RESTRICTING ANONYMOUS "YIK YAK": THE CONSTITUTIONALITY OF REGULATING STUDENTS' OFF-CAMPUS ONLINE SPEECH IN THE AGE OF SOCIAL MEDIA

MICHAEL K. PARK*

The First Amendment protects students' rights to free expression, but the degree of that protection has come under increasing scrutiny with the proliferation of social media networks that students increasingly use to communicate. With the advent of mobile digital platforms and the growing popularity of anonymous online networks, the line between speech that occurs on campus and off has become blurred. While social media networks have become popular sites for students to share ideas and spread news, these same platforms have increasingly been used to harass, bully, and threaten other members of the school community. This Article analyzes the extent to which school officials can restrict students' off-campus online speech in the absence of clear doctrinal guidance regarding schools' authority over such speech. It examines the diverse and inconsistent approaches that the appellate courts have adopted to address off-campus online speech, paying particular attention to the Fifth Circuit's recent ruling in Bell v. Itawamba *and its implications to student speech regulation. This Article proffers an approach to off-campus online speech that properly balances a school's pedagogical and safety concerns with a student's First Amendment right to free expression. It ends with an exploration of student speech issues that arise with online anonymity, an intersection that has yet to develop much case law, but an intersection that school officials and courts will face with increasing frequency.*

* Assistant Professor, S.I. Newhouse School of Public Communications, Syracuse University.

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I. INTRODUCTION

In the fall of 2015, Thaddeus Pryor, a Colorado College student, was suspended for six months over a six-word comment he made on the online social media app Yik Yak.[1] Pryor replied to an online post tagged "#blackwomenmatter" with, "They matter, they're just not

1. Tyler Kingkade, *Colorado College Suspends Student for 6 Months over Yik Yak Post,* THE HUNTINGTON POST, Dec. 16, 2015, http://www.huffingtonpost.com/entry/colorado-college-yik-yak_us_56718ab1e4b06 48fe30 b019.

hot."[2] According to the college, Pryor's suspension was warranted because his online remarks violated campus policies against "abusive behavior" and "disruption of college activities." Last January, New Jersey school officials reprimanded a high school student for posting a string of online expletives directed at Israel and expressing happiness that a fellow classmate had "unfollowed" her on her Twitter account.[3] School officials claimed that her online expressive activity could constitute harassment and cyberbullying.[4] Many of the student's 6,000 followers expressed solidarity with the student's right to express what she referred to as "unpopular political views on the Internet."[5] While the Colorado and New Jersey school officials' attempts to address offensive behavior in order to foster an inclusive environment are commendable, these recent examples also reflect the breadth of authority that school officials assert over student speech that occurs online and, more frequently, off campus.

Social media sites such as Yik Yak and After School, represent some of the latest and most popular social media networks to be adopted by students, joining the "established" sites like Facebook and Twitter. Unlike Facebook and Twitter, networks like Yik Yak offer a hyper-local feature, enabling users within a geographic radius of a few miles to post anonymous comments, which has helped increase its popularity among both college and high school students. While all these social media networks have become popular sites for students to engage in seemingly innocuous banter (*e.g.* expressing frustrations with class or dating), these online platforms have increasingly become sites for users to spread hate speech, bully, harass, and threaten other members of the school community. These developments have heightened school officials' sensitivity to the pedagogical and safety concerns of the educational setting, resulting in school authority over a broad range of student expression, from innocuous "likes" on Facebook[6] to more menacing online posts such as threats to "shoot

2. *Id.*

3. *See* Liam Stack, *Tweets About Israel Land New Jersey Student in Principal's Office,* N.Y. TIMES, Jan. 7, 2016, http://www.nytimes.com/2016/01/07/nyregion/anti-israel-tweets-land-new-jersey-student-in-principals-office.html?_r=0.

4. *Id.*

5. *Id.*

6. *See* Andrea Eger, *11 Booker T. Washington Students Suspended After Social Media Post of Vandalism, Gay Slur,* TULSA WORLD, May 8, 2015, http://www.tulsaworld.com/news/education/booker-t-washington-students-suspended-after-social-media-post-of/article_6e9c87c4-ea2c-5f5b-bcf5-cff83cd88312.html (several students were suspended for "liking" a

up" a school.[7] School officials are also facing an increasing number of student-speech cases that originate from a multitude of platforms, from Facebook and YouTube to anonymous networking sites, further complicating the regulatory boundaries involving student online expression.

As the Supreme Court observed in *Tinker v. Des Moines Independent Community School District*,[8] students or teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] However, the First Amendment does not provide absolute rights of such freedoms, and due to the special pedagogical environment of education, school officials generally have more authority to regulate student speech.[10] Moreover, students' expressive activity in the era of social media has created unique challenges for school administrators, as digital expression has blurred the line between speech that occurs "off-campus" versus "on-campus." Greatly affecting this landscape is the rise in school shootings and other forms of violence against schools and universities. Online-based threats, harassment, and intimidation directed at the school community create a tension between a student's free-speech rights and a school administrator's duty to maintain discipline and ensure public safety. In our advanced information age, this tension is unprecedented. With the advent of new online communication platforms and their rapid adoption by students, the extent to which schools can effectively maintain order and prevent a hostile educational climate without running afoul of First Amendment principles remains unresolved.

This Article examines the extent to which school officials can discipline and restrict students' online speech, including their use of social media platforms for speech acts that arise off-campus. Left with an unresolved doctrinal legacy of off-campus speech after

post on Facebook that included images of students defacing school property).

7. Ally Marotti & Keith Biery Golick, *Student Arrested After Social Media Threat*, CINCINNATI ENQUIRE, Oct. 29, 2014, 5:05 PM), http://www.cincinnati.com/story/news/crime/2014/ 10/29/new-richmond-high-school-yik-yak-threat/18114855/.

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

9. *Id.* at 506.

10. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that schools have greater authority, as compared to other state actors, to regulate students who make lewd speech in school); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (considering speech made by students in a school newspaper, the Court concluded that schools generally have more authority than the state does to regulate school-sponsored student speech).

Tinker,[11] federal circuit courts that have addressed the issue of off-campus online speech have employed a variety of approaches to online student speech. Specific attention will be focused on recent circuit court approaches to off-campus online speech, including the Fifth Circuit's recent foray into this unresolved question in *Bell v. Itawamba*.[12] Unfortunately, without a universal standard or clear guidelines from the high court on the limits of off-campus student speech, school officials run the risk of overreaching their authority and infringing on the free speech rights of students.

Part I explains the popularity and growing influence of social media among the demographic lines and the recent trends and dynamic shifts that are taking place with social networking use. Part II provides an overview of the Free Speech Clause's applicability to the school setting and outlines the constitutional limits to free speech and the right to anonymous speech. Unresolved doctrinal questions regarding student speech are examined in Part III, including the scope of *Tinker* and its progeny's reach within both secondary and post-secondary school settings. Part III will also include an analysis of the diverse approaches that circuit courts have adopted to address off-campus online speech. Part IV analyzes the legal and pedagogical implications of school restrictions on off-campus online speech after the Fifth Circuit's most recent ruling in *Bell v. Itawamba*, and proffers an approach that meets an appropriate balance between schools' pedagogical and public safety concerns and students' First Amendment rights. Finally, Part IV will also explore the student speech issues that arise with anonymous online speech—issues that courts and school officials will face with increasing frequency as such platforms continue to gain in popularity.

II. THE RISE OF SOCIAL MEDIA USE: WHO IS "TWEETING" AND "YAKING"?

Modern online communication via the World Wide Web provides any user with almost limitless reach and open access to the entire digital public sphere. From Facebook to Twitter, to more recently developed anonymous-based social networking sites like Yik Yak and Whisper, the face of social media is in a constant state of flux. The underlying attraction of social media use, however, has

11. 393 U.S. 503.

12. Bell v. Itawamba, 799 F.3d 379 (5th Cir. 2015).

remained steadfast: the creation and maintenance of social networks through the sharing of information, ideas, news, and other content to users around the world. Social media platforms are generally free and accessible to any wired user and such platforms enable users to disseminate information instantaneously to users as close as your neighbor or to users in another hemisphere. Moreover, social media is also an effective tool of communication because of its ease of use; social media requires little effort on the part of users to interact with others, share information, or "lurk" online.

Social media's accessibility and minimal cost allows for an immediate and effective tool to disseminate critical information to the public. However, accessible, reliable, and easy-to-use platforms also lend themselves to more sinister objectives, including the means to advocate for extreme violence with merely a push of a "send" button. Terrorists, both domestic and abroad, have adopted social media as the go-to platform to recruit and spread its message, because social media channels "are by far the most popular with the intended audience, which allows terrorist organizations to be part of the mainstream."[13] Questions remain regarding the constitutional boundaries between mere online advocacy of violence and a "clear and present danger" of an imminent threat, particularly in an age where violent extremists such as the Islamic State have successfully used social media to nurture terrorists and provoke violence.[14] Most recently, a defendant's Facebook posting of self-styled rap lyrics that included violence and threatening language called into question when such digital-age expression constitutes a "true threat" and is no longer

13. Paulina Wu, *Impossible to Regulate? Social Media, Terrorists, and the Role for the U.N.*, 16 CHI. J. INT'L L. 281 (2015).

14. *See* Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech,* SLATE MAGAZINE, Dec. 15, 2015, http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html. Posner argues for a law that makes it a crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions. Posner acknowledges that such a proposal would likely be found unconstitutional under current doctrine, but contends that changes to modern communication technology calls for courts to reevaluate current tests for free speech violations. *See also* Erik Eckholm, *ISIS Influence on Web Prompts Second Thoughts on First Amendment,* N.Y.TIMES, Dec. 27, 2015, http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html; ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 162 (2007) (Lewis questions the efficacy of the "imminence" of threat requirement under current "clear and present danger" doctrine in light of radical jihadist online terror campaigns).

afforded First Amendment protection.[15] These questions go beyond the scope of this article, but nonetheless underscore the ubiquity of social media and the importance of addressing the boundaries of expressive activity on such platforms.

While the dynamics of social networking continue to evolve, its popularity has not waned, as evidenced with the exponential rise in the adoption of smartphones. As of 2015, 64% of Americans own a smartphone, an increase of approximately 50% from the percentage of smartphone users in 2011.[16] Moreover, the latest data from Pew Research (July 2015) on social networking use reveals that 76% of adult Internet users use social networking sites.[17] For Internet users between the ages of 18–29, use of social networking climbs to 92%.[18] Campaign operatives of the last two U.S. presidential elections can certainly attest to the increased importance of social networking sites for politics, and, for many users, such sites are the primary resource for news and information about local and international affairs.[19] Within the 18–29 demographic, there is even a stark racial contrast as to the user rates of social networking sites like Twitter. Younger African-Americans have especially high rates of Twitter use, whereby 40% of 18–29 year-old African-Americans use Twitter, compared to 28% of young Caucasian users.[20]

Although social media platforms like Twitter and Facebook now

15. *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (holding that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it.") (citing Morissette v. United States, 342 U.S. 246, 250 (1950) (holding that, when the government prosecutes an individual for making an online threat under 18 U.S.C. § 875(c), the *mens rea* standard is satisfied if the defendant "transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")).

