THE FIRST AMENDMENT, PUBLIC SCHOOL STUDENTS, AND THE NEED FOR CLEAR LIMITS ON SCHOOL OFFICIALS' AUTHORITY OVER OFF-CAMPUS STUDENT SPEECH

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I. INTRODUCTION

Public schools are not "enclaves of totalitarianism,"[1] where students "shed their constitutional rights to freedom of speech or expression."[2] While "the special characteristics of the school environment"[3] require school officials to maintain order so that schools can fulfill their "basic educational mission,"[4] which includes instructing students in civility,[5] "[s]chool officials do not possess absolute authority over their students."[6] No matter how important their goal, public schools must perform their duties "within the limits of the Bill of Rights."[7] Nevertheless, since "a proper educational environment requires close supervision of schoolchildren,"[8] public school officials do have "custodial and tutelary" authority that permits "a degree of supervision and control that could not be exercised over free adults."[9] Public school students, therefore, do not necessarily have rights coequal to those of adults in other contexts, including under the First Amendment.[10]

So you be the judge: In which of the following cases, if any, should school officials have the authority to punish a student's off-campus speech?

A. *LAYSHOCK EX REL. LAYSHOCK V. HERMITAGE SCHOOL DISTRICT*

In December 2005, high school senior Justin Layshock created a MySpace[11] "parody profile" of his principal—who "is apparently a

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[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[2] *Id.* at 506.

[3] *Id.*

[4] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[5] *Id.* at 681.

[6] *Tinker*, 393 U.S. at 511.

[7] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[8] New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

[9] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

[10] *See* Morse v. Frederick, 551 U.S. 393, 404–05 (2007) ("*Fraser*'s holding demonstrates that 'the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.' " (quoting *Fraser*, 478 U.S. at 682)).

[11] MySpace, as described in a separate case, is

> a "social networking web site" that allows its members to create online "profiles," which are individual web pages on which members post

large man"—from his grandmother's home computer.[12] Layshock mocked his principal's size in various ways, including by answering tell-me-about-yourself questions using a "big" theme. For example: "Are you a health freak: big steroid freak[;] In the past month have you smoked: big blunt[;] . . . In the past month have you gone Skinny Dipping: big lake, not big dick[;] . . . Ever been drunk: big number of times."[13] After creating the parody profile, Layshock became "friends" with other students who then could view the profile.[14] The profile's popularity "spread like wildfire," and by mid-December three more students posted principal-mocking profiles on MySpace.[15]

When the principal's high-school-aged daughter told him about the various parody profiles, he discussed with the police whether he could press charges for harassment, defamation, or slander[16] but ultimately filed no criminal charges.[17] After investigating, however, school officials concluded that Layshock's profile violated the school's discipline code because it disrupted the normal school process, disrespected and harassed a school administrator, and violated the school's computer policy by using the principal's school-website photo without permission.[18] They suspended him from school for ten days, required him to finish the year in the

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> photographs, videos, and information about their lives and interests. . . . Once a member has created a profile, she can extend "friend invitations" to other members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.

Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845–46 (W.D. Tex. 2007).

[12] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). Layshock later claimed that he made the profile to be funny. *Id.* at 208 n.4.

[13] *Id.* at 208.

[14] *Id.*

[15] *Id.* According to the court, these profiles were more vulgar and offensive than the one created by Layshock. *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 209–10. Layshock and several other students also accessed the parody profile created by Layshock at school. *Id.* at 209. School officials shut down on-campus MySpace access several days after learning of the various parody profiles. *Id.*

Alternative Education Program, and banned him from extracurricular activities—including graduation.[19]

B. *J.S. EX REL. SNYDER V. BLUE MOUNTAIN SCHOOL DISTRICT*

In March 2008, eighth graders J.S. and K.L. created a fake MySpace profile of their principal from home.[20] This profile did not state the principal's name, school, or location, but it did include his photo from the school's website.[21] In short, the profile purported to be a self-portrait of a bi-sexual principal from Alabama (their principal lived in Pennsylvania) and contained "crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[22] Although initially publicly available, J.S. made the profile "private" after learning that some students found it funny.[23] J.S. and K.L. continued to allow about twenty-five students to view the profile as "friends."[24]

The fake profile was inaccessible at school because the school blocked on-campus MySpace access.[25] After learning about the profile, their principal tried to find it online; when he was unsuccessful, he contacted MySpace directly—but to no avail.[26] He finally received a printout of the profile from the student who initially brought it to his attention.[27] After examining the profile's content, school officials determined that it violated the school's computer-use policy and contained false allegations against a staff member.[28] They suspended J.S. and K.L. from school for ten days

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[19] *Id.* at 210. The school's officials also considered expelling Layshock. *Id.* Interestingly, even though Layshock's profile was the least vile of the four, he was the only student punished. *Id.*

[20] 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). Like Layshock, J.S. also stated that she created the profile to be funny. *Id.* at 921.

[21] *Id.* at 929.

[22] *Id.* at 920.

[23] *Id.* at 921. A "private" profile can only be viewed by the profile's "friends." *Id.*

[24] *Id.*

[25] *Id.* at 929.

[26] *Id.* at 921.

[27] *Id.* Only one printout was ever brought to school. *Id.* at 929.

[28] *Id.* at 921.

and barred them from attending school dances.[29] The principal also contacted the state police who informed him that while he could file harassment charges, they would likely be dropped.[30] The principal filed no charges.[31] Yet at his request, the state police discussed with the girls and their parents the possible legal repercussions they faced by creating the profile.[32]

C. *KOWALSKI V. BERKELEY COUNTY SCHOOLS*

In December 2005, high school senior Kara Kowalski created a MySpace discussion group called S.A.S.H. from her home computer.[33] She claimed the acronym meant "Students Against Sluts Herpes," but fellow student Ray Parsons said it meant "Students Against Shay's Herpes."[34] In any event, Kowalski invited nearly 100 of her MySpace "friends" to join the group; ultimately, about twenty-five students joined.[35] Parsons joined first and posted a photo of himself and another student "holding their noses while displaying a sign that read, 'Shay Has Herpes.' "[36] After Kowalski and others commented positively on the photo, Parsons posted two additional photos.[37] On the first he added red dots to Shay N.'s face simulating herpes and "a sign near her pelvic region, that read, 'Warning: Enter at your own risk.' "[38] On the second he posted a caption that read "portrait of a whore."[39]

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[29] *Id.* at 922.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012). According to Kowalski, she created the group to "make other students actively aware of STDs." *Id.* (internal quotation marks omitted).

[34] *Id.* Since Shay N., a classmate of Kowalski's, was the main topic of discussion on the webpage, *id.*, the latter meaning seems more likely.

[35] *Id.*

[36] *Id.* at 568. Although Kowalski created the S.A.S.H. webpage from home, Parsons joined and uploaded this photo from a school computer after school had ended. *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (internal quotation marks omitted).

