NOTES

Tinker Tortured: The Scope of Student Off-Campus Viral Speech Rights in the Federal Circuits

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INTRODUCTION

On January 15, 2016, John Reinhart published a memorandum on the Easton Area School District's website for students' parents to read.[2] Reinhart was (and is still) the superintendent of the school district, which is located in Easton, Pennsylvania.[3] The memorandum concerned a recent outbreak of student fights and confrontations that had transpired at the schools.[4] In fact, twelve fights had occurred at the district's middle and high schools in less than ten days.[5] School administrators were taking every course of action available to curb the eruption of student brawls.[6] To wit, additional adult supervisors were authorized to help secure areas of heavy student movement, such as hallways and bus lots.[7] Moreover, every single student involved in the fights was suspended, with some expulsion proceedings still pending at the time the letter was written—both punishments that Superintendent Reinhart described as a last resort.[8]

Under normal circumstances, such extensive actions on behalf of the school administration might have been more than enough to end the surge of fights and return the school to normalcy. But it was not enough here.[9] In the web memorandum, Reinhart urged that "District personnel [could not] act alone in

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[2] Letter from John Reinhart, Superintendent of Sch., Easton Area Sch. Dist., to parents, guardians, and students (Jan. 15, 2016), http://www.eastonsd.org/data/files/gallery/ContentGallery/Parent_Letter_11516.PDF.

[3] *Id.*; *Administration*, EASTON AREA SCH. DISTRICT, http://www.eastonsd.org/about-easd/administration/index.aspx (last visited May 22, 2016).

[4] Reinhart, *supra* note 3.

[5] Manual Gamiz, Jr., *Social Media Blamed for a Dozen Fights at Easton Schools*, MORNING CALL (Jan. 16, 2016, 3:42 PM), http://www.mcall.com/news/breaking/mc-c-easton-school-fights-20160116-story.html.

[6] Reinhart, *supra* note 3; *see also* Gamiz, Jr., *supra* note 5.

[7] *See* Keleigh Gibbs, *Social Media Fueling 'Physical Altercations' in Easton Area School District*, 69 NEWS WFMZ-TV (Jan. 16, 2016, 6:29 PM), http://www.wfmz.com/news/news-regional-lehighvalley/social-media-fueling-physical-altercations-in-easton-area-school-district/37473136; *see also* Reinhart, *supra* note 3.

[8] Rudy Miller, *12 Fights in 10 Days Spurred by Social Media at Easton Area Schools,* LEHIGHVALLEYLIVE (Jan. 16, 2016, 9:01 AM), http://www.lehighvalleylive.com/easton/index.ssf/2016/01/social_media_comments_instigat.html.

[9] *See id.* ("Efforts to quell the violence are stalled in part because the messages sent on Kik disappear before administrators can view them.").

remediating this issue,"[10] and indicated that parents would have to play a primary role in extinguishing the fights that were occurring on a daily basis.[11] While parents of students certainly maintain a crucial responsibility in how their children behave on school grounds, to some extent, they are powerless once their child is out the door. The fights in the Easton Area schools, for instance, presumably occurred during normal work hours while the parents were likely miles away from the school grounds. Why then did Superintendent Reinhart repeatedly stress the vital importance of school parents in ending the violent outbursts?[12] Because many of the fights had in part originated off school grounds.[13] Every single one of the fights had been instigated by prior social media posts and comments made by students on platforms such as Instagram, Snapchat, and Twitter.[14] Many of the posts had been made while the students were away from the school.[15]

One reaction to the dilemma faced by the Easton Area School District Administration might be that school administrators should get ahead of the eight ball by punishing the students who made the social media posts immediately, instead of waiting for a fight to occur before taking disciplinary actions. At first blush, this seems like a perfectly reasonable approach to redressing a situation that puts students' wellbeing at risk. But the implications of punishing a student for viral speech that occurred away from school grounds before any tangible disruption in the school occurred makes some uncomfortable, including at least one circuit judge.[16] The Free Speech Clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[17] At least one survey suggests that many Americans think freedom of speech is the most important freedom that U.S. citizens enjoy.[18] Moreover, in the same survey, a majority of Americans responded that they believed that high school students should be free to exercise free speech to the same degree as adults.[19] Deciding cases with freedom of speech implications for which student lives are obviously at stake has generally been a more clear-cut decision in favor of the school districts, and rightfully so.[20] But how should courts reconcile the benefits of the "marketplace of ideas" theory of free

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[10] *See* Reinhart, *supra* note 3.

[11] *See id.*

[12] *See id.*

[13] *See* Miller, *supra* note 8.

[14] *Id.*

[15] *Id.*

[16] *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–22 (3d Cir. 2011) (Jordan, J., concurring).

[17] U.S. CONST. amend. I.

[18] *34% Say First Amendment Goes Too Far in Protecting Rights*, FIRST AMEND. CTR. (July 16, 2013), http://www.firstamendmentcenter.org/34-say-first-amendment-goes-too-far ("Americans identified freedom of speech as the most important freedom that citizens enjoy (47%).").

[19] *Id.*

[20] *See, e.g.*, Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069–70, 1072 (9th Cir. 2013); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 990 (9th Cir. 2001).

speech[21] with the possibility of preventing the less dangerous, but nevertheless disruptive, incidents[22] that disturb the school day?

The question has become more complicated as advancements in technology have transformed and multiplied the fact patterns that courts are faced with. Perhaps the most prominent example in the student speech context is that of an academic institution's authority to punish its students for off-campus viral speech, in light of students' abilities to interact with one another regardless of geographic proximity to either the school's location or the students themselves.[23] While the Supreme Court has taken the firm position that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[24] a different question arises when students' online or digital conduct outside of the school nevertheless impacts or threatens what happens inside the school.[25] In this light, to what extent should courts be willing to shelter students' freedom of speech protection under the First Amendment from school interference?

In answering this question, the circuit courts have molded differing thresholds and used differing criterion to determine whether such speech falls within a school's authority to control or hand down punishment to its students. This note analyzes the advantages and shortcomings of these varying circuit standards and advocates for the most effective and beneficial method for determining the scope of a school's authority over off-campus viral speech under the First Amendment. Part I discusses the Supreme Court's rule (and its accompanying exceptions) concerning student speech rights while on-campus and the common struggle of circuit courts in applying the Court's precedent in off-campus speech cases. Part II provides an analysis of the thresholds and criteria the federal circuits have developed in their

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[21] The "marketplace of ideas" theory is generally defined by an idea that "robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems." Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2–3 (1984). The Court seemed to use this theory as a basis for their decision in a landmark student free speech case. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[22] One example of such incidents could include cyber-bullying. *See generally* Chris Brooke, *One in Four Children Targeted by Cyber Bullies With 350,000 Suffering Persistent Torment*, DAILY MAIL (Feb. 5, 2012, 7:10 PM), http://www.dailymail.co.uk/news/article-2096968/One-children-targeted-cyber-bullies-350-000-suffering-persistent-torment.html.

[23] *See generally* STEVE DUCK & DAVID T. MCMAHAN, COMMUNICATION IN EVERYDAY LIFE: A SURVEY OF COMMUNICATION 276 (2d ed. 2015) ("Cell phones position people as being constantly connected and constantly available to others. . . . The ability to make instant contact with another person regardless of geographic location creates a symbolic connection unlike that created by any previous communication technology."). Communication-broadening devices like cellphones have garnered a particular importance in the lives of students. *See* Katrina Schwartz, *What Happens When Teens Try to Disconnect From Tech For Three Days,* KQED NEWS (Mar. 6, 2015), http://blogs.kqed.org/mindshift/2015/03/turned-off-how-teens-respond-to-a-no-tech-challenge/ (discussing growing teen dependence on electronic devices such as cellphones).

