that categorically receives no First Amendment protection, including speech "directed to inciting or producing imminent lawless action," Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942), obscenity, Roth v. United States, 354 U.S. 476, 485 (1957), child pornography, New York v. Ferber, 458 U.S. 747, 764 (1982), and imminent threats, Schenck v. United States, 249 U.S. 47, 52 (1919).

22. *See* Spence v. Washington, 418 U.S. 405, 410–11, 414–15 (1974) (per curiam) (finding that a college student who hung his American flag upside down conveyed a message to the public, and that when applied to the case facts, a statute prohibiting such communicative conduct violated the student's right to freedom of speech); Brown v. Louisiana, 383 U.S. 131, 141–42

attempted to delineate the scope of protected expression by applying a cost-benefit categorization principle, which separated protected First Amendment speech from other forms of expression outside of the First Amendment.[23] However, under this doctrine, the Court struggled to draw meaningful lines between what constituted protected and unprotected expression,[24] and the legitimacy of withholding protection of certain speech met severe scholarly resistance.[25]

In the 1960s, the Warren Court broadened First Amendment protections.[26] Instead of limiting the protection of expression to certain categories of speech, the Court "treat[ed] all speech as presumptively protected and consider[ed] differences among various types of speech only in evaluating whether particular restrictions were justified."[27] In doing so, the Court developed a balancing test, applying strict scrutiny and the strongest possible presumption in favor of free expression.[28] It is within this context that the Court addressed the freedom of speech in public schools.[29]

(1966) (noting that the First Amendment goes beyond verbal expression and protects the right "to protest by silent and reproachful presence"). *But cf.* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (noting that burning a draft card contains both speech and non-speech aspects, and a government regulation on such an action is sufficiently justified if it furthers an important government interest unrelated to the suppression of speech).

23. KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 70–71 (Jack Stark ed., 2004) (noting that in *Chaplinsky v. New Hampshire*, the Court used a "cost-benefit, balancing test to determine whether any particular category of speech should be outside First Amendment protection").

24. *See* WERHAN, *supra* note 23, at 72. The *Chaplinksy* test bars protection to forms of speech that play "no essential part of any exposition of ideas and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky,* 315 U.S. at 568 (1942); *see also* WERHAN, *supra* note 23, at 71.

25. WERHAN, *supra* note 23, at 72 (explaining that the *Chaplinsky* approach remains "a continuing source of controversy"); *see also* Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 547 (1989) (noting the difficulties that accompany the categorization of speech). *But see* Cass R. Sunstein, Commentary, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 555 (1989) (advocating criteria to determine what is constitutionally protected speech in an effort to help courts distinguish between "high value" and "low value" speech).

26. *See, e.g.*, *Brandenburg*, 395 U.S. at 447 (holding that inflammatory speech is protected unless it incites or is likely to incite imminent and lawless action); New York Times v. Sullivan, 376 U.S. 254, 283 (1964) (extending First Amendment protection to libel laws by requiring proof of actual malice in libel suits brought by public officials); *see also* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 351 (1996) (describing the Warren Court "as the most significant institutional champion of free speech to appear thus far in America").

27. Nadine Strossen, *Freedom of Speech in the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE 68, 70 (Bernard Schwartz ed., 1996).

28. CHRIS DEMASKE, MODERN POWER AND FREE SPEECH: CONTEMPORARY CULTURE AND ISSUES OF EQUALITY 1 (Chris Demaske ed., 2009). The number of categories of unprotected speech shrunk as a result of this balancing approach. *Id.* In an effort to protect speech, the Court looked at traditional values underlying the principles of freedom of expression. *See Sullivan*, 376

B. The Court Arrives at the Schoolhouse Gate with Tinker

The Supreme Court first attempted to develop clear student-speech jurisprudence in *Tinker v. Des Moines Independent Community School District*.[30] In this case, three students wore black armbands to school to protest the Vietnam War.[31] Upon learning of the students' plan, the school adopted a policy that required students wearing armbands to remove them or face suspension.[32] Although the three students knew of the newly adopted policy, they wore the armbands to school, refused to remove them, and were subsequently suspended by the school.[33]

The Court began its opinion by stating that "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[34] Although the Court reaffirmed the authority of school officials to "prescribe and control conduct in the schools," it explained that control must be consistent with recognized constitutional safeguards.[35] Deciding between the competing interests of freedom of speech and school autonomy, the Court held that interference with a student's speech is constitutionally prohibited unless it can be shown that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[36]

U.S. at 270 (concluding that the Court's freedom of speech jurisprudence evolved from "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *see also* Strossen, *supra* note 27, at 71–72 (noting the Warren Court's willingness to scrutinize a broader array of speech restrictions for potential First Amendment infringement).

29. Even before the Warren Court, the Supreme Court recognized that the First Amendment offers protection of speech to public school students. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (reasoning that because schools "educat[e] the young for citizenship," students should be given the "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

30. 393 U.S. 503 (1969).

31. *Id.* at 504.

32. *Id.*

33. *Id.*

34. *Id.* at 506.

35. *Id.* at 507. The Court also noted that students retain their status as "persons" under the Constitution, even when at school. *Id.* at 511.

36. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). The Court rejected the lower court's conclusion that the school authorities' actions were reasonable because they were based on a predetermined supposition that the armbands would create some disturbance. *Id.* at 508. The Court found "undifferentiated fear or apprehension of disturbance" insufficient to dispose of a person's First Amendment right to free speech. *Id.*

In his dissent, Justice Hugo Black argued for more deference to school authorities and attacked the majority's use of a *Lochner*-esque "reasonableness" test in the manner of strict scrutiny. *Id.* at 518–19 (Black, J., dissenting).

This substantial-disruption test reflected the Court's shift from the categorization of speech toward a more balanced test built on a heavy preference for freedom of speech.[37] The Court in *Tinker* regarded the American classroom—like American social life generally—as a "marketplace of ideas,"[38] and did not wish to confine the freedom of expression to "a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."[39] The majority saw the classroom as both a safe haven for constitutional freedoms and a place where students could learn about their rights.[40]

With this philosophy, the Court reasoned that more than just a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was required before school administrators could intervene to censor or punish speech.[41] The Court declared that the First Amendment's explicit language banning government abridgment of free speech "means what it says."[42] These statements evidence the Warren Court's view that the First Amendment reached inside the schoolhouse gate.[43]

*C. Post-*Tinker *Precedent Stipulates the Location of Schoolhouse Gateposts*

In the cases following *Tinker*, the Supreme Court authorized regulation of speech by school administrators not only when the speech causes a material and substantial disruption of the school environment,[44] but also when (1) the

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37. *See* Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 441, 443 (1980) (noting that in the Warren Court's view, freedom of expression trumps censorship and any attempts to specifically enumerate what expression should receive constitutional protection must be rejected).

38. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

39. *Id.* at 513.

40. See *id.* at 511–12 (describing a school as a place involving "personal intercommunication among the students" and therefore the protection of this student speech, for the Warren Court, was a manner in which to advance one of the inherent purposes of the First Amendment); *see also* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 532 (2000) (describing the *Tinker* majority's view that safeguarding speech at school is "a crucial part of educating students about the Constitution").

41. *Tinker*, 393 U.S. at 509, 511 ("[Students] may not be regarded as closed-circuit recipients of only that which the state chooses to communicate [nor] confined to the expression of those sentiments that are officially approved.").

42. *Id.* at 513.

43. *See* Frank D. LoMonte, *Shrinking* Tinker*: Students Are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1329 (2009) (asserting that under the Warren Court's formulation in *Tinker*, the scope of the First Amendment reaches into the school with the limited exception of speech in a "curricular medium" sanctioned by the school).

44. *Tinker*, 393 U.S. at 509.

speech created is lewd or vulgar,[45] (2) the speech bears the school's imprimatur,[46] or (3) the speech promotes drug use.[47] Whether subsequent cases relax *Tinker* or merely implicate *Tinker*'s own exception is yet to be resolved.[48] Either way, these later cases seemingly grant school administrators greater deference and have also permitted school administrators further protection under the doctrine of qualified immunity, which serves as a buffer should the administrators err in judgment.[49]

1. Bethel School District No. 403 v. Fraser*: The Categorical Exception for Vulgar Speech*

Following *Tinker*, the Supreme Court addressed student speech in *Bethel School District No. 403 v. Fraser*.[50] Although the Court purported to apply *Tinker*, *Fraser* validated a greater degree of judicial deference to school administrators.[51] In *Fraser*, a student gave a sexually explicit campaign speech during a school assembly, which resulted in a three-day suspension for the student.[52] The school justified the suspension by contending that the speech caused embarrassment and disruption among the students.[53]

The Court upheld the school's disciplinary action.[54] Although the Court reaffirmed *Tinker*'s notion that students do not "shed their constitutional rights at the schoolhouse gate,"[55] it distinguished this "lewd and indecent speech" from *Tinker*'s political speech.[56] Emphasizing the necessity of a school's

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45. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

46. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988).

47. Morse v. Frederick, 551 U.S. 393, 410 (2007).

48. *See infra* note 86 and accompanying text.

49. Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

50. 478 U.S. at 675.

51. Tracy L. Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1092 (2008) (noting that the holding in *Fraser* "effectively shifted the focus of student expression from the rights of the students to the needs of the educators and administrators, and showed an almost total judicial deference to the schools"); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1045–46 (2008) (discussing how *Fraser*'s shift from *Tinker* provided more deference to school administrators to regulate that speech).

52. *Fraser*, 478 U.S. at 677–78. Fraser delivered his speech, even after he had been warned by teachers that it was inappropriate. *Id.* at 678. Bethel High School's disciplinary rule stated, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

53. *Id.* at 678 (noting that one teacher "found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class").

54. *Id.* at 685.

55. *Id.* at 688 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

56. *Fraser*, 478 U.S. at 685; *see* Morse v. Frederick, 551 U.S. 393, 404 (2007) ("The mode of analysis employed in *Fraser* is not entirely clear."); *see also* 2 RODNEY A. SMOLLA, SMOLLA

control over student behavior, the Court held that this kind of "nonpolitical" expression can be categorically prohibited without offending the Constitution because toleration of such expression "undermine[d] the school's basic educational mission."[57] Balancing the need for "socially appropriate behavior" with the importance of encouraging political and religious tolerance among students, the Court held that regulation of vulgar and lewd speech must be allowed to protect the school's educational mission.[58]

2. Hazelwood School District v. Kuhlmeier*: The Categorical Exception of Legitimate Pedagogical Concerns*

Less than two years after *Fraser*, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*—the second case that scaled back *Tinker*'s broad First Amendment protection.[59] In *Kuhlmeier*, the school removed two student-written articles from the high school newspaper out of concern that the articles violated students' privacy rights and because the subject matter was inappropriate.[60] The Court framed the issue as whether the First Amendment "require[d] a school affirmatively to promote particular student speech."[61] The Court held that the school's actions did not violate the First Amendment, finding that student speech could be limited when it is related to a school's "legitimate pedagogical concerns."[62] Contrary to *Tinker*'s general preference

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AND NIMMER ON FREEDOM OF SPEECH § 17:4, at 17–28 (2011) (emphasizing the lack of clarity as to the relationship between *Fraser* and *Tinker*).

57. *Fraser*, 478 U.S. at 685. *Fraser*, however, never defined the scope of the school's educational function and the permissible values perceived through that function. *See* Benjamin F. Heidlage, Note, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. REV. 572, 577 (2009).

58. *Fraser*, 478 U.S. at 685. The Court justified its decision by citing Justice Black's dissent in *Tinker*, further evidencing that it only gave cursory deference to *Tinker*. *Id.* (citing *Tinker*, 393 U.S. at 526 (Black, J., dissenting)) (rejecting any implication that the Constitution requires public schools to give up control over students).

59. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). *See* Mark W. Cordes, *Making Sense of High School Speech After* Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657, 667 (2009) (noting that the Court's distinction between tolerating speech and promoting speech distanced *Kuhlmeier* from the protective approach in *Tinker*); Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 114 (2009) (stating that *Kuhlmeier* further restricted *Tinker*'s holding and created another exception to the *Tinker* substantial-disruption test).

60. *Kuhlmeier*, 484 U.S. at 262–63. The principal removed the first article, which covered current students' pregnancies, to maintain the anonymity and privacy of the students covered in the article. *Id.* at 263. The principal removed a second article about a student's experience with divorce because the student's parents were not given the opportunity to respond to allegations contained in the article. *Id.*

61. *Id.* at 270–71. The Court noted that the question in *Tinker* was whether a school needed to tolerate particular student speech. *Id.* at 270.