Angered by the photos and comments on the S.A.S.H. webpage, Shay N.'s father called Parsons who then called Kowalski.[40] When Kowalski's attempt to delete the group was unsuccessful, she renamed it "Students Against Angry People."[41] The next morning, Shay N. and her parents filed a harassment complaint against Kowalski and gave the vice principal a printout of the S.A.S.H. webpage.[42] Shay N., however, did not stay at school since she was uncomfortable sitting in class with students who had posted negative comments about her on the webpage.[43]

After investigating, school officials concluded that Kowalski's "hate website" violated the school's "harassment, bullying, and intimidation" policy.[44] They therefore suspended her from school for ten days and placed her on ninety days "social suspension," meaning that she could not attend school events unless she was a direct participant.[45]

D. AND THE VERDICT IS?

Unclear.[46] While the Supreme Court has addressed school officials' authority to regulate on-campus and school-activity-related student speech,[47] the Court has never considered school officials' ability to regulate off-campus speech.[48] Worse still, both lower courts and legal commentators are unsure about how the Court's prior student-speech decisions apply to off-campus student

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 568–69.

[45] *Id.* at 569.

[46] *See* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011) ("Student speech cases dominate courts' First Amendment dockets. Confusion seems to be the rule.").

[47] *See id.* at 417 ("When student speech occurs under school supervision, the Supreme Court's student speech cases control.").

[48] *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, 166 (2009) ("The Supreme Court has never directly addressed the contours of a student's free speech rights outside the confines of the schoolyard.").

speech.[49] Many commentators want the Supreme Court to resolve this uncertainty.[50] But until then, the courts of appeals must wrestle with the scope of school officials' authority to regulate off-campus student speech.[51]

In 2011 alone, four student-speech cases were decided among the Second,[52] Third,[53] and Fourth[54] Circuits.[55] Although each case was appealed to the Supreme Court, the Court denied certiorari in all four cases.[56] As discussed below, however, the Court should have granted certiorari on the appeals from the Third and Fourth Circuits to resolve whether school officials have authority to regulate off-campus student speech.[57]

Specifically, this Note argues that until the Supreme Court grants certiorari to address the scope of school officials' authority

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[49] *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 102–03 (2010) ("Not only are lower court decisions in disarray as to the limits of school jurisdiction over online student speech, legal commentary also exhibits uncertainty as to these limits.").

[50] *See, e.g.*, Backus, *supra* note 48, at 204 ("Legal scholars have called on the Supreme Court to resolve the jurisdictional question of a school's authority to discipline a student's off-campus Internet speech.").

[51] *See infra* Part II.B.

[52] *See* Doninger v. Niehoff, 642 F.3d 334, 339 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011) (holding that school officials who allegedly violated a student's First Amendment rights were immune from liability, since the rights at issue were not clearly established).

[53] *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (holding that school officials violated a student's First Amendment rights by suspending him for creating a website mocking his principal, since the website neither caused a substantial in-school disruption nor created a reasonable risk of such a disruption), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011) (en banc) (holding that school officials violated a student's First Amendment rights by punishing him for off-campus conduct that did not create an in-school disruption and was not related to a school event), *cert. denied*, 132 S. Ct. 1097 (2012).

[54] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012) (upholding school-district-imposed sanctions against a student who attacked another student using a website while off-campus but did so in a manner connected to the school environment).

[55] The factual scenarios described in Part I.A–C above were drawn from these cases. For further discussion of these cases, see *infra* Part II.B.

[56] *Kowalski*, 652 F.3d at 574, *cert. denied*, 132 S. Ct. 1095 (2012); *J.S.*, 650 F.3d at 920, *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock*, 650 F.3d at 207, *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger*, 642 F.3d at 339, *cert. denied*, 132 S. Ct. 499 (2011).

[57] *See infra* Part III. The Second Circuit case is not discussed in this Note because that case focused on qualified immunity and not the scope of students' free speech rights. *See supra* note 53.

over off-campus student speech, courts should follow the Third Circuit's approach to these cases. To make this argument, this Note proceeds in three parts. Part II analyzes not only the Supreme Court's prior student-speech jurisprudence but also how the Third and Fourth Circuits recently applied this precedent. Part III argues that the approaches and decisions in the relevant Third and Fourth Circuit cases highlight why the Court should have granted certiorari on these appeals. Finally, this Note concludes that because the Third Circuit's approach more closely encapsulates the Supreme Court's student-speech precedent generally, courts should follow that approach to off-campus student-speech cases until the Supreme Court issues a direct holding on off-campus cases.

II. BACKGROUND

A. THE SUPREME COURT'S ON-CAMPUS STUDENT-SPEECH JURISPRUDENCE

Student-speech cases are not new.[58] But the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District* still represents the high-water mark for students' First Amendment rights.[59] Post-*Tinker*, the Court has addressed school officials' authority to regulate student speech on three occasions.[60] In each case, discussed in depth below, the Court sided with the school officials and thus limited students' speech rights.[61]

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[58] In the Supreme Court's first free speech case, *West Virginia State Board of Education v. Barnette*, the Court held that a statute requiring all students to salute the flag and recite the Pledge of Allegiance was unconstitutional. 319 U.S. 624, 636–37 (1943); *accord* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1038 (2008) (noting that in the early student-speech cases—*Barnette* and *Tinker*—the Court "gave schools little authority to restrict student expression").

[59] Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 262 (1992).

[60] *See* cases discussed *infra* Part II.A.*1–4*.

[61] *Accord* Tomain, *supra* note 49, at 111 ("Although the Court has eroded *Tinker*'s holding over time, it remains the seminal case for student-speech doctrine."); *see also* Michael W. Macleod-Ball, *Student Speech Online: Too Young to Experience the Right to Free Speech?*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 101, 129 (2011) (noting that *Tinker*'s "disruption" standard "has eroded significantly since the days of the Vietnam War").

1. Tinker v. Des Moines Independent Community School District. In *Tinker*, the Court addressed whether public high school students in Des Moines, Iowa, could wear black armbands at school symbolizing the students' disapproval of the conflict in Vietnam and support for an end to the hostilities.[62] The principals of the Des Moines schools attempted to preempt the armband protest by prohibiting students from donning them.[63] Fifteen-year-old John Tinker, his thirteen-year-old sister Mary Beth, and sixteen-year-old Christopher Eckhardt defied the policy and refused to remove their armbands when asked.[64] Pursuant to the new policy, their principals suspended the three student protestors until they agreed to return to school without their armbands.[65]

Through their fathers and on First Amendment grounds, the students sought a federal injunction enjoining the armband restriction's enforcement and ending their suspensions.[66] The district court denied their request because the policy was adopted to prevent a reasonably anticipated "material or substantial interference with school discipline."[67] An en banc Eighth Circuit split evenly on the issue and affirmed without issuing an opinion.[68] The Supreme Court granted certiorari and reversed.[69]

Tinker pitted students' First Amendment free speech rights against school officials' need to maintain order at school.[70] Yet according to the Court, despite the "special characteristics of the school environment," neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[71] At the same time, states and school boards

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[62] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* The students also sued for nominal damages. *Id.*

[67] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).

[68] *Tinker*, 393 U.S. at 505.

[69] *Id.* at 514.

[70] *See id.* at 507 ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of school authorities."); *see also* Papandrea, *supra* note 58, at 1039 ("The Supreme Court viewed the case as a conflict between the speech rights of students and the need for schools to control conduct in schools.").