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

[25] This line, in fact, is the exact issue the lower courts have wrestled with in student free speech cases. *See, e.g.*, cases discussed *infra* Part II.

respective seminal cases of students' off-campus, online speech.[26] Part III provides a solution that involves combining the principles set out by the Supreme Court for on-campus student speech cases with the *Brandenburg v. Ohio* test for inciting lawless action. Primarily, this combination results in a higher threshold for the student's intent behind the speech than most of the circuit courts have utilized, while raising the requisite level of foreseeability of disrupted school proceedings that school administrators must procure before discipline may occur without a constitutional violation.

I. THE *TINKER* DOCTRINE, ITS EXCEPTIONS, AND ITS REACH INTO OFF-CAMPUS AND DIGITAL STUDENT SPEECH

This section examines the judicial origin of student speech rights while on-campus and subsequent jurisprudence. Part I.A discusses *Tinker v. Des Moines Independent Community School District*, the leading Supreme Court Case on student free speech rights while on the school campus. Part I.B discusses the exceptions the Supreme Court has found regarding *Tinker*. Part I.C discusses the differing ways lower courts have utilized *Tinker* in dealing with off-campus speech cases.

A. Tinker v. Des Moines Independent Community School District

The origin of students' First Amendment rights can be traced back to Des Moines, Iowa. In December 1965, a group of Des Moines residents met at the home of Christopher Eckhardt, a high school student.[27] Adults as well as students were present at the meeting.[28] During the meeting, the group decided that they would protest the Vietnam War and demonstrate their support for its cessation through a truce.[29] All of the members agreed that they would wear black armbands in school during the holiday season, concluding on New Years Day, and would fast on two dates during the month of December.[30] The principals of the protesting students' schools learned of the plan in advance and agreed to adopt a policy that any student wearing an armband to school would be required to remove it or face

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[26] The cases considered in this note have been identified by several scholars as some of the cases that best exemplify the varying treatment that off-campus digital speech has received from the circuit courts. *See generally, e.g.*, Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, 83 MISS. L.J. 805 (2014); Anika Hermann Bargfrede, Note, *Demolishing the Schoolhouse Gate: Tinkering With the Constitutional Boundaries of Punishing Off-Campus Student Speech*, 2015 U. ILL. L. REV. 1645 (2015); Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests For Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395 (2014).

[27] *Tinker*, 393 U.S. at 504.

[28] *Id.*

[29] *Id.*

[30] *Id.*

suspension until they complied.[31] Christopher, John Tinker, and Mary Beth Tinker elected to carry out the plan despite the school policy and were all suspended from their respective schools until New Year's Day.[32]

The students' parents filed a complaint in a United States district court, alleging a violation of the students' right of free speech under the First Amendment.[33] The court dismissed the complaint, finding that the school's disciplinary actions in attempting to prevent school disturbance had been reasonable.[34] The Eighth Circuit affirmed on appeal,[35] and the Supreme Court granted certiorari.[36] The Supreme Court noted that school attendees, ranging from students to principals, do not abandon their constitutional rights at the school steps.[37] Nevertheless, the Court also acknowledged that the issue of the case arose out of the apposite compelling axioms of student free speech and the power of school administrators to regulate what happens inside the school walls.[38] The Court stated: "Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[39]

The district court held that the school principals were justified in their actions because they were based on the reasonable fear of school disruption as a result of the armbands.[40] The Supreme Court, however, decided that the mere fear of disruption was too shallow of a threshold to maintain.[41] Instead, the Court considered the relatively passive nature of the protest.[42] Dawning black armbands was not an actively disruptive gesture in the eyes of the Court.[43] A school policy seeking to avoid the "unpleasantness" that accompanies bare disagreements or differences of opinion, the Court found, was an unreasonable restriction on student free speech.[44]

The Court implemented a higher threshold for determining when school authorities may constitutionally limit student speech and expression, requiring a showing that the speech must reasonably lead school administrators "to forecast substantial disruption of or material interference with school activities."[45] In the absence of such a showing, the Court held that school administrators may not

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971 (S.D. Iowa 1966).
[35] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 383 F.2d 988 (8th Cir. 1967).
[36] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 390 U.S. 942 (1968).
[37] *Tinker*, 393 U.S. at 506.
[38] *Id.* at 507.
[39] *Id.*
[40] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).
[41] *See Tinker*, 393 U.S. at 509.
[42] *See id.*
[43] *See id.*
[44] *Id.* at 514.
[45] *Id.*

restrict students' constitutional freedom of expression inside of school walls.[46] The Court found that no such showing was made by the Des Moines school administrators, that the anti-armband policy was therefore in violation of the students' constitutional rights, and reversed and remanded to the lower courts to determine what relief should be granted.[47]

B. Limiting and Expanding the Tinker Threshold

Since the *Tinker* ruling in 1965, the Supreme Court has restricted the scope of the substantial disruption threshold in subsequent cases, while at the same time, the Circuit Courts of Appeal have wrestled with how and whether or not to broaden it in new and developing arenas where student freedom of expression and school authority to regulate collide. The Supreme Court has relied on two primary rationales in cases where it has either severely curtailed the use of the *Tinker* doctrine or held it entirely inapplicable. The first concerns the content and value of the speech, and the second concerns the mode and forum of the speech.[48] These rationales are best explained with reference to the particular opinions in which they originally appeared.

In 1983, a student at Bethel High School named Matthew Fraser gave a speech at a school assembly in which he supported his classmate in his campaign for a student elective position.[49] Throughout his speech, Fraser relied on poorly veiled

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[46] *Id.* at 509, 514. While most courts have interpreted *Tinker* under a substantial disruption standard, others have argued that a second prong exists that protects speech to the extent that it does not collide with the rights of other students. Jessica K. Boyd argues that renewed focus on this prong may help to address the student viral speech issue at the heart of this note. Jessica K. Boyd, Note, *Moving The Bully From The Schoolyard To Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under The First Amendment?*, 64 ALA. L. REV. 1215, 1237–40 (2013).

[47] *Tinker*, 393 U.S. at 514.

[48] *See* Marcus-Toll, *supra* note 26, at 3404. In this piece, the author asserts that liability for schools in student-on-student discrimination in the Title IX context has created another exception to the *Tinker* doctrine. *Id.* at 3395–96. The author contends that the standard for discrimination in this context should be used to decide student off-campus digital speech rights. *Id.* Indeed, several scholars have crafted differing threshold tests for or acknowledged the issue addressed by this Note. *See, e.g.,* Nathan S. Fronk, Note, *Doninger v. Niehoff: An Example of Public Schools' Paternalism and the Off-Campus Restriction of Students' First Amendment Rights,* 12 U. PA. J. CONST. L. 1417 (2010); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895 (2012); Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 135 (2007). While these pieces provide additional potential answers to the student viral speech issue (in addition to Jessica K. Boyd's proposed schema discussed earlier), this note contends that a test combining *Tinker* with elements from the imminent lawless action test espoused in *Brandenburg v. Ohio* provides the best solution for protecting and balancing student speech rights with school administrators' ability to maintain school proceedings. The benefits and application of such a test, including what evidence courts should consider in determining whether it has been met, is more fully discussed in Part III of this note.