62. *Id.* at 273. The Court stated that school administrators may exercise greater control over on-campus student expression to ensure that students are presented with material suited to their maturity level and that the speaker's views are not imputed to the school. *Id.* at 271. This

for freedom of speech, the Court in *Kuhlmeier* more closely paralleled *Fraser*'s deference to school administration[63] by articulating the notion that a more relaxed standard of First Amendment protection applies for student expression that occurs within the school's "pedagogical" scope.[64]

3. Morse v. Frederick*: The Categorical Exception of Referencing and Promoting Illegal Drug Use*

Almost twenty years passed before the Supreme Court heard another student speech case, *Morse v. Frederick*, which shifted from an examination of speech occurring on-campus to speech occurring off-campus.[65] In *Morse*, a student stood on a street opposite the school during school hours and unfurled a fourteen-foot banner that read "BONG HiTS 4 JESUS."[66] When asked to take the banner down, the student refused and received a ten-day suspension.[67] The school believed that the student sought to encourage illegal drug use and was therefore in violation of the school code of conduct.[68]

The Court acknowledged *Tinker*, *Fraser*, and *Kuhlmeier* as precedent for on-campus student speech; however, the Court avoided the issue of whether these precedents also inform off-campus student speech cases by determining that the student's actions in *Morse* occurred on-campus.[69] To reach this

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allowed the school to "'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that [was], for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* (quoting *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 509).

63. As in *Fraser*, the Court in *Kuhlmeier* quoted Justice Black's dissent in *Tinker*. *Id.* at 271 n.4; *see* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 367–68 (2007) (discussing *Kuhlmeier*'s favorable treatment of *Fraser* in contrast to its dismissive treatment of *Tinker*); *see also supra* note 58.

64. *See* Dickler, *supra* note 63, at 368 (classifying the level of review in *Kuhlmeier* as rational basis); *see also* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 401 (2011). By citing the *Fraser* opinion, the Court in *Kuhlmeier* reiterated the view that the educational mission of the school is valued more than student speech. Goldman, *supra*, at 401.

65. Morse v. Frederick, 551 U.S. 393 (2007); Carolyn Joyce Mattus, *Is It Really My Space?: Public Schools and Student Speech on the Internet After* Layshock v. Hermitage School District *and* Snyder v. Blue Mountain School District, 16 B.U. J. SCI. & TECH. L. 318, 321 (2010) (noting that *Morse* is the only Supreme Court case addressing off-campus student speech).

66. *Morse*, 551 U.S. at 397. The student opened the banner during an approved "class event or social trip," where the school had given students permission to observe the Olympic torch relay from the street near the school. *Id.*

67. *Id.* at 398.

68. *Id.* The school district's policy prohibited expression that promoted the use of illegal substances and applied the code of conduct to students when in school as well as when participating in school-approved trips or school social events. *Id.*

69. *Id.* at 400–01, 403–06. The Court considered the student to be at school because he was at an event that occurred during school hours with teachers in attendance, that included a

conclusion, the Court interpreted *Tinker* narrowly, focusing on its language regarding political speech.[70] The Court then identified and applied two principles from *Fraser*: (1) that student rights in a public school setting are not "coextensive with the rights of adults," and (2) that the "analysis set forth in *Tinker* [was] not absolute."[71] The Court found that censoring drug-related speech did not constitute a mere desire to avoid controversy,[72] and that, under the two principles derived from *Fraser*, schools were authorized to restrict student expression that encouraged illegal drug use.[73] The Court's ruling in *Morse* added yet another categorical exception to *Tinker*'s broad preference for freedom of speech and reinforced the Court's shift toward greater deference to a school administration's restriction of student speech.[74]

4. The Qualified Immunity Defense for Public School Officials

In the years following *Tinker*, the Supreme Court enunciated a lower standard of review in cases that alleged violations by government officials under the doctrine of qualified immunity.[75] In the context of First Amendment cases, qualified immunity is unanimously regarded as having a broad scope[76] and allowing a state actor to defend against a civil lawsuit.[77] In cases in which

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performance by the school's band and cheerleaders, and where he was visible to fellow classmates. *Id.* at 400–01.

70. *Id.* at 403–04. The Court stressed *Tinker*'s finding that the school only desired to avoid the discomfort of an unpopular viewpoint. *Id.* The Court rejected the dissent's argument that the message could be political by noting that the student had not argued the banner conveyed any political or religious message. *Id.* at 402–03. The student argued that "the words were just nonsense meant to attract television cameras." *Id.* at 401.

71. *Id.* at 404–05 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)). The Court commented that while the distinction made between the political message in *Tinker* and the sexually explicit speech in *Fraser* was unclear, it was not necessary to resolve the debate to proceed with the present case. *Id.* at 404.

72. *Id.* at 406–09 (relying on Fourth Amendment cases, legislation, and social and medical studies, the Court determined that drug-use prevention among school-aged children was an important and compelling interest).

73. *Id.* at 408, 410.

74. See *id.* at 397 ("[W]e hold that schools may take steps to safeguard [students] from speech that can reasonably be regarded as encouraging illegal drug use."); *see also* Harriet A. Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1570 (2009) (arguing that the decisions rendered in *Fraser*, *Kuhlmeier*, and *Morse* demonstrated a general trend toward giving deference to a school's authority to regulate student speech); Sarah O. Cronan, Note, *Grounding Cyberspeech: Public Schools' Authority to Discipline Students for Internet Activity*, 97 KY. L.J. 149, 157 (2008) (commenting that *Morse* created another exception to *Tinker*).

75. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (discussing the need for qualified immunity as applied to executive officials exercising their discretion and articulating the relevant standard of review); Butz v. Economou, 438 U.S. 478 (1978).

76. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 651 (1998).

77. *Harlow*, 457 U.S. at 818.

a state actor's conduct does not clearly violate a federal statute or a constitutional right "of which a reasonable person would have known," he or she is entitled to the affirmative defense of qualified immunity.[78] A court considering the defense must first examine whether the facts, viewed in the light most favorable to the plaintiff, demonstrate a violation of the constitutional right by the state actor.[79] If that burden is met, the court must then decide whether the right at issue was established clearly at the time the conduct occurred.[80] The Supreme Court recently decided that lower courts may exercise discretion when determining which prong to consider first.[81] If the conduct does not violate a clearly established constitutional right, or if the state actor reasonably believes the right did not exist, he is immune from civil liability.[82]

II. JURISPRUDENCE IN THE SECOND AND THIRD CIRCUITS: "UPDATING" *TINKER* AND RELEVANT INTERVENING PRECEDENTS IN THE CONTEXT OF ONLINE SPEECH

As a result of the muddled post-*Tinker* jurisprudence, lower-court opinions on student speech vary greatly.[83] The legal community eagerly anticipated the Court's decision in *Morse* because it provided an opportunity for the Court to address off-campus speech;[84] however, because the Court limited its holding, it never reached the issue.[85] As a result, the boundaries of a school's authority to

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78. *Id.* at 815, 818.