16. *See* Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/.

17. *See Social Networking Use,* PEW RESEARCH CENTER (July 7, 2015), http://www.pewresearch.org/ data-trend/media-and-technology/social-networking-use/.

18. *Id.*

19. *See* David Carr, *How Obama Tapped Into Social Networks' Power,* N.Y. TIMES, Nov. 9, 2008, www.nytimes.com/2008/11/10/business/media/10carr.html?_r=0; *see also* Jenna Wortham, *The Presidential Campaign on Social Media*, N.Y. TIMES, Oct. 8, 2012, http://www.nytimes.com/interactive/2012/10/08/technology/campaign-social-media.html (noting the importance of incorporating social media use to get each candidate's message out to voters, and compared how each campaign made use of social media. For instance, Obama had over 20,420,000 followers on Twitter versus just over 1,225,000 for Romney).

20. *See* Aaron Smith, *African Americans and Technology Use*, PEW RESEARCH CENTER (Jan. 6, 2014), http://www.pewinternet.org/2014/01/06/african-americans-and-technology-use/.

occupy a ubiquitous existence in today's information society, there is an increasing shift toward anonymity online—particularly for a generation of millennials who are more cognizant of the permanence of their digital tread. In the wake of revelations of extensive data collection by the U.S. government and government-sanctioned surveillance on millions of Americans, online expectations of privacy have reached their nadir, which coincidentally coincides with the meteoric growth of anonymous social media apps on high school and college campuses. The attraction of such platforms is due in part to the intimacy of the hyperlocal feature, which creates a communal dynamic—the same feature that originally attracted college students to Facebook in its infancy—promoting a sense of connection for many in an environment of alienation (*e.g.* college and high school). A social app designed to be "a place where communities share news, crack jokes, ask questions, offer support, and build camaraderie,"[21] Yik Yak has close to 3.6 million monthly active users and students at over 1,500 colleges currently report using the application, with nearly 50% to 80% of enrolled students using the app.[22]

Online anonymity induces many liberating acts, including the ability to speak freely without fear of retaliation. Anonymity on the Internet has also been used to promote political change (*e.g.* disclosures by WikiLeaks, online "hacktivism" by "Anonymous"). Throughout our nation's history, anonymous speech has been used to further public discourse. Several Framers of the Constitution, including Alexander Hamilton, John Jay, and James Madison, wrote the Federalist Papers under the pseudonym "Publius," encouraging the adoption of the new Constitution.[23] While anonymity can encourage political participation and public debate, the same protection afforded the anonymous speaker emboldens many to disseminate repugnant and destructive speech. The increasing frequency of online acts of hate speech, harassment, cyberbullying, and the heightened sensitivity to such acts, has prompted school officials and other civic groups to increase efforts to curtail the risks associated with social media—including anonymous social media use.

21. Edwin Rios, *Everything You Need to Know About Yik Yak, the Social App at the Center of Missouri's Racist Threats*, MOTHER JONES, Nov. 11, 2015, http://www.motherjones.com/media/2015/11/yik-yak-anonymous-app-missouri-explainer.

22. *See* Dave Smith, *This Is the Next Major Messaging App,* BUSINESS INSIDER, Mar. 30, 2015, http://www.businessinsider.com/yik-yak-the-next-major-messaging-app-2015-3.

23. *See* THE FEDERALIST NOS. 1-85 (Alexander Hamilton, John Jay & James Madison).

Several universities have even attempted to displace Yik Yak's use by blocking access to it when the student is on university campus wi-fi networks, and the student government of one college in Idaho even requested Yik Yak to place a geo-fence around the small campus, which Yik Yak declined to do.[24] Moreover, a coalition of civil rights groups recently urged the U.S. Department of Education to issue guidelines that protect "students from harassment and threats based on sex, race, color or national origin" on social media platforms.[25]

While several categories of speech are exempt from constitutional protection,[26] the courts have only recently begun to address traditional legal principles of free speech, privacy, and criminal law in social media. The boundaries of constitutional protection of online speech continue to evolve. The constitutional boundaries over school regulation of off-campus online speech are even less developed, yet schools are increasingly asserting authority to regulate students' off-campus speech.

However, like the right to free expression, the right to online speech is not absolute and must be balanced against the basic role and mission of schools and colleges in society. In the context of online speech, the state's interest in prosecuting a crime or a party's desire to seek redress for reputational injury is often balanced against free speech principles.[27] Part II will highlight the constitutional considerations when addressing the right of students' online speech, including the necessity of state action, speech acts that fall outside First Amendment protection, and the limited right to anonymity.

III. FIRST AMENDMENT CONSIDERATIONS AT SCHOOL: THRESHOLD

24. *See* Caitlin Dewey, *What Is Yik Yak, the App that Fielded Racist Threats at University of Missouri?*, THE WASHINGTON POST, Nov. 11, 2015, www.washingtonpost.com/news/the-intersect/wp/2015/11/11/what-is-yik-yak-the-app-that-fielded-racist-threats-at-university-of-missouri/.

25. *See* Rios, *supra* note 21.

26. *See infra* III.B for a discussion of unprotected speech.

27. *See, e.g.*, Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *3-4 (D. Ariz. July 5, 2006) ("Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrong doers from hiding behind an illusory shield of purported First Amendment rights.") (citation and internal quotations marks omitted); In re Grand Jury Subpoena No. 11116275, 846 F. Supp. 2d 1, 6 (D.D.C. 2012) (government made a showing of compelling need to identify author of anonymous tweet to investigate whether tweet constituted a true threat against a presidential candidate).

INQUIRIES

While the proliferation of communication technology and social media has swept through schools, dorm rooms, and spaces beyond the "schoolhouse gate," student speech issues do not constitutionally implicate all secondary and post-secondary institutions. Section A of this Part considers constitutional standing and the requirement of state action. Section B addresses Free Speech Clause issues generally, including the doctrinal exceptions to First Amendment protection. Finally, Section C of this Part examines the right to anonymity and the limits afforded to anonymous speech.

A. Public Versus Private: The First Amendment and the Requirement of State Action

It is well established in First Amendment jurisprudence that the First Amendment applies to states and the federal government.[28] While students at schools such as Phillips Exeter Academy or New York University may wish to assert a First Amendment claim against school officials for any school-sanctioned intrusion or limitation to their right of free expression, their claims would find no merit in court: the First Amendment does not apply to private institutions. In 2011, Lehigh University and the National Collegiate Athletic Association (NCAA) suspended Ryan Spadola, a student-athlete, for forwarding a Twitter message that included a racial slur against an opposing team.[29] Since both the NCAA and Lehigh University are private entities, Spadola had no legal recourse under a First Amendment challenge to his suspension. In fact, as a private university, Lehigh could conceivably implement broad, sweeping bans on social media use and even compel students to submit their Facebook or Twitter profiles to a university mediator without running the risk of a constitutional violation. In order for a student to bring a valid First Amendment claim, there must be a state actor involved before liability for constitutional violations attach. In contrast, public

28. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

29. *Tweet Leads to Lehigh Suspension*, ESPN, Dec. 9, 2011, http://espn.go.com/college-football/story/_/id/7335763/lehighmountainhawks-ryan-spadola-suspended-tweet.

schools and universities are subject to First Amendment challenges[30] and as state actors must abide by constitutional limitations.

A few states, however, have tried to provide students at private educational institutions with free speech protections parallel to those in the First Amendment. For example, in 1992, California passed the "Leonard Law," granting First Amendment protections to students at private and public postsecondary institutions.[31] Under California Education Code section 94367(a), no private postsecondary institution is allowed to discipline a student based on speech or other communication that, "when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."[32] In *Corry v. Leland Stanford Junior University*,[33] several Stanford students challenged the university's speech code as a violation of California's Leonard Law. The university speech code sought to shield students from bigotry by banning insults based on race and sex, and university officials argued that the code's wording did not proscribe a particular idea, including offensive ideas.[34] The court ruled in favor of the students, holding that the code was unconstitutionally broad and content-based.[35]

New Jersey mandated that private educational institutions cannot enact and enforce sweeping prohibitions on student speech. In *State v. Schmid*,[36] the New Jersey Supreme Court ruled that a state constitutional guarantee of free expression prevented Princeton University, a private institution, from mandating that all individuals unconnected to Princeton must obtain permission to distribute literature on campus. However, California and New Jersey's extension of free speech protections to private educational institutions represent the exception, not the rule, to the requirement of state

30. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("[a] state university without question is a state actor.").

31. Cal. Educ. Code § 94367 (1992).

32. *Id.* § 94367(a).

33. Corry v. Leland Stanford Junior Univ., Case No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

34. *Court Overturns Stanford University Code Barring Bigoted Speech*, N.Y. TIMES, Mar. 1, 1995, http://www.nytimes.com/1995/03/01/us/court-overturns-stanford-university-code-barring-bigoted-speech.html.

35. *See Corry*, Case No. 740309.

36. State v. Schmid, 423 A.2d 615 (N.J. 1980).

action. The Supreme Court has yet to answer whether the operation of a private university constitutes "state action" when there is "such a close nexus between the State and the challenged action that seemingly private behavior may be treated as that of the State itself."[37] As a threshold inquiry into the First Amendment rights of students, it is essential to determine whether the educational institution is a private or state actor, or whether an exception to the state actor requirement applies.

As the United States Supreme Court has articulated in numerous opinions, regulations enacted for the purpose of restraining speech on the basis of its content or viewpoint presumptively violate the First Amendment.[38] However, the Free Speech Clause of the First Amendment is not without constitutional limitations; very few scholars would argue that the right of free speech is absolute. Restrictions of free speech rights by state actors in the educational context, whether "on-campus" or "off-campus," must still adhere to traditional First Amendment principles, including the various exceptions to free speech protection carved out by the Supreme Court. The next section will briefly review the exceptions to First Amendment protection, including the categories of speech judicially determined to be "unprotected" because such speech lacks any social value to the exposition of ideas.[39]

B. Unprotected Speech: Exceptions to Constitutional Protection Under the First Amendment

The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[40] and while the protection afforded by the First Amendment is most commonly understood as a limitation on government coercion and intrusion, it is also a mechanism to promote robust debate, and to foster an informed citizenry pursuant to self-governance.[41] The First Amendment

37. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

38. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–47 (1986); *see also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

39. *See* Miller v. California, 413 U.S. 15, 20–21 (1973).