[71] *Tinker*, 393 U.S. at 506.

still retain "comprehensive authority . . . to prescribe and control conduct in the schools" provided that this authority is exercised "consistent with fundamental constitutional safeguards."[72] Such authority is not absolute, however. Before restricting a particular viewpoint, school officials must show something "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[73] In other words, "students are entitled to freedom of expression of their views"[74] unless school officials have reasonably anticipated that the student conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"[75] or "impinge upon the rights of other students."[76]

Under *Tinker*, school officials cannot limit student speech only to officially approved expressions.[77] Public schools are not "enclaves of totalitarianism," and school officials do not "possess absolute authority over their students" on- and off-campus.[78] Students, after all, are " 'persons' under our Constitution."[79] They therefore may express their views at school with one important caveat: If their conduct—whether inside or outside of the classroom—"for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others[, then it] is, of course, not immunized by the constitutional guarantee of freedom of speech."[80] But where, as here, "the record does not demonstrate *any facts* which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred," then school officials cannot constitutionally forbid a form of student

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[72] *Id.* at 507.

[73] *Id.* at 509.

[74] *Id.* at 511.

[75] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

[76] *Id.*

[77] *Id.* at 511.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 513. This follows since the Constitution permits "reasonable regulations of speech-connected activities in carefully restricted circumstances." *Id.*

expression.[81] The students' suspensions therefore violated their First Amendment rights.[82]

2. Bethel School District No. 403 v. Fraser. High school senior Matthew Fraser delivered a speech supporting his friend's nomination for elected office before approximately six hundred high school students, including many fourteen-year-olds.[83] According to the Court, "[d]uring the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[84] As he spoke, some students hooted and yelled, some simulated the activities he alluded to, while others were embarrassed or bemused.[85] Fraser's assistant principal however was not amused. And after allowing him to explain his conduct, she not only suspended him for three days but also removed him from consideration for graduation speaker.[86]

Fraser appealed to the school district, but dissatisfied with its review, he filed suit alleging that the punishment violated his First Amendment rights and seeking injunctive relief and monetary damages.[87] In granting the injunction, the district court held that the school's disruptive-conduct rule was unconstitutionally vague and overbroad.[88] On appeal, the school justified its authority to regulate on-campus, student-activity-related speech on two grounds: First, its "interest in protecting an essentially captive audience of minors from lewd and indecent language" in school-sponsored settings, and second, "its responsibility for the school curriculum"

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[81] *Id.* at 514 (emphasis added).

[82] *Id.*

[83] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986). For the transcript of the speech, see *infra* note 195 and accompanying text.

[84] *Fraser*, 478 U.S. at 677–78. Although Justice Brennan concurred in the judgment, he found the majority's characterizations of the speech—"obscene," "vulgar," "lewd," and "offensively lewd"—overblown. *Id.* at 687 (Brennan, J., concurring in the judgment) ("Having read the full text of [Fraser's] remarks, I find it difficult to believe that it is the same speech the Court describes.").

[85] *Id.* at 678 (majority opinion).

[86] *Id.*

[87] *Id.* at 678–79.

[88] *Id.* at 679. The policy stated: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678.

allowed it to determine what language was permissible during school-sponsored activities.[89]

The Ninth Circuit, however, upheld the injunction, finding that Fraser's speech was not only "indistinguishable from the protest armband in *Tinker*" but also that his conduct did not disrupt the educational process.[90] The circuit court reasoned that "unbridled discretion to determine what discourse is decent would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."[91] The Supreme Court, however, disagreed.[92]

In reversing the Ninth Circuit, the *Fraser* Court did not rely on *Tinker*.[93] Instead, the Court noted that even after *Tinker* nothing in the First Amendment prohibits school officials from forbidding "vulgar and lewd speech" that "would undermine the school's basic educational mission."[94] According to the Court, the school's basic mission is to "prepare pupils for citizenship in the Republic[ ] . . . [by] inculcat[ing] the habits and manners of civility."[95] Underlying the school's basic mission are "fundamental values" of tolerance for divergent or unpopular political and religious views as well as "consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students."[96] The true work of schools, therefore, is "[t]he inculcation of these values."[97]

Citing *New Jersey v. T.L.O.*,[98] a Fourth Amendment student-search case, the Court reiterated: "[Students' rights] in public school are not automatically coextensive with the rights of adults

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[89] *Id.* at 680.

[90] *Id.*

[91] *Id.* (citation omitted) (internal quotation marks omitted).

[92] *Id.*

[93] *See* Morse v. Frederick, 551 U.S. 393, 405 (2007) ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.").

[94] *Id.* at 685.

[95] *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968) (internal quotation marks omitted)).

[96] *Id.*

[97] *Id.* at 683.

[98] 469 U.S. 325 (1985).

in other settings."[99] And when school officials act *in loco parentis*,[100] they may do so to "protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."[101] After all, "schools must teach by example the shared values of a civilized social order."[102] The Court therefore concluded that determining the appropriate manner of speech for a classroom or school assembly is the province of the school board.[103]

3. Hazelwood School District v. Kuhlmeier. Principal Robert Reynolds reviewed the page proofs of each edition of *Spectrum*, the high school newspaper, before publication.[104] Three days before the May 13th edition's printing deadline, he objected to two stories.[105] Believing that the authors could not change the stories before the deadline and since any printing delay would push *Spectrum*'s publication date after the school year's end, he excised the pages containing the objectionable stories.[106] In addition to the objectionable stories, the deleted pages contained other, non-objectionable stories.[107]

Three student writers for *Spectrum* filed suit in federal district court seeking injunctive relief, monetary damages, and a declaration that Reynolds violated their First Amendment rights.[108] The district court rejected the students' claims, finding that Reynolds's actions were reasonable under the circumstances.[109] The court held that school officials can impose

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[99] *Fraser*, 478 U.S. at 682.

[100] "*In loco parentis*" means "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." BLACK'S LAW DICTIONARY 858 (9th ed. 2009); *see also* Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 694 (1987) ("[T]eachers and administrators acting in daily roles of temporary but de facto child custody *literally are standing in the place of parents* for many custodial purposes . . . .").

[101] *Fraser*, 478 U.S. at 684.

[102] *Id.* at 683.

[103] *Id.*

[104] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).

[105] *Id.*

[106] *Id.* at 263–64.

[107] *Id.* at 264 n.1. These articles were only deleted because they were on the same pages as the two objectionable articles. *Id.*

[108] *Id.* at 264.

[109] *Id.* at 264–65.

restraints on student speech provided that the restriction is reasonably related to the school's educational mission.[110] But the Eighth Circuit disagreed and reversed.[111] According to the court of appeals, because *Spectrum* was a public forum, the principal could censor the newspaper's content only if it was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."[112] Again, the Supreme Court granted certiorari and reversed.[113]

The *Kuhlmeier* Court, like the *Fraser* Court, held that *Tinker*'s material-disruption standard did not apply to the facts of the case.[114] The Court nevertheless reversed, holding that, contrary to the Eighth Circuit's view, student newspapers are not public forums under the First Amendment.[115] Thus, school officials could regulate *Spectrum*'s content in any reasonable manner.[116] The Court also noted that it is "parents, teachers, and state and local school officials, and not federal judges" who are primarily charged with education.[117]

4. Morse v. Fredrick. On January 24, 2002, the Olympic Torch Relay for the Winter Games passed through Juneau, Alaska, on its way to Salt Lake City, Utah.[118] Since the Torch's path crossed right in front of the high school, Principal Deborah Morse permitted students and staff to observe its passing from both sides of the street.[119] Senior Joseph Frederick stood with his friends across the street from the high school.[120] As the Torch and camera crews passed him, Frederick and his friends unfurled a fourteen-

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[110] *Id.*

[111] *Id.* at 265.

[112] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1374 (8th Cir. 1968) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

[113] *Kuhlmeier*, 484 U.S. at 266.