79. Saucier v. Katz 533 U.S. 194, 201 (2001), *overruled on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009).

80. *Pearson*, 555 U.S. at 232.

81. *Id.* at 242.

82. *Harlow*, 457 U.S. at 818.

83. *See, e.g.,* Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S.Ct. 499 (2011); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *see also* Benjamin T. Bradford, Comment, *Is It Really MySpace? Our Disjointed History of Public School Discipline for Student Speech Needs a New Test for an Online Era*, 3 J. MARSHALL L. REV. 323, 330–31 (2010) (pointing out that the Supreme Court has applied four different tests in *Tinker*, *Fraser*, *Kuhlmeier* and *Morse*, and commenting on Justice Clarence Thomas's confusion in his *Morse* dissent about whether *Tinker* still applies to student-speech cases); Allison E. Hayes, Note, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 255 (2010).

84. *See* Dickler, *supra* note 63, at 356 (discussing the desire for clarification of *Tinker* and its application in subsequent cases).

85. Morse v. Frederick, 551 U.S. 393, 400–01 (2007); *see supra* note 69 and accompanying text.

restrict off-campus speech have not yet been determined by the Supreme Court.[86]

A. Third Circuit Cases and Off-Campus Cyberspeech

1. Layshock *ex rel.* Layshock v. Hermitage School District

Although the Supreme Court has avoided addressing a school's authority to regulate off-campus speech, lower courts have confronted the issue with inconsistent results.[87] The Third Circuit first ruled on the issue in *Layshock* ex rel. *Layshock v. Hermitage School District,* in which the student, Layshock, created a "parody profile" of his principal on the social-media website MySpace from his grandmother's home.[88] In response to the website, the school suspended Layshock for ten days, banned him from extracurricular activities, prohibited him from attending graduation events, and required him to attend the Alternate Education Program for the remaining portion of the school year.[89]

The Third Circuit held that the school's disciplinary actions violated the student's First Amendment rights.[90] The court noted that because the school district did not use the *Tinker* rule to justify the suspension, the court was able to avoid the issue of whether *Tinker* applied to off-campus speech.[91] The court

86. *See* Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 165 (2009) (describing the uncertainty lower courts have when addressing off-campus speech).

87. *See* Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 263–66 (2008) (discussing the varying approaches and results between lower courts in attempting to analyze off-campus student speech cases under *Tinker* and its progeny).

88. *Layschock*, 650 F.3d at 207–08. MySpace is a social-media website where users create profiles of themselves by uploading videos, photographs, and personal information. *Id.* at 208. The profile at issue in *Layshock* included a survey with answers that mocked the principal's large size by repeatedly using the word "big." *Id.* The student accessed his parody profile at school and showed it to his fellow classmates. *Id.* at 209. Subsequently, three classmates created three additional parody profiles. *Id.* at 208.

89. *Id.* at 210. Although the other parody profiles contained more vulgar and offensive content, Layshock was the only student punished. *Id.* Layshock's actions violated the school district's disciplinary code, which barred "[d]isruption of the normal school process; [d]isrespect; [h]arassment of a school administrator via computer/internet with remarks that have demeaning implications; [g]ross misbehavior; [o]bscene, vulgar and profane language; [and] Computer Policy violations (use of school pictures without authorization)." *Id.* at 209–10.

90. *Id.* at 207.

91. *Id.* at 214. Although the district court did not find "a sufficient nexus between [the student's] speech and a substantial disruption of the school environment," the school district did not challenge that point on appeal. *Id.* (quoting Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007)). Instead, the school argued that there was a nexus between the profile's use and circulation on school property such that the school could regulate the speech. *Id.* at 214–15. Under this theory, the court concluded that because Layshock had accessed the school website to obtain a photo of the principal, the speech originated on-

did consider Layshock's access to the profile at school, but ultimately relied on a decision by the Second Circuit in which the court determined that the First Amendment prohibits schools from restricting speech that occurs outside the classroom at an activity not sponsored by the school.[92]

The Third Circuit also concluded that the school could not punish the student simply because the speech came within the school.[93] Although the school district cited three cases as support for allowing a school to censor vulgar speech made online,[94] the *Layshock* court distinguished these cases by explaining that each case evoked a substantial disruption of the school environment.[95]

The Third Circuit leaned toward *Tinker*'s analysis by emphasizing the district court's determination that the parody profile caused no disruption in the school environment and that only certain narrow circumstances—not present in this case—would authorize regulating off-campus speech.[96] The court, therefore, gave minimal deference to the school authorities in regulating speech occurring outside the confines of the schoolhouse gate and adhered to the spirit of *Tinker* and its permissive approach toward protection of student expression.[97]

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campus. *Id.* at 215. Moreover, the speech targeted those in the school community and was accessed by Layshock on school computers. *Id.* at 216. Therefore, the school concluded, it was "reasonably foreseeable that the profile would come to the attention of the School District and the Principal." *Id.*

92. *Id.* at 215 (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1045–50 (2d Cir. 1979)). *Thomas v. Board of Education* involved disciplinary action taken against students who had created a satirical paper, which included articles on masturbation and prostitution. *Thomas*, 607 F.2d at 1045. Although the students distributed the paper off-campus and not during school hours, some activities involving the paper occurred on school grounds. *Id.* The Second Circuit found that the activity in the school was de minimis and thus could not be punished by the school. *Id.* at 1050. In *Layshock*, the court determined that if *Thomas* involved conduct that was not seen as sufficient to establish a nexus between the conduct and school, then the requisite nexus did not exist in the present case. *Layshock*, 650 F.2d at 216. The court recognized the danger of allowing schools to reach into the homes of its students and control their actions. *Id.* Although, the court admitted that under *Tinker* the "schoolhouse gate" is not limited to the confines of school property, it noted that the authority of school administrators does have boundaries and limits. *Id.* Relying on *Morse*, the court emphasized that school authority reaches only to school-sponsored events. *Id.* (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).

93. *Layshock*, 650 F.3d at 216.

94. *Id.* at 217. The school relied on Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007), and J.S. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).

95. *Layshock*, 650 F.3d at 217.

96. *Id*. at 219.

97. *Id.* ("[O]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." (quoting *Thomas*, 607 F.2d at 1044–45)).