[49] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677 (1986).

sexual innuendos and language to make his point.[50] The school suspended Fraser for three days, citing a previously established disciplinary rule that prohibited obscene language.[51] Fraser brought suit against the school district, alleging a violation of his right to freedom of speech under the First Amendment.[52] Relying on the *Tinker* doctrine, the Ninth Circuit affirmed the district court's holding that the school's disciplinary actions against Fraser violated his First Amendment rights, noting that it found essentially no difference between Fraser's speech and the Des Moines students' decision to wear black arm bands, and rejecting the School District's argument that the campaign speech was substantially disruptive.[53] On appeal, the Supreme Court reversed, relying on the content of the speech itself, stating that "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[54]

The Court reached a similar result in *Morse v. Frederick*.[55] In 2002, at a school-sponsored event in which Juneau-Douglas High School students were excused from class to view the Olympic Torch Relay as it passed through Juneau, Alaska, a student named Joseph Frederick and other students unfurled a banner that read "BONG HiTS 4 JESUS."[56] The relay took place off-campus, but the Court nevertheless viewed it as a school sanctioned event.[57] The school principal, Deborah Morse, who was also in attendance, immediately demanded that the students remove the banner, with only Frederick refusing to comply.[58] Morse subsequently suspended Frederick for ten days because she believed Frederick had violated a school policy prohibiting any student assembly that promoted illegal drug use.[59] Frederick filed suit alleging a violation of his First Amendment rights and the district court granted summary judgment in favor of the school board and Morse;[60] but the Ninth Circuit vacated the judgment on appeal, finding that the school had not made a showing that Frederick's banner risked substantial disruption of school activities, as required by *Tinker*.[61] In reversing the Ninth Circuit's decision, the Supreme Court relied heavily on the school board and Morse's contention that the banner was aimed at promoting illegal drug use—after noting that illegal drug use by minor students was a serious and considerable problem across the nation, the Court found that the Constitution "allow[s] schools

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[50] *See id.* at 677–78.
[51] *Id.* at 678.
[52] *Id.* at 679.
[53] Fraser v. Bethel Sch. Dist., 755 F.2d 1356, 1360–61, 1365 (9th Cir. 1985).
[54] *Fraser*, 478 U.S. at 685, 687.
[55] Morse v. Frederick, 551 U.S. 393 (2007).
[56] *Id.* at 397.
[57] *Id.* at 397, 400.
[58] *Id.* at 398.
[59] *Id.*
[60] *Id.* at 399.
[61] *See* Frederick v. Morse, 439 F.3d 1114, 1115, 1124–25 (9th Cir. 2006).

to restrict student expression that they reasonably regard as promoting illegal drug use."[62]

The Court created another limit of the applicability of the *Tinker* standard in *Hazelwood School District v. Kuhlmeier*.[63] However, unlike *Fraser* and *Frederick,* the Court in *Kuhlmeier* found an exception in the vehicle of the speech, rather than the content of the speech itself. The plaintiffs in *Kuhlmeier* were former high school students in St. Louis County, Missouri, who were members of the school newspaper.[64] The newspaper, although managed by students, was largely funded by the St. Louis Board of Education.[65] The newspaper's practice was to submit the articles to the principal for approval prior to publication.[66] The principal objected to two particular articles that were to be published in a spring issue.[67] The first had to do with pregnant students at the high school and their experiences in handling teenage pregnancy, and the second had to do with the effects of divorce on some of the school's students.[68] The Court framed the issue differently than in *Tinker*, stating: "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[69] Instead of applying the substantial disruption standard under *Tinker,* the Court found that school administrators do not violate students' rights in implementing editorial control over student speech when the school itself is the sponsor of the mode of expression, so long as the schools actions "are reasonably related to legitimate pedagogical concerns."[70]

Despite tipping its hat to the *Tinker* substantial disruption standard in both *Frazer* as well as *Frederick,* the Court in all of these cases created, in effect, categorical exclusions for certain types or modes of speech from the protection of *Tinker* that is afforded to students. In *Frazer,* the Court created an exception to the *Tinker* rule for cases where the student speech is vulgar, lewd, or obscene.[71] In *Frederick*, the Court refused to apply the *Tinker* standard when the student speech advocated illegal drug use.[72] In *Kuhlmeier*, the Court created a tangential exception to *Tinker* in cases of school sponsored student speech. [73] Such erratic and

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[62] *Morse*, 551 U.S. at 408.
[63] Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260 (1988).
[64] *Id.* at 262.
[65] *See id.*
[66] *Id.* at 263.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 270–71.
[70] *Id.* at 273.
[71] *See* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 365–66 (2007).
[72] *See id.* at 356.
[73] *Id.* at 367–68.

inconsistent application of *Tinker* has led to sharp criticism of the Court, and appeals for a stricter usage of the substantial disruption standard.[74]

C. Extending/Limiting Tinker to Off-Campus Student Speech Cases

Adding to the confusion created by the several exceptions to *Tinker* is the fact that the Supreme Court was not instructive to lower courts in how to utilize *Tinker* in cases concerning off-campus speech. Varying uses of *Tinker* in such cases has been fragmented.[75] Some have completely adopted the *Tinker* doctrine in off-campus speech cases, such as the United States Central District of California in *J.C. v. Beverly Hills Unified School District*.[76] This case concerned a student who recorded an off-campus, derogatory conversation between two other students, the existence of which eventually became known to the student body.[77] However, other courts have plainly refused to bend students' free speech protection to the *Tinker* rationale, including the Second Circuit Court of Appeals. In *Thomas v. Board of Education,* the Second Circuit found that the *Tinker* doctrine did not apply where students had created and distributed satirical newspapers almost entirely off-campus.[78] Several courts have faced the issue of expressions of speech that are created off-campus but later brought on-campus, with many of them applying *Tinker* in such scenarios.[79] These varying results, reached by different federal courts, emphasize the difficulty in applying *Tinker's* "substantial burden" standard in off-campus speech cases, primarily due to the Supreme Court's lack of guidance.

II. FEDERAL CIRCUIT TESTS FOR PROTECTING STUDENT VIRAL SPEECH OCCURRING OFF-CAMPUS

The ever-increasing ability of students and peers to interact with one another without being in the same place,[80] coupled with an inconsistent application of the

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[74] *See, e.g.*, Matthew Sheffield, Note, *Stop With The Exceptions: A Narrow Interpretation of* Tinker *for All Student Speech Claims*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 175, 214 (2012) ("Judging all claims regarding student free speech made on school premises by a narrow application of the standard set forth in *Tinker* would have one important advantage: clarity, both for courts and school officials.").

[75] *See generally* Marcus-Toll, *supra* note 26.

[76] *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) ("[T]he geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech.").

[77] *Id.* at 1098.

[78] *See Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) ("Here, because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.").

[79] *See, e.g.*, *Beverly Hills*, 711 F. Supp. 2d at 1107. *But see* Marcus-Toll, *supra* note 26, at 3418 ("Alternatively, other courts . . . have declined to apply *Tinker*, instead analyzing regulations of such speech by considering whether the speech at issue constituted a 'true threat.'").

[80] Boyd, *supra* note 46, at 1215–16.

Tinker standard by the Supreme Court, has led to diverging treatment by the federal circuit courts of cases concerning school disciplinary action for student online or digital speech occurring off-campus. This section examines the varying tests developed in the federal circuits, in order of how protective each test is of student viral speech rights.

A. The Most Protective

The most recent federal circuit to examine the battle between student off-campus viral speech and school disciplinary authority was the Ninth Circuit, in a case called *Wynar v. Douglas County School District*.[81] Landon Wynar, a high school student at Douglas County High School in Nevada, sent several instant messages online from his home to his friends through Myspace.[82] Wynar's communications were initially humorous, but later turned dark.[83] The messages contained statements regarding weapons and ammunition that Wynar had collected over a period of time, including at least one semi-automatic rifle.[84] In the instant messages, Wynar bragged about owning the weapons, going as far as to threaten using them against specific classmates at Douglas County on a certain date.[85] Frightened, his friends reported what Wynar had stated in these instant messages to school administrators, who suspended him for ten days.[86] The school board then conducted a formal hearing.[87] The board found that Wynar was a "habitual disciplinary problem" under Nevada state law,[88] under which any student so deemed could be suspended for not more than a semester.[89] The board expelled Wynar for 90 days.[90]

Wynar sued the school district and administrators for violating his constitutional rights under the First Amendment.[91] The district court granted summary judgment for the school district, and Wynar appealed.[92] The Ninth Circuit noted that while the Supreme Court had developed extensive case law on the speech rights of students inside of the school, there was a lack of precedent regarding student freedom of expression outside of the school.[93] The Ninth Circuit

