

CYBERSPACE IS OUTSIDE THE SCHOOLHOUSE GATE: OFFENSIVE, ONLINE STUDENT SPEECH RECEIVES FIRST AMENDMENT PROTECTION

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“A student’s right to criticize his or her teachers is a right secured by the Constitution.”¹

*Imagine a high school junior class secretary seeking to ensure the school’s annual music festival happens. After being rescheduled three times, the principal informs her the music festival needs to be rescheduled again. Later that night, the junior class secretary posts a blog entry imploring community members and taxpayers to contact the principal in support of keeping the music festival as scheduled. She posts this blog entry from home and refers to school administrators as the “douchebags in central office.”*²

*Imagine a middle school student that creates a parody profile of his principal on MySpace. The student creates this online speech while he is at home. He uses words like “fagass,” “fucking,” “dick head,” and “bitch” in the profile.*³

In both cases, the schools punished the students for their online speech because it was offensive and related to the school, even though no substantial disruption occurred at school. Is offensive, online student speech subject to school jurisdiction? Should it be? Should it matter whether online speech is created or accessed on or off campus?

I. INTRODUCTION

Although the United States Supreme Court has not yet considered whether schools have jurisdiction over online student speech, its opportunity may be fast approaching.⁴ On February 4, 2010, two different

1. Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007).

2. Doninger v. Niehoff, 514 F. Supp. 2d 199, 203, 206 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008) (citation omitted). On remand, the district court certified two questions to the Second Circuit, which are still pending. Doninger v. Niehoff, No. 3:07CV1129 (MRK), 2009 WL 1364890 (D. Conn. May 14, 2009).

3. J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 290–91 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010); *see also* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252–53 (3d Cir. Feb. 4, 2010) (concerning high school student who created a “parody profile” of his principal on MySpace), *vacated, reh’g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

4. *See Doninger*, 527 F.3d at 48 (“The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that . . . does not occur on school grounds or at a school-sponsored event.”); Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMENDMENT L. REV. 210, 214, 216 (2009) (noting the Court has not yet considered whether school jurisdiction over online, off-campus student speech violates First Amendment rights).

Third Circuit panels issued decisions directly addressing school jurisdiction over online, off-campus student speech.⁵ On April 9, 2010, the Third Circuit vacated both opinions and granted a consolidated en banc rehearing to resolve the contradictory results reached by the two different Third Circuit panels.⁶ Oral arguments occurred on June 3, 2010.⁷ Another case involving online, off-campus student speech is currently before the Second Circuit on a certified question concerning school jurisdiction over offensive online student speech that is created off campus.⁸ All three cases address whether *Bethel School District No. 403 v. Fraser*⁹ applies to online, off-campus student speech.¹⁰ Doctrinal analysis and a close reading of recent student speech cases involving *Fraser* demonstrate the erosion of sound precedent through the continued expansion of a school's disciplinary jurisdiction over online speech. This expanded assertion of school jurisdiction beyond the schoolhouse gate undermines core First Amendment rights and values by restricting students' speech rights and is not supported by *Fraser*.

Chronologically, *Fraser* is the second of four Supreme Court student speech cases.¹¹ *Fraser* is an exception to the Court's first and seminal student speech case: *Tinker v. Des Moines Independent Community School District*.¹² In *Tinker*, the Court held that a school could not regulate student speech unless it could foreseeably cause a substantial disruption of

5. See *Blue Mountain*, 593 F.3d at 303; *Layshock*, 593 F.3d at 263.

6. *Blue Mountain*, No. 08-4138, slip op. at 1; *Layshock*, No. 07-4465, slip op. at 1.

7. *Blue Mountain*, No. 08-4138, slip op. at 1; *Layshock*, No. 07-4465, slip op. at 2.

8. *Doninger v. Niehoff*, No. 09-1452-cv(L) (2d Cir. 2009) (two certified questions are currently pending before the Second Circuit); see also *Doninger v. Niehoff*, No. 3:07CV1129 (MRK), 2009 WL 1364890 (D. Conn. May 14, 2009) (certifying two questions to the Second Circuit).

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

10. See *Blue Mountain*, 593 F.3d at 299; *Layshock*, 593 F.3d at 256–58; *Doninger*, 527 F.3d at 49.

11. The cases are: *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (holding schools may punish speech that could reasonably be interpreted as advocating illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding a school may punish school-sponsored student speech when such regulation is reasonably related to the school's legitimate pedagogical concerns); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

12. *Blue Mountain*, 593 F.3d at 312 (Chagares, J., concurring in part and dissenting in part) (describing *Fraser* as an “exception” to *Tinker*).

the school environment.¹³ *Fraser* is an exception to *Tinker* because it did not overrule *Tinker* and allows a school to regulate student speech, even absent a substantial disruption.¹⁴ The *Fraser* Court held that a school could punish a student for giving a speech filled with sexual innuendo at a mandatory school assembly because it considered the speech “offensively lewd and indecent.”¹⁵ Twenty-one years after *Fraser*, the Supreme Court stated, “The mode of analysis employed in *Fraser* is not entirely clear.”¹⁶

The recent cases in the Second and Third Circuits demonstrate uncertainty as to whether *Fraser* applies to online, off-campus speech. In *Layshock v. Hermitage School District*, the United States District Court for the Western District of Pennsylvania found the school violated the student’s First Amendment rights because *Fraser* does not apply to online, off-campus speech.¹⁷ In *J.S. v. Blue Mountain School District*, the United States District Court for the Middle District of Pennsylvania reached the opposite conclusion, finding the school did not violate the student’s First Amendment rights because *Fraser* is applicable to online, off-campus speech.¹⁸ On the respective appeals, the Third Circuit did not resolve the intra-circuit split between *Layshock* and *Blue Mountain*.

The Third Circuit *Layshock* panel unanimously affirmed the district court opinion, holding *Fraser* does not apply to online, off-campus speech.¹⁹ In *Blue Mountain*, a different Third Circuit panel failed to resolve the split because the majority declined to decide if *Fraser* applies to online, off-campus speech.²⁰ The *Blue Mountain* majority affirmed the lower court’s decision that the school did not violate the student’s First Amendment rights based on *Tinker*, not *Fraser*.²¹ The majority reasoned the school had jurisdiction to punish the student’s online, off-campus speech under *Tinker* because the speech could reasonably be forecasted to cause a substantial

13. *Tinker*, 393 U.S. at 513–14.

14. *Fraser*, 478 U.S. at 685.

15. *Id.*

16. *Morse*, 551 U.S. at 404.

17. See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599–600 (W.D. Pa. 2007), *aff’d*, 593 F.3d 249 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

18. See *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *6–7 (M.D. Pa. Sept. 11, 2008), *aff’d*, 593 F.3d 286 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

19. *Layshock*, 593 F.3d at 260–61, 261 n.16.

20. *Blue Mountain*, 593 F.3d at 301.

21. *Id.*

disruption of the school environment.²² The Third Circuit reached this holding even though it agreed with the district court that the record failed to establish an actual substantial disruption occurred.²³

One *Blue Mountain* judge dissented, stating *Fraser* does not apply to online, off-campus speech and criticizing the majority for conflating *Fraser* and *Tinker*.²⁴ Although *Layshock* and *Blue Mountain* did not create an express intra-circuit split, they left uncertainty as to when schools possess jurisdiction over offensive, online student speech.²⁵ Even though the *Layshock* panel applied *Fraser* and the *Blue Mountain* panel ostensibly applied *Tinker*, these Third Circuit decisions seem to contradict each other.²⁶ In its consolidated en banc rehearing, the Third Circuit has an opportunity to reduce this uncertainty and ensure First Amendment rights of students and others are fully protected in the context of online speech.

In *Doninger v. Niehoff*, the Second Circuit declined to decide whether *Fraser* applies to online, off-campus speech but affirmed the lower court

22. *Id.* at 290.