2. J.S. *ex rel.* Snyder v. Blue Mountain School District*: The Third Circuit Re-emphasizes the Centrality of* Tinker

In *J.S.* ex rel. *Snyder v. Blue Mountain School District*, the Third Circuit again addressed the scope of First Amendment protection of off-campus student expression.[98] In *Snyder*, an eighth-grade student, J.S., created a fake MySpace profile of her principal from her home computer.[99] The school found J.S. to be in violation of the school's disciplinary code and suspended her for ten days.[100] The school argued that the profile disrupted the school by creating general "rumblings" among students.[101]

The court applied *Tinker* in its analysis, although it never explicitly articulated that *Tinker*'s substantial-disruption test applied to off-campus speech.[102] Although the parties agreed that no substantial disruption actually occurred at school, the school argued that, given the circumstances, it was reasonable to forecast that a profile would cause disruption of school activities.[103] The court compared the case to the facts in *Tinker* and concluded that if armbands protesting the Vietnam War did not reasonably forecast a disruption in the school environment, a MySpace profile about the principal similarly did not make a forecast of substantial disruption reasonable.[104] The court also looked to *Fraser*, as the court had in *Layshock*, and concluded that *Fraser* did not apply to off-campus speech.[105] In its conclusion, the court highlighted that school authorities may not punish off-campus speech that was

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98. J.S. *ex rel* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied,* 132 S. Ct. 1097 (2012).

99. *Id.* at 920. The profile displayed a photo of the principal and described him as a "tight ass," "fagass," "pervert," and "dick head." *Id.* at 920–21. No student accessed the profile at school; however, another student informed the principal of the website and brought him a printout of the profile. *Id.* at 921.

100. *Id.* at 921–22. Under the school's disciplinary policy, the principal found the profile to be "a false accusation about a staff member of the school and a 'copyright' violation of the computer use policy, for using [the principal's] photograph." *Id.* at 921.

101. *Id.* at 922.

102. *Id.* at 926 ("The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.'s speech in this case.").

103. *Id.* at 928 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1964)). The school argued that the fake MySpace profile "was accusatory and aroused suspicion among the school community." *Id.* at 930. The court disageed, stating that "[t]he profile was so outrageous that no one could have taken it seriously," and that, unlike the three cases the school district relied on for support, J.S. did not intend for the profile to reach the school community because she took precautions to keep the profile private so that only her friends could view it. *Id.*

104. *Id.* at 929–30. Even though the armbands worn by the three students in *Tinker* diverted attention to the "highly emotional and controversial subject of the Vietnam war," the Supreme Court did not find any facts to lead school officials to a reasonable forecast of substantial disruption in the school environment. *Id.*

105. *Id.* at 932 ("[Had] Fraser delivered the same speech in a public forum outside the school context, it would have been protected." (quoting Morse v. Frederick, 551 U.S. 393, 405 (2007)).

not school-sponsored, did not occur at a school-sponsored event, or did not cause a substantial disruption of school activities.[106]

Throughout *Snyder*, the court emphasized *Tinker*'s strong preference for student speech, and interpreted *Fraser*, *Kuhlmeier*, and *Morse* as narrow limitations to *Tinker*.[107] The concurring judges underscored the need for courts to "tolerate thoughtless speech like J.S.'s to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination."[108] To do otherwise, the majority contended, would bestow a totalitarian power on the school administration to authorize censorship of student speech outside the schoolhouse gate in contradiction to *Tinker*.[109]

B. The Second Circuit: Doninger v. Niehoff

In *Doninger v. Niehoff* the Second Circuit diverged from the Third Circuit's approach of interpreting and analyzing off-campus student cyberspeech under *Tinker* and its progeny.[110] The student, Doninger, used school computers to contact people through a mass e-mail and blog and requested that they contact her school regarding a cancelled concert.[111] Her prompt resulted in a deluge of phone calls and e-mails to the school, forcing the principal and faculty

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106. *Id.* at 933 ("[T]o apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority.").

107. *Id.* at 927 (stating that *Fraser*, *Kuhlmeier*, and *Morse* were "narrow" exceptions to *Tinker*). The Third Circuit commented on Justice Samuel Alito's concurrence in *Morse*, highlighting his view that *Morse* stood "at the far reaches of what the First Amendment permits." *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 425 (2007) (Alito, J., concurring)). The court further explained that Justice Alito's concurrence in *Morse* was predicated on his understanding that the majority's opinion did not allow "the special characteristics of the public schools [to] necessarily justify any other speech restrictions than those recognized by the Court in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*." *Id.* (quoting *Morse*, 551 U.S. at 423 (Alito, J., concurring)).

108. *Id.* at 941 (Smith, J., concurring).

109. *See id.* at 933 (majority opinion). Advocates for the freedom of student speech have classified the Third Circuit decisions in *Layshock* and *Snyder* as "landmark" rulings, and a victory for students across the nation. Seth Zweifler, *Third Circuit Sides with Students in Online Speech Fight: Landmark Rulings Leave Some Questions Unanswered*, STUDENT PRESS L. CENTER (June 13, 2011), http://www.splc.org/news/newsflash.asp?id=2238.

110. *See* Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

111. *Id.* at 339–40. The email, addressed to parents, students, and others, informed recipients that the concert could not be held in the auditorium. *Id.* Doninger solicited everyone to contact the administration office and ask for the event to be held in the auditorium. *Id.* That evening, Doninger posted on her livejournal.com blog that the "douchebags in central office" canceled the concert. *Id.* at 340–41. Doninger encouraged others to continue contacting the principal in an effort to "piss her off more." *Id.* at 341.

members in charge of the concert to miss school-related activities.[112] When Doninger's blog post calling the administrators "douchebags" came to the attention of school officials, the school barred her from seeking nomination for senior class secretary and prohibited her from wearing a "Team Avery" shirt on election day.[113]

Unlike the Third Circuit, the Second Circuit used two lines of reasoning to address and ultimately uphold the school's disciplinary action against Doninger. The *Doninger* court glossed over *Tinker, Fraser*, *Kuhlmeier*, and *Morse*.[114] Instead, the court relied on the doctrine of qualified immunity—a defense that the court asserted would circumscribe the Supreme Court's First Amendment student-speech cases if its requirements were met.[115]

The court ultimately concluded that the school satisfied the two-prong test necessary to establish qualified immunity.[116] The court first examined whether a constitutional right was clearly established.[117] The court rejected Doninger's argument that both Supreme Court precedent and Second Circuit