[114] *Id.* Subsequently, the Court held "that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272–73.

[115] *Id.* at 270.

[116] *Id.*

[117] *Id.* at 273.

[118] Morse v. Frederick, 551 U.S. 393, 397 (2007).

[119] *Id.*

[120] *Id.*

foot banner that said: "BONG HiTS 4 JESUS."[121] Across the street at the high school, students could easily read this banner.[122]

Believing that this banner violated the school's policy prohibiting the encouragement of illegal drug use, Morse demanded that Fredrick and his friends put it away.[123] When Frederick refused,[124] Morse confiscated the banner and suspended him for ten days because "his speech appeared to advocate the use of illegal drugs."[125] After appealing his suspension to the local board of education, Frederick filed suit alleging that his suspension violated the First Amendment.[126] The district court granted summary judgment for the school officials; however, the Ninth Circuit reversed because the speech did not give rise to a "risk of substantial disruption."[127] Yet again, the Supreme Court granted certiorari and reversed.[128]

Writing for the Court, Chief Justice Roberts framed the question presented as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[129] The Court noted that school officials have an important interest in deterring drug use among America's youth.[130] In fact, Congress mandates that public schools "receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs 'convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful.' "[131] To further this goal many schools forbid students from promoting illegal drug use.[132]

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[121] *Id.*
[122] *Id.*
[123] *Id.* at 398.
[124] *Id.* Only Frederick refused to comply. *Id.*
[125] *Id.* (internal quotation marks omitted).
[126] *Id.* at 398–99.
[127] Frederick v. Morse, 439 F.3d 1114, 1121 (9th Cir. 2006).
[128] *Morse*, 551 U.S. at 400.
[129] *Id.* at 403.
[130] *Id.* at 407.
[131] *Id.* at 408 (quoting 20 U.S.C. § 7114(d)(6) (Supp. IV 2000)) (alterations in original).
[132] *Id.*

Here again, the Court did not rely on *Tinker*'s substantial-disruption test in reversing the Ninth Circuit. Rather, the Court began by distilling two basic principles from *Fraser* about public-school students' First Amendment rights.[133] First, public-school students do not necessarily have coequal rights to those of adults in other contexts.[134] Second, the *Tinker* "substantial disruption" analysis is not the sole analytical method in student-speech cases.[135] Thus, given the government's interest in deterring illegal drug use and the special characteristics of the school environment, school policies forbidding students from promoting illegal drug use—even at off-campus, school-sponsored events—do not violate students' free speech rights.[136]

B. THE THIRD AND FOURTH CIRCUITS SPLIT ON OFF-CAMPUS STUDENT SPEECH

Part I of this Note presented the facts of three recent student-speech cases and invited the reader to determine whether school officials should have the authority to punish the students' off-campus speech.[137] This Note now returns to those cases and proceeds by examining how each was decided under the Supreme Court's student-speech precedents. As discussed further below, the courts disagreed not only about how to apply the Supreme Court's on-campus or school-related student-speech holdings to off-campus, online speech, but also about whether such precedents apply at all.

1. The Third Circuit's View. Justin Layshock and J.S. both posted fake or parody profiles of their principals on MySpace.[138] The Third Circuit, sitting en banc, heard oral arguments in these cases on the same day, and, over a year later, the court issued both opinions at the same time.[139] In each case, the question presented

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[133] *Id.* at 404–05.
[134] *Id.* at 404.
[135] *Id.* at 405.
[136] *Id.* at 410.
[137] *See supra* Part I.A–C.
[138] *See supra* notes 12–19, 20–32 respectively.
[139] *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (Jordan, J., concurring) ("Our Court today issues en banc decisions in two cases

was "whether school administrators can, consistent with the First Amendment, discipline students for speech that occurs off campus."[140] Yet despite similar factual underpinnings, the outcomes in these cases diverged wildly: The *Layshock* court *unanimously* held that Layshock's punishment violated his First Amendment rights,[141] but the court in *J.S.* split 8-to-6, though still holding that J.S.'s punishment violated her First Amendment rights.[142] Underlying the divergent outcomes in these cases is a disagreement about the applicability of *Tinker* to off-campus speech.[143]

In *Layshock*, the district court found that the school officials "could not establish[ ] a sufficient nexus between Justin's speech and a substantial disruption of the school environment.' "[144] On appeal, the school district did not challenge this conclusion. Instead, it grounded its authority to punish Layshock on two alternative theories: First, the speech began on-campus, when Layshock removed his principal's photo from the school website;[145] and second, Layshock aimed his speech (i.e., the MySpace profile) at the school district and its employees, the students accessed the profile on-campus, and it was reasonably foreseeable that the principal or school officials would learn about the website.[146]

The Third Circuit rejected both arguments.[147] First, the court held that using the school district's website to procure the principal's photo "does not constitute entering the school."[148] According to the court, even though *Tinker*'s "schoolhouse gate"

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with similar fact patterns."), *cert. denied*, 132 S. Ct. 1097 (2012).

[140] *Id.*

[141] *Id.* (majority opinion).

[142] 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).

[143] *Layshock*, 650 F.3d at 220 (Jordan, J., concurring) ("The issue is whether the Supreme Court's decision in [*Tinker*] can be applicable to off-campus speech.").

[144] *Id.* at 214 (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007)) (alteration in original).

[145] *Id.*

[146] *Id.*

[147] *Id.* at 219.

[148] *Id.*

extends beyond the physical boundaries of the school's property,[149] this does not mean that school officials can—absent a material or substantial disruption on-campus—reach and punish a student's expressive conduct at home.[150]

Furthermore, the court noted that all lewd or offensive speech that makes its way onto campus cannot be regulated under *Fraser* because *Fraser* applies only to on-campus speech.[151] In fact, the Third Circuit held that Layshock's punishment could be justified only if he created a "foreseeable and substantial disruption of school."[152] The court expressed concern with allowing school officials to punish Layshock-like conduct:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish [Layshock] for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent . . . .[153]

Having unanimously found in favor of the student in *Layshock*, the Third Circuit began its opinion in *J.S.* by noting that "[t]he First Amendment unquestionably protects the free speech rights of students in public school."[154] Yet post-*Tinker* these rights are

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[149] *See id.* at 216 ("*Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard.").

[150] *See id.* (holding that the First Amendment cannot "tolerate the School District stretching its authority into [Layshock's] grandmother's home and reaching [him] while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there").

[151] *Id.* at 219 ("*Fraser* does not allow the School District to punish Justin for expressive conduct which occurred outside of the school context." (citing 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."))).

[152] *Id.*

[153] *Id.* at 216.

[154] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

"applied in light of the special characteristics of the school environment, and thus the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[155] Courts, therefore, must balance students' First Amendment rights with the need for school officials to "maintain an appropriate learning environment."[156]

According to the Third Circuit, *Tinker* established the framework for student-speech cases.[157] Under this framework, "school officials must demonstrate that 'the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school' " before forbidding the expression of particular opinions.[158] While school officials may not forbid unpopular opinions simply because they are disquieting,[159] they also need not wait until a substantial on-campus disruption occurs before acting.[160] But when school officials do act in advance of an on-campus disruption, there must be a "specific and significant fear of disruption, not just some remote apprehension of disturbance."[161]

Like in *Layshock*, the district court found that J.S.'s conduct did not result in a substantial or material disruption at school.[162] On appeal, however, the school officials argued that *Tinker* justified punishing J.S.'s conduct since her conduct reasonably created a risk for a material or substantial disruption of school activities.[163] As noted, the Third Circuit disagreed.[164]

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[155] *Id.* (citations omitted) (internal quotation marks omitted).