23. *Id.* at 299 (“Were we examining the facts merely for evidence of a ‘substantial disruption of or material interference with school activities’ that had already taken place, we would have no trouble concluding, as the District Court did, that these incidents did not amount to a substantial disruption of the Middle School sufficient to discipline the students for their speech.” (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969))). *Blue Mountain School District* offered the following evidence, which was rejected by both the district court and the Third Circuit because it failed to establish an actual substantial disruption: (1) two teachers quieting their classes that were discussing the online speech; (2) a counselor proctoring an exam so the administrator originally assigned to proctor the exam could attend a meeting regarding the online speech; and (3) two students decorating the lockers of the online speakers, as well as students congregating in the hallway, when the suspended students returned from their suspensions. *Id.* at 293–94.

24. *Id.* at 317 (Chagares, J., concurring in part and dissenting in part) (“[The majority’s holding] sounds like an application of the *Fraser* standard rather than the *Tinker* standard.”).

25. Eric Goldman, *Third Circuit Schizophrenia over Student Discipline for Fake MySpace Profiles*, TECH. & MARKETING L. BLOG (Feb. 7, 2010, 9:05 AM), http://blog.ericgoldman.org/archives/print_001745.html (“[T]he Third Circuit’s dichotomous rulings create a lot of uncertainty that will lead to more frequent, longer-lasting and unproductive court battles over [online student speech].”).

26. Shannon P. Duffy, *Do 3rd Circuit Rulings over Student Speech on MySpace Pages Contradict?*, LEGAL INTELLIGENCER, Feb. 5, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202442025383&pos=atagance> (explaining the Third Circuit “has confounded the prognosticators by handing down a pair of decisions on the same day that reached opposite results”).

judgment denying the student's preliminary injunction motion.²⁷ In a subsequent suit for damages against school officials, the United States District Court of Connecticut found *Fraser* does apply to online, off-campus speech.²⁸ *Doninger* is currently pending on a certified question before the Second Circuit to determine if *Fraser* applies to offensive, online, off-campus speech.²⁹ Because lower courts are in "disarray" when defining school jurisdiction over online student speech,³⁰ the issue is ripe for Supreme Court review.³¹

For decades, courts have struggled with balancing the competing interests of students' First Amendment rights and schools' rights to regulate the school environment.³² Online speech is a relatively new factor that must be considered when balancing these competing interests. Not only are lower court decisions in disarray as to the limits of school jurisdiction over online student speech, legal commentary also exhibits

27. *Doninger v. Niehoff*, 527 F.3d 41, 49–50, 53–54 (2d Cir. 2008).

28. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 221 (D. Conn. 2009) ("It is true that the Second Circuit declined to decide whether *Fraser* applied to off-campus speech in the context of an extracurricular activity. But given that this Court has already decided this issue, unless and until the Second Circuit rules otherwise, the Court does not believe there is any reason to change its position that Ms. Doninger's First Amendment rights were not violated when she was told that she could not run for class secretary because of an offensive blog entry that was clearly designed to come on to campus and influence fellow students.").

29. Supplemental Brief of Plaintiff-Appellee/Cross-Appellant at 1–2, *Doninger v. Niehoff*, Nos. 09-1452-cv(L), 09-1601-cv(XAP), 09-2261-cv(CON) (2d Cir. Aug. 28, 2009).

30. *Doninger*, 594 F. Supp. 2d at 224 ("[W]hen it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles." (quoting Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 990 (2008))).

31. Duffy, *supra* note 26 ("Attorney Anthony G. Sanchez, the losing defense lawyer in the *Layshock* case, said he believes the issue is ripe for review by the U.S. Supreme Court because the lower courts are struggling with a framework of student-speech jurisprudence that was laid down in the late 1960s and early 1970s."); see Calvert, *supra* note 4, at 212–13 (recognizing there are jurisdictional and substantive issues the "lower courts are grappling with" as a result of off-campus, technology-assisted expression).

32. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 311 (3d Cir. Feb. 4, 2010) (Chagares, J., concurring in part and dissenting in part) (noting the court's struggle "to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators" since the days of *Tinker*), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

uncertainty as to these limits.³³

As online student speech doctrine develops through the courts, some parties and amici are reaching common ground. At least some parties and amici agree *Tinker*'s substantial disruption test applies to online, off-campus speech when that speech causes, or is reasonably forecasted to cause, a substantial disruption in the school environment.³⁴ But what about school jurisdiction over offensively lewd or indecent online speech that does not cause a substantial disruption? Do schools have jurisdiction over online *Fraser*-type speech?³⁵ Does it matter if online *Fraser*-type speech occurs on or off campus? Are geographic, physical demarcations useful for drawing jurisdictional limits of school authority over online student speech?

Schools seek to extend jurisdiction over online, off-campus speech by relying on language in *Fraser* concerning schools' rights to inculcate values of civility in children.³⁶ While schools have a role in inculcating values of

33. *Doninger*, 594 F. Supp. 2d at 223–24 (stating “even a cursory review of legal commentary shows” school jurisdiction over online student speech is still unclear).

34. See, e.g., *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 218–20 (D. Conn. 2007) (considering the student's argument the *Tinker* test applied to her blog post created off campus during nonschool hours, but determining no substantial disruption occurred on campus), *aff'd*, 527 F.3d 41 (2d Cir. 2008); Amicus Curiae Brief in Support of the Cross-Appellant, Avery Doninger at 4, *Doninger*, 527 F.3d 41 (Nos. 09-1452-cv(L), 09-1601-cv(XAP), 09-2261-cv(CON)), available at <http://www.acluct.org/downloads/DoningerAmicus09.pdf> (agreeing that the *Tinker* test applies to off-campus speech when it could cause a substantial disruption to the school environment). But see *Blue Mountain*, 593 F.3d at 313 n.15 (Chagares, J., concurring in part and dissenting in part) (“The question of whether *Tinker*'s ‘substantial disruption’ standard applies to off-campus speech in the first place is not settled.”); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1092 (2008) (“The application of *Tinker*'s materially and substantially disruptive standard to all digital speech is also a tempting but ultimately unsatisfying approach.”).

35. For purposes of this Article, “*Fraser*-type speech” means offensively lewd or indecent speech involving sexual content. See *infra* Part II.A, notes 40 & 97 and accompanying text (supporting this definition).

36. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); cf. Brief of Appellee, *Blue Mountain School District* at 7, *Blue Mountain*, 593 F.3d 286 (No. 08-4138) (arguing the school district can discipline a student based on an offensive online parody profile because it has an “effect on the school and the educational mission of the [d]istrict”); Brief of Appellant/Cross-Appellee at 11, *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010) (Nos. 07-4465, 07-4555) (“Public education . . . must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community

civility, that role alone cannot provide *Fraser*-jurisdiction over off-campus speech, online or offline. Such an interpretation of *Fraser* would permit school jurisdiction over student speech wherever it occurs and whenever the school finds the content uncivil, without due regard for students' First Amendment rights.³⁷ Students and their parents,³⁸ and amici like the Student Press Law Center and the ACLU, advocate a narrower reading of *Fraser* that precludes school jurisdiction over online speech.³⁹

Fraser holds that three factors are important for schools to assert jurisdiction over student speech: (1) there must be a captive audience; (2) the speech must involve lewd or indecent sexual content; and (3) the school must have a need to disassociate itself from the speech.⁴⁰ Because there is no captive audience in cyberspace and a school is not reasonably associated with a student's online speech, schools do not have jurisdiction over online *Fraser*-type speech. This rule applies regardless of whether the online speech is created or accessed on or off campus. The border of school jurisdiction over online *Fraser*-type speech is not geographical; it is a border between real space and cyberspace. *Fraser* and its progeny support this legal rule. The online nature of the speech does not provide a basis for schools to expand *Fraser*-jurisdiction beyond the schoolhouse gate into cyberspace.

A bright-line rule that schools do not have jurisdiction over *Fraser*-type speech in cyberspace is more than a mere logical application of *Fraser*.

and the nation.” (quoting *Fraser*, 478 U.S. at 681)).

37. Cf. Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, note 29, at 37–42 (arguing *Fraser* does not apply to an online, off-campus blog post).