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112. *Id.*

113. *Id.* at 340, 342–43. The school claimed Doninger violated the student handbook's good-citizenship clause, which required that "[a]ll students elected to student offices . . . shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student's principal." *Id.* at 339. Doninger's name did not appear on the election ballot, but students wore "Team Avery" shirts and voted for her as a write-on candidate on Election Day. *Id.* at 343. The principal instructed those wearing the shirt to remove them, claiming they were "disruptive" and "set[] a bad example." *Id.*

114. *Id.* at 344–45. The court interpreted *Tinker* as holding that a school may prohibit student speech that "materially and substantially disrupt[s]" the school environment. *Id.* at 344 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). The *Doninger* court read *Fraser* as stating that schools need to teach socially acceptable behavior and this need allows administrators to regulate speech that might otherwise be protected outside of school. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681–82 (1986)). The court read *Kuhlmeier* as reiterating that schools may control school-sponsored speech as long as it "reasonably relates to legitimate pedagogical concern[s]." *Id.* at 345 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)). Finally, the court characterized *Morse* as standing for the proposition that schools can regulate speech that encourages illegal drug use. *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 397 (2007)).

115. *Id.*

116. The test for qualified immunity requires examining the official's conduct to see if he or she violated a constitutional right and whether the right was clearly established. *Id.* at 345 (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009); Gilles v. Repicky, 511 F.3d 239, 244 (2d Cir. 2007)). The order of these inquiries is left to the court's discretion. *Id.* (citing *Pearson*, 555 U.S. at 242).

117. *Id.* The court explained that a clearly established right exists if "(1) it was defined with reasonable certainty, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood that his conduct was unlawful." *Id.* (citing Young v. Cnty. of Fulton, 160 F.3d 899, 903 (2d Cir. 1998)). The court clarified that a right is clearly established "in light of the specific context of the case, not as a broad general proposition." *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated on other grounds by Pearson*, 555 U.S. at 242).

jurisprudence[118] protected Doninger's off-campus speech, and concluded that there was no clearly established right to First Amendment protection.[119] In support of its conclusion, the court pointed to the fact that *Tinker* permits school officials to regulate substantially disruptive speech.[120] Contrary to the Third Circuit, however, the Second Circuit's analysis of the Supreme Court cases centered on language in those opinions that limited the freedom of speech afforded to students within the schoolhouse gate.[121] This approach gives deference to school authorities to regulate student speech.

In response to Doninger's assertion that school regulations must satisfy *Tinker*'s substantial disruption test even when the school is permitted to regulate off-campus speech,[122] the Second Circuit categorized the rules in *Fraser*, *Kuhlmeier*, and *Morse* as distinct from *Tinker*, and reasoned that they did not limit regulation of off-campus speech to *Tinker*.[123] Moreover, given the facts of the case, the court held that even under a *Tinker* standard, the school reasonably found the blog post potentially disruptive.[124]

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118. *Id.* at 347.

119. *Id.* at 346–47. In support of its determination that a right was not clearly established, the court noted that "the 'Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event.'" *Id.* at 346 (quoting Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008)). The court rejected Doninger's assertion that Supreme Court precedent offered her protection from disciplinary action for off-campus speech, "no matter its relation to school affairs or its likelihood of having effects—even substantial and disruptive effects—in school." *Id.* The court also rejected the argument that the Second Circuit had clearly established a right to protection of off-campus speech. *Id.* at 346–47. Although the Second Circuit had found in favor of protecting the student speech in *Thomas v. Board of Education*, the opinion included a caveat that in some instances, off-campus speech could create a substantial disruption within the school, making disciplinary aciton appropriate. *Id.* (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979)).

120. *Id.* at 347–48. The court asserted that "[i]t is thus incorrect to urge . . . that Supreme Court precedent necessarily insulates students from discipline for speech-related activity occurring away from school property." *Id.* at 346.

121. *Id.* at 344; *see supra* note 114.

122. *Doninger*, 642 F.3d at 347.

123. *See id.* at 347–48. The court indicated that it had previously opined on the uncertain applicability of *Fraser* to offensive off-campus speech. *Id.* at 348 (citing *Donninger*, 527 F.3d at 49–50).

124. *Id.* at 348–49. The court reasoned that because Doninger's blog post related to a school event, invited others to contact school officials, elucidated students' comments on the post, and became known to the school, it was undisputed that such a blog post would disrupt the school environment. *Id.* at 349.

III. ANALYSIS: FUNDAMENTALLY DIVERSE ALTERNATIVES TO THE TREATMENT OF *TINKER* IN THE CONTEXT OF STUDENT EXPRESSION IN DIGITAL SOCIAL MEDIA

The Supreme Court has yet to rule on the scope of First Amendment protection accorded to student expression in digital social media.[125] Lower courts have looked to *Tinker* when determining whether schools' disciplinary actions restricting off-campus student speech constituted legitimate uses of power.[126] Lower courts have also considered *Fraser*,[127] in which the Court held that schools can regulate "sexually explicit, indecent, or lewd speech";[128] however, courts less often apply *Fraser* to off-campus speech.[129] The lack of Supreme Court guidance has led to differing analytical approaches among courts deciding cases that involve off-campus student speech.[130]

The Second and Third Circuits' adoption of varying analyses to decide cases involving off-campus student speech illustrate the inconsistency among lower courts.[131] Although both circuits looked to *Tinker* and *Fraser* in their analyses, their interpretations of the cases varied, leading to a drastic difference in their jurisprudential stance on student speech and its protection under the First Amendment.[132]

125. *See supra* note 86 and accompanying text; *see also* James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 864–85 (2010) (noting that the Supreme Court has not addressed off-campus speech).

126. *See, e.g.*, D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 757, 760–61 (8th Cir. 2011); Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 571–72 (4th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3427 (2012); Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007); Evans v. Bayer, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1279–80 (W.D. Wash. 2007); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 783–84 (E.D. Mich. 2002); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

127. *See, e.g.*, Coy v. Bd. of Educ. of the N. Canton City Schs., 205 F. Supp. 2d 791, 798 (N.D. Ohio 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 452–53 (W.D. Pa. 2001); *Emmett*, 92 F. Supp. 2d at 1090.

128. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

129. *See, e.g.*, *Killion*, 136 F. Supp. 2d at 456, 457 (quoting *Fraser*, 478 U.S. at 688 (Brennan, J., concurring)) ("Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech . . . occurred within the confines of [the student's] home, far removed from any school premises or facilities.").

130. *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, 870 (2011) (noting the lower courts' lack of uniformity).

131. *See supra* Part II.A–B.

132. *See supra* Part II.A–B.