[156] *Id.*

[157] *Id.* For the Third Circuit, the Supreme Court's decisions in *Fraser*, *Kuhlmeier*, and *Morse* represent exceptions to *Tinker*'s general rule. *Id.* at 927.

[158] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[159] *Id.*

[160] *Id.* at 928 (citing cases from the Second, Sixth, and Ninth Circuits).

[161] *Id.* at 926 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001)) (internal quotation marks omitted). At the same time, "absolute certainty" is not required for school officials' prognostications concerning future on-campus substantial disruptions. *Id.* at 928.

[162] *Id.* at 928.

[163] *Id.*

[164] *Id.* at 931 ("The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile."). Although the Third Circuit held that J.S.'s speech

In support of its conclusion, the Third Circuit contrasted the facts of *J.S.* with the facts drawn from Justice Black's dissent in *Tinker*. The court highlighted the following from Justice Black's opinion:

> [T]he [ ] armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with [a protesting student] who wore her armband for her 'demonstration.'[165]

Against this factual backdrop, the court contrasted the profile J.S. created that contained "indisputably vulgar" content and used a photo of her principal from the school's website.[166] The Third Circuit then concluded: "If *Tinker*'s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' neither can J.S.'s profile, despite the unfortunate humiliation it caused for [her principal]."[167]

2. The Fourth Circuit's View. Despite creating the S.A.S.H. MySpace group at home and neither "discuss[ing] the webpage or its contents at school" nor "encourag[ing] other students to access the webpage during school hours,"[168] the Fourth Circuit held that

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did not violate *Tinker*, it did not decide whether *Tinker* itself actually applies to off-campus speech. *Id.* at 926. Five judges from the majority joined a concurrence arguing that *Tinker* does not apply to off-campus speech and "that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936 (Smith, J., concurring).

[165] *Id.* at 928 (majority opinion) (second and third alterations in original) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 517–18 (1969) (Black, J., dissenting)).

[166] *Id.* at 929.

[167] *Id.* at 929–30 (quoting *Tinker*, 393 U.S. at 514). The Third Circuit also noted that the *Tinker* majority held, despite Justice Black's dissent, that there were not "*any facts*" to support school official prognostications of substantial or material disruptions. *Id.* at 929.

[168] Petition for Writ of Certiorari at 2, Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095

Kowalski's ten-day school and ninety-day social suspensions did not violate her First Amendment speech rights.[169] The court reasoned that "schools have a duty to protect their students from harassment and bullying"[170] analogous to their "responsibility to provide a safe environment for students free from messages advocating illegal drug use."[171] This duty, therefore, entails allowing school officials to prevent and punish any harassment or bullying—notwithstanding the "bedrock" First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[172] In other words, school officials are not required to tolerate student speech—even off-campus student speech—that attacks other students and that fails to show "any concern" for the other students' reactions, particularly when the school is attempting to inculcate the " 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.' "[173] After all, public school students' First Amendment rights are not coequal to those of adults in other contexts.[174]

After analyzing the Supreme Court's student-speech jurisprudence, the Fourth Circuit concluded that under *Tinker* "public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[175] And while the Fourth Circuit was "confident" that based on *Tinker* Kowalski's speech was "immune from First Amendment protection,"[176] the court also noted that the S.A.S.H. website's "targeted, defamatory nature" created a foreseeable risk

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(2012) (No. 11–461), 2011 WL 4874091, at *2.

[169] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572–73 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

[170] *Id.* at 572.

[171] *Id.* (citing Morse v. Frederick, 551 U.S. 393, 425 (2007) (Alito, J., concurring)).

[172] *Id.* at 571 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)) (internal quotation marks omitted).

[173] *Id.* at 573 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[174] *Id.* at 572 (citing Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[175] *Id.*

[176] *Id.*

of substantial on-campus disorder and disruption.[177] After all, since the target and most of the members of the S.A.S.H. group were students, Kowalski's speech would likely "reach the school via computers, smartphones, and other electronic devices."[178] Thus, unless school officials intervened, the S.A.S.H. group created a "potential for continuing and more serious harassment of Shay N. as well as other students."[179] The Fourth Circuit, therefore, held that school officials could punish Kowalski's speech, "*regardless of where her speech originated*, because the speech was materially and substantially disruptive in that it interfered with the schools' work and collided with the rights of other students to be secure and to be let alone."[180] The court further explained that even if no actual, on-campus disruption occurred, the same conclusion would follow because the risk of a substantial on-campus disruption was reasonably foreseeable following Kowalski's speech.[181]

III. ANALYSIS

Both Third Circuit cases were consolidated into one appeal to the United States Supreme Court.[182] The Fourth Circuit case was also appealed.[183] Here, this Note argues that the Supreme Court should have granted both appeals and should have addressed the following questions:

> (1) Whether *Fraser* applies to lewd, vulgar, or offensive off-campus student speech that reaches the

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[177] *Id.* at 574.

[178] *Id.*

[179] *Id.* The Fourth Circuit also noted that Shay N. missed school to avoid further abuse. *Id.*

[180] *Id.* at 573–74 (emphasis added) (internal alterations and quotation marks omitted). The Fourth Circuit based its decision principally on the fact that "[Kowalski's] speech interfered with the work and discipline of the school." *Id.* at 574.

[181] *Id.* at 574.

[182] Petition for Writ of Certiorari at 1, Blue Mountain Sch. Dist. v. Snyder, 132 S. Ct. 1097 (2012) (No. 11–502), 2011 WL 5014761, at *1.

[183] Petition for Writ of Certiorari at 1, Kowalski v. Berkeley Cnty. Schs., 132 S. Ct. 1095 (2012) (No. 11–461), 2011 WL 4874091, at *1.

> school but does not cause a material or substantial disruption;[184]
> (2) To what extent, if any, does *Tinker* apply to off-campus speech;[185]
> (3) Under Tinker, when can school officials forecast that off-campus speech is reasonably likely to materially and substantially interfere with the school's work;[186] and
> (4) To what rights does *Tinker*'s second prong refer?[187]

A. *FRASER*'S APPLICABILITY TO OFF-CAMPUS STUDENT SPEECH

According to the Third Circuit, *Fraser* is an "exception" to *Tinker*.[188] To support this view, the court quotes then-Circuit Judge Alito's statement in *Saxe v. State College Area School District*: "Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption."[189] School officials therefore cannot punish "expressive conduct which occurred outside of the school context."[190] In other words, as Chief Justice Roberts explained in *Morse*, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[191] The Third Circuit reasons that "[t]he

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[184] *See infra* Part III.A.

[185] *See infra* Part III.B.

[186] *See infra* Part III.C.

[187] *See infra* Part III.D.

[188] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 927 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

[189] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001), *quoted in J.S.*, 650 F.3d at 927. Now-Justice Alito reiterated this view in casting the necessary fifth vote in *Morse v. Frederick*. *See* 551 U.S. 393, 422–23 (2007) (Alito, J., concurring) (noting in addition to speech that "threatens a concrete and substantial disruption," school officials can also restrict "speech advocating illegal drug use," "speech that is delivered in a lewd or vulgar manner as part of a middle school program," and speech that "is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ" (citations omitted) (internal quotation marks omitted)).