38. E.g., Brief of Appellants at 35–36, *Blue Mountain*, 593 F.3d 286 (No. 08-4138) (noting Justice Blackmun's *Fraser* concurrence makes clear the school could not punish *Fraser* for giving the same speech outside the school environment).

39. Brief of *Amicus Curiae* Student Press Law Center in Support of Plaintiff-Appellee–Cross-Appellant at 7, *Doninger v. Niehoff*, Nos. 09-1452-cv(L), 09-1601-cv(XAP), 09-2261-cv(CON) (“[W]here student speech occurs off campus, the fact that it may be considered offensive does not provide a constitutionally valid reason for regulating or punishing it.” (citations omitted)).

40. *Fraser*, 478 U.S. at 684–86. Courts disagree as to whether *Fraser* is limited to lewd and indecent sexual speech or whether it applies to other categories of offensive speech. Resolving this dispute is beyond the scope of this Article because the captive-audience and need-to-disassociate factors preclude school jurisdiction over online speech, regardless of whether *Fraser* is limited to lewd or indecent speech. While acknowledging the existence of this split of authority, this Article takes the position that *Fraser* is limited to lewd or indecent speech based on the Court's reasoning in that case. See *infra* Part II.A, note 97 and accompanying text for further analysis.

Normative reasons support limiting school jurisdiction over online student speech. Schools concededly encroach on students' First Amendment rights when students enter the school environment. Since *Tinker*, the Supreme Court has continually eroded students' free speech rights.⁴¹ That erosion has rapidly increased with schools asserting jurisdiction over online student speech and lower courts upholding that jurisdiction.⁴² Additionally, school administrators sometimes impose excessive punishments, especially when they are the subject of the online speech.⁴³ Incursion on free speech rights should be as narrow as possible because speech is an inherent part of an individual's development and quest for identity.

Self-realization theory helps maintain robust protection of free speech rights guaranteed under the Constitution.⁴⁴ A school should not be permitted to punish a student engaging in online political speech merely because she uses the term "douchebag." Just as the First Amendment tolerates some false speech to ensure true speech is not lost, the First Amendment tolerates online student speech that schools may reasonably find offensive to ensure valuable speech is not lost.⁴⁵ Nor should a school be permitted to punish a student who creates an online parody profile of a school administrator merely because it finds the profile offensive and

41. Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1190 (2009) (noting although *Tinker* has been eroded, it is not dead); *see also* *Morse v. Frederick*, 551 U.S. 393, 417–18 (2007) (Thomas, J., concurring) (noting the Supreme Court has "scaled back" *Tinker* and continues to make student-speech rules on an "ad hoc basis"). Justice Thomas went on to state, "I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard." *Id.* at 422.

42. *See, e.g., Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 604–05 (W.D. Pa. 2007) (holding policies that required students to express their ideas in a respectful manner and refrain from verbal abuse were not overbroad), *aff'd*, 593 F.3d 249 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

43. *See, e.g., id.* at 593–94 (noting the student received a ten-day out-of-school suspension, as well as additional discipline that included a ban from extracurricular activities and a prohibition from participating in the high school graduation ceremony, after creating unflattering profiles of his principal on MySpace).

44. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (discussing self-realization as an overall First Amendment theory); *see also infra* Part IV.

45. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–73 (1964) (discussing how some false speech is constitutionally protected to avoid the chilling effect of self-censorship).

valueless.⁴⁶ Schools are not keepers of the public mind.⁴⁷ Protecting online student speech is important—regardless of whether it involves political speech or merely offensive, juvenile humor—because it helps avoid the chilling effect on free speech⁴⁸ and protects the value of self-realization.⁴⁹ Such protection is especially important in our diverse and pluralistic country⁵⁰ where we recognize “one man’s vulgarity is another’s lyric.”⁵¹

Part II establishes that children have First Amendment rights and Supreme Court doctrine consistently limits school jurisdiction to student

46. This Article focuses on speech that may be offensive but does not cause a substantial disruption in the school environment or rise to the level of other unprotected speech, such as defamation, a true threat, or one of the few other categories of unprotected speech.

47. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 286 (1988) (Brennan, J., dissenting) (citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

48. *See Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1048 (2d Cir. 1979) (“Indeed, we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone.”).

49. Redish, *supra* note 44, at 593.

50. *See, e.g.,* JOSEPH P. TOMAIN, CREON’S GHOST: LAW, JUSTICE, AND THE HUMANITIES 19 (2009) (“[P]articularly in a modern pluralistic democracy, we acknowledge and accept the existence and value of moral and political disagreement. We acknowledge that society is comprised of a variety of political, moral, and religious points of view. We are committed to toleration and endorse the idea that there can be no single moral viewpoint that can or should take precedence over others.”).

51. *Cohen v. California*, 403 U.S. 15, 25 (1971). The Supreme Court held that Cohen had a First Amendment right to wear a jacket with the words “Fuck the Draft” in a courthouse. *Id.* at 16–17, 26. “[B]ecause governmental officials cannot make principled distinctions in this area . . . the Constitution leaves matters of taste and style . . . largely to the individual.” *Id.* at 25; *see also FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) (Brennan, J., dissenting) (“[P]arents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin’s unabashed attitude towards the seven ‘dirty words’ healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right’s nature or its existence. Only the Court’s regrettable decision does that.”). These insights about the limits of government action against free speech are particularly relevant in the context of schools that discipline students for offensive, online student speech that is critical of the school or school administrators. When school administrators are the subject of the critical speech, it is even more difficult for them to be objective about whether and how much punishment should be imposed. *See infra* Part IV.B.

speech that occurs on campus, at school-sponsored events, or that causes a substantial disruption of the school environment. Online, *Fraser*-type speech is outside the scope of these categories, and cyberlaw commentary supports creating a jurisdictional border between cyberspace and the physical world.⁵² Part III demonstrates caselaw applying *Fraser*—*Layshock*, *Blue Mountain*, and *Doninger*, for example—supports precluding school jurisdiction over online, *Fraser*-type student speech. Part IV sets forth self-realization theory as a normative basis for limiting school jurisdiction over online student speech rights. While self-realization is not the dominant First Amendment theory, it appears in a variety of First Amendment Supreme Court cases, most recently in Justice Stevens’s dissenting opinion in *Citizens United v. Federal Election Commission*.⁵³ Beyond its role in Supreme Court First Amendment jurisprudence, self-realization has special relevance for online student speech because of the importance of cyberspace in the lives of today’s youth.⁵⁴

II. FIRST AMENDMENT RIGHTS OF CHILDREN

While there is broad agreement on the importance of free speech rights, there is little agreement on an overall theory of the First Amendment,⁵⁵ although there is near-universal agreement that it protects

52. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378–80 (1996).

53. *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (noting free speech “facilitates the value of ‘individual self-realization’” (quoting Redish, *supra* note 44, at 594)).

54. See Papandrea, *supra* note 34, at 1030, 1034. “The importance of these new [digital] technologies to the development of not only their social and cultural connections but also their identities should not be underestimated.” *Id.* at 1030. The use of such technology helps young people engage in expression, which promotes self-realization and self-reflection. See generally JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 3–4 (2008) (discussing how “the digital era has transformed how people live their lives and relate to one another and to the world around them” and today’s youth “live much of their lives online, without distinguishing between the online and the offline”). “Instead of thinking of their digital identity and their real-space identity as separate things, they just have an identity (with representations in two, or three, or more different spaces).” *Id.* at 4.

55. *Citizens United*, 130 S. Ct. at 952 n.58 (Stevens, J., concurring in part and dissenting in part) (“‘The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us’ as the Free Speech and Press Clause.” (quoting L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 4 (1960))); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1183 (3d Cir. 1986) (Gibbons, J., dissenting) (“Over the years, the

political speech.⁵⁶ Further, different views exist on how much First Amendment protection applies to student speech. Some believe “scrupulous protection of Constitutional freedoms” at school is necessary, lest we “strangle the free mind at its source.”⁵⁷ Yet, others believe “the First Amendment, as originally understood, does not protect student speech in public schools,”⁵⁸ “early public schools were not places for freewheeling debates or exploration of competing ideas,”⁵⁹ and the Supreme Court should reverse the “sea change” *Tinker* created by protecting student speech rights.⁶⁰ Under either viewpoint, speech occurring outside the school environment should receive maximum protection under the First Amendment.