A. *Applying* Tinker *to Off-Campus Speech*

Lower courts have chosen to apply *Tinker* and its substantial disruption test in cases of off-campus student speech with varying results.[133] Among these, the Third Circuit has upheld *Tinker*'s fundamental principle that deference is given to student speech,[134] while the Second Circuit seemed to implicitly rely on Justice Black's approach in his *Tinker* dissent and his reference to the maxim, "[c]hildren are to be seen not heard."[135]

The Second Circuit asserted that *Tinker* applied to off-campus speech in *Doninger*.[136] However, the court noted that in not defining *Tinker*'s full scope, the Supreme Court had not specifically held that all off-campus student speech was protected from disciplinary action.[137] Though *Tinker* would counsel against such deference to a school's authority, the Second Circuit focused on language in *Fraser* and *Kuhlmeier* that emphasized the need to teach students acceptable social behavior.[138] For the Second Circuit, these cases indicated that off-campus student speech was not an unequivocally protected right.[139]

While the Third Circuit did not explicitly apply *Tinker* to off-campus speech, language in its opinions lends credence to the view that it might do so.[140] In *Snyder*, the Third Circuit used *Tinker* as a backdrop for its analysis

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133. *See, e.g.*, Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007) (allowing for regulation of off-campus speech if it was reasonably foreseeable that the speech would reach school property); J.C. 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."); Evans v. Bayer, 684 F. Supp. 2d 1365, 1371–72 (S.D. Fla. 2010) (suggesting that *Tinker* would apply to off-campus speech if the off-campus speech was aimed at the school); Neal v. Efurd, No. 04-2195, 2005 U.S. Dist. LEXIS 47296, at *12 (W.D. Ark. Feb. 18, 2005) (finding that a student's website did not cause a substantial disruption and permanently enjoining the school from taking action against the student). *But see* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (refusing to apply *Tinker* to off-campus speech); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding that a student's website was off-campus speech and therefore outside the scope of school regulation).

134. *See supra* Part II.A.

135. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting); *see also supra* Part II.B.

136. Doninger v. Niehoff, 642 F.3d 334, 346–47 (2d Cir. 2011).

137. *Id.* at 346.

138. *Id.* at 344 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)); *see also id.* at 345 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)) (emphasizing a school's legitimate "pedagogical concerns"); *cf.* Abby Marie Mollen, Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1507 n.37 (2008) (observing that both the *Fraser* and *Kuhlmeier* decisions parallel Justice Black's dissent in *Tinker* more than the majority's opinion).

139. *See supra* note 119 and accompanying text.

140. *See supra* note 91 and accompanying text. Judge Jordon argued in a concurring opinion in *Layshock* that *Tinker* did apply to off-campus speech. Layshock *ex rel.* Layshockv. Hermitage Sch. Dist., 650 F.3d 205, 220 (3d Cir. 2011) (Jordan, J., concurring), *cert. denied*, 132 S. Ct. 1097 (2012).

and noted the difficulty in balancing the school's authority to regulate speech with the First Amendment rights of students.[141] Although not explicitly applying *Tinker* to the student's speech,[142] the Third Circuit reached its conclusion based on a framework that appropriately conformed to *Tinker*'s preference for freedom of speech.[143] The court acknowledged that a student's constitutional rights within the confines of the school's property are not parallel to those of an adult,[144] and concluded that *Tinker*'s substantial disruption rule was the *general* rule and that the subsequent Supreme Court cases were *narrow* exceptions to that rule.[145]

B. The Proper Integration of the Tinker *Doctrine into the Exception Enunciated in* Fraser

Despite the Second and Third Circuits' examinations of *Tinker* in the context of off-campus student speech, the courts differed in how they believed *Fraser*, *Kuhlmeier*, and *Morse* were should be aligned under *Tinker*, ultimately leading to conflicting views on *Fraser*'s applicability to off-campus speech.[146] The Third Circuit stated that *Fraser* did not apply to conduct occurring outside the schoolhouse gates, except in very narrow circumstances.[147] The Second Circuit was unclear as to whether *Fraser* applied, but would not limit *Fraser*'s application under a *Tinker* analysis.[148]

In *Snyder*, the Third Circuit refused to apply *Fraser*'s lewdness standard to off-campus student speech.[149] The court characterized *Fraser* as an exception to the freedom of speech principle propounded in *Tinker*, not as an equal and independent doctrine.[150] To support its holding, the Third Circuit cited *Morse*

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141. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925–27 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). The court acknowledged that schools' relationships with their students are "custodial and tutelary," and reasoned that although courts generally exercise restraint in reviewing issues arising under the context of school officials, the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 925–26 (quoting Vernonia Sch. Dist. 475 v. Acton, 515 U.S. 646, 655 (1995); Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

142. *See supra* note 102 and accompanying text.

143. *Snyder*, 650 F.3d at 926.

144. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

145. *Id.* (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001)).

146. *See supra* notes 107, 121, and 123 and accompanying text.

147. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011), *cert. denied,* 132 S. Ct. 1-97 (2012); *see also* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (en banc) (expressly stating tht *Fraser* is unapplicable to speech occuring off-campus), *cert. denied*, 132 S. Ct. 1097 (2012).

148. Doninger v. Niehoff, 642 F.3d 334, 344, 348 (2d Cir. 2011) (citing Doninger v. Niehoff, 527 F.3d 41, 49–50 (2d Cir. 2008)), *cert. denied*, 132 S. Ct. 499 (2011).

149. *Snyder*, 650 F.3d at 932 ("*Fraser*'s 'lewdness' standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.").

150. *Id.*

and indicated that the student speech in that case would have received First Amendment protection had it occurred off-campus.[151] The court explained that *Morse* determined that a student's off-campus speech receives the same protection as that of an adult; therefore, a state agent may not impede those rights absent a constitutionally valid reason.[152] The Third Circuit's interpretation correctly limited *Fraser*'s application to school property and characterized it as an exception falling under *Tinker*'s general preference for protecting student speech.[153]

The application of *Fraser* to off-campus student speech would give schools wide latitude to restrict student speech even though the Supreme Court has never authorized schools to punish students for off-campus speech that is unrelated to school activities or that does not cause a substantial disruption.[154] As the Third Circuit contended, the application of *Fraser* to off-campus speech could lead to a rule allowing schools to restrict or discipline student speech that occurs in any forum so long as it relates in any way to the school or its administrators and is found vulgar or offensive.[155]

Interpreting *Fraser*, *Kuhlmeier*, or *Morse* as independent rules apart from the principles laid forth in *Tinker* contradicts *Tinker*'s expansive holding.[156] By expanding *Fraser* to allow for censorship of off-campus student speech, a court would reach contradictory results from one that viewed *Fraser* as a mere exception to *Tinker's* general rule.[157] The result in cases such as *Layshock* and *Snyder* would differ if a court applied the Second Circuit's view of *Fraser*, not as a strict limitation to the general rule in *Tinker*, but as a separate doctrine potentially applicable to off-campus student speech.[158]

C. The Second Circuit's Application of Qualified Immunity Neutralizes Tinker *and Ensures* Tinker *Has No Meaningful Application in the Area of Student Expression*

The Second Circuit ultimately did not reach the question of whether the school violated the student's First Amendment rights in *Doninger*.[159] Instead,

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151. *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 405 (2007)).