40. U.S. CONST. amend. I.

41. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 29–32 (Alfred A. Knopf, 2005) (recognizing that the First Amendment protects individuals from government restrictions on speech, Justice Breyer finds that First Amendment principles, including the principle of protecting "active liberty" or participatory self-government, must be incorporated in the interpretation of laws affecting

protects not only unpopular minority views, but also protects the true "majority" view among people from an unrepresentative and self-interested governing body.[42] Yet, the protection guaranteed by the First Amendment is not absolute. While internet communication falls within the free speech doctrine as "speech,"[43] not all online speech acts are afforded constitutional protection. Before turning to the applicability of student speech doctrine to online student speech, school administrators and courts must determine whether the speech falls under one of the narrow categories of speech not included within the ambit of First Amendment protection.[44] The Supreme Court has determined that these unprotected speech categories are not an "essential part of any exposition of ideas, and are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] Since the early 20th century, the Supreme Court has delineated unprotected speech to include the incitement of imminent lawless action,[46] "patently offensive" material that appeals to the prurient interest (e.g. obscene content),[47] "fighting words,"[48] "true threats" to commit violence,[49] and defamation.[50]

Speech is legally obscene if it satisfies the *Miller* test.[51] In

speech); *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 274–76 (1992) (noting that the First Amendment creates more than a mere right to fend off government censorship as conventionally understood, and that the First Amendment is no mere negative right, but has positive dimensions compelling the government to take steps to ensure that legal rules according exclusive authority to private persons (e.g. broadcasters) do not violate the system of free expression).

42. AKHIL REED AMAR, THE BILL OF RIGHTS 21 (1998) ("Thus, although the First Amendment's text is broad enough to protect the rights of unpopular minorities . . . the Amendment's historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.") (citations omitted).

43. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997); *see also In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011).

44. *See infra* III.B for a discussion of unprotected speech, discussing only limited categories of unprotected speech and excluding discussion of unprotected speech such as child pornography and other speech acts pursuant to criminal conduct.

45. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

46. Brandenburg v. Ohio, 395 U.S. 444 (1969).

47. Miller v. California, 413 U.S. 15 (1973).

48. *Chaplinsky*, 315 U.S. at 573.

49. Virginia v. Black, 538 U.S. 343 (2003).

50. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

51. S*ee Miller*, 413 U.S. at 24.

Miller, the Supreme Court articulated a three-prong test to determine if content is obscene.[52] To find that speech is legally obscene, the following requirements must be met: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes in a patently offensive way sexual conduct as defined by state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

Under the fighting words doctrine, speech that includes words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[54] is also exempted from constitutional protection. However, the constitutional parameters as to what type of content amounts to fighting words have not been conclusively drawn.[55]

A defamatory statement, or the published communication of a false statement of fact that harms the reputation of another person, is another category of unprotected speech.[56] Such statements, when directed at a public official or public figure, require that the speaker had knowledge of the statement's falsity or had a reckless disregard for the truth in order to be exempted from First Amendment protection.[57]

Moreover, government restrictions and limitations on speech must not impermissibly burden protected speech any more than is necessary to achieve the state's goals. Overly broad and sweeping restrictions on the content of speech are subject to constitutional challenges under the overbreadth and vagueness doctrines.[58] Thus, a regulation that prohibits more protected expressive activity than is

52. *Id.*

53. *Id.*

54. S*ee Chaplinsky*, 315 U.S. at 572.

55. *See* Melody L. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994); *see also* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 443 (2004).

56. *See* Gertz v. Robert Welch, 418 U.S. 323 (1974).

57. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *see also Gertz*, 418 U.S. at 327–28.

58. *See* United States v. Stevens, 559 U.S. 460 (2010) (striking down a federal statute that criminalized the sale or possession of "depictions of animal cruelty" as substantially overbroad); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (holding that a local city ordinance that made it a crime for three or more persons to assemble and annoy a passerby was unconstitutionally vague).

necessary to achieve the government's stated purpose is facially unconstitutional. Furthermore, a law restricting speech can be declared void for vagueness if persons "of common intelligence must necessarily guess at its meaning."[59] The State may also enforce reasonable content-neutral regulations on expressive activity, or limits on the "time, place and manner" of speech, so long as such limitations are narrowly tailored to serve an important government purpose, without regard to content or viewpoint.[60]

Speech that is directed at inciting imminent lawlessness and speech containing "true threats" are particularly relevant categories of unprotected speech for this article's focus on school authority over off-campus online speech. Under the doctrine set forth in *Brandenberg v. Ohio,*[61] speech that advocates for lawlessness or violent action is exempted from constitutional protection if the speech is "directed to inciting imminent lawless action and is likely to incite or produce such action."[62] Since the Court's ruling in *Brandenburg*, questions remain unanswered with regard to how the imminence element should be defined: whether the *Brandenburg* test is limited to mere "political advocacy" that encourages others, or whether it is also applicable to the individual speaker's own announcement of criminal or violent acts pursuant to political ends.[63] Similarly, "true threats" are another category of unprotected speech tethered in uncertainty with its applicability. The Supreme Court articulated that a statement is considered a "true threat" if the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual group or individuals."[64] However, what counts as a proscribable threat has not been especially clear, even

59. *Coates*, 402 U.S. at 614.

60. *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988).

61. 395 U.S. 444 (1969).

62. *Id.* at 447.

63. *See* Nat'l. Assoc. for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, (1982) (holding that if the unlawful activity advocated is weeks or months away, a court may determine the speech is not "imminent"); *see also* Thomas Healy, Brandenburg *in a Time of Terror,* 84 NOTRE DAME L. REV. 655, 667-70 (2009) (discussing whether *Brandenburg* only applies to speech that encourages others to commit criminal acts in a show of political protest, or whether it applies when the individual speaker discusses their own criminal proclivities in a political context); Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 384 (2014) (questioning whether the *Brandenburg* test is limited to speech that is "political advocacy" or if it applies to all speech).

64. Virginia v. Black, 538 U.S. 343, 360 (2000).

after the Court's most recent holding in *Elonis v. United States*[65] in which it addressed threats via social media.

In *Elonis,* the petitioner, Anthony Elonis, posted tirades in the form of rap lyrics on Facebook, which included violent language and imagery and was charged with violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."[66] Elonis's posts frequently included "crude, degrading, and violent material about his soon-to-be ex-wife"[67] and included posts about "making a name for myself . . . [e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined."[68] Elonis did, however, include disclaimers to some of his posts, writing: "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"[69] The government argued that as long as Elonis knew the content and context of his posts, and a reasonable person would have understood the posts as genuine threats, Elonis' conviction under § 875(c) was appropriate. But Chief Justice Roberts, writing for the majority, held that the mental state requirement turns on whether a defendant knew the *character* of what was sent, not simply its content and context.[70] Therefore, laws barring threats, including online threats are satisfied "if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[71] While the Court in *Elonis* addressed the *mens rea* requirement for making an online threat, it also left open questions regarding the appropriate standard to apply to online threats.[72] Nevertheless, the

65. *Elonis*, 135 S. Ct. 2001.

66. *Id.* at 2002.

67. *Id.* at 2005.

68. *Id.* at 2006.

69. *Id.*

70. *Id.* at 2012.

71. *Id.*

72. *See Elonis*, 135 S. Ct. 2012 (Alito, J., concurring in part and dissenting in part) (rejecting the majority's decision not to decide whether recklessness suffices for liability under Section 875(c), stating that the Court's disposition is certain to cause confusion because the majority refuses to explain what type of intent is necessary), (Thomas, J., dissenting) (criticizing the majority's adoption of the minority circuits' position requiring proof of an intent to threaten, yet also noting that it has only resolved the requirement that general intent will not suffice, leaving open the possibility that recklessness may be enough); *see also* Michael Pierce, *Prosecuting Online Threats After Elonis,* 110 NW. U. L. REV. ONLINE 51 (2015) (the author notes that the *Elonis* decision failed to decide which *mens rea* standard the government must prove when it prosecutes an individual for making an online threat under 18

burden to determine a true threat, according to the Court in *Elonis*, is fairly high, requiring more than a negligence standard and the general intent of knowing the content and context of the speech.

C. Right to Anonymous Online Speech?

The Supreme Court has held that online speech is deserving of the same protection as other speech—there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech.[73] From blogging to online product reviews, anonymous online speech is prevalent in our wired society, providing users with a degree of security from social stigma and government prosecution. Yet anonymous speech can also lend itself to greater instances of antisocial behavior, creating new social problems associated with online, but "off-campus" activity, where students can harass, threaten, and post hate speech. Schools and universities are being forced to quickly adapt to evolving communication technologies that provide students with both anonymity and additional channels for communication. Interestingly, the younger generation of digital users or Millennials (ages 18–34)—those who have been "connected" to the Internet since birth—are far more likely than older generations to endorse government action to prevent people from saying offensive statements against minority groups.[74] Lower courts addressing the scope of protection for anonymous digital speech have been confined to issues of unmasking "John Doe" defendants in libel suits, where standards vary greatly by jurisdiction.[75]

The European Court of Justice recently held in *Google Spain SL v. Agencia Espanola de Proteccion de Datos*[76] that search engines like Google must delete links to personal information from search results at the request of a data subject. In other words, users have the "right

U.S.C. §857(c), and left lower courts to face a broad decision between the requirement of a "reckless" standard or whether defendants "specifically intended" that their words be interpreted as threats).

73. *Reno*, 521 U.S. at 870 (1997).

74. *See* Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities,* PEW RESEARCH CENTER (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/).

75. *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B. C. L. REV. 1373, 1376–81 (2009) (observing that the scope of protection for anonymous Internet speech varies greatly by jurisdiction, allowing resourceful plaintiffs to make strategic use of libel law against defendants).

76. A.N., June 25, 2013 (R.J., No. C-131/12) (Spain).

to be forgotten" by erasing links to web pages after a certain time, absent a legitimate government reason not to.[77] While closely related to the right of anonymity, no U.S. court has recognized a similar "right to be forgotten."[78] However, the Supreme Court asserted that the First Amendment protects anonymous speech,[79] but the scope of the right is limited. In 1960, the Supreme Court in *Talley v. California*[80] struck down a Los Angeles ordinance that required persons distributing handbills to print their names and addresses on the cover of the handbill.[81] The state argued that the ordinance was enacted to identify persons responsible for fraud, false advertising, and libel, but the ordinance applied to all handbills, making it unconstitutionally overbroad.[82] The Court in *Talley* based its ruling on the First Amendment principle of preserving and promoting self-governance, reasoning that anonymous political speech without fear of reprisal can help promote public discussion.[83]

Furthermore, in *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio law that prohibited the distribution of anonymous handbills in support of a ballot measure, holding that political speech would be burdened by the compulsory identification requirement.[84] Echoing the reasoning put forth in *Talley*, the Court

77. David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES, May 13, 2014, www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html.