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[81] Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).
[82] *Id.* at 1065.
[83] *Id.*
[84] *Id.* at 1065–66.
[85] *Id.*
[86] *Id.* at 1066.
[87] *Id.*
[88] *See id.* Landon was charged under a Nevada statute specifically dealing with "habitual disciplinary problem[s]." NEV. REV. STAT. ANN. § 392.466(3) (West, Westlaw through the end of the 78th Reg. Sess. (2015) and 29th Spec. Sess. (2015)).
[89] *Wynar*, 728 F.3d at 1066.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1067.
[93] *Id.*

went on to acknowledge what it considered the most comparable case it had ruled on in the past, *LaVine v. Blaine School District*.[94] In *LaVine,* the Ninth Circuit considered the constitutionality of expelling a student from school on a temporary, emergency basis as a result of a poem he had written at home, away from the school campus.[95] The poem, written in first-person, expressed material about a school shooting and committing suicide.[96] Although the poem was written entirely at home, the student eventually brought the poem to school and showed it to his English teacher, which ultimately led to the school's decision to expel the student.[97]

Finding that none of the established exceptions to the *Tinker* standard were present in the case, the Ninth Circuit in *LaVine* decided that the school could have reasonably forecasted substantial disruption as a result of the speech, and no First Amendment violation had occurred.[98] In *Wynar*, the Ninth Circuit noted that other courts interpreting *LaVine* had used it to support the theory that *Tinker* is applicable to student speech regardless of whether the speech occurs on or off of the school campus.[99] Disagreeing with this understanding and treatment of *LaVine,* the Ninth Circuit stated that *LaVine* strictly addressed the situation in which a student "creates" speech or expression at home, but later brings the expression to the school campus.[100] Although noting that this was not a trivial distinction, the Ninth Circuit extended the analysis it had used in *LaVine* in deciding *Wynar* by focusing on the physical harm that the speech threatened.[101]

The court distinguished *Wynar* (and *LaVine*) from cases that other circuits had decided which also concerned student online communications and school disciplinary authority.[102] These other cases concerned arguably less serious and perilous subject matter than what was at issue in *Wynar* and *LaVine* (to wit, a student parodying his school principal or making fun of fellow students online).[103] The Ninth Circuit focused on the physical and potentially fatal danger that surrounded Wynar's online communications to his friends, and then made "explicit what was implicit in *LaVine*: when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."[104] The Ninth Circuit went on to find that these requirements had been met and held that the school district did not violate Wynar's constitutional rights in suspending him for his off-campus communications.[105]

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[94] *Id.* (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001)).
[95] *LaVine*, 257 F.3d at 984–85.
[96] *Id.* at 983–84.
[97] *Id.* at 984–86.
[98] *See id.* at 990–92.
[99] *Wynar*, 728 F.3d at 1068.
[100] *Id.*
[101] *Id.*
[102] *See id.* at 1068–69.
[103] *See id.*
[104] *Id.* at 1069.
[105] *Id.* at 1070–72.

Essentially, then, the Ninth Circuit's holding remains close to the standard set out in *Tinker*, but adds a second, qualifying requirement that the speech involve some threat of violence occurring on the school campus. The Ninth Circuit was especially concerned with the escalated frequency of violent attacks at schools, specifically mentioning the shootings at Columbine High School, Santee High School, and Newtown Elementary School.[106] In this author's opinion, the Ninth Circuit undoubtedly reached the correct result in *Wynar*. As the court observantly stated, one "'Can only imagine what would have happened if the school officials, after learning of [the] writing, did nothing about it' and [Wynar] did in fact come to school with a gun."[107]

The Ninth Circuit's interpretation of when a school's disciplinary measures for off-campus expressions may impede on student free speech rights is highly protective of student speech, and can thus be deemed the most protective of any of those tests developed by other circuits. Under the Ninth Circuit's current standard, any speech that falls short of establishing a threat of violence to people within the school would be protected. Despite what appears to be obvious and correct logic in the *Wynar* decision, the fact that the court was unwilling to rule broadly on the issue of off-campus student speech makes it less useful as precedent for other courts to look towards in the future. In essence, the *Wynar* ruling is not entirely instructive to more common and less extreme situations that other circuits have faced.[108] A student threatening to bring guns on school grounds in order to murder classmates certainly falls on one side of the line, but the court's failure to otherwise define how severe the threat of violence must be in order to invoke a school's authority to discipline off-campus viral speech may leave future district courts in the dark.[109]

B. Protective

In *J.S. v. Blue Mountain School District,* the Third Circuit Court of Appeals considered a case in which an eighth-grade student created a MySpace page making fun of her middle school principal.[110] The MySpace page was created at the student's home computer with the help of a classmate.[111] The creation of the page came just months after the petitioner-student had been disciplined by the principal for dress code violations on two separate occasions.[112] After learning about the website from another student, the principal met with the school district

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[106] *Id.* at 1064.

[107] *Id.* at 1070 (quoting Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007)).

[108] *See id.* at 1068–69 (citing Kowalski v. Berkeley Cty Sch., 652 F.3d 565 (4th Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)).

[109] *See* Marcus-Toll, *supra* note 26, at 3432.

[110] *Blue Mountain Sch. Dist.*, 650 F.3d at 920.

[111] *Id.*

[112] *Id.*

superintendent as well as the director of technology.[113] The principal then met with school guidance counselors and the students, and proceeded to suspend the students for ten days.[114] The students and their parents brought suit, alleging a violation of the student's free speech rights, but the district court granted the school district's motion for summary judgment.[115] The school argued that the required "substantial disruption" had occurred primarily in two ways. First, students gossiping about the MySpace page during class hours had made it more difficult for teachers to instruct.[116] Second, the school was forced to give some faculty members certain jobs that would have otherwise been carried out by the guidance counselors who were busy supervising the principal's meeting with the students informing them of their suspensions.[117]

The Third Circuit heard the case on appeal *en banc*.[118] In applying the *Tinker* doctrine, the plurality found that there was no reasonable forecast of a substantial disruption.[119] First, the court noted that although the student had posted a photograph of the principal to the MySpace page (which they obtained from the school district website), the student did not identify the principal by his name or location.[120] The court found this distinction, which it believed suggested that the student had not intended for the speech to reach the school, to be very relevant in its determination.[121] Second, the student had made the MySpace page "private" so that it was only available to her and her friends.[122] Third, although the court acknowledged that the website contained some vulgar language, it also noted that the website was entirely nonsensical, and that no one could have taken it (or did take it) seriously.[123] Fourth, because the school district blocked school computer access to MySpace, no student could have viewed the profile from the school.[124] Finally, the court noted that beyond "general rumblings" of the students about the website and some minor rearranging of faculty duties, no substantial disruption had actually occurred.[125] The Third Circuit thus reversed the district court's holding that the student's free speech rights were not violated.[126]

The fact that the student had made the MySpace profile "private" was relevant to the court's findings both as to the student's intent as well as to the issue of

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[113] *Id.* at 921.
[114] *Id.* at 921–22.
[115] *Id.* at 923.
[116] *Id.* at 922–23.
[117] *Id.* at 923.
[118] *Id.* at 915.
[119] *See id.* at 929–30.
[120] *Id.* at 929.
[121] *See id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 920.

whether the school disruption was reasonably foreseeable.[127] This is one example of how evidence of a student's intent in creating speech may overlap as evidence that also reveals whether school administrators could have reasonably forecasted a substantial disruption. For instance, many of the facts the court considered in *Blue Mountain* in discerning whether substantial disruption was reasonably foreseeable by the school administration could also, at least in part, be framed as circumstantially indicative of the speaker's intended forum, effect, and contextual audience.[128] Factors such as whether the speaker took affirmative steps to either expand or confine his or her potential audience,[129] whether the speaker chose a mode of a communication that was known to be inaccessible within the school,[130] and whether the speaker had patently focused the speech at a unique association with the school,[131] are all considerations that, under the Third Circuit's analysis, may circumstantially bear on whether the speaker intended the speech to reach the school.