152. *Id.*

153. *Id.* at 931–32.

154. *Id.* at 932–33.

155. *Id.* at 933.

156. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (noting that the Constitution permits free speech regulations only "in carefully restricted circumstances").

157. *See Snyder*, 650 F.3d at 933 (reasoning that students who bad-mouthed a teacher at a private party could be punished if courts interpreted *Fraser* to apply to off-campus speech).

158. *See* Doninger v. Niehoff, 642 F.3d 334, 348 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *see also* Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 B.Y.U. L. REV. 501, 516 (2011) (classifying the Second Circuit's approach to off-campus speech as the most expansive standard for regulating off-campus student speech).

159. *Doninger*, 642 F.3d at 346.

the Second Circuit used the doctrine of qualified immunity to refute the student's claim.[160] The effect of requiring Doninger to show that a constitutional right was clearly established was to add a barrier to Doninger's freedom of speech protection that is antithetical to *Tinker*'s emphasis on protecting students' speech.

The Second Circuit sought to determine whether Doninger's First Amendment rights were clearly established, but opined that because a determination is sometimes so nuanced, meeting this standard is exceedingly difficult.[161] Therefore, the Second Circuit gave school officials ultimate deference, finding that not even lawyers and judges could interpret the cases involving student speech in a consistent manner such that a clear right was established.[162]

D. A Circuit Split or a Mere Fact-Specific Difference?

Although the Second and Third Circuits' application of *Tinker* and its progeny differed, the facts of the cases in each circuit differed as well. The Third Circuit addressed the suspension of a student,[163] while the Second Circuit dealt with a school's refusal to allow a student to run for a class office.[164] The Third Circuit noted the differences in disciplinary action taken by the schools in *Doninger* and *Layshock*, but it pointed out that by citing the Second Circuit's *Doninger* decision, it was disagreeing with the conclusion that Doninger's off-campus conduct was not protected by the First Amendment.[165]

In addition to the differences in disciplinary action taken by the schools, the effects of each student's speech on the school varied. Doninger reached out and encouraged people to contact her school in an effort to "piss [the principal] off more."[166] This could be seen as incitement—an exception to the general protection accorded under the First Amendment.[167] Though the speech occurred off-campus, it resulted in a number of calls made to the school and

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160. *Id.*

161. *Id.* at 353.

162. *Id.* The court stated, "The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case." *Id.*

163. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 210 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

164. *Doninger*, 642 F.3d at 338.

165. *Layshock*, 650 F.3d at 218.

166. *Doninger*, 642 F.3d at 341.

167. Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) (providing that the First Amendment does not prevent a state from forbidding "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

caused teachers to miss school-related activities.[168] In contrast, the students in the Third Circuit cases did not reach out into the community with their actions, but instead created Internet profiles and distributed them among friends.[169] In *Snyder*, the student even restricted access to the MySpace profile after other students became aware of it.[170]

Lastly, the facts differ as to where access to the student speech occurred. In *Doninger* and *Snyder*, the blogs and Internet pages were created at home and were never accessed on campus.[171] In *Layshock*, however, the student accessed the website at school and showed it to some classmates.[172] Additionally, in *Layshock*, it could be argued that the profile presented lewd and vulgar on-campus speech, and that under *Fraser* censorship would be appropriate.[173] The Third Circuit, though, found that the speech was conducted off-campus,[174] and refused to extend *Fraser* to off-campus student speech.[175]

The conflict between the Second and Third Circuit decisions manifests a need for the Supreme Court to demonstrate and address the proper analysis for schools' discipline of off-campus student speech. Even though both circuits similarly applied *Tinker* to off-campus speech, their applications of *Fraser* differed. Arguably, the differing facts in the circuit decisions are distinct enough to justify the opposing conclusions. Nonetheless, even identical facts would likely lead to contradictory rulings given the circuits' analyses on this issue.[176] This establishes the necessity for a cohesive standard that all courts can apply to the rising number of off-campus student speech cases.[177]

IV. CONCLUSION

The split between the Second and Third Circuits affirms the need for the Supreme Court to address off-campus student speech. Although the three Supreme Court cases subsequent to *Tinker* reflect a general trend toward

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168. *Doninger*, 642 F.3d at 341.

169. *Layshock*, 650 F.3d at 208; J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 921 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

170. *Snyder*, 650 F.3d at 921.

171. *Doninger*, 642 F.3d at 338, 340; *Snyder*, 650 F.3d at 920, 921 (noting that the school network blocked access to MySpace).

172. *Layshock*, 650 F.3d at 209.

173. *Id.* at 208 (describing the nature and content of the MySpace profile).

174. *Id.* at 216 (finding the relationship between the off-campus speech and the school too attenuated to render it on-campus).

175. *Id.*

176. *See supra* Part II.A–B.

177. *See* Kathleen Conn, Commentary, *The Long and Short of the Public School's Disciplinary Arm: Will* Morse v. Frederick *Make a Difference?*, 227 EDUC. L. REP. 1, 3 (2008) ("[T]he most frequently litigated challenges to school officials' imposition of suspensions or expulsions for out-of-school student offenses occur when school officials discipline students for speech originating outside school.").

deference to a school's authority to regulate student speech, the Third Circuit adhered to *Tinker's* free speech preference and characterized *Fraser*, *Kuhlmeier*, and *Morse* as strict exceptions to *Tinker's* overarching rule.[178] The Second Circuit, on the other hand, stripped *Tinker* of its foundation, and characterized the narrow exceptions derived from the subsequent cases as alternative means to regulate student speech. The methods and standards used in reaching the decisions in both the Second and Third Circuits are arguably different, and the facts of each case vary significantly as well. The lack of a clear and comprehensive standard to determine when a school is authorized to censor student expression should be addressed so that courts can reach consistent opinions regardless of the facts.