78. *See* Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten,* 39 N. KY. L. REV. 119, 133 (2012); Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012); *see also* Jeff John Roberts, *The Right to Be Forgotten from Google? Forget it says U.S. Crowd,* FORTUNE, Mar. 12, 2015, 11:32 AM, http://fortune.com/2015/03/12/the-right-to-be-forgotten-from-google-forget-it-says-u-s-crowd/ (noting that there is no right in the U.S. to delete links in search results, but highlighting the growing debate as to whether a similar "right to be forgotten" should be legally recognized in the U.S.).

79. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect protected by the First Amendment.").

80. 362 U.S. 60 (1960).

81. *Id.* at 60–61.

82. *Id.* at 64.

83. *See* Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 815, 834 (2013) (explaining that the Court's support for anonymity in *Talley* is structured around the example of anonymous political pamphleteering, reasoning that "(1) banning anonymity interferes with a First Amendment freedom of distribution, and (2) laws that deter discussion by creating a fear of reprisal violate the First Amendment.").

84. *See McIntyre*, 514 U.S. at 342.

held that anonymity supports a core First Amendment principle: "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[85] However, in *McConnell v. FEC*[86] the Court upheld disclosure requirements in the context of campaign finance pursuant to the McCain–Feingold Campaign Finance Reform Act.[87] Arguably, the strong government interest and concerns with maintaining the legitimacy of political elections (or the semblance of it) outweigh the interests of contributor anonymity. In 2010, the Court in *Doe v. Reed*[88] addressed the issue of whether disclosure of referendum petitions violates the First Amendment.[89] In *Reed*, the Court held that disclosure of referendum petitions "does not as a general matter violate the First Amendment"[90] and state interests can trump the right to anonymity if there is a sufficiently important government interest.[91] Based on the aforementioned Supreme Court precedent, there is a limited right to anonymous, *political* speech, but questions remain if First Amendment protection extends beyond political speech.[92]

Much of the recent case law and scholarly work on online anonymity has centered on narrowing a standard for unmasking anonymous, online defendants through the civil subpoena process.[93] However, as one legal scholar points out, outside of the subpoena process, there is very little guidance as to how courts might protect online anonymity.[94] At a minimum, courts generally understand that

85. *Id.* at 357.

86. McConnell v. FEC, 540 U.S. 93 (2001), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

87. *McConnell*, 540 U.S. at 143–223 (discussing the constitutionality of provisions in the Act, formally known as the Bipartisan Campaign Reform Act of 2002).

88. 561 U.S. 186 (2010).

89. *Id.* at 193.

90. *Id.* at 202.

91. *Id.* at 197.

92. *See* Kaminski, *supra* note 83, at 843–44 (explaining the consensus among commentators that the right to anonymous speech is not absolute, and instead must be balanced between the value of the anonymous speech and state interests).

93. Cases that have set forth to narrow or define the standard are referred to as the *Doe* or *Dendrite* cases, referring to the original New Jersey state case that established one of the first subpoena standards to unmask anonymous online defendants in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace,* 48 DUKE L. J. 855, 881–82 (2000) (explaining how subpoenas have been used to chill defendants' speech through the subpoena process).

94. *See* Kaminiski, *supra* note 83, at 883–86 (discussing how the few past commentators

anonymity has value, and should, therefore, in limited circumstances, be protected. As with other forms of communication, the ability to speak anonymously online promotes robust dialogue and allows speakers to express themselves without "fear of economic or official retaliation."[95] According to legal scholar Margot Kaminiski, anti-mask cases also inform us that "the state should not be permitted to include the nature of anonymity as part of state interests, to be balanced against the speaker's First Amendment rights . . . courts should be cautioned against allowing states to regulate anonymity because it is inherently bad, and should look instead to showings of a real, concrete state interest."[96]

The courts understand that online speech is empowering because any user with Internet access—commoner or elite—can post information to protest or galvanize a cause or campaign. But is there a constitutional right to anonymity, even when a user publishes offensive speech? While the Supreme Court has not yet determined the legal boundaries of anonymous online speech, the judicial precedent thus far points to a limited right to anonymity, especially for political speech and association. Conversely, nonpolitical anonymous speech is likely afforded lower First Amendment protection. Ultimately, this limited right must be balanced against other state and societal interests and will not trump concerns that include nefarious darknet activities (*e.g.* Silk Road, the online black market on the anonymity network Tor), anonymous campaign contributions, or "true threats." But as communication technology continues to evolve pursuant to Moore's law,[97] so too will the development of laws and policies regulating our anonymous online presence and expressive activity. What remains unanswered is whether there is a general right to anonymity apart from speech or association. According to at least one Ninth Circuit judge, there is no general right under the Constitution.[98] Although the Court has not

have handled anti-mask laws and how they vary in their understanding of Supreme Court case law, while noting the sparse treatment of anti-mask laws in the legal literature on online anonymity).

95. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

96. Kaminiski, *supra* note 83, at 888–89 (asserting that where the State has significantly stronger interests, however, a narrowly tailored real-name policy might be permissible—for example, a real-name policy for commercial speech, or targeted fraud).

97. The observation made in 1965 by Gordon Moore, co-founder of Intel, that computing processing power doubles every 18 months.

98. *See* Alex Kozinski, *The Two Faces of Anonymity,* 43 CAP. U. L. REV. 1, 16–17

addressed anonymous student speech, the doctrinal legacy points to at least a limited right of anonymity for political content.

IV. UNRESOLVED DOCTRINAL QUESTIONS: FIRST AMENDMENT ISSUES REGARDING ON- AND OFF-CAMPUS ONLINE SPEECH

The extent to which public school students enjoy constitutionally protected rights to expression has long been debated even before the Supreme Court's landmark 1969 decision in *Tinker v. Des Moines Independent Community School District*.[99] Lately, this debate took a digital turn, further muddling the degree to which school officials can regulate student speech, both on and off campus. Section A of this Part reviews the holding in *Tinker*, and addresses subsequent Supreme Court cases that have refined the scope of student speech. Section B explores the unresolved question regarding the scope of *Tinker* and its progeny's application to the university campus, even while some lowers courts continue to rely on the *Tinker* doctrine in the college context. Lastly, Section C analyzes the variety of approaches that the appellate courts have adopted to address off-campus online speech, including an analysis of the appellate court's latest holding in *Bell v. Itawamba County School Board.*[100]

A. Student Speech: The Tinker *Standard and Its Progeny*

In, *Tinker*[101] the Supreme Court affirmed the First Amendment rights of students in public schools and recognized the right of student protestors to wear black armbands to protest the Vietnam war, despite a school ban on such symbolic speech. Writing for the majority, Justice Abe Fortas observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[102] However, the Court

(2015), contending that there is no general right of anonymity beyond speech or association. Kozinski notes that while the Fourth and Fourteenth Amendments protect privacy, there does not appear to be a constitutional anchor for blanket anonymity, arguing that there is no societal consensus that anonymity is inherently good: "[s]ome scary things happen when people are—or feel to be—anonymous, and any right that has such highly anti-social aspects is unlikely to be greeted with enthusiasm by the Supreme Court."

99. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see* Morse v. Frederick, 551 U.S. 393, 413–15 (2007) (Thomas, J., concurring) (noting that cases involving student speech restrictions and discipline date back to the 1800s).

100. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).

101. 393 U.S. 503.

102. *Id.* at 506.

in *Tinker* also recognized the "special characteristics" of the school environment, which requires that students' free speech rights must also be tempered with considerations of school authority and their ability to produce an informed citizenry.[103] The Court's compromise between these competing interests—the students' right to free expression and the school's interest in maintaining order pursuant to its educational goals—led to the *Tinker* standard set forth in the decision. The Court held: "conduct by the student, *in class or out of it*, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized . . . ."[104]

Since *Tinker*, the Supreme Court has further refined the scope of student speech, carving out narrow exceptions to the *Tinker* standard based on the characteristics and content of the speech. In *Bethel School District No. 403 v. Fraser*,[105] the Supreme Court held that school officials acted within their authority when they suspended a high school student for "offensively lewd and indecent" speech delivered at a school assembly.[106] Moreover, the Court subsequently addressed a school's right to exercise editorial control and prevent the publication of student speech in a school-sponsored publication in *Hazelwood School District v. Kuhlmeier*.[107] There the Court held that restrictions on school-sponsored, student news articles related to students' experiences with divorce and pregnancy do not violate the First Amendment if actions by school officials are "reasonably related to legitimate pedagogical concerns."[108] Most recently, in *Morse v. Frederick*,[109] the Supreme Court considered whether school officials infringed a student's right of free speech when it disciplined a student for holding up a banner at a school-sponsored event that read "BONG HiTS 4 JESUS" across the street from the school. The *Morse*

103. *Id.* at 506–07.

104. *Id.* at 513 (emphasis added).

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

106. *Id.* at 685.

107. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding a school's right to exercise editorial control over the style and content of the school publication when students engage in "expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.").

108. *Id.* at 262, 271, 273 (the Court upheld a school's right to exercise editorial control over the content of student speech in a school-sponsored publication when the student engages in "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

109. 551 U.S. 393.

majority held that school officials may restrict student speech that can be reasonably viewed as promoting illegal drug use.[110] In concurrence, Justice Alito held that a school may discipline a student for speech which poses a "grave and . . . unique threat to the physical safety of students" including "advocating illegal drug use."[111] Thus, student speech, at least at the K–12 level, can be limited if the content involves "lewd and indecent" material,[112] school-sponsored speech activities,[113] and content that can be reasonably interpreted as promoting illegal drug use.[114] However, beyond these limited contexts, as the Court noted in *Morse*, "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[115] Thus far the Supreme Court has never addressed a school's authority over the recurring scenario of the student who posts off-campus digital messages about fellow classmates or school officials, nor provided any guidance as to whether school speech precedents apply with equal force in the university context.

B. Student Speech in the University Context: Tinker *Standards in Higher Education?*

As the previous section pointed out, the doctrinal roots of student speech have centered on the K-12 educational context. Yet, several lower courts have cited *Tinker*[116] and *Hazelwood School District*[117] both of which involve the secondary school environment, to carve out a limited legal framework for student speech in the university context.[118] While the Supreme Court has treaded lightly on the issue

110. *Id.* at 397, 401–02.

111. *Id.* at 425.

112. *Bethel Sch. Dist.*, 478 U.S. at 677–78.

113. *Hazelwood*, 484 U.S. at 264.