The court ultimately concluded that the student had in fact taken steps to prevent access to the speech by anyone other than her group of friends.[132] Adding this intent-driven factor to the *Tinker* analysis for off-campus digital speech cases serves to safeguard student speech beyond the protections that are afforded under *Tinker*, as student viral speech that inadvertently ended up causing substantial disruption on the school campus would be protected. In fact, even some categories of speech which could reasonably be foreseen to make their way to the school would likely be protected under this approach, so long as the student in question did not subjectively intend for it to do so.[133]

This "intent-driven" test is more protective of student speech than those of most other circuits, but does not quite rise to the level of protection espoused under the above-discussed "threat of violence" test. Under the intent-driven test, instances where a student intended for the speech to reach the school may be unprotected, whereas under the threat of violence test, such speech would only be unprotected if it presented an identifiable threat of violence to the school.[134] Without a more

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[127] *See id.* at 929–31.

[128] *See, e.g.*, *id.* at 930 (stating that it is not enough that students were the intended audience). Under this rationale, speech targeting students at a forum other than the school would not meet the requirement of the first prong.

[129] *Id.* at 929, 930.

[130] *Id.* at 921.

[131] *See id.* at 929.

[132] *Id.* at 930–31.

[133] *See id. Blue Mountain* is significant to the Third Circuit's jurisprudence for a reason other than the court's holding. In a separate concurring opinion signed by five judges, Judge Smith wrote that *Tinker* was inapplicable in off-campus student speech cases. *Id.* at 936 (Smith, J., concurring). The concurrence noted that the principle established in *Tinker* was "expressly grounded in 'the special characteristics of the school environment,'" and that extending it further than those boundaries sets a dangerous precedent that could potentially lead to stricter regulation of adult, public speech. *Id.* at 937, 940.

[134] *Compare* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1074–75 (9th Cir. 2013) (holding that the subjective intent of the student-speaker was not a determinative issue), *with Blue Mountain*

explicit directive on how to prove "intent," however, a wholesale adoption of the standard set out by the Third Circuit would inherently lead to more issues of what is necessary to do so.[135] Because the Third Circuit did not sufficiently flesh out how intent may be shown, schools would conceivably be left powerless in all incidents in which the student never explicitly and unequivocally made known his intent for the speech to reach the school, but the circumstances nevertheless allowed for a strong inference that intent was present. Although not all such situations would necessitate or justify school action, undoubtedly some would. Thus, the Third Circuit's approach would provide little relief for school administrators facing such incidents. Finally, the Third Circuit's analysis is not entirely transparent about whether the speech must simply target the school or target a substantial disruption occurring on school grounds. The Third Circuit would likely be satisfied with a showing that the student targeted the school,[136] but a more concrete and forthright explanation of how the analysis should be framed could have saved district courts some grief in the future.

C. Less Protective

The Second Circuit has taken a different approach than *Wynar* and *Blue Mountain* to the regulation of off-campus student speech, largely adopting the *Tinker* threshold with a measure of foreseeability added to consideration. In *Doninger v. Niehoff,* the most recent off-campus student expression case to come before the Second Circuit, members of the Lewis Mills High School student council sent emails to a mass number of people concerning Jamfest, an annual school battle-of-the-bands event that took place in the school auditorium.[137] The members of the student council helped plan the event each year, although a teacher at the school was routinely responsible for the operation of the auditorium's sound and light equipment.[138] Due to scheduling conflicts, the teacher that normally performed this task was unavailable to do so on the date that was originally reserved for Jamfest.[139] The students were informed that they would either have to change the venue of the concert or otherwise move it to another date.[140] Deciding that either one of these alternatives would drastically decrease both the student attendance as well as band participation of the concert, four members of the student council convened in the school computer lab and logged in under one of their fathers' email account.[141] The students wrote a message explaining that

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Sch. Dist., 650 F.3d at 930–31 (emphasizing the intent behind the student's speech in deciding the case).

[135] *See* Boyd, *supra* note 46, at 1236; Marcus-Toll, *supra* note 26, at 3433–34.

[136] *See Blue Mountain Sch. Dist.*, 650 F.3d at 930–31.

[137] Doninger v. Neihoff, 527 F.3d 41, 44 (2d Cir. 2008).

[138] *See id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

Jamfest was in jeopardy, asking anyone who read the email to call Superintendent Paula Schwartz and urge that Jamfest go on as scheduled, and also imploring readers to spread the email to as many others as possible.[142] The students sent the email to everyone in the online address book, and also added several other names to the recipient list that were contributed by one of the involved students.[143] One student later encountered a school administrator, who had been flooded with phone calls and emails throughout the day as a result of the student council message.[144] The administrator explained that she was disappointed in the council's actions that resulted in countless phone calls and emails, that the school was more willing to work with the students to reorganize Jamfest than the recipients of the council message were led to believe, and that the students should send out a follow up message correcting this information.[145] The student told the teacher she would comply with this request.[146]

Later that night while at home, however, this student posted a message on her individual blog on the website LiveJournal.[147] The blog post criticized Schwartz and the school administration and claimed that Jamfest would in all likelihood be cancelled by Schwartz because she was angry with the students from the backlash she received as a result of the original council message.[148] Several classmates of the student read the blog post and added their own comments.[149] As a result of the email as well as the blog post, school administrators and the superintendent continued to receive phone calls and emails. [150] The students and school administrators met the next day and agreed to reschedule Jamfest for a date in June.[151] However, Schwartz only became aware of the blog post some days after this meeting.[152] As a result, when the student who made the blog who was running for class office came to accept her nomination, she was told that she would be required to write an apology to Schwartz, show a copy of the blog to her mother, and withdraw her candidacy.[153] Although the student went on to win a plurality of the votes as a write-in candidate, the school refused to allow her to assume the position.[154]

The student filed a complaint alleging her First Amendment rights had been violated, and filed a motion for a preliminary injunction.[155] The district court found

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[142] *See id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 45.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *See id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 46.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 46–47.

that a preliminary injunction was not warranted, as the student had not shown a substantial likelihood of success.[156] On appeal, the Second Circuit restated its precedent, set in an earlier case for school discipline of student off-campus speech.[157] It noted that if the student had distributed the contents of the blog post on school grounds, then the case would fall on all fours with *Fraser* and the school's action would have been justified.[158] Without defining the precise scope of "lewd" language, the court felt the language in the blog was "the sort of language that properly may be prohibited in schools."[159]

However, it was unclear to the court whether the *Fraser* doctrine also applied to student off-campus speech.[160] Regardless, the court applied the *Tinker* threshold, as well as the extension of *Tinker* that the Second Circuit had established in *Wisniewski v. Board of Education* that set forth the standard for substantial disruption within the school, and with regard to off-campus speech, found that if it was reasonably foreseeable that the speech or expression "would come to the attention of school authorities and that it would create a risk of substantial disruption."[161] Under this test, the school would thus be justified in disciplining the student and limiting the expression altogether. The Second Circuit agreed with the district court that this standard was met in the case at bar, relying on the fact that the student blogger had essentially intended for the blog post to reach the school campus and that the blog post could have led school administrators to reasonably anticipate substantial disruption with school proceedings.[162] The blog post, echoing the council email, specifically requested that readers call and complain to the superintendent and school administrators to increase their frustration.[163] The court also recognized that allowing the student to maintain a student leadership position despite her recent actions and behavior would give rise to the foreseeable risk of undermining the student council and faculty relationship, which in turn would risk even further substantial disruption of school proceedings.[164] The Second Circuit thus affirmed the district court's denial of a preliminary injunction.[165]

The Second Circuit's interpretation of when a student's off-campus speech or expression falls within the domain of school discipline is broader than the tests established by the Ninth and Third Circuits and is less protective of student viral

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[156] *Id.* at 47.

[157] *Id.* at 48 ("We have determined . . . that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus.") (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)).

[158] *Id.* at 49.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 50–51.

[162] *Id.* at 51.

[163] *Id.* at 45.

[164] *Id.* at 52–53.