If one believes scrupulous protection of free speech rights at school is necessary, such as the right to wear clothing in protest of a controversial war,⁶¹ it would be illogical to provide less protection to off-campus speech,

animating purpose of the speech–press clause has been the subject of much discussion by justices and scholars alike.”); Redish, *supra* note 44, at 591 (“There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression.” (citations omitted)).

56. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

57. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943)). In *Barnette*, the Court held a school cannot require students to salute the American flag. *Barnette*, 319 U.S. at 642. While *Barnette* is a student speech case, it concerns a student’s right to not speak. *See id.* at 629–30. For this reason, it is not included in Part II.A, *infra*, where the focus is on affirmative student speech.

58. *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

59. *Id.* at 411. *But see Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 858 (E.D. Mich. 2003) (“[A]s the *Tinker* Court and other courts have emphasized, students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others.”). In *Barber*, a school prohibited a student from wearing a T-shirt that included a photograph of then-President George W. Bush and the caption, “International Terrorist.” *Id.* at 849–50. The court granted the student’s motion for a preliminary injunction, finding he had a substantial likelihood of proving a First Amendment violation because the school could not establish a substantial disruption of the school environment as required by *Tinker*. *See id.* at 860.

60. *See Morse*, 551 U.S. at 410, 416 (Thomas, J., concurring). Rather than creating another exception to *Tinker*, Justice Thomas proffered: “[T]he better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.” *Id.* at 422.

61. *See Tinker*, 393 U.S. at 504; *Barber*, 286 F. Supp. 2d at 849; *see also infra*

especially when it creates no substantial disruption on campus. Yet, even if another believes student speech rights are not protected in public schools, there must be a limit on the reach of school jurisdiction over student speech for at least three reasons. First, “[c]hildren have First Amendment rights,”⁶² and they do not shed these constitutional rights at the schoolhouse gate.⁶³ If students do not have free speech rights, *Tinker*’s “schoolhouse gate” metaphor is meaningless because a student cannot shed rights that do not exist.⁶⁴

Second, the two main theories for allowing schools to restrict students’ constitutional free speech rights are delegation of parental authority under *in loco parentis*⁶⁵ and the need to maintain discipline within the school environment.⁶⁶ Neither of these theories support extending school jurisdiction over off-campus student speech, at least when that

Part II.A.

62. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975)). In *Erznoznik*, the Court reversed a declaratory action upholding an ordinance that prohibited theaters from showing films containing nudity if the film was visible from a public place outside the theater. *Erznoznik*, 422 U.S. at 206–07. The City claimed the ordinance was a reasonable means of keeping minors from viewing this material. *Id.* at 212. The Court disagreed, stating, “[M]inors are entitled to a significant measure of First Amendment protection,” and any restrictions targeting dissemination of protected materials must be narrow and well-defined. *Id.* at 212–13 (citing *Tinker*, 393 U.S. at 503). State laws seeking to restrict minors’ access to violent or sexually explicit video games have been deemed unconstitutional. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), *cert. granted*, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (2010); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 650–53 (7th Cir. 2006).

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

64. *But cf. id.* at 514–15 (Stewart, J., concurring) (“I cannot share the Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.”). Justice Stewart’s concurring opinion is of limited value because he relies on *Ginsberg v. New York*, in which the Court held New York could prohibit the sale of pornographic materials to minors, though parents could still purchase such materials for their children. *Id.* at 515 (referencing *Ginsberg v. New York*, 390 U.S. 629, 637–39 (1968)). Justice Stewart’s concurrence does not negatively impact the rule articulated here because this Article establishes schools do not have jurisdiction over constitutionally protected, offensive online speech. *See id.*

65. *Morse*, 551 U.S. at 413 (Thomas, J., concurring) (“Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.”).

66. *Id.* at 424 (Alito, J., concurring) (“[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting.”).

speech causes no substantial disruption of the school environment. Such extension of jurisdiction not only violates students' speech rights, it also violates parents' rights to raise their children as they believe proper.⁶⁷

Third, schools cannot extend their jurisdiction over student speech merely because they disapprove of the speech or the speech does not involve a matter of public concern.⁶⁸ Indeed, the United States Supreme Court has made clear offensive speech is protected by the First Amendment,⁶⁹ and this protection applies to students.⁷⁰ Children have the right to play violent video games, view pornographic material with their parents' consent, and create juvenile, offensive online posts that provide little or no value to society.⁷¹ Thus, both ends of the student-speech-rights spectrum reasonably and logically, though not necessarily, support strong protection of student speech that occurs online and causes no substantial disruption of the school environment.

67. *Cf. Ginsberg*, 390 U.S. at 639 (holding a prohibition on the sale of "girlie" magazines "to minors does not bar parents who so desire from purchasing the magazines for their children.").

68. *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 766 (9th Cir. 2006) (stating student speech need not be a matter of public concern to receive First Amendment protection under *Tinker* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))).

69. *E.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826 (2000) ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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 itself offensive or disagreeable." (citations omitted)); *see, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (upholding the right to privately possess obscene material, the Court found the First Amendment protects the "right to receive information and ideas, regardless of their social worth" (citing *Winters v. New York*, 333 U.S. 507, 510 (1948))).

70. *Morse*, 551 U.S. at 409 (rejecting the school's argument that *Fraser* applies to any speech that is plainly offensive, the Court stated: "We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'").

71. Papandrea, *supra* note 34, at 1070 ("The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students' expression."); *see also Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010); *infra* Part III.B.

A. *Supreme Court Student-Speech Doctrines Consistently Focus on Speech in the School Environment*

The four Supreme Court cases directly addressing student speech rights show school jurisdiction over student speech is limited and can be an incursion on otherwise-protected First Amendment rights.⁷² Although the Court has eroded *Tinker*'s holding over time, it remains the seminal case for student-speech doctrine. In *Tinker*, students were punished for wearing black armbands to school as a protest against the Vietnam War.⁷³ The Court began its legal analysis by noting the “unmistakable” law that students do not lose their First Amendment rights merely by entering the school environment.⁷⁴ While the *Tinker* majority acknowledged schools may “prescribe and control conduct in the schools,”⁷⁵ even on-campus jurisdiction over student speech is limited.⁷⁶

After recognizing the limited jurisdiction schools possess over student speech, the Court held that the schools violated the students' First Amendment rights because “the record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”⁷⁷ The

72. See *Morse*, 551 U.S. 393; *Kuhlmeier*, 484 U.S. 260; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

73. *Tinker*, 393 U.S. at 504.

74. *Id.* at 506.

75. *Id.* at 507 (citations omitted).

76. *Id.* at 513 (“If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.” (citations omitted)).

77. *Id.* at 514. *Tinker* also stated student expression that invades “the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Id.* at 513 (citing *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). Some courts seek to expand *Tinker* beyond its holding to include the right of schools to prohibit speech that interferes with the rights of other students to be let alone. *E.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171, 1178 (9th Cir. 2006) (relying on the “rights of others” language in *Tinker* to uphold a school's decision to prohibit a student from wearing a T-shirt with the statement, “HOMOSEXUALITY IS SHAMEFUL,” on the back and, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,” on the front). The

Court emphasized mere “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁷⁸ A school must present some evidence to establish a substantial disruption actually occurred or is reasonably forecasted to occur.⁷⁹

Even though the *Tinker* majority and dissenting opinions reached opposite conclusions concerning the school’s jurisdiction to punish students for wearing the armbands, they were consistent in limiting the reach of school jurisdiction over speech within the schoolhouse gate. Justice Black’s dissent stated the Court should give deference to a state’s educational institutions “to determine for themselves to what extent free expression should be allowed in its schools.”⁸⁰ Justice Harlan’s dissent stated, “[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions.”⁸¹ Together, the majority and dissenting opinions show school jurisdiction under *Tinker* is limited to a likelihood of substantial disruption of the school environment.

In *Fraser*, the Court departed from the substantial-disruption test and

“rights of others” language in *Tinker*, however, is dicta because the Court expressly stated the record contained no evidence wearing the armbands interfered with other students’ right to be let alone: “Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.” *Tinker*, 393 U.S. at 508. Further, *Kuhlmeier* declined to address a similar issue involving the rights of others. *Kuhlmeier*, 484 U.S. at 273 n.5 (reversing the Eighth Circuit’s application of *Tinker*, and stating it “need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid ‘invasion of the rights of others,’ except where that speech could result in tort liability to the school” (quoting *Tinker*, 393 U.S. at 513)). Thus, *Tinker*’s language regarding the rights of others remains dicta. See Papandrea, *supra* note 34, at 1042–45 (commenting further on *Harper* and the “rights of others” language in *Tinker*).

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

79. *See id.* at 508–09.

80. *Id.* at 520–21, 524 (Black, J., dissenting).

The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue.

Id. at 521–22.

81. *Id.* at 526 (Harlan, J., dissenting).

created a new test—an exception to *Tinker*.⁸² At a mandatory school assembly, Fraser gave a speech nominating a fellow student for student government.⁸³ Although the Court referred to the speech as “sexually explicit,”⁸⁴ that description is inaccurate because the speech involved sexual innuendo and double entendres, not explicit references to sexual activities or organs.⁸⁵ Regardless, the speech involved implicit sexual content.

As a result of his speech, the school suspended Fraser for three days and prohibited him from being eligible to speak at graduation.⁸⁶ At his school-district-grievance process, the examiner upheld Fraser’s punishment, finding his speech “obscene” under the school’s “disruptive-conduct” rule.⁸⁷ The district court overruled the administrative decision on

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

83. *Id.* at 677 (“Students were required to attend the assembly or to report to the study hall.”).

84. *Id.* at 685.

85. After noting the majority referred to the speech “as ‘obscene,’ ‘vulgar,’ ‘lewd,’ and ‘offensively lewd,’” Justice Brennan commented in his concurring opinion: “Having read the full text of respondent’s remarks, I find it difficult to believe that it is the same speech the Court describes.” *Id.* at 687 (Brennan, J., concurring). Justice Stevens also criticized the majority’s characterization of Fraser’s speech as “obscene” and “profane” because “there is no such language in respondent’s speech.” *Id.* at 694 (Stevens, J., dissenting). Justice Brennan’s concurring opinion quotes Fraser’s speech:

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

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

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring) (citation omitted).

86. *Id.* at 678–79 (majority opinion) (“Fraser served two days of his suspension, and was allowed to return to school on the third day.”). Fraser delivered a speech at commencement as a result of write-in votes by his classmates. *Id.* at 679. Fraser became eligible to speak at commencement after the district court enjoined the school from preventing him from speaking at graduation. *Id.*

87. *Id.* at 678–79. The school used the following definition: “*Disruptive Conduct*. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” *Id.*

First Amendment grounds, finding the disruptive-conduct rule vague and overbroad.⁸⁸

On appeal, the Ninth Circuit affirmed the district court's ruling by applying *Tinker* and reasoning the school district failed to establish a substantial disruption.⁸⁹ The Ninth Circuit rejected the School's argument that *FCC v. Pacifica Foundation* provided support for the school to punish Fraser.⁹⁰ In *Pacifica*, the Court narrowly held the Federal Communications Commission could regulate indecent content—content that generally receives First Amendment protection—on broadcast radio and television because those media were “uniquely pervasive” in society and “uniquely accessible to children.”⁹¹ The Ninth Circuit reasoned that it could not expand *Pacifica* to allow public high schools to regulate indecent speech because “the rationales of *Pacifica* have no applicability to the high school environment, especially to an assembly convened for student political speech-making.”⁹²

at 693 (Stevens, J., dissenting) (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1357 n.1 (9th Cir. 1985)).

88. *Id.* at 679. The district court also found the school violated Fraser's due process rights because the disruptive-conduct rule did not list ineligibility to speak at graduation as a possible sanction for violating that rule. *Id.* That court awarded Fraser \$278 in damages and \$12,750 in attorney's fees, and enjoined the school from making Fraser ineligible to speak at graduation. *Id.*

89. *Fraser*, 755 F.2d at 1359, *rev'd*, 478 U.S. 675.

90. *Id.* at 1362–63 (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

91. *Pacifica*, 438 U.S. at 728, 748–50. The specific content in *Pacifica* was the late George Carlin's famous monologue, *Filthy Words*. *Id.* at 729, 751–55.

92. *Fraser*, 755 F.2d at 1363. One wonders whether the rationales from the 1978 *Pacifica* decision have any applicability today. *Pacifica* reasoned indecency could be regulated on broadcast radio and television without violating the First Amendment because of the mediums' unique pervasiveness in society and unique accessibility to children. *Pacifica*, 438 U.S. at 748–49. With the rise of cable, Internet, satellite, and other wireless devices, broadcast is no longer uniquely accessible and uniquely pervasive. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (“[W]e would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”), *rev'd and remanded*, 129 S. Ct. 1800 (2009). The Supreme Court declined to rule on the idea the *Pacifica* rationales no longer apply and limited its holding to the Administrative Procedure Act. *Fox*, 129 S. Ct. at 1811–12, 1814, 1819 (holding the FCC's decision to change its rule from allowing “fleeting expletives” on broadcast radio and television to finding such language sanctionable as indecent content was not “arbitrary and capricious”). On remand, the Second Circuit held the FCC's rule making “fleeting expletives” actionable as indecent content violated the First Amendment because the rule was unconstitutionally vague. *Fox Television*

The Supreme Court reversed the Ninth Circuit's holding by creating a new exception that does not require a substantial disruption before a school can punish student speech.⁹³ After criticizing the Ninth Circuit for failing to differentiate between the political speech in *Tinker* and Fraser's sexually charged speech,⁹⁴ the Court held, "[P]etitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."⁹⁵ Although the Court recently stated its mode of analysis "in *Fraser* is not entirely clear,"⁹⁶ the *Fraser* majority outlined three factors that explained its departure from *Tinker* and established the limits of school jurisdiction: (1) Fraser presented his speech to a captive school audience; (2) the speech involved sexual content; and (3) the school needed to disassociate itself from speech at a mandatory school assembly.⁹⁷

First, *Fraser* requires a "captive audience."⁹⁸ The Court framed the issue to limit the question presented to "a lewd speech at a school assembly"⁹⁹ and reasoned "[a] high school assembly or classroom is no place for" Fraser's speech.¹⁰⁰ Justice Brennan's concurring opinion highlighted the captive nature of the audience is *sine qua non* for schools to punish *Fraser*-type speech by unequivocally stating, "[T]he Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."¹⁰¹ Absent a substantial disruption, a school could not punish a student for giving a lewd and indecent speech on the playground unless a "captive audience" existed.¹⁰² Otherwise, *Fraser* would overrule

Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010). The Second Circuit reiterated its observation that broadcast radio and television are not as uniquely pervasive in society or uniquely accessible to children as they were in 1978 when the Court decided *Pacifica*, but it noted it was bound to apply the *Pacifica* framework "regardless of whether it reflects today's realities." *Id.* at 326–27.

93. *Fraser*, 478 U.S. at 685–87.

94. *Id.* at 680 ("The marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals.").

95. *Id.* at 685.

96. *Morse v. Frederick*, 551 U.S. 393, 404 (2007).

97. *Fraser*, 478 U.S. at 684–86.

98. *Id.* at 684.

99. *Id.* at 677.

100. *Id.* at 685.

101. *Id.* at 689 (Brennan, J., concurring).

102. *See id.* at 684–85 (majority opinion).

Tinker, which it did not. *Tinker* remains valid law.

Logically, if a school cannot punish lewd and indecent speech at school when there is no captive audience, a school cannot punish the same speech that occurs off campus. Several times, the Court referenced speech occurring “in school.”¹⁰³ Justice Brennan expressly made the point: “If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court’s opinion does not suggest otherwise.”¹⁰⁴ A school could not punish Fraser for wearing Cohen’s “Fuck the Draft” jacket when off campus, even though it might be able to if he wore the same jacket at school.¹⁰⁵ Nor should a school be able to punish a student who posts the message, “Fuck the School,” in an online forum because there is no captive audience in cyberspace.