[190] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

[191] *Morse*, 551 U.S. at 405; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring in the judgment) ("If [Fraser] had given the same speech

most logical reading of [this] statement prevents the application of *Fraser* to speech that takes place off-campus, during non-school hours, and that is in no way sponsored by the school."[192]

Yet citing *Fraser*, the Fourth Circuit takes the position that "student speech also may be regulated if it is otherwise 'vulgar and lewd.' "[193] Although deciding *Kowalski* under *Tinker*, the Fourth Circuit nevertheless opined:

> To be sure, a court could determine that speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them was in fact in-school speech. In that case, . . . its regulation would be permissible not only under *Tinker* but also, as vulgar and lewd in-school speech, under *Fraser*.[194]

Both circuits therefore agree that *Fraser* applies only to on-campus speech. Yet consider the possible disparate outcomes based on the following hypothetical. Suppose that Fraser posted the following "elaborate, graphic, and explicit sexual metaphor" supporting another student's candidacy on Facebook from his house after school:

> 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.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

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outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . .").

[192] *J.S.*, 650 F.3d at 932 n.12.

[193] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 571 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

[194] *Id.* at 573.

> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[195]

This speech is obviously targeted at persons in school. For argument's sake, assume Fraser's speech is "received by" many fellow high school students. The next day, when his Facebook "friends" see him in the hallway, some start hooting and yelling, some simulate the activities he alluded to in his Facebook status, while other students nearby seem embarrassed or bemused by their conduct. Have Fraser's friends "acted on" his off-campus speech?

If yes, then under the Fourth Circuit's view, Fraser's Facebook post—though made after school and off-campus—is punishable because it is "vulgar and lewd." In other words, speech originating off-campus and after school can *become* "on-campus speech"—and thus within the regulatory purview of school officials—based on its target audience, whether the audience receives it, and what the recipients do upon receiving it. In the Third Circuit, however, school officials could not punish Fraser's Facebook post under *Fraser*, provided that Facebook is a public forum outside of the school context.[196]

The Court should resolve this circuit split concerning whether off-campus speech can ever become "on-campus" speech proscribable under *Fraser*. Unfortunately, since both *J.S.* and *Kowalski* were decided based on *Tinker*, neither case offered the Court a direct reason to address this question.[197] But since whether *Fraser* applies to off-campus speech is a question of law,

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[195] This is a transcript of the speech that Fraser gave during the assembly. *Fraser*, 478 U.S. at 687 (Brennan, J., concurring in the judgment) (internal quotation marks omitted) (alteration in original).

[196] It is reasonable to assume that Facebook is a public forum since at least one court seemingly considered it so. *See* Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) ("For the Court to equate a school assembly to the entire internet would set a precedent too far reaching. Furthermore, the Supreme Court has recognized that '[h]ad 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))).

[197] *See supra* notes 154–67, 175–81 and accompanying text.

the Court could have simply required the parties in *J.S.* or *Kowalski* to brief this issue.[198]

Of the two views, the Third Circuit's approach most closely encapsulates the Supreme Court's precedent, and any court considering this issue should follow its lead. For example, in *Morse* the Court rejected an invitation to decide the case under *Fraser*. There, the Court found that a rule permitting school officials to proscribe plainly "offensive" speech within the meaning of *Fraser* "stretches *Fraser* too far; [*Fraser*] *should not be read to encompass any speech that could fit under some definition of 'offensive.'* "[199] In the same vein, the Third Circuit rejected the view that *Fraser* permits school officials to punish any offensive speech that makes its way to campus.[200] The Third Circuit is correct; *Fraser* should never apply to off-campus speech—whether uttered in a public forum or a private home.[201]

For this reason, all courts should eschew the Fourth Circuit's view that off-campus speech not materially disrupting on-campus school activities can become on-campus speech and thus punishable under *Fraser*[202] even if the speech targets students (as Kowalski's S.A.S.H. group did) or school officials (as J.S.'s parody profile of her principal did). *Fraser* already empowers school officials to punish "offensive" (as determined by school officials) on-campus, school-related speech. Given schools' basic mission to teach its students the habits and manners of civility, school officials can punish any of Fraser's Facebook friends who make vulgar or lewd comments (and almost certainly gestures) at

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[198] *See infra* Part III.C–D.

[199] *Morse*, 551 U.S. at 409 (emphasis added).

[200] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932–33 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). The Third Circuit also suggested that Fraser's off-campus speech would "[p]resumably" be protected even if "a school official or Fraser's fellow classmate overheard the off-campus speech, recorded it, and played it to the school principal." *Id.*

[201] The Third Circuit also suggested that two students could not be punished for making vulgar remarks made about a teacher at a private party, even if these comments were overheard by another student and reported to school officials who found the comments "offensive." *Id.* at 933.

[202] *See supra* note 194 and accompanying text.

school[203]—even if these comments do not "materially and substantially interfere with the requirements of appropriate school discipline" or "impinge upon the rights of other students."[204]

B. *TINKER*'S APPLICABILITY TO OFF-CAMPUS STUDENT SPEECH

The Fourth Circuit was unequivocal: Under *Tinker*, school officials can punish student speech "*regardless"* of where it originated if it "was materially and substantially disruptive in that it interfered with . . . the schools' work and collided with the rights of other students to be secure and to be let alone."[205] As the Supreme Court recognizes, "in most cases, *Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts."[206] According to the Fourth Circuit, *Tinker* permits school officials to punish any off-campus student speech that "eventually makes its way to the school in a meaningful way[,] . . . as long as it was reasonably foreseeable that the post would reach the school and create a substantial disruption there."[207] School officials thus could punish Kowalski's S.A.S.H. website, which targeted a fellow student using a social-networking website, since the speech foreseeably could reach the school and "impact the school environment."[208] Under the Fourth Circuit's reasoning, almost any public school student's speech on a social-networking website—whether school related or not—will foreseeably reach the school. Applying similar reasoning, several other courts apply *Tinker* to off-campus speech.[209] For example, in

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[203] *See supra* notes 94–95 and accompanying text.

[204] *See supra* notes 73–75 and accompanying text. At least under the Third Circuit's approach, where the court compares the disruption in the Fraser Facebook hypothetical to the disruption in *Tinker*, the Fraser Facebook example almost certainly does not give rise to a material or substantial disruption under *Tinker*. *See supra* notes 165–67 and accompanying text.

[205] *See supra* note 180.

[206] Morse v. Frederick, 551 U.S. 393, 425 (2007) (Alito, J., concurring).

[207] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

[208] *Id.* at 573.

[209] *Accord* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 620–24 (2011) (highlighting that, in allowing school officials to reach off-campus speech, courts "rely

Doninger v. Niehoff, the Second Circuit held that *Tinker* applies to off-campus speech that was "purposely designed . . . to come onto the campus,"[210] used "plainly offensive" language,[211] and foreseeably created "a substantial risk that [school] administrators and teachers would be further diverted from their core educational responsibilities."[212]

The Third Circuit, on the other hand, merely assumed, without deciding, that *Tinker* applies to off-campus speech.[213] A five-judge concurrence, however, argued not only that *Tinker* does not apply to off-campus speech but also—and perhaps more importantly—that when students are off-campus, they have the same First Amendment rights as adults.[214] For these judges, *Tinker*'s central holding is that school officials can suppress some otherwise-protected speech in the school setting, "but only if it would materially and substantially disrupt the work and discipline of the school."[215] Moreover, *Fraser*, *Kuhlmeier*, and *Morse* are exceptions to *Tinker* that apply *solely* to on-campus speech.[216] And yet, these judges also recognize that in some extreme cases "schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate.' "[217]

To illustrate the absurdity of applying *Tinker* to off-campus speech, consider again Fraser's hypothetical Facebook post.[218]

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mainly on *Tinker*'s protective justification, focusing on whether the speech was reasonably likely to reach school and cause a substantial disruption there").