[165] *Id.* at 44.

speech rights. Whereas the Ninth Circuit limited the scope of its decision to incidents of potential violence and danger on the school campus, and the Third Circuit considered whether the student intended for the speech to reach the school, the Second Circuit focused its decision on whether or not the student speaker could have reasonably foreseen that the expression would eventually make its way to school administrators and in turn cause a substantial disruption to school activities. At the expense of student speech rights, the Second Circuit's test may provide some shelter to school administrators to deal with school disruptions that were not necessarily targeted at the school premises. Consider a student who cyberbullies a classmate without necessarily taking any concrete actions that explicitly reveal he subjectively intended his online speech to reach school grounds. Such a case would allow for school administrative involvement if it was foreseeable to the cyberbully that the speech would reach the school. Still, some legal scholars have criticized the Second Circuit's holding in *Doninger* for failing to establish a definitive and precise threshold, making the argument that in this day and age, virtually all communications between students outside of the classroom have a reasonable possibility of reaching the school premises.[166] Essentially the flip side of the benefit of the Second Circuit's approach described above, this criticism encompasses how the Third Circuit's intent-driven test is more protective of student speech than the foreseeability test established by the Second Circuit. While arguably all viral speech between students could be reasonably foreseeable to reach school grounds, certainly not all such speech would be subjectively *aimed* at school grounds. A school's authority to discipline a cyberbully for hurtful speech towards another student that was not intended to reach the school but was nevertheless reasonably foreseeable to end up there is one thing, but less invidious and pernicious student speech made with an expectation (albeit incorrect) of remaining private that did not specifically target the school is quite another.

D. The Least Protective

The Fourth Circuit has also established its own precedent concerning students' off-campus viral speech rights, holding most closely to the Second Circuit's standard. In *Kowalski v. Berkely County School*, a twelfth-grade student named Kara Kowalski at Musselman High School in Berkeley County, West Virginia created a group on the social networking site MySpace.com using her home computer that insulted and degraded another student.[167] Kowalski placed the acronym "S.A.S.H." as the MySpace group's heading, which Kowalski claimed stood for "Student's Against Slut's Herpes," but which one of Kowalski's classmates stated stood for "Students Against Shay's Herpes."[168] The court found that this primarily referred to another classmate named Shay, who was the main topic of

[166] Marcus-Toll, *supra* note 26, at 3430; *see also* Boyd, *supra* note 46, at 1236.
[167] Kowalski v. Berkely Cty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).
[168] *Id.*

discussion on Kowalski's website.[169] Kowalski sent online invitations to roughly 100 of her peers to join and view the website, and roughly two-dozen Musselman High School students joined.[170] Joining the website allowed its members to post comments, photographs, and interact with one another.[171] One student who joined the website posted two different pictures of Shay, both edited, insinuating that Shay was sexually promiscuous and was infected with herpes.[172] The student who posted these pictures joined the website from a school computer.[173] Several classmates made comments on the pictures, further insulting Shay and applauding both Kowalski and the student who had posted the photos.[174] When Shay's father learned of the website, he called the student who posted the photos to voice his anger.[175] The student then alerted Kowalski, who attempted to delete the website, and when she was unable to do so, simply changing the name of the page to "Students Against Angry People."[176]

After a meeting and discussion of the web page with Shay's parents, Musselman High School Principal Ronald Stephens contacted the school board in order to decide whether this was an incident that warranted school discipline.[177] Deciding that the website violated the school's policy against harassment and bullying, Kowalski was suspended from school for ten days, though this was later reduced to five days at her father's request.[178] Kowalski was also suspended from attending any school-sponsored events for ninety days.[179]

Kowalski filed a motion in the district court alleging a violation of her First Amendment freedom of speech rights, amongst other constitutional claims.[180] The district court dismissed the complaint for lack of standing, finding that her "injury" could not be cured by a decision in her favor.[181] The district court also granted summary judgment on Kowalski's remaining claims, and Kowalski appealed the district court's findings to the Fourth Circuit, which affirmed the district court's holding.[182] The Fourth Circuit framed the issue before them as "whether Kowalski's activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students."[183] The court found that, regardless of the

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[169] *Id.* at 567, 568; *see also id.* at 573.
[170] *Id.* at 567.
[171] *Id.*
[172] *See id.* at 568.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 568–69.
[179] *Id.* at 569.
[180] *Id.* at 570.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 571.

geographic location of Kowalski at the time she created the MySpace page, the website caused precisely the type of substantial disruption and interference with school activities that *Tinker* aimed to exclude from the protections of the First Amendment.[184]

On appeal, with regard to the fact that the speech in this case took place over the Internet, the Fourth Circuit implied that it was a metaphysical issue, and perhaps impossible to pinpoint precisely *where* Kowalski's "speech" took place.[185] The court noted that while Kowalski "pushed [the] computer's keys in her home," she was aware that most, if not all, of those who received the "speech" would be *outside* of her home and possibly even *inside* the school building.[186] She thus could have reasonably anticipated the website reaching the school or "impact[ing] the school environment."[187] Given the name of the web page itself (*Students* Against Sluts Herpes) and the fact that at least one student interpreted the site to center around Shay, the court reasoned, Kowalski should have known that the impact of the page "would be felt in the school itself."[188] After flooding its opinion with evidence seemingly supporting a school's right to discipline a student for off-campus speech, the court acknowledged that the reach of a school's disciplinary authority for such speech is not unlimited.[189] Without drawing a specific line for where that limit exists, the court found that Kowalski's speech was safely within the school's authority, stating: "[W]e are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials."[190]

The Fourth Circuit's "sufficient nexus" test[191], with an added consideration of whether the student should have known that the speech would reach the school, is arguably the least protective of student viral speech rights of the various circuit tests and provides school administrators with the most authority to discipline students for such speech. Emphasizing the pedagogical interests of the school allows administrators to protect school proceedings in a way that other threshold tests would not allow. For example, if the Fourth Circuit had strictly applied the highly speech protective "threat of violence" test from *Wynar* and had focused exclusively on the threat of substantial school violence, it would have assuredly reached the opposite conclusion, and the severe cyberbullying at hand in *Kowalski* would have been allowed to continue. On the other hand, if the Ninth Circuit had applied the Fourth Circuit's approach when it decided *Wynar*, the court would have reached precisely the same result, as student well-being and safety is clearly a pedagogical

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[184] *Id.* at 574.

[185] *Id.* at 573.

[186] *See id.*

[187] *Id.*

[188] *Id.*

[189] *See id.* ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of students when the speech at issue originates outside the schoolhouse gate.").

[190] *Id.*

[191] Marcus-Toll, *supra* note 26, at 3426.

interest of the school. Establishing a threshold test that addresses such a wide variety of potential school disruptions, including those seen in *Wynar* and *Kowalski*, is certainly valuable. Still, there are holes in the Fourth Circuit's "sufficient nexus" test. First, the same shortcomings of the Second Circuit's approach in considering the foreseeability to the student speaker that the speech would reach the school grounds is also present here. Furthermore, "pedagogical interests" is an extremely vague term that the Court did not spend sufficient time describing. This lends itself to unnecessary restrictions on student speech rights. As one author questions: "[W]ould a school's interest in shielding its faculty be sufficient? Or a school's interest in preserving institutional integrity?"[192] Arguably even minor school disruptions such as the mere rumblings at hand in *Blue Mountain* could be characterized as satisfying this "sufficient nexus" test. Such a reading would unduly impede on student speech rights.

III. LOOSE APPLICATION OF THE *BRANDENBURG V. OHIO* AND *TINKER* DOCTRINES IN THE STUDENT OFF-CAMPUS DIGITAL SPEECH CONTEXT

In each of the tests outlined throughout Part II, courts either explicitly or implicitly adopted elements of the *Tinker* doctrine for substantial disruption. *Tinker* alone, however, nor any of the tests provided by the circuit courts to date, provide adequate protection for student free speech rights without hamstringing school administrators. Adopting a loose interpretation of the *Brandenburg v. Ohio* imminent lawless action test and combining this test with elements of the *Tinker* substantial disruption test would strike the correct balance between student freedom of speech and undisturbed school proceedings.[193]

In *Brandenburg*, the Supreme Court considered an Ohio statute which criminalized "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'"[194] Clarence Brandenburg, a Ku Klux Klan ("KKK") leader in Ohio, had invited a Cincinnati television reporter to cover a KKK rally that was to take place in Hamilton County.[195] At the rally, members of the KKK were filmed

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[192] *Id.* at 3431.

[193] Aaron H. Caplan suggests that student speech "that is maliciously intended for the purpose of disrupting school, and that has a high likelihood of succeeding in its purpose," may be excluded from the general protection of speaking off-campus. Aaron H. Caplan, *Public School Discipline For Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 163 (2003). He argues that such an exception would be applicable in extreme circumstances such as threatening phone calls and letters to the school or conspiring to bring a bomb to the school. *Id.* at 163–64.

[194] Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (quoting OHIO REV. CODE ANN. § 2923.13 (West 1958) (invalidated by *Brandenburg*, 395 U.S. at 448)).

[195] *Id.* at 445.

carrying firearms and burning crosses.[196] One of the members made mention of "revengeance" [sic] and announced that the KKK would lead a march on Washington on the Fourth of July, while another stated negative opinions of certain ethnic groups. [197] Brandenburg was charged and convicted under the Ohio Criminal Syndicalism statute, which he appealed to the United States Supreme Court.[198] The Supreme Court overturned the Ohio Criminal Syndicalism statute and reversed Brandenburg's conviction, establishing a new threshold test for determining the scope of freedom of speech.[199] The Court announced that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[200]

Most commentators have recognized three prongs within the *Brandenburg* test: speech directed towards inciting lawless action, the likelihood that such action will occur, and the imminence of the lawless action. [201] Replacing intent to cause imminent lawless action with intent for the speech to reach the school grounds, as well as replacing "imminent lawless action" with the idea of "substantial disruption" (as those concepts are understood under the *Brandenburg* test) provides adequate protection for student viral speech without hamstringing administrators from maintaining an orderly school environment.[202]

The first prong of this suggested *Tinker-Brandenburg* test would consider whether the viral speaker's speech was directed towards school grounds. Many federal courts have interpreted the Supreme Court's language of "directed towards" as being synonymous with intent.[203] While the *Brandenburg* test is an extremely speech protective doctrine, there is an inherent difficulty in proving a person's subjective intent,[204] which has led to some criticism of courts' failures or inabilities to consider inferential evidence of intent, calling for lessening the perquisite of a

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[196] *Id.*

[197] *Id.* at 446–47.

[198] *Id.* at 444–45.

[199] *Id.* at 447–49.

[200] *Id.* at 447.

[201] *See, e.g.*, Amos N. Guiora, Note, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5034, 5039 (2011).

[202] This suggested alteration of the *Brandenburg* test would, in effect, do away with the imminence prong altogether. This is a necessary step given the effect of the Internet to delay and detach when speech is heard compared to when it is "spoken." Author John P. Cronan contends that the way the Internet has changed how humans interact is so significant that the *Brandenburg* formula as it applies to adults should also be adjusted. John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 452 (2002).

[203] *See, e.g.*, All. to End Repression v. City of Chicago, 733 F.2d 1187, 1190 (7th Cir. 1984).

[204] *See* Martha A. Field, Holder v. Humanitarian Law Project*: Justice Breyer, Dissenting*, 128 HARV. L. REV. 434, 443 (2014).

smoking gun.[205] This argument is especially persuasive in the student viral speech arena for many reasons. First, the Supreme Court has already found that the high level of protection afforded to adult speech rights is not entirely applicable to students.[206] Second, the intended forum/audience of the type of speech at issue is not as readily identifiable as cases concerning in-person speakers and listeners.[207] Finally, application of the *Brandenburg* standard without allowing for adjustment for the Internet Age could render the *Brandenburg* test inadequate.[208]

The factors described above in Part II.B, including whether the speaker took affirmative steps to broaden or restrict those with access to the speech (especially in relation to the school environment), whether the speaker's chosen mode of communication was known to be inaccessible inside the school environment, and whether the speaker had patently focused the speech at a unique relationship with the school by emphasizing that relationship, make up a strong starting point for circumstantial evidence that may be relevant to the speaker's intent. Placing greater reliance on such factors, which tend to circumstantially reveal a viral student speaker's intended contextual audience and forum, has several benefits. First, it would help shed light for students on where their viral speech rights stand. Dually, it would help teachers and school administrators better understand the instances in which their authority to discipline students to maintain order in school proceedings overrides a student's free speech rights. Finally, and most importantly, it would preserve student viral speech rights to the utmost extent that they do not particularly target the school environment. The second relevant prong to a court's analysis under the proposed *Tinker-Brandenburg* test would be whether a substantial disruption to school proceedings occurred or was likely to occur. As previously stated, the *Tinker* doctrine does not require school administrators to be absolutely certain that a substantial disruption will result from the student's speech before acting, but rather that the circumstances surrounding the speech give rise to

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[205] *See, e.g.*, MICHAEL E. HERZ & PETER MOLNAR, THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 195 (2012) ("A significant difference between the American and the Hungarian 'imminent danger' tests is that in the United States inciting speech can be restricted only if imminent danger is *intended* by the speaker, while in Hungary it is enough if the speaker had to have known that his/her speech caused imminent danger of violence. . . . [T]here can be situations when . . . courts should be able to infer intent."); *see also* Steven Penaro, Note, *Reconciling* Morse *with* Brandenburg, 77 FORDHAM L. REV. 251 (2008). *But see* Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 987, 989 (1994) (acknowledging that there are potential benefits in relaxing the *Brandenburg* standard, but concludes in cases of harm resulting from mimicry, the pros are outweighed by the cons).

[206] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

[207] *See* Penaro, *supra* note 204, at 252. In *Reconciling* Morse *with* Brandenburg, Steven Penaro makes a comparable argument to that espoused in this note in the context of student-promoted illegal drug use. *Id.* at 252–53.

[208] *See id.* at 270; *see also* Cronan, *supra* note 201, at 428.

a mere reasonable forecast that such disruption will occur.[209] While the *Brandenburg* test does not require absolute certainty either, "to satisfy *Brandenburg*, the plaintiffs . . . have . . . to prove not just that the harm was foreseeable, but that it was likely to occur."[210] Incorporating this element from the *Brandenburg* test raises the requisite probability from mere reasonable foreseeability to a discernable likelihood that a substantial disruption will occur,[211] addressing one of the primary weaknesses of the foreseeability approach adopted by the Second Circuit: that it is reasonably foreseeable that nearly all student viral speech will eventually make its way to school hallways. The heightened standard addresses this issue in two primary ways. First, as stated, the requisite probability of the speech affecting the school is raised from mere reasonable foreseeability to a discernable likelihood. While it is plausible that all student viral speech may *foreseeably* make its way to the school campus, certainly not all such speech is *likely* to make it to the school campus. Second, the event that is found likely to occur would also need to constitute a substantial disruption as opposed to the speech merely infiltrating school grounds. Again, while it is plausible to believe most student viral speech will eventually *come* to the school campus, not all such speech would be likely to *cause a substantial disruption* to school proceedings. In tandem, the two prongs balance the policy interests of school administrators in maintaining school proceedings as well as students in protecting the right to free, viral speech.

Implementing this *Tinker-Brandenburg* test for student online speech serves courts as well as student speakers and school administrators. This test would help guide judges to a more congruent and less fragmented authority than what the federal circuits have currently established, and would allow them to reach this result by utilizing familiar features of judicial analysis, as both *Tinker* and *Brandenburg* are well established precedents within First Amendment jurisprudence. Indeed, in some ways, *Tinker* can be interpreted as merely an adjustment in scale to that of *Brandenburg*, as opposed to an entirely new threshold test for First Amendment protection.[212] Further, the proposed *Tinker-Brandenburg* test gives school administrators the ability to discipline students for conduct that is not explicitly and concretely targeted at the school, but does so without declaring open season on the precious right of student's freedom of speech by requiring that administrators at least acquire circumstantial evidence that the speech was targeted at the school and was likely to cause a substantial disruption.

By applying this proposed *Tinker-Brandenburg* analysis to the fact pattern of *Wynar*, a court would likely find that the speech was unprotected. Describing

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[209] *See, e.g.*, Lowery v. Euverard, 497 F.3d 584, 592 (6th Cir. 2007).

[210] Brill, *supra* note 204, at 999.

[211] For a discussion of the precise meaning of "likely" in the *Brandenburg* context, see Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 713–15 (2009).

[212] *See* Matthew M. Pagett, Note, *A Tinker's Damn: Reflections on Student Speech,* 2 WAKE FOREST J.L. & POL'Y 1, 18 (2012) ("With this comparison Justice Stevens suggests that the *Tinker* standard, which protects student speech unless it is likely to cause a substantial disruption at the school, is a sort of modification of the *Brandenburg* test.").

repeated threats about the murder of specific classmates on particular dates at school as speech directed at the school is an understatement, and the presence of such explicit intent would make inquiry into circumstantial evidence of intent unnecessary. Furthermore, the likelihood of a school disruption prong would also be satisfied when a student has repeatedly admitted and bragged about owning dangerous weapons and threatened to bring them to school to use against other students.[213]

Likewise, running the *Blue Mountain* case through a *Tinker-Brandenburg* test would produce the same result the Third Circuit reached, although the first prong of intent may arguably have been met. Because no explicit intent regarding the aim of the speech was present, a court would need to consider the circumstantial factors described earlier to determine if the requisite intent was present. Since those factors were largely drawn from the Third Circuit's opinion in *Blue Mountain*, the facts are inherently applicable. In that factual situation, the student took steps to confine who could access the speech by making the MySpace page private. Additionally, the student chose a mode of communication that was inaccessible within the school, as the district had blocked access to MySpace from all school computers.[214] Finally, the hardest evidential determination would be whether the student patently targeted the school by emphasizing the unique relationship between it and the principal. As the Third Circuit noted, the student did not provide any personally identifying information of the principal, such as his name, location, or even the name of the school itself. On the other hand, the Third Circuit could have given more weight (and should have, under a *Tinker-Brandenburg* test) to other factors that did emphasize this relationship. Indeed, the MySpace page included some information that at least pointed to the principal's capacity as a school administrator, not the least serious of which was that one of his hobbies was "hitting on students". This particular factor is, arguably, a closer call than the Third Circuit was willing to admit, but given that the other factors and circumstantial evidence relating to intent weigh in the students favor, the first prong of a *Tinker-Brandenburg* test is likely not met here. Furthermore, as the Third Circuit noted, the substantial disruption that the school claimed had occurred as a result of the student's viral speech was nothing more than general rumblings; this too would fail the proposed *Tinker-Brandenburg* analysis and the speech would be protected.

An analysis of the *Doninger* facts through the *Tinker-Brandenburg* test would also likely result in the same conclusion as the Second Circuit, although the second prong arguably may not have been met. The court, by finding that it was

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[213] The speech at hand in *Wynar* would also most likely be unprotected under the "true threat" exception established in several Supreme Court cases. *See, e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969); Andrew P. Stanner, *Toward An Improved True Threat Doctrine For Student Speakers*, 81 N.Y.U. L. REV. 385 (2006) (discussing the true threat doctrine in the context of schools).

[214] This fact is certainly helpful, but is more persuasive if the speaker can demonstrate that she was *aware* that the viral speech could not be accessed from within the school.

reasonably foreseeable that the speech would reach the school administrators, noted that the student's intent was for the speech to reach the school.[215] The likelihood of a substantial disruption is somewhat trickier. The court did not rule forcefully that the facts in *Doninger* were constitutionally protected, regardless of any punishment that the teachers could have handed down.[216] Instead, the court limited itself, basing its decision "only that based on the existing record," when holding that "Avery's post created a foreseeable risk of substantial disruption to the work and discipline of the school."[217] Nevertheless, the fact that the school administrators and teachers had already been "diverted from their core educational responsibilities" in the earlier emails is strong evidence that continued diversion and disruption would be likely to result from the comparable online conduct of the blog posts.[218]

Finally, examining *Kowalski* under this *Tinker-Brandenburg* test would also likely result in the same decision, but a court would need to rely on circumstantial evidence in order to find the speech's intended forum. Considering the factors described in Part II.B above, the student in *Kowalski* seemingly took no steps whatsoever to limit those who could access the MySpace page, and in fact took affirmative steps to significantly broaden its availability. The student invited over 100 people to access the group, and roughly two-dozen who joined attended the same school as the speaker and the student targeted by the speech.[219] Furthermore, the student created a website that was accessible from the school building.[220] Finally, the viral speech on the web page targeted an individual connected to the school and emphasized that relationship.[221] As the court noted, the original web page was entitled "*Students* Against Slut Herpes."[222] The court also noted that at least one student interpreted the acronym to actually stand for "Students Against *Shay's* Herpes."[223] Beyond that, unlike the principal in *Blue Mountain*, the name of the student was mentioned and recognized by several students on the web page, including the student creator. The aggregate of this circumstantial evidence allows for a strong inference that the student speech was directed towards the school grounds. Regarding the substantial disruption prong, the court noted that the viral speech "created 'actual or nascent' substantial disorder and disruption in the

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

[216] *Id.* at 53.

[217] *Id.*

[218] *Id.* at 51.

[219] Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 567 (4th Cir. 2011). It is also unclear from the court's opinion how the targeted student's parents became aware of the website in the first place. This may provide even further evidence that the student who created the website attempted to reach as broad an audience as possible.

[220] *See id.* at 568.

[221] *See id.* at 573.

[222] *Id.*

[223] *See id.* at 567 (emphasis added).

school."[224] Since actual disruption occurred in the school, the need to consider whether it was *likely* that speech would occur would be unnecessary.

CONCLUSION

The inconsistent application of the *Tinker* doctrine as a result of varying exceptions, the increased ability of students to communicate with and about one another without being in the same location, and the lack of any Supreme Court precedent regarding student viral expression away from the school's proximity has led to a jumbled understanding of student free speech in the viral age. The Ninth Circuit's approach focuses too heavily on requiring an element of violence or physical harm to the inhabitants of the school in order for administrators to be justified in taking disciplinary action against the students, thereby excluding many instances of substantial disruption of school activities and procedure that the *Tinker* standard was designed to protect. Other circuit approaches that focus on the intent and foreseeability of the off-campus speech or expression eventually reaching the school premises do a better job of protecting the ordinary course of school activities at the heart of *Tinker*. These approaches are fairly encompassing—a large portion of what students discuss and express to one another *outside* of school is likely to end up *inside* of school, especially given recent technological advancements that have strengthened students' communication abilities. Such off-campus speech inherently deserves greater deference and constitutional protection than student speech occurring on school grounds.

By combining the original principles set out in *Tinker* with the framework of the *Brandenburg* imminent lawless action test, the proper balance is struck between school regulatory authority and student free speech. Interpreting the intent element of the *Brandenburg* test with greater deference to circumstantial evidence that strongly suggests "directed speech" in instances where intent is not explicitly established would quell a major shortcoming of the Third Circuit's intent-driven approach. Furthermore, by raising the standard for forecasting substantial disruption from reasonably foreseeable to likely to occur, the *Tinker-Brandenburg* test provides more protection for viral speech that occurs off of the school campus than speech that occurs on it, as it deserves. Adopting this modified *Tinker-Brandenburg* test would serve to end the muddle the circuit courts find themselves in over student off-campus viral speech by establishing a consistent test that embodies the fundamental precepts of *Tinker*, accounts for the greater amount of deference that off-campus speech warrants, and allows flexibility for the courts to decide cases on a fact-intensive basis.

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[224] *Id.* at 574 (referencing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).