Second, unlike the Ninth Circuit, the Court found *Pacifica* and other cases involving sexual content as persuasive authority for allowing schools to regulate on-campus student speech, even when it does not cause a substantial disruption.¹⁰⁶ The Court reasoned, “These cases recognize the obvious concern on the part of parents, and school authorities acting *in*

103. *Id.* at 681 (“The undoubted freedom to advocate unpopular and controversial views *in schools* and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” (emphasis added)); *id.* at 682 (“It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children *in a public school*.” (emphasis added)); *id.* at 682–83 (“[T]he First Amendment gives a high school student the *classroom right* to wear Tinker’s armband, but not Cohen’s jacket.” (emphasis added) (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring))); *id.* at 683 (“The determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board.” (emphasis added)); *id.* at 686 (“We have recognized that ‘maintaining security and order *in the schools* requires a certain degree of flexibility in school disciplinary procedures’” (emphasis added) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985))).

104. *Id.* at 688 (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

105. The *Fraser* majority approvingly quoted a Second Circuit concurring opinion stating: “[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.” *Id.* at 682–83 (majority opinion) (quoting *Thomas*, 607 F.2d at 1057 (Newman, J., concurring)). See also *infra* Part III.D.1 (discussing *Thomas*).

106. *Fraser*, 478 U.S. at 683–86 (discussing the sexual nature of Fraser’s speech as an explanation for departing from *Tinker*’s substantial-disruption test).

loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”¹⁰⁷ Indeed, the Court limited its express holding to “lewd and indecent speech.”¹⁰⁸ Despite the Court’s holding and rationale limiting *Fraser* to lewd and indecent speech, there is uncertainty in the lower courts as to whether *Fraser* applies to “plainly offensive”¹⁰⁹ speech that is not lewd or indecent.¹¹⁰ Not only do

107. *Id.* at 684; *see also id.* at 685 (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”).

108. *Id.* at 685.

109. *Id.* at 683 (“The pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students—indeed to any mature person.”). As the preceding quote shows, even the phrase “plainly offensive” is tied to sexual speech.

110. *Compare, e.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), *with* *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). In *Boroff*, the Sixth Circuit affirmed summary judgment in favor of a school because a student wore a “plainly offensive” Marilyn Manson T-shirt. *Boroff*, 220 F.3d at 466, 469. Although the T-shirt did not contain any lewd or indecent images or words, the court reasoned because “Boroff’s T-shirts contain[ed] symbols and words that promote values that are so patently contrary to the school’s educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts.” *Id.* at 470. Although the dissenting judge would have remanded the case for trial because a reasonable jury could conclude the school officials improperly prevented a student from wearing a T-shirt because it communicated a message with which they disagreed, he would not limit *Fraser*’s applicability to lewd or indecent speech. *See id.* at 472, 474–76 (Gilman, J., dissenting). “I have little doubt that school administrators may reasonably decide that certain rock performers are so closely identified with illegal drug use or other unlawful activities that T-shirts bearing their images are unacceptable for high school students to wear in school.” *Id.* at 472 (citing *Williams v. Spencer*, 622 F.2d 1200, 1206 (4th Cir. 1980)).

In *Guiles*, the Second Circuit expressly rejected *Boroff*’s interpretation of *Fraser*. *Guiles*, 461 F.3d at 329. In that case, a student wore a T-shirt critical of then-President George W. Bush that included images of drugs and alcohol. *Id.* at 322. The school censored the T-shirt and the district court upheld the school’s right to do so under *Fraser*, finding the shirt “plainly offensive.” *Id.* at 323. The Second Circuit rejected the district court’s application of *Fraser* to the case. *Id.* at 327. “Courts that address *Fraser* appear to treat ‘plainly offensive’ synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent—meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity.” *Id.* at 328 (citing *Frederick v. Morse*, 439 F.3d 1114, 1118–19 (9th Cir. 2006), *rev’d and remanded*, 551 U.S. 393, *vacated*, 499 F.3d 926 (9th Cir. 2007)). Although the Second Circuit declined to define the outer limits of “plainly offensive” speech under *Fraser*, “the phrase ‘plainly offensive’ as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student’s expression conflicts with its ‘educational mission’ or claims a legitimate pedagogical concern.” *Id.* at 330. Thus, the Second Circuit expressly declined to follow *Boroff*. *Id.* at 329.

the express holding and rationale of *Fraser* establish that it only applies to lewd and indecent speech, the Court's framing of the issue also shows the limits of *Fraser*: "We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly."¹¹¹

Third, the school had the right to "disassociate itself" from Fraser's speech because it occurred at a mandatory school assembly.¹¹² A school has no need to disassociate itself from off-campus student speech that is not part of a school-sponsored event because no one could reasonably associate a school with such speech. Similarly, a school need not disassociate itself from online student speech because there is no reasonable association between a school and online student speech. Thus, *Fraser*'s applicability is limited in three significant ways. *Fraser* only applies to speech that: (1) occurs before a "captive audience" at school;¹¹³ (2) involves lewd or indecent sexual content;¹¹⁴ and (3) occurs under circumstances where a school must "disassociate itself" from the speech.¹¹⁵

The Supreme Court's third case concerning student speech, *Hazelwood School District v. Kuhlmeier*, involved the right of schools to censor school-sponsored speech.¹¹⁶ The principal prevented two articles from being published in a school-sponsored newspaper.¹¹⁷ The Supreme Court held that schools may exercise editorial control over "school-sponsored expressive activities" when that control is "reasonably related to

Guiles's analysis of *Fraser* is consistent with the reasoning in *Fraser* because the Court focused on the sexual nature of the speech and relied on cases like *Pacifica* and *Ginsberg* to support its holding. See *id.* at 328–29.

111. *Fraser*, 478 U.S. at 677.

112. *Id.* at 685–86 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.").

113. *Id.* at 684.

114. *Id.* at 685.

115. *Id.* at 684–86.

116. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

117. *Id.* at 263–64. One article addressed teen pregnancy. *Id.* at 263. The principal had concerns the students mentioned in this article would lose their anonymity, even though they were given fictitious names. *Id.* The other article addressed the impact of divorce on students. *Id.* The principal had concerns this article would invade the privacy of the students and parents discussed in the article. *Id.* Student members of the paper filed suit alleging this censorship violated their First Amendment rights. *Id.* at 264.

legitimate pedagogical concerns.”¹¹⁸ The *Hazelwood* Court reasoned that “students, parents, and members of the public might reasonably perceive [a school-sponsored newspaper] to bear the imprimatur of the school” based on the school’s involvement with the speech.¹¹⁹ This reasoning is consistent with *Fraser*. Similar to *Fraser*, in which the school had a need to disassociate itself from a lewd or indecent speech at a mandatory assembly, “a school may in its capacity as publisher of a school newspaper or producer of a school play ‘dissociate itself’ from that speech.”¹²⁰ In *Hazelwood*, the school dissociated itself through censorship.

The concern of “disassociating itself” from a student’s speech because of the risk the speech may bear the “imprimatur of the school” does not arise with off-campus or online speech, regardless of where it occurs. Like *Tinker* and *Fraser*, *Hazelwood* supports the position that schools may limit on-campus speech, “even though the government could not censor similar speech outside the school.”¹²¹ Although *Hazelwood* further eroded *Tinker* by creating another new student-speech doctrine that allows schools to punish student speech, the Court maintained consistency by recognizing the limited jurisdiction schools possess over student speech. “Even in its capacity as educator the State may not assume an Orwellian ‘guardianship of the public mind.’”¹²²

The most recent Supreme Court case on student speech created a third exception to *Tinker* and seemingly began to blur the lines between on-campus and off-campus speech. In *Morse v. Frederick*, Joseph Frederick, a senior at Juneau-Douglas High School, arrived to school late but still in time to join his friends across the street from the high school to watch the Olympic Torch Relay.¹²³ The school allowed students to go outside and watch the event.¹²⁴ As the torch neared, Frederick unfurled a banner with a “cryptic”¹²⁵ message that a majority of the Court deciphered

118. *Id.* at 273.

119. *Id.* at 271.

120. *Id.* (quoting *Fraser*, 478 U.S. at 685).

121. *Id.* at 266. In *Fraser*, the Court recognized “[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board,’ rather than with the federal courts.” *Id.* at 267 (emphasis added) (quoting *Fraser*, 478 U.S. at 683).

122. *Id.* at 286 (Brennan, J., dissenting) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

123. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

124. *Id.*

125. *Id.* at 401 (“The message on Frederick’s banner is cryptic. It is no doubt

to be pro-drug: “BONG HiTS 4 JESUS.”¹²⁶ When Frederick refused his principal’s request to furl the banner, the school suspended Frederick for ten days.¹²⁷ The federal district court upheld the suspension under *Fraser*, but the Ninth Circuit reversed.¹²⁸

Reasonably, the Ninth Circuit found neither the *Fraser* nor *Kuhlmeier* exceptions to *Tinker* applied to Frederick’s banner.¹²⁹ *Fraser* did not apply because “[t]he phrase ‘Bong Hits 4 Jesus’ may be funny, stupid, or insulting, depending on one’s point of view, but it is not ‘plainly offensive’ in the way sexual innuendo is.”¹³⁰ *Kuhlmeier* did not apply because Frederick’s banner did not bear the imprimatur of the school.¹³¹ Applying

offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.”). It is puzzling that the majority describes the message as “cryptic,” offers alternative interpretations, and then allows a school to punish the student based on one interpretation of an admittedly obscure message. Moreover, this approach contradicts a different approach taken by Chief Justice Roberts and Justice Alito in another free speech opinion issued on the very same day as *Morse*. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007). In *Wis. Right to Life*, Chief Justice Roberts and Justice Alito declared, “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” *Id.* at 474 (Roberts, C.J., concurring).

126. *Morse*, 551 U.S. at 397.

127. *Id.* at 398.

128. *Frederick v. Morse*, No. J 02-008 CV(JWS), 2003 WL 25274689, at *2–3,*5–6 (D. Alaska May 29, 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006), *rev’d and remanded*, 551 U.S. 393 (2007). The *Morse* district court decision exemplifies a misapplication of *Fraser* because the court interpreted *Fraser* to apply to speech that did not involve lewd or indecent speech. *Id.* at *5 (“Frederick is incorrect that *Fraser* applies only to lewd and obscene language.”). In part, the *Morse* district court relied on *Boroff*. *Id.* at *5 n.38. Even the Supreme Court’s majority found *Fraser* did not apply to Frederick’s banner, although it declined to define the limits of *Fraser*. See *Morse*, 551 U.S. at 409 (The Court declined to accept the argument Frederick’s banner is punishable under *Fraser*, and stated, “We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of ‘offensive.’”). See also *supra* note 110 and accompanying text (discussing further the meaning of “plainly offensive”).

129. *Morse*, 439 F.3d at 1123.

130. *Id.* at 1119. Although the Ninth Circuit did not expressly rule *Fraser* is limited to lewd or indecent speech, it did recognize the sexual nature of *Fraser*’s speech was material to the Supreme Court’s analysis in *Fraser*: “Our case differs from *Fraser* in that Frederick’s speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly.” *Id.* Like the Second Circuit, the Ninth Circuit declined to follow the Sixth Circuit’s expansive interpretation of “plainly offensive” student speech subject to regulation by schools under *Fraser*. *Id.* at 1122; see also *supra* note 110 (discussing the meaning of “plainly offensive” in the Second and Sixth Circuits).

131. *Morse*, 439 F.3d at 1119 (“*Kuhlmeier* does not control the case at bar,

Tinker, the Ninth Circuit held the school violated Frederick's clearly established First Amendment rights because unfurling the banner did not cause a substantial disruption of the work or discipline of the school.¹³² Apparently not satisfied with the results under *Tinker*, the Supreme Court invented yet another new student-speech exception "out of whole cloth," one that created more authority for schools to punish student speech and further eroded the protection provided under *Tinker*.¹³³ The new rule announced in *Morse* is that schools may punish student speech if it could reasonably be interpreted to advocate illegal drug use.¹³⁴

Despite creating another exception to *Tinker*, *Morse* is consistent with the three previous student-speech cases in that it recognized the limits of school jurisdiction over student speech. "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."¹³⁵ Although one can reasonably disagree as to whether Frederick unfurling a banner on a public sidewalk across the street from his school during the Olympic Torch Relay qualifies as "student" speech subject to school jurisdiction, the Court rejected the argument that *Morse* involved speech outside the school environment.¹³⁶ The first sentence of the majority opinion set the stage by referring to Frederick's speech as occurring "[a]t a school-sanctioned and school-supervised event"¹³⁷

The concurring and dissenting opinions in *Morse* also provide support for the limited jurisdiction schools possess over student speech. Justice Thomas did not believe "the First Amendment, as originally understood,

however, because Frederick's pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity.").

132. *Id.* at 1123–25.

133. *Morse v. Frederick*, 551 U.S. 393, 446 (2007) (Stevens, J., dissenting). Creating a new test "out of whole cloth" contradicted Chief Justice Roberts's purported fidelity to judicial restraint and conflicted with general expectations of the role of the judiciary. See TOMAIN, *supra* note 50, at 121 ("We desire law to provide determinate answers to the conflicts that find their way to courts, and in turn, we desire judges who apply the law instead of making it out of whole cloth.").

134. *Morse*, 551 U.S. at 397 (majority opinion) ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

135. *Id.* at 405 (citations omitted).

136. *Id.* at 400 ("The event occurred during normal school hours. It was sanctioned by Principal Morse 'as an approved social event or class trip'" (citation omitted)).

137. *Id.* at 396.

[protected] student speech in public schools.”¹³⁸ Justice Alito noted arguments for limiting student-speech rights in public schools must “be based on some special characteristic of the school setting,” as opposed to *in loco parentis*.¹³⁹ Justice Breyer agreed Frederick’s speech occurred “during a school-related event.”¹⁴⁰ Justice Stevens emphasized student-speech doctrines apply only “in school settings” and the First Amendment “unquestionably” would have protected Frederick’s speech but for the Court’s finding his speech occurred at a school-sponsored event.¹⁴¹

A common thread in all four of the Court’s student-speech cases is that the school punished speech occurring either at school or a school-sponsored event. As to the limits of school jurisdiction over student speech, the *Morse* Court stated, “There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents”¹⁴² In light of the schools’ incursion on students’ First Amendment rights under these doctrines, the value of free speech to individual self-realization, and the well-established policy of avoiding chilling free speech, adopting a bright-line rule that *Fraser* does not apply to online speech helps remove some uncertainty as to the limits of school jurisdiction over online student speech. This bright-line rule applies to *Fraser*-type online speech, regardless of whether it occurs on or off campus.

B. Jurisdictional Borders: Cyberspace and Physical Space

The Supreme Court has allowed schools to restrict students’ free speech rights within the schoolhouse gate and at school-sponsored events in ways the First Amendment would not otherwise allow. The Court has not yet addressed how these doctrines might apply outside the school environment.¹⁴³ Recently, lower courts have struggled with whether and how to apply *Fraser* to online speech. Courts struggling to apply existing legal doctrine in cyberspace is not unique to student speech law.¹⁴⁴ The

138. *Id.* at 410–11 (Thomas, J., concurring).

139. *Id.* at 424 (Alito, J., concurring).

140. *See id.* at 427 (Breyer, J., concurring in part and dissenting in part).

141. *Id.* at 434 (Stevens, J., dissenting).

142. *Id.* at 401 (majority opinion) (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

143. *See supra* note 4 and accompanying text.

144. Most law schools now offer courses dedicated to exploring how cyberspace requires us to rethink—or at least reconsider—a wide range of current legal doctrines, including free speech rights. *See* Eric Goldman, *Teaching Cyberlaw*, 52 ST. LOUIS U. L.J. 749, 751 (2008) (“[In 2008], between one-half and two-thirds of U.S. law

new experiences of online interaction require courts, legislatures, and commentators to consider whether and how to apply a variety of familiar legal principles that operate in the physical world to the unfamiliar world of cyberspace.¹⁴⁵ Analyzing school jurisdiction over online speech provides the opportunity to consider two areas of cyberlaw commentary on the micro-level: (1) the debate between exceptionalists and unexceptionalists and (2) the proper role of metaphor and analogy.

Problems of geography and jurisdiction are common in analyzing online interactions. Early cyberlaw scholarship defined two main competing positions on comparing cyberspace to the physical world: exceptionalism and unexceptionalism.¹⁴⁶ On the one hand, exceptionalists view cyberspace as unique from the real world and require new or different legal rules to properly regulate this new space.¹⁴⁷ David Johnson and David Post state the online world transcends geographic boundaries and nation-states cannot impose their laws on online activity without resulting in a monopoly of rulemaking authority over online activity by one sovereign.¹⁴⁸ On the other hand, unexceptionalists like Jack Goldsmith argue “territorial regulation of the Internet is no less feasible and no less legitimate than territorial regulation of non-Internet transactions.”¹⁴⁹ The debate between exceptionalism and unexceptionalism helps provide a framework for deciding, or at least discussing, whether online interaction is

schools regularly offer[ed] at least one Cyberlaw course.” (citing Kenneth L. Port, *Essay on Intellectual Property Curricula in the United States*, 46 IDEA 165, 170 (2005)).

145. See generally PATRICIA L. BELLIA, PAUL SCHIFF BERMAN & DAVID G. POST, CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE (3d ed. 2007) (describing the various philosophical, jurisdictional, technical, constitutional, and cultural issues involved in cyberlaw).

146. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200–01 (1998) (explaining how communication in cyberspace is legitimately capable of regulation in regards to jurisdiction and choice of law). But see David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1365–69 (2002) (supporting the exceptionalism position that communication in cyberspace is not the same as communication in real space in regards to choice-of-law and jurisdictional principles).

147. Post, *supra* note 146, at 1368–69.

148. Johnson & Post, *supra* note 52, at 1390–91 (“Governments cannot stop electronic communications from coming across their borders, even if they want to do so. Nor can they credibly claim a right to regulate the Net based on supposed local harms caused by activities that originate outside their borders and that travel electronically to many different nations. One nation’s legal institutions should not monopolize rule-making for the entire Net.”).

149. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 475 (1998).

sufficiently analogous to a real world interaction when existing legal principles apply, or whether new laws are necessary to meet the changing times.

Exceptionalists are correct in expressing concerns about one jurisdiction overreaching its assertion of authority into another jurisdiction when regulating cyberspace activity, especially when that assertion of jurisdiction restricts freedom of speech. French law prohibits the display of Nazi-related items in France.¹⁵⁰ Does France have personal jurisdiction over Yahoo!, an American company, because Yahoo! displays Nazi-related items on its website? Italian privacy law can result in criminal sanctions for mishandling another's personal information for profit.¹⁵¹ Does Italy have jurisdiction over Google executives for third-party content posted on Google's YouTube website that is based on revenue generated from advertisers?¹⁵² The Yahoo! and Google examples illustrate the conflicts between laws of nation-states that result when a geographic sovereign seeks to regulate online interactions. Cyberspace is not connected to a physical place. If France is able to dictate the content of Yahoo!, then a foreign sovereign curtails First Amendment rights of a United States company merely because the content is available online and accessible in France.¹⁵³ If Italy is able to criminally prosecute Google executives, then rights and liberties of United States citizens are infringed.

Although the Yahoo! and Google examples focus on the conflict-of-law problems that arise when nations seek to regulate cyberspace, the examples are instructive when considering the reach of school jurisdiction over online student speech because similar jurisdictional conflicts arise. French law prohibits the display of Nazi-related items in France, but the

150. *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 2006).

151. *See, e.g., Rachel Donadio, Larger Threat Is Seen in Google Case*, N.Y. TIMES, Feb. 25, 2010, at A1, *available at* <http://www.nytimes.com/2010/02/25/technology/companies/25google.html?pagewanted=all>; Adam Liptak, *When American and European Ideas of Privacy Collide*, N.Y. TIMES, Feb. 28, 2010, at WK1, *available at* <http://www.nytimes.com/2010/02/28/weekinreview/28liptak.html>.

152. An Italian court found three Google executives in violation of Italian privacy law—Article 8 of the European Convention on Human Rights—for a video posted by a third party on YouTube that showed teenage boys harassing an autistic child. *See* Liptak, *supra* note 151; *see also* Donadio, *supra* note 151.

153. *See Yahoo!*, 433 F.3d at 1217–18. This is not to say First Amendment rights of artificial entities are or should be coextensive with the rights of individuals. The current majority of the Supreme Court, however, seems to be leaning in that direction. *See Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010).

First Amendment protects the same material in the United States.¹⁵⁴ Schools may prohibit lewd and indecent speech at a school assembly, but the First Amendment protects the same speech outside the schoolhouse gate.¹⁵⁵ In both instances, one sovereign seeks to extraterritorially impose its authority, coming into conflict with the laws of another jurisdiction. Neither France, nor Italy, nor schools should be able to exert a monopoly on rulemaking authority over speech generally protected by the First Amendment merely because the speech is accessible online and ostensibly violates their respective jurisdictional laws or rules. Cyberspace is not the equivalent of the physical world. Exceptionalism shows new solutions are needed to determine the jurisdictional limits of sovereigns over online interactions, especially when the laws of two sovereigns conflict.¹⁵⁶

Adopting an exceptionalist viewpoint, however, does not inherently preclude school jurisdiction over online, *Fraser*-type speech. The school defendants in *Layshock*, *Blue Mountain*, and *Doninger* relied on exceptionalists' arguments in their appellate briefs as support for extending *Fraser*-jurisdiction over online student speech by arguing against a geographical approach for limiting school jurisdiction over student speech.¹⁵⁷ They argue the impact of online student speech in the school environment is so significant it merits extended jurisdiction.¹⁵⁸ Essentially,

154. See *Yahoo!*, 443 F.3d at 1217–18 (noting whether the French court's ruling affected only those outside the United States would impact a First Amendment analysis).

155. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680, 685–86 (1986).

156. A recent example of the United States seeking to protect First Amendment rights in conflict with speech laws of foreign nations is the SPEECH Act, signed into law on August 10, 2010. SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (to be codified at 28 U.S.C. § 4101). The SPEECH Act prohibits United States courts from enforcing defamation judgments issued by foreign nations, unless they comport with First Amendment and due process requirements. § 3, 124 Stat. at 2381–82 (to be codified at 28 U.S.C. §§ 4102(a)–(b)).

157. Brief of Appellant/Cross Appellee, *supra* note 36, at 13–16; Brief of Appellee, *Blue Mountain School District*, *supra* note 36, at 20–21 (“The pure geographic approach . . . is outdated and unworkable.”); Supplemental Response and Reply Brief of Defendants-Appellants/Cross-Appellees at 31, *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2009) (Nos. 09-1452-cv(L), 09-1601-cv(XAP), 09-2261-cv(CON)) (“[T]erritoriality is not necessarily a useful concept in determining the limit of [school] authority.” (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979))).

158. E.g., Brief of Appellee, *Blue Mountain School District*, *supra* note 36, at 20 (“Specifically, whereas before students were limited to traditional means of communication such as a pen and paper, students today are able to use the internet, personal web pages and/or blogs, to transmit messages that are available to the entire world at anytime of day.”).

they argue offensive, online speech is not functionally identical to offensive, offline speech and schools need exceptional jurisdiction over online speech to preserve the school environment.¹⁵⁹ There are at least three reasons to reject the schools' exceptionalist arguments: (1) online speech does not satisfy *Fraser* because there is no captive audience online and no need for a school to disassociate itself from online student speech;¹⁶⁰ (2) the self-realization theory and the role cyberspace plays