[210] 527 F.3d 41, 50 (2d Cir. 2008) (citation omitted) (internal quotation marks omitted).

[211] *Id.* In this case, the student posted a request on her personal blog that essentially asked "others [to] call the 'douchebags' in the central office to 'piss [them] off more.' " *Id.* at 51 (second alteration in original).

[212] *Id.*

[213] *See supra* note 164.

[214] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, J., concurring), *cert. denied*, 132 S. Ct. 1097 (2012).

[215] *Id.* at 937 (citation omitted) (internal quotation marks omitted).

[216] *Id.* To the extent that *Kowalski* impugns this statement's veracity, it bears noting that the Fourth Circuit decided *Kowalski* after *J.S.*, and its statements about *Fraser*'s applicability to off-campus speech are arguably dicta.

[217] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). All five judges concurring in *J.S.* joined the court's opinion in *Layshock*.

[218] *See supra* note 195 and accompanying text.

Suppose that several students take issue with the post and cause a significant disturbance at school the next day, but Fraser himself is not disruptive.[219] If *Tinker* applies to off-campus speech, school officials can punish Fraser because a substantial disruption occurred. As the five-judge concurrence pointedly concluded: "That cannot be, nor is it, the law."[220]

As a final point, suppose that the candidate's father and not Fraser makes the Facebook post that causes a substantial disruption at school. If *Tinker* applies to off-campus speech, is there any principled reason to forbid school officials from punishing him? The five-judge concurrence correctly asserted that "using *Tinker* to silence such speakers is absurd."[221] But does this absurdity arise from attempting to apply *Tinker* to adults or from extending *Tinker* beyond the public schoolhouse setting? For the five-judge concurrence, it was "from the antecedent step of extending *Tinker* beyond the public-school setting to which it is so firmly moored."[222] This is the correct view.

But if there are times when schools may punish conduct occurring outside of school, such as "a case where a student sent a disruptive email to school faculty from his home computer"[223]—is the on-campus/off-campus distinction meaningful? After all, given the internet's "somewhat 'everywhere at once' nature,"[224] school officials' authority over student speech cannot merely turn on where it originates.[225] At the same time, "bare foreseeability" that the speech will reach the school sets the bar too low and "risk[s] ensnaring any off-campus expression that happened to discuss school-related matters."[226] Not even the Fourth Circuit uses a bare

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[219] The five-judge concurrence in *J.S.* considers a similar hypothetical. *J.S.*, 650 F.3d at 939.

[220] *Id.*

[221] *Id.* at 940.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*; *see also supra* note 206 and accompanying text.

[226] *J.S.*, 650 F.3d at 940.

foreseeability standard—it also requires reasonable foreseeability that the speech will create a substantial disruption at school.[227]

Accordingly, while both the Third and Fourth Circuits agree that *Tinker* permits school officials to punish student speech originating off-campus in some cases, the Supreme Court nevertheless should clarify what types of school-related speech school officials can punish. The Court could have addressed this question through either appeal, since the speech punished in both cases originated off-campus and related to either school officials (principals) or other students.[228]

There was, however, a major factual difference between these appeals: The Fourth Circuit found that Kowalski's S.A.S.H. website materially and substantially disrupted the school's work and collided with Shay N.'s rights to be secure and let alone,[229] whereas the Third Circuit found that J.S.'s vulgar and offensive parody profile of her principal neither created a material or substantial disruption of the school's work nor permitted school officials to reasonably anticipate such a disruption.[230] This raises an additional question: When is speech substantively and materially disruptive?

C. AN ACTUAL OR NASCENT RISK OF A MATERIAL OR SUBSTANTIAL DISRUPTION

The *Tinker* Court held that school officials could not punish students for wearing black armbands as long as they did not create an "actual or nascent" disruption that interfered "with the schools' work" or "colli[ded] with the rights of other students to be secure and to be let alone."[231] Interestingly, because the Supreme Court has never upheld a student's punishment under either of *Tinker*'s prongs,[232] its student-speech cases offer lower courts scant guidance regarding how to analyze student-speech cases under

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[227] *See supra* note 207 and accompanying text.
[228] *See supra* Part I.A–C.
[229] *See supra* notes 176–81 and accompanying text.
[230] *See supra* notes 166–67 and accompanying text.
[231] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).
[232] *See, e.g.*, cases discussed *supra* Part II.A.*2–4*.

these prongs. And as *Kowalski* and *J.S.* highlight, lower courts not only determine whether school officials could forecast the risk for a material or substantial disruption under different standards, they also base their factual findings on different analytical approaches.

For example, to determine whether an actual material or substantial disruption occurred, the Third Circuit compares the on-campus disruptions described in *Tinker*'s record—which did not provide school officials with *any facts* to reasonably forecast a material or substantial disruption—with the disruptions in the present case's record.[233] This is a high standard, since *Tinker*'s record revealed that the students' speech "wrecked" a math class and led to threats, counter-threats, and mockery.[234] The Fourth Circuit, on the other hand, does not compare the disruptions in *Tinker*'s record to the case on appeal; in fact, the court found an actual, material disruption both because Shay N. missed school to avoid further abuse by those in the S.A.S.H. group and more serious harassment was possible without intervention by school officials.[235] Compared to the Third Circuit's standard, the Fourth Circuit's approach presents a much lower threshold.

These courts also applied different tests to determine whether school officials could reasonably forecast a material and substantial disruption. Quoting then-Circuit Judge Alito, the Third Circuit stated: "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."[236] The Fourth Circuit, on the other hand, requires only that the speech is foreseeably likely to reach the school—which almost all student speech on social-networking websites will be—and that the speech will foreseeably cause a material and substantial disruption

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[233] *See supra* notes 162–67 and accompanying text.

[234] *Tinker*, 393 U.S. at 517–18 (Black, J., dissenting).

[235] *See supra* notes 176–79 and accompanying text.

[236] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001) (internal quotation marks omitted)), *cert. denied*, 132 S. Ct. 1097 (2012). *Tinker* itself counsels that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508.

there.[237] Given the Fourth Circuit's lower threshold for substantial disruption, however, all student speech on social-networking sites that could "foreseeably" cause students to stay home out of embarrassment or discomfort is punishable.[238] The Fourth Circuit's view sets the bar too low and underscores the existence of a circuit split. The Court therefore should have granted certiorari in these cases and clarified when, and for what types of off-campus speech, school officials can punish students consistent with *Tinker*.