114. *Morse*, 551 U.S. at 397, 401–02.

115. *Id.* at 401.

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

117. 484 U.S. 260 (1988).

118. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (Applying a *Tinker* analysis, the Court declared that First Amendment protections apply to college students' speech and rejected arguments by the university that the college students suffered no First Amendment deprivation when they were denied access to use campus facilities because they could still meet off campus.); Widmar v. Vincent, 454 U.S. 263 (1981) (Holding that once a university created an open public forum for use by student groups, it could not restrict access based on content grounds without a compelling governmental justification, and citing *Tinker,* the Court noted that First Amendment standards should be evaluated by taking into consideration the special characteristics of the school environment.); Axson-Flynn v. Johnson, 356 F.3d 1277

as to whether a university student's speech is protected to the same degree as a high school student, the Court has accepted the view that universities play a distinct role in our public discourse.[119] Unlike the K–12 context, most of the students and faculty on university campuses are adults, and the differences in maturity and intellectual freedom call into question the applicability of *Tinker* and its progeny to the university context. Unfortunately, the Court has never definitively answered the question as to whether the general rules applicable under standard First Amendment doctrine would apply in the same way in the university context.[120]

On several occasions, the Supreme Court addressed free speech issues in the university context pertaining to clashes between universities and student organizations seeking official recognition, but without directly addressing the appropriate standard for reviewing university regulation of students' speech. In several university-based speech cases, the Court ruled that the university student groups were unconstitutionally singled out because of their points of view.[121] In *Healy v. James*,[122] the Supreme Court ruled that university students were deprived of their First Amendment rights when they were denied access to campus facilities open to other students even if they could

(10th Cir. 2004) (applying a *Hazelwood* analysis to student speech in a school play).

119. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (asserting that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas."); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 230 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teacher and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."); Bd. of Regents v. Southworth, 529 U.S. 217, 231-32 (2000) ("Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech." According much deference to the goals of the academy, the Court held that "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.").

120. S*ee* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions,* 54 UCLA L. REV. 1497, 1513 (2007) (explaining that the Court's decisions continue to recognize the special role played by universities in public discourse). Horwitz cites Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (declining, without deciding, to apply a general rule involving government employees in cases "involving speech related to scholarship or teaching.") and Rust v. Sullivan, 500 U.S. 173, 200 (1991) (suggesting that the Court's application of unconstitutional conditions doctrine might be different in cases involving universities, which constitute "a traditional sphere of free expression so fundamental to the functioning of our society . . . .").).

121. *See* Healy v. James, 408 U.S. 169 (1972); Widmar v. Vincent, 454 U.S. 263 (1981); Rosenberger v. Univ. of Va., 515 U.S. 819 (1995).

122. 408 U.S. 169 (1972).

meet off campus.[123] Citing language from *Tinker*, the Court in *Healy* noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[124] In *Board of Regents of University of Wisconsin v. Southworth*,[125] the Court noted that the unique cultural and intellectual dynamics of the university allows it to decide how best to serve its students, as long as their civil rights are not violated.[126] Without relying on *Tinker*, the Court acknowledged that changes in communication technology have blurred traditional conceptions of territorial boundaries, but asserted that as long as universities adopt a viewpoint neutral stance, they must be afforded deference with regard to student speech programs.[127]

More recently, in *Christian Legal Society Chapter of the University of California v. Martinez*,[128] the Supreme Court again faced a student group seeking official recognition when the University of California law school rejected the Christian Legal Society's (CLS) application for recognition on the grounds that the group adopted discriminatory membership guidelines. The Court deferred to the school officials' judgment in light of the "reasonableness" of the restrictions, taking into account the "special circumstances" of the educational context and reiterated the boundaries a state may set with regard to student speech: "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint."[129] Supreme Court precedent reveals the Court's willingness to defer to the judgment of university officials when they impose restrictions on speech, so long as they are "reasonable" in light of the forum and are viewpoint

123. *Id.* at 183.

124. *Id.* at 180.

125. 529 U.S. 217 (2000).

126. *Id.* at 232–33.

127. *Id.* at 234 ("Universities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse. If the rule of viewpoint neutrality is respected, our holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities.").

128. 561 U.S. 661 (2010).

129. *Id.* at 685.

neutral.[130]

While both the Supreme Court and several lower courts have cited *Tinker* in cases pertaining to university recognition and funding of student groups,[131] the Court has not directly applied *Tinker* to speech occurring on or off a university campus, nor has the Court articulated clear guidelines for limiting student speech in the university context to the same extent it has with secondary schools. In the absence of Supreme Court guidance, some lower courts, including the Third Circuit[132] and the Minnesota Supreme Court,[133] have argued that *Tinker* does not apply to institutions of higher education. In *Tatro v. University of Minnesota*, the Minnesota Supreme Court held that the University of Minnesota did not violate a student's First Amendment rights when it disciplined the student for her Facebook posts about her mortuary science lab programs.[134] The plaintiff had posted personal status updates on the social networking site, which allowed "friends" and "friends of friends" to see these posts that were described in court filings as "satirical commentary and violent fantasy about her school experience."[135] While the Minnesota Court of Appeals applied *Tinker*'s "substantial disruption test" to uphold the university's discipline of plaintiff, the Minnesota Supreme Court held that the *Tinker* standard is inappropriate "in the context of a university student's Facebook posts when the university has imposed disciplinary sanctions for violations of academic program rules."[136] The court emphasized that its decision rested on the fact that the student was punished for violating professional standards, and that universities do not violate the First Amendment for disciplining students for online, off-campus speech that violates academic program rules, as long as such sanctions "are narrowly tailored and

130. *See id.* at 687–98.

131. S*ee Healy*, 408 U.S. at 169, 180; *see also* Jessica B. Lyons, *Defining Freedom of the College Press After* Hosty v. Carter, 59 VAND. L. REV. 1771 (2006).

132. *See* McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010) (the Third Circuit recognizes that "there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school" and that public university "administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators.") (citing DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008)).

133. *See* Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

134. *Id.*

135. *Id.* at 511–12.

136. *Id.* at 517–18.

directly related to established professional conduct standards."[137]

However, other circuits, including the Sixth, Seventh, and Ninth, have imported the speech standards from the K-12 context and applied them to curricular student speech in the higher education context,[138] eliciting criticism from many commentators.[139] Thus, while some lower courts have recognized a higher degree of speech protection in the university setting, the Supreme Court has yet to clarify the parameters of school authority over student speech in the extent to which it is coextensive with secondary schools.[140] Despite this murky picture of free speech jurisprudence on college campuses, many lower courts continue to rely on the secondary school decisions in speech cases involving college students.

C. Online Speech Originating Off-campus: Circuit Court Variation

New media technologies and their adoption by secondary and post-secondary students have created challenges centered on balancing the students' right of free expression and competing pedagogical concerns in maintaining order and protecting the school community. With the growth of social media, the crucial question as to when and to what extent speech originating off campus but implicating the school community can be regulated, has become

137. *Id.* at 520–21.

138. *See, e.g.*, Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) ("Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (extending *Hazelwood* to the university context); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) ("It is thus an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work. We conclude that it does.").

139. *See, e.g.*, Gregory C. Lisby, *Resolving the* Hazelwood *Conundrum: The First Amendment Rights of College Students in* Kincaid v. Gibson *and Beyond*, 7 COMM . L. & POL'Y 129, 156 (2002) (forecasting "dire consequences" if *Hazelwood* standards are applied in the university speech context); Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 199 (2003) (arguing that *Hazelwood* standards should not be applied to university students, and supporting the use of *Tinker*'s material and substantial disruption test); HARVEY A. SILVERGATE ET AL., FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 48 (Greg Lukianoff ed., 2005) (contending that "arguments that attempt to end that tradition by citing those constitutional principles that apply to our nation's children are constitutionally flawed, intellectually dishonest, and terribly demeaning to young adults of our colleges and universities.").

140. Jessica B. Lyons, *Defining Freedom of the College Press After* Hosty v. Carter, 59 VAND. L. REV. 1771 (2006).

highly contested and tethered in judicial uncertainty. This complicated balancing act in the age of 140 characters or less has resulted in differing circuit court standards being applied to off-campus speech—albeit primarily in the K–12 context—muddling the scope of government authority over off-campus online speech. Lamenting the failure of guidance as to when the *Tinker* standards apply, Justice Thomas noted in *Morse*: "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not."[141] While the *Tinker* doctrine and its progeny address student speech in the context of K–12 education, the Supreme Court, as mentioned in the previous sections, has yet to address this doctrinal legacy in the context of higher education, particularly where speech occurs online and originates outside the "schoolhouse gate." However, recent circuit decisions have addressed off-campus online speech and if courts' previous reliance on secondary school precedent in the college setting is a harbinger of future application, then a similar alignment with off-campus online speech is expected. The circuit cases reviewed in this section are therefore instructive, and can provide guidance to the extent that school officials and university administrators can restrict online speech that originates off-campus.

As of the fall of 2015, six circuits have addressed whether *Tinker* applies to off-campus online speech. The Second,[142] Fourth,[143] Fifth,[144] Eighth,[145] and Ninth[146] Circuits have held that *Tinker* applies to online speech that originated off-campus in certain situations. In the Third Circuit, there is an intra-circuit split as to the *Tinker* standard's applicability.[147] The Second Circuit first addressed off-

141. Morse v. Frederick, 551 U.S. 393, 418 (2007) (Thomas, J., concurring).

142. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007); *see also* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

143. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).

144. *See* Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); *see also* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).

145. *See* S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).

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

147. S*ee* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219-20 (3d Cir. 2011) (*en banc* holding that *Tinker*'s applicability to off-campus speech remained unresolved in the Third Circuit); *see also* J.S. *ex rel.* Snyder v. Blue Mt. Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (A divided *en banc* panel assuming that the *Tinker* standard applies to online speech harassing a school administrator, holding that the facts of the case "do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school . . . .").

campus online student speech in *Wisniewski v. Board of Education*,[148] which involved a student who sent instant messages to fellow classmates. The instant messages contained an icon of a small drawing of the student's English teacher being shot in the head. After learning about the messages' crude content, school officials suspended the student.[149] The court ruled that the speech in question was not immunized from government regulation because there was a "reasonably foreseeable risk" that the icon would cause a "substantial disruption" within the school environment.[150] Thus, the *Wisniewski* court established a threshold inquiry as to whether the off-campus student speech in question presents a "reasonably foreseeable risk" of substantial disruption within the educational environment.[151]

Similarly, in *S.J.W. v. Lee's Summit R-7 School District*,[152] the Eighth Circuit held that before school officials could discipline a pair of students for creating an online blog containing offensive comments about the school and classmates, it had to be "reasonably foreseeable that the speech will reach the school community and cause substantial disruption."[153] The students' blog included a variety of racist comments mocking African American students, along with sexually explicit comments about female classmates. The Eighth Circuit panel determined that *Tinker* applied because the speech was "targeted" at the school.[154] In *Kowalski v. Berkeley County Schools*,[155] the speech in question involved a student who from her home computer created a MySpace social media page that was largely dedicated to ridiculing a fellow student.[156] The Fourth Circuit applied an initial inquiry as to whether the student's off-campus speech had a sufficiently strong "nexus" to the school's pedagogical concerns.[157] Interestingly, in

148. 494 F.3d 34 (2d Cir. 2007).

149. *Id.* at 35–36.

150. *Id.* at 40.

151. *Id.*

152. 696 F.3d. 771 (8th Cir. 2012).

153. *Id.* at 777 (Citing D.J.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754, 766 (8th Cir. 2011) "*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.").

154. *Id.* at 778.

155. 652 F.3d 565 (4th Cir. 2011).

156. *Id.* at 567.

157. *Id.* at 573 (Noting that there is a limit to the scope of a school's interest in the order, safety, and well-being of its students when the speech originates outside the schoolhouse gate. "But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's

Kowalski, the court underscored the affirmative duty that school officials have as "trustees of the student body's well-being"[158] holding that "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[159] As opposed to the threshold inquiries followed by the Second and Eighth Circuits, the *Kowalski* court appears to have cast a wider net of potential off-campus speech subject to school regulation with its "nexus" standard.[160]

The Ninth Circuit most recently addressed off-campus online speech in *Wynar v. Douglas County School District*.[161] Landon Wynar, a high school sophomore, sent instant messages to classmates via MySpace, where he also frequently wrote about his guns and his interest in shooting, and glorified Hitler as "our hero."[162] However, the content of Wynar's messages became increasingly violent, eventually including statements that centered around a school shooting to take place on a specific date in the near future.[163] Wynar was later suspended by school officials. He then sued the school district for violating his constitutional rights.[164] While declining to adopt or incorporate the threshold tests from other sister circuits, the *Wynar* court did acknowledge that both the speech's "nexus" to the school and the message's foreseeable reach into the school "could be easily satisfied in this circumstance."[165] The Ninth Circuit had the opportunity to craft a standard as to when *Tinker* applies to off-campus speech, but declined to do so.[166] Instead, the panel made

speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role . . . .").

158. *Id.* at 573.

159. *Id.* at 572.

160. *Id.* at 577. Observing the growing phenomenon of harassing and bullying speech that originates online and off-campus, the court concludes, "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."

161. 728 F.3d 1062 (9th Cir. 2013).

162. *Id.* at 1065.

163. *See id.* (the student's online messages included violent statements centered on a school shooting to take place on April 20, the date of the Columbine massacre, and referencing the Virginia Tech shooter).

164. *Id.* at 1066.

165. *Id.* at 1069.

166. *See id.* ("One of the difficulties with the student speech cases is an effort to define and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.").

explicit what the Ninth Circuit made implicit in a previous decision,[167] and carved out a new and narrow boundary: "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*."[168] The court then analyzed Wynar's speech under *Tinker*, including the rarely addressed "rights of other students to be secure"[169] prong and found the disciplinary action by the school board to be constitutional.[170]

Bell v. Itawamba County School Board[171] is a circuit court's most recent foray into the evolving doctrinal legacy of *Tinker* and the constitutional boundaries of off-campus online speech. Rehearing the case *en banc*, the Fifth Circuit addressed the constitutionality of school officials disciplining a student for posting an online rap video made off campus containing threatening language against the school's teachers and coaches.[172] Taylor Bell, a high school senior, posted a rap recording on his Facebook page and on YouTube, which contained explicit language, including a description of violent acts to be carried out against two high school teachers and coaches.[173] School officials interpreted the language as threatening and harassing, and took disciplinary action against Bell.[174] The *en banc* panel first examined whether Bell's speech fell under one of the exceptions to the *Tinker* standard, and found that Bell was not disciplined based on the "lewdness"[175] of the content or "perceived sponsorship by the

167. LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).

168. *Wynar*, 728 F.3d at 1069-70. The panel references several school shootings including Columbine, Virginia Tech, Sandy Hook, and others, for the proposition that the potential of such school violence must be taken into consideration when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment. "The approach we set out strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students."

169. *Id.* at 1071-72 (Acknowledging that few circuit cases address this prong) (citing then-Circuit Judge Alito's assertion in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) ("[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear.")).

170. *Id.* at 1071–72.

171. 799 F.3d 379 (5th Cir. 2015).

172. *Id.*

173. *Id.* at 383.

174. *Id.*

175. *Id.* at 390 (citing *Fraser,* 478 U.S. at 685, for the holding that lewd, vulgar, or indecent speech is one of the narrow exceptions to the general *Tinker* standard).

school."[176] Furthermore, the rap song did not "advocate illegal drug use"[177] or "portend a Columbine-like mass, systematic school shooting."[178] Thus, the Fifth Circuit panel found that Bell's online rap piece did not trigger an exception necessitating divergence from the *Tinker* standard.

Citing its own precedent in *Porter v. Ascension Parish School Board*[179] as instructive, the panel held that a speaker's intent matters when determining whether off-campus speech is subject to *Tinker*.[180] Referencing the omnipresent nature of the Internet, increased social media use, and school officials' concerns for public safety in the wake of recent school shootings, the *Bell* panel makes explicit what other circuits have made implicit[181] with regard to disciplining students for off-campus speech: *Tinker* governs when "a student *intentionally* directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate . . . even when such speech originated and was disseminated, off-campus without the use of school resources."[182] Although the *Bell* panel declined to adopt a "rigid standard" as to when *Tinker* applies to off-campus speech, the panel grounded its analysis first with a threshold inquiry as to whether the speaker intended for the speech to reach the school community, before determining whether the online speech was reasonably understood by school officials to threaten, harass or intimidate.[183]

After concluding that *Tinker* governs Bell's off-campus speech, the Fifth Circuit then addressed the unresolved doctrinal question as to under what circumstances off-campus online speech would satisfy the *Tinker* standard of a "substantial disruption" or speech that "reasonably could have been forecast" to cause substantial disruption.[184] Without addressing whether Bell's speech would

176. *Id.* at 391 (citing *Hazelwood*, 484 U.S. at 273, for the proposition that school-sponsored speech is also another exception to the *Tinker* standard).

177. *Id.* (citing *Morse*, 551 U.S. at 397–98 (holding that a school may discipline a student for speech, . . . such as "advocating illegal drug use.")).

178. *Id.* at 392.

179. 393 F.3d 608 (5th Cir. 2004)

180. *See Bell*, 799 F.3d at 395.

181. *See* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); *see also* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

182. *Bell*, 799 F.3d at 396 (emphasis added).

183. *See id.* (holding *Tinker* applies to the off-campus speech here, but "because such determinations are heavily influenced by the facts in each matter, we declined to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits.").

184. *See id.* at 397 ("Having held *Tinker* applies in this instance, the next question is

amount to a "substantial disruption," the *Bell* panel found that Bell's expressive activity could have at least reasonably been forecast to cause a substantial disruption.[185] Citing *Tinker*, the panel reiterated the fact that school authorities are not expressly required to forecast a "substantial or material disruption," only requiring the *possibility* of a reasonable forecast based on the facts and context of the speech.[186] The *Bell* panel outlined several factors that other circuits have considered in determining whether *Tinker*'s "substantial disruption" or "reasonable forecast" standard is satisfied, before finding that the record at hand established that a substantial disruption reasonably could have been forecast by school authorities.[187] In the context of off-campus online messages intentionally directed at the school community, the latest circuit precedent reveals that courts afford greater deference to school officials disciplining students for speech that reasonably is understood as harassing, intimidating, and threatening to members of the school community if the speech causes a substantial disruption or is reasonably forecast to cause one. Compared to the Ninth Circuit's narrow application of *Tinker* to an "identifiable threat of school violence,"[188] the Fifth Circuit expanded the reach of school officials to restrict off-campus online speech that could include words and expressive activity that could be "reasonably understood . . . to threaten, harass, and intimidate."[189]

In sum, the circuit courts that have addressed the circumstances under which *Tinker* applies to off-campus online speech have applied diverse approaches. Both the Second[190] and Eighth[191] Circuits have adopted a "reasonably foreseeable risk" standard, requiring that off-campus speech present a reasonably foreseeable risk of substantial disruption to the school environment before *Tinker* applies.[192] In

whether Bell's recording either caused an actual disruption or reasonably could be forecast to cause one.").

185. *See id.* at 398.

186. *See id.* at 398 ("Accordingly, school authorities are not required expressly to forecast a 'substantial or material disruption"; rather, courts determine the possibility of a reasonable forecast based on the facts of the record.").

187. *See id.* (The panel explained that these factors include: "the nature and content of the speech, the objective and subjective seriousness of the speech, and the severity of the possible consequences should the speaker take action.").

188. *Wynar*, 728 F.3d at 1069–70.

189. *Bell*, 799 F.3d at 396.

190. *See* Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007).

191. *See* S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012).

192. The Second Circuit has not decided the question as to whether the speech must be

contrast to the "reasonably foreseeable risk" standard, the Fourth Circuit[193] requires that the off-campus speech have a sufficient "nexus" to the school environment. Thus far, the Fourth Circuit's threshold inquiry as to when *Tinker* governs student speech is the broadest, potentially subjecting a wide-variety of off-campus speech to *Tinker* analysis. However, the Ninth Circuit avoided a "global standard" for the variety of circumstances involving off-campus speech, nor did it adopt the threshold tests of its sister circuits.[194] Instead, the Ninth Circuit employed an approach narrowing the off-campus content subject to *Tinker* with its "identifiable threat of violence" test.[195] Lastly, the Fifth Circuit imposes both a specific intent requirement on the student, and a reasonableness standard imposed on school officials, whereby *Tinker* governs if the student intentionally directs speech at the school that is reasonably understood by school officials to threaten, harass, or intimidate.[196] These varied approaches leave the courts and school officials with more questions than answers regarding the constitutional boundaries as to when *Tinker* applies to off-campus online speech. The next Part will address both the constitutional and logistical implications of school restrictions on off-campus online speech and the unresolved speech issues that warrant resolution by the Supreme Court.

V. THE CONSTITUTIONAL IMPLICATIONS OF SCHOOL RESTRICTIONS ON OFF-CAMPUS ONLINE SPEECH AFTER *BELL*: MORE QUESTIONS THAN ANSWERS

While the Supreme Court has yet to address whether college students' free speech rights are coextensive with adults' free speech rights,[197] even assuming that current judicial precedent on student speech applies with equal force to the university context, restrictions on secondary and post-secondary students' off-campus online speech under *Tinker* and its progeny have undoubtedly raised many questions

reasonably foreseeable that it would reach the school or "whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability." *See Wisniewski*, 494 F.3d at 39. However, where it is reasonably foreseeable that off-campus speech meeting the *Tinker* test reaches the school, the Second Circuit has permitted schools to impose discipline based on the speech. *See Doninger*, 527 F.3d at 48.

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

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

195. *See id.*

196. *See Bell*, 799 F.3d at 396.

197. *See supra* IV.B.

regarding the boundaries of school authority over off-campus speech. The mixed approaches adopted by several circuit courts and state courts have led to legal uncertainties that preclude conclusive answers, leaving school officials and courts without clear guidance as to how off-campus speech should be constitutionally governed. Given the growing free speech concerns with online speech, what are the current constitutional boundaries of off-campus student speech, including anonymous speech, following the latest circuit decision in *Bell*? Section A of this Part will first analyze the off-campus speech implications that arise from the qualitative differences in how the circuit courts have applied the *Tinker* standards. Section B will highlight the unresolved issues that are in need of emphatic clarity and guidance from the high court in order to fashion an analytical framework that would adequately balance students' First Amendment rights with the duty of school authorities to "maintain discipline and protect the school community."[198] Lastly, Section C will address some of the evolving issues and challenges that school officials and courts face when applying student speech doctrine to anonymous online speech.

A. To Threaten, Intimidate, or Harass? The Scope of Tinker*'s Application to Off-campus Speech*

As discussed above, school restrictions on the content of students' expressive activity—both the subject matter and viewpoint—will presumptively be found unconstitutional, unless the speech falls under an unprotected category of speech[199] or one of the carved-out exceptions to *Tinker* and its progeny. The Supreme Court articulated three categorical exceptions to the *Tinker* standard, including: (1) offensively lewd and indecent speech,[200] (2) speech that involves a school-sponsored event or activity,[201] and (3) speech promoting illegal drug use.[202] Moreover, some lower courts have ruled that student speech related to legitimate school curriculum[203] or

198. *See Bell*, 799 F.3d at 392.

199. *See supra* III.B.

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

201. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

202. *See* Morse v. Frederick, 551 U.S. 393 (2007).

203. *See* Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) (holding that "[t]he neutral enforcement of a legitimate school curriculum generally will satisfy [*Hazelwood*]; the selective enforcement of such a curriculum or the singling out of one student for discipline based on hostility to her speech will not." The court further notes that when a university "lays

off-campus speech in violation of professional codes of conduct can also be regulated.[204]

The latest circuit court precedent, discussed above, reveals that school officials are given significantly broad authority to regulate online student speech that is violent in character and threatens the safety of students and the school. In the wake of recent school shootings and advancements in communication technology, courts have acknowledged the difficulty that school administrators face in balancing public safety without impinging on student's constitutional rights.[205] In this context, lower courts have given greater deference to the judgment of school officials with regards to speech limitations with several circuits, including the Second, Fifth, and Eighth, applying *Tinker*'s "reasonably foreseeable risk" of substantial disruption prong to speech that is violent or threatening. For example, in *Wisniewski*, the court declined to evaluate the student's online speech, which depicted a violent scene of a teacher being shot, under a "true threat" standard. Instead, the court evaluated the school's restriction under the "broader authority" to discipline a student's expression pursuant to *Tinker*.[206] The Ninth Circuit adopts a similar approach with regard to student speech that is violent or threatening, requiring a threshold inquiry as to whether the speech amounts to "an identifiable threat of school violence" before applying *Tinker*.[207] In *Bell*, the court held that *Tinker* applies to a student's online rap lyrics, made off campus, if they are reasonably understood by school officials to "threaten, harass or intimidate" the school community.[208] Interestingly, the court in *Bell* required a specific

out a program's curriculum or a class's requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them."); *see also* Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002).

204. *See supra* IV.B; *see also* Tatro v. Univ. of Minn., 816 N.W.2d 509, 520–21 (2012) (holding that a student can be punished for her off-campus online Facebook posts that violate professional standards of a mortuary science program the student was enrolled in).

205. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013) ("With the advent of the Internet and in the wake of school shooting at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result.").

206. *See* Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007) ("With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker*.").

207. *Wynar*, 728 F.3d at 1069.

208. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015).

intent for the speech to reach the school before *Tinker* governs.[209] Thus, if the speech in question is *threatening* in nature or urges *violent conduct*, such speech will be subject to a standard of either a "reasonably foreseeable risk" of "substantial disruption" or an actual "substantial disruption" to the operation of the school. Other than the Fifth Circuit's decision in *Bell*, circuit courts addressing violent or threatening online speech have not required a student's intent to "target the school" before applying *Tinker*, leaving greater discretion to school officials to act on a "reasonably foreseeable risk" that such speech will cause a substantial disruption.

Apart from off-campus expressions of violent themes or threatening posts, one question left unanswered is how far does *Tinker's* reach extend to off-campus speech? The circuit cases examined above, including the Eighth,[210] Fourth,[211] and the Third Circuit in *J.S. ex rel. Snyder v. Blue Mountain School District*,[212] addressed the application of *Tinker* to off-campus speech that contained a variety of racist, sexist, "lewd," and harassing speech *targeted* at students and teachers. While such speech does not evoke violent themes, schools and universities could look to recent circuit precedent discussed above and argue that targeted racist, sexist, homophobic and other forms of hate speech, including online posts that shame or harass students and teachers, interferes with or "disrupts the work and discipline of the school." While the scope of *Tinker's* reach to off-campus speech has not been clearly defined, the Fourth Circuit's "nexus" test undoubtedly casts a wide net of off-campus speech that could potentially be "disruptive" under the *Tinker* framework. The panel in *Kowalski* narrows the scope by injecting an intent requirement, or at least a reckless standard as to whether the speech targeted the school, by underscoring the fact that the student knew her online posts could reasonably be expected to reach the school.[213] Similarly, in *S.J.W.*, the Eighth Circuit ruled that *Tinker* applied because the students had "targeted" the school community with their website that contained racist and sexually explicit comments about fellow students.[214] Moreover, the Third Circuit's

209. *Id.*

210. S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).

211. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011).

212. 650 F.3d 915 (3d Cir. 2011).

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

214. *S.J.W.*, 696 F.3d at 773–77.

decision in *J.S. ex rel. Snyder* alludes to an "intent to reach school" requirement, after school officials disciplined a student for creating an Internet profile of her school's principal with insinuations that he was a sex addict and pedophile.[215] This analysis demonstrates that for off-campus speech that amounts to targeted ridicule, harassment, and cyberbullying, courts will require an intent to target or reach the school, or at least recklessness, before deciding if *Tinker* has been satisfied. While *Tinker* requires a disruption that is "not just some remote apprehension of disturbance,"[216] it is unclear as to the nature and degree of off-campus speech—whether cyberbullying or harassment—that gives rise to a "substantial disruption," especially when online harassment and bullying is of paramount concern for schools.[217]

On the other hand, the recent circuit court rulings could also be reconciled with *Fraser*, one of the narrow exceptions to *Tinker*, permitting schools to regulate "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school."[218] In evaluating the harassing character of a student's webpage that accused a fellow student of having herpes and being a "slut," the *Kowalski* court confirmed that such speech created a substantial disruption, but also noted that such speech could also be found to satisfy *Fraser*'s vulgar and lewd in-school speech exception.[219] Furthermore, while the Eighth Circuit in *S.J.W.* does not cite *Fraser*, the online posts subject to discipline contained sexually explicit and racist comments directed at named classmates,[220] but the court applied a traditional *Tinker* "substantial

215. *J.S.*, 650 F.3d at 930–31 (The court found that the student did not intend for the online speech to reach the school; the court noted that the student took specific steps to make the profile "private" so that only she and her friends could access it, even if the friends went to the same school.)

216. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).

217. *See Kowalski*, 652 F.3d at 572 ("According to a federal government initiative, student-on-student bullying is a 'major concern' in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide." (citing STOPBULLYING.GOV, http://www.stopbullying.gov/index.html (last visited July 23, 2016)).

218. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 685 (1986).

219. *See Kowalski*, 652 F.3d at 573 ("To be sure, a court could determine that speech originating outside of 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, because it was determined to be in-school speech, its regulation would be permissible not only under *Tinker* but also, as vulgar and lewd in-school speech, under *Fraser*.").

220. S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773 (8th Cir. 2012).

disruption" analysis to confirm the school's disciplinary action. Conceivably, the court could have applied *Fraser* to justify the school's disciplinary action without violating the First Amendment. Due to the uncertainty of *Fraser's* application to off-campus speech or due to the extent of its reach to off-campus speech, courts are seemingly reluctant to apply *Fraser* to speech that is "vulgar," "lewd," or "indecent" when such speech originates not only off-campus but online.[221] However, until the Supreme Court clearly delineates school officials' limitations on discipline and regulation of speech created online and off-campus, lower courts are left with employing an *ad hoc* approach to off-campus online speech that reaches the school and its students.

B. Tinkering with a Balanced Approach to Off-campus Speech: the Necessity of Defined Standards

There has been no consensus among the lower courts on how to approach school limitations of off-campus student speech that is increasingly online.[222] Courts are challenged with the task of regulating a variety of off-campus online student speech without guidance via a universal standard that squarely addresses the unique circumstances of online, but off-campus speech. As the court in *Wynar* noted, "[a] student's profanity-laced parody of a principal is hardly the same as a threat of school shooting . . . ."[223] This section offers an approach that strikes an appropriate balance between allowing schools to act to protect their students and teachers from credible threats of violence and harassment, while recognizing and protecting students' freedom of expression.

A starting point in the constitutional quest to seek an appropriate analytical framework that balances these competing interests is the approach adopted in *Bell*. The *Bell* court had the benefit of building on sister circuit court precedent in formulating its approach to establish that online and off-campus speech may be restricted without offending the First Amendment. Without adopting "rigid" and "clear-cut" standards, the *Bell* approach holds that *Tinker* applies to off-

221. *But see* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (the School District argued that the student's speech subject to discipline occurred off-campus and was "lewd, vulgar, and offensive" but the Third Circuit ruled that "[t]he School District's argument fails at the outset because *Fraser* does not apply to off-campus speech.").

222. *See supra* III.C. and IV.A.

223. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).

campus speech when: (1) it is intentionally directed at the school and (2) it could be reasonably understood by school officials to "threaten, harass, and intimidate."[224] Incorporating a specific intent prong—requiring the intent for the speech to reach the school community—narrows the scope to speech that the student deliberately targets at students and administrators. What remains unanswered is the scope of a student's intent to reach the school: are posts on a public website, blog, or a twitter feed followed by several classmates "directed at the school"? Are college-network Yik Yak posts that can be seen by anyone within a few miles of campus "targeting the school"? Are Facebook updates and posts that can be read by "friends" who are also classmates "targeting the school"? Virtually any form of online speech *could* conceivably reach the school community, whether it is "published" in a Facebook news feed or brought to the attention of school officials, blurring the line between private, personal speech—which is protected—and speech directed at the school—which is punishable.

Undoubtedly, incorporating a specific intent element buttressed by actions pursuant to such deliberation is preferable to a broad and sweeping "nexus"[225] approach, which enables school officials to take regulatory action on a much wider range of off-campus speech. However, the question remains as to the form and substance of off-campus online activity that satisfies an "intent" to direct such speech at the school community. As the Third Circuit concurrence in *J.S.* noted, "speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus."[226] Without definitive standards on school authority, school officials run the risk of disciplining students for a limitless array of off-campus speech.

The *Bell* majority's threshold inquiry also calls for a reasonableness standard in order to determine if the off-campus speech is designed to "threaten, harass and intimidate." Limiting this inquiry to speech acts that threaten and harass might address the most serious problems facing schools and universities today: violence, harassment, and cyberbullying. The *Bell* majority even cited the rise

224. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015).

225. *See supra* III.C.; *see also Kowalski*, 652 F.3d 565.

226. *J.S.*, 650 F.3d at 940 (Smith, J., concurring) ("[a] bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.").

in incidents of violence against school communities, and the need for school officials to be vigilant and give serious consideration to statements resembling violence as well as harassment posted online.[227] However, off-campus online speech takes many forms, and vulgar or menacing speech is often intertwined with political commentary, satire, and matters of public concern. While certain aspects of Bell's online rap could be construed as addressing a matter of public concern,[228] the majority in *Bell* ruled that its graphic discussion of violence against teachers did not elevate the speech above *Tinker*. Unfortunately, neither the Supreme Court, nor any circuit court, has established articulable standards to determine when off-campus speech could "reasonably" be found to be "threatening" or "harassing" let alone "substantially disruptive," when the speech is also tethered with content on matters of public concern. For that reason, this article calls for a standard beyond a "reasonable school officials" standard; such a standard gives school administrators sweeping authority to discipline students for posts that are interpreted out of context. At a minimum, courts should impose a *recklessness* standard whereby *Tinker* governs when students' online posts are made with the knowledge that they will be viewed as harassing or threatening.

Furthermore, courts should require an analysis of the "overall thrust" of the speech in order to determine if the speech is designed to address matters of public concern, political speech, and other "non-threatening" speech, or if its primary purpose is to harass and threaten. In applying this prong, the Court should develop an inquiry that considers the factors outlined in *Wynar* in order to conclude whether the speech satisfies this threshold inquiry: (1) the nature and content of the speech; (2) the objective and subjective seriousness of the speech; and (3) the severity of the possible consequences should the speaker take action.[229] Against the backdrop of a national

227. *Bell*, 799 F.3d at 393 ("[t]his now-tragically common violence increases the importance of clarifying the school's authority to react to potential threats before violence erupts.") (citing Morse v. Frederick, 551 U.S. 393, 408 (2007)).

228. *Id.* at 408–09 (Dennis, J., dissenting) (Noting that the lyrics of Bell's song describe in detail female students' allegations of sexual misconduct on the part of some of the school's teachers and coaches: "[a]lthough the song does contain some violent lyrics, the song's overall 'content' is indisputably a darkly sardonic but impassioned protest of two teachers' alleged sexual misconduct . . . .").

229. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1070–71 (9th Cir. 2013); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397 (5th Cir. 2015) (While these factors were outlined in consideration of whether the speech in question amounts to a "substantial disruption," their

epidemic in cyberbullying, sexual harassment, and continued violence in schools, the Supreme Court needs to clearly articulate at least a recklessness standard—as opposed to a reasonableness standard—for school officials to follow. A recklessness standard balances the need for deference to the reasonable judgment of school officials, without overly constricting the free speech rights of students. Under *Tinker*, the suppression of speech is based on its effects rather than its content, so broad off-campus regulation could potentially create ominous implications, allowing schools to regulate speech when and wherever it takes place. In its quest to fashion an appropriate standard, the Supreme Court should remain steadfast in striking the appropriate balance to allow school administrators to properly identify warning signs and prevent violence, while limiting arbitrary disciplinary decisions that adversely affect students' freedom of expression.

C. Regulating Anonymous Online Speech Beyond the "Schoolhouse Gate"

Assuming that school officials can constitutionally discipline and regulate off-campus online expression pursuant to *Tinker*, courts will be faced with the broader question of *Tinker*'s applicability with anonymous online speech. As discussed above, the First Amendment protects speech in cyberspace, and the right to speak anonymously, especially speech pursuant to political advocacy, has been recognized by the Court.[230] Public schools are, therefore, bound by free speech concerns that limit the scope of what school administrators can constitutionally limit, including anonymous online content. There is currently no federal law addressing cyberbullying or online harassment, and regulating anonymous online speech because it is "offensive" or "unpopular" will presumptively be found unconstitutional. As the Supreme Court has unequivocally declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[231] While anonymous online speech on platforms like Yik Yak can veer into

applicability to the second prong is appropriate since threatening, harassing, and intimidating students and teachers "inherently portends a substantial disruption making feasible a *per se* rule in that regard.") (citing *Bell*, 799 F.3d at 397).

230. *See supra* III.C.

231. Texas v. Johnson, 491 U.S. 397, 414 (1989).

sexist, racist, and other harassing content, there is no "harassment exception" to the First Amendment, unless the severity of the conduct creates a "hostile environment."[232] In addition, school harassment policies applied to online speech can also be challenged under overbreadth grounds, where core-protected speech is unduly chilled in the government's quest to target "unprotected" speech. Furthermore, unless the speech falls under an unprotected category of speech, selective application of online speech limitations can amount to content-based or viewpoint discrimination.

An additional challenge to regulating off-campus anonymous speech is identifying the anonymous speaker. Since the defining features of anonymous online apps are tied to a user's ability to speak with anonymity, identifying the author of harassing or threatening speech will prove difficult without information about IP addresses or personal information about the account. But can school officials unmask speakers for repugnant, sexist, and hateful speech while regulating off-campus speech pursuant to the various circuit approaches? Social media apps like Yik Yak and other Internet Service Providers are generally reluctant to disclose private information about a user unless the posts poses either a "true threat" or "a risk of imminent harm."[233] Assuming, *arguendo*, that school administrators have the ability to unmask anonymous users for harassing or threatening speech, if the perpetrators are not students or have no affiliation with the school, will the legal principles derived from *Tinker* and its progeny be applicable? Moreover, if the anonymous speech in question is also tethered in political speech or where "it serves as a catalyst for speech," the speaker's identity will likely be shielded with First Amendment protection.[234]

232. *See* DeJohn v. Temple Univ., 537 F.3d 301, 316–18 (3d Cir. 2008) ("[W]e have found no categorical rule that divests 'harassing' speech as defined by federal anti-discrimination statutes, of First Amendment protection.") (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001)). However, the court points out that conduct akin to a showing of severity or pervasiveness that creates a hostile environment "provides no shelter for core protected speech."

233. *See* Rios, *supra* note 21. According to Yik Yak, authorities need a subpoena to obtain user information unless "a post poses of risk of imminent harm." Yik Yak determines on a case by case basis whether to disclose a "user's IP addresses, GPS coordinates, message timestamps, telephone number" even without a warrant or court order.

234. *See supra* III.C.; *see also* Doe v. Shurtleff, 628 F.3d 1217, 1225 (10th Cir. 2010) ("Speech is chilled when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression.") (citing Peterson v. Nat'l Telecomm. & Info. Admin., 478 F.3d 626, 632 (4th Cir. 2007)).

Some colleges[235] have also banned anonymous online speech platforms such as Yik Yak from their campus wi-fi networks. It remains unresolved whether similar bans or geo-fencing would be found constitutional if state schools adopted the same measures. Conceivably, if public schools did adopt measures to prevent students on campus networks from accessing online platforms, they could be subject to claims of unconstitutional prior restraints on speech. Furthermore, blocking anonymous online platforms could also implicate restricted use of virtual private networks, limiting a student's ability to transmit information through shared or public networks. The efficacy of a blanket ban on anonymous online platforms on a school's wi-fi networks is also questionable since students can easily use their personal smart phones, which provide mobile web access, to circumvent the restriction. Moreover, restricting access to anonymous online platforms could deprive users in marginalized groups from exchanging ideas, educating others, and advocating for change through a channel that shields users from social ostracism, threats, and harassment. Given the current legal and digital landscape, the ability for schools to regulate anonymous online speech is very limited. However, once the Supreme Court decides to address whether, or under what circumstances, school officials may regulate off-campus online speech, the high court's guidance will perhaps help determine the parameters of regulating anonymous online speech.

VI. CONCLUSION

In the context of student speech, the effects of modern communication technology have been especially pronounced, disrupting the pedagogical dynamics of the school setting and traditional notions of school authority over students' speech. In today's information age, it is imperative that students' First Amendment rights be constitutionally preserved in the face of disciplinary action asserted by school officials who are often guided by an outdated doctrinal framework for student speech. This is a framework that could lead to regulatory overreaching. However, the ubiquity of social media sites like Facebook and Twitter have significantly altered how students communicate, enabling greater

235. New York's Utica College in New York and Norwich University in Vermont have banned the Yik Yak site from their wi-fi networks.

instances of "cyberbullying," hate speech, harassment, and threatening speech. While several appellate courts have addressed *Tinker*'s applicability to off-campus online speech, they have struggled to apply a consistent, uniform standard to off-campus speech. Exacerbating this problem is the growing adoption and use of anonymous online platforms, which further underscores the critical need for the Court to establish greater guidance and a uniform standard for off-campus online speech.

Social networking sites are today's soapbox and megaphone, and students with a large online following can often spur debate about important social and political issues that affect their students and community. Yet, students also use social media, including anonymous networks, for personal communication amongst friends and their network, unaware and without the intent for such communications to be directed at the school or school officials. In fact, the overwhelming majority of students' expressive activity on social networking sites is not lewd, harassing, or threatening; yet, schools and colleges continue to extend their authority to a broad range of content posted online and off-campus. Hopefully, the Supreme Court will revisit the student speech doctrine and adopt stringent standards, including both a specific intent requirement and, at least, a recklessness standard that requires a student's knowledge regarding how a post will likely be interpreted. At this point, it is critical that the lower courts receive guidance on the regulation of off-campus speech in order for school officials to effectively manage and regulate student speech without overly limiting students' First Amendment rights.