D. WHEN FREE SPEECH RIGHTS COLLIDE WITH THE RIGHT TO BE LEFT ALONE

In *Kowalski*, the Fourth Circuit found that the S.A.S.H. group's speech collided with Shay N.'s rights to be secure and let alone.[239] For support, the Fourth Circuit relied on the Court's oft-quoted statement in *Tinker*:

> But 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.[240]

On its face, this quote supports the broad application of *Tinker* to off-campus student speech that invades *anyone*'s rights. But as the five-judge concurrence in *J.S.* correctly highlighted, reading this quote in context "it is clear that the phrase 'or out of it' does not mean 'out of school' but rather 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.' "[241] And as the majority in *J.S.* noted, if the phrase "rights of others" is

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[237] *See supra* notes 205–07 and accompanying text.
[238] *See supra* note 43 and accompanying text.
[239] *See supra* note 193 and accompanying text.
[240] *Tinker*, 393 U.S. at 513 (emphasis added).
[241] *J.S.*, 650 F.3d at 937–38 n.1 (Smith, J., concurring).

broadly construed, then students' First Amendment rights could be eviscerated.[242]

Only the Supreme Court can definitively clarify which view is correct. In doing so, the Court should articulate what rights cannot be invaded by off-campus student speech. Students should have the right to attend school without verbal or physical harassment, and school officials should have the authority to protect students from such conduct when they are on-campus.[243] Moreover, harassed students have the right to seek private remedies for violations of their rights—even if the violation occurs off-campus.[244] Whether school officials should have the authority to proscribe off-campus speech that collides with the rights of others under *Tinker* still awaits Supreme Court review. The Court missed an opportunity with the cases recently decided by the Third and Fourth Circuits to reaffirm that students have broad First Amendment rights when they are off-campus and not engaged in a school-related activity. For now, lower courts are left to wrestle with these questions under unclear standards.

IV. CONCLUSION

No one—especially not a public school student—has absolute First Amendment free-speech rights.[245] The Supreme Court's precedent is clear: Public school students *when at school or a school-related activity* do not have free speech rights that are necessarily coextensive with the rights that adults have in other places.[246] This is not surprising. Public schools have special characteristics and school officials have certain responsibilities,

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[242] *Id.* at 931 n.9 (majority opinion).

[243] *See supra* Part II.A.*1–2*.

[244] *See* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 225 (2009) ("[O]ff-campus remedies (civil lawsuits) already exist for the victims of off-campus speech.").

[245] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (holding that not even adults have an "absolute interest . . . in reaching an unlimited audience" with their speech (citing Ginsberg v. New York, 390 U.S. 629, 634 (1968))).

[246] *See supra* notes 133–34 and accompanying text.

such as teaching students the manners of civility required for a well-ordered society.[247]

Yet this duty can stretch only so far. After all, *Tinker* is equally clear: School officials do not have absolute authority over students, even when they are *at school*.[248] In this way, school officials' authority over students is not coextensive with parental authority. In *New Jersey v. T.L.O.*, the Court affirmed as much by denying school officials parent-like immunity for their actions: School officials are state actors.[249] But not all the time.[250] Post-*T.L.O.*, the Court has reaffirmed that for some actions school officials still stand in the place of parents (i.e., *in loco parentis*).[251] So when school officials punish student speech, are they acting *in loco parentis*? If students are within the schoolhouse gate or on a school-related activity (e.g., a field trip), perhaps so.[252] Here again, this makes sense.

But it is hard to see why school officials' authority over student speech would extend beyond these school-related contexts and invade students' speech at home or posted on social-networking sites away from school. At least for some school officials who claim the authority to reach such speech, this view likely rests on a misunderstanding of their role as *in loco parentis* actors.[253]

For example, unlike school officials, parents can prescribe rules governing their children's speech that applies no matter where it occurs. So if school officials' authority over student speech is

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[247] *See supra* notes 3–5 and accompanying text.

[248] *See supra* note 6 and accompanying text.

[249] New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985) ("In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.").

[250] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (noting that while school officials' authority is not correlative with parental authority, school officials nevertheless "ac[t] *in loco parentis* with the power and indeed the duty to inculcate the habits and manners of civility" for many purposes (alteration in original) (citation omitted) (internal quotation marks omitted)).

[251] *Id.*

[252] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (stating that when school officials act *in loco parentis*, they may proscribe otherwise-protected First Amendment speech "to *protect* children" who have been left in their charge (emphasis added)).

[253] *See supra* note 100.

analogous to parental authority, then their reach is unlimited. This is not, nor can it be, the law. After all, school officials do not have the authority to punish *every* type of student speech *no matter* where it occurs; in fact, they cannot even punish every type of speech that occurs *at school*.[254]

The appropriate analogy between school officials' and parental authority is that which parents have over a visiting child's speech. Just because the visiting child's parents permit certain types of speech, it does not follow that the parents must permit it in their home. If the visiting child violates their speech rules, then they can punish this speech to the extent that the visiting child's parents consent. Where egregious violations occur, the parents can send the visiting child home. But once the visiting child returns home, whatever authority the parents had to proscribe the visiting child's speech is gone. This should represent the limits on school officials' authority. No matter what duty school officials have or how important it is, their authority is not limitless.

The Supreme Court's student-speech precedents do not currently give enough guidance as to the scope of school officials' authority.[255] This needs to change. The Third and Fourth Circuit student-speech cases afforded the Court the opportunity to address the shortcomings in its student-speech precedents. But by denying certiorari in these cases, the Court missed a golden opportunity.

Until the Court grants certiorari in an off-campus student-speech case and clarifies its student-speech precedent, courts should follow the Third Circuit's approach. First, courts should unambiguously find that *Fraser* does not apply to off-campus speech, and more importantly, that no off-campus speech can ever become "on-campus" speech punishable under *Fraser*—contrary to the Fourth Circuit's suggestion. Second, while courts should find that *Tinker* allows school officials to regulate speech beyond the bricks and mortar of the schoolhouse gate, they should also conclude that this reach is limited to cases where the student's speech reasonably creates a threat to the on-campus safety of students or school officials. That is, courts should not interpret *Tinker* so that it

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[254] *See supra* Part II.A.*1* (discussing *Tinker*).

[255] Tomain, *supra* note 49.

applies to all off-campus student speech that could offend other students or even devastate their well-being. By interpreting *Tinker* this way, school officials' authority to regulate off-campus speech will be analogous to that which parents have over a visiting child.

Of course, this does not mean that school officials cannot punish on-campus speech. Nor does it mean that they cannot respond to a student's malicious off-campus, online speech with on-campus speech. For instance, school officials could hold a general assembly to discuss such uncivil online speech. After all, it is within their purview as educators—during school hours—to instruct children on how they should act in a well-ordered society. But school officials cannot police all potentially disquieting speech that occurs outside the schoolhouse gate. The Constitution grants students free speech rights, including the right to say moronic, offensive, vulgar, and even hurtful things to and about others.[256] But more importantly, nothing in the Constitution grants anyone the right not to be offended—period.[257]

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[256] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (holding that speech in a public place on matter of public concern is entitled to "special protection" under the First Amendment, even when it involved picketing at the funeral of a United States service member).

[257] *See* Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1054 (9th Cir. 2006) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[T]his unprecedented—and unsupportable—expansion of the right to be let alone as including a right not to be offended has no basis in *Tinker* or its progeny."); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) (striking down on First Amendment grounds a ban on virtual child pornography and noting that "[i]t is . . . well established that speech may not be prohibited because it concerns subjects offending our sensibilities"); Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." (quoting FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (internal quotation marks omitted))); Cohen v. California, 403 U.S. 15, 18 (1971) (holding that "the State certainly lacks power to punish" even "offensive" speech unless the speech was intended to incite disobedience or disruption); Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967) (noting that, "however noxious [the mailbox's] contents often seem," "[t]he short, though regular, journey from mailbox to trash can provides an appropriate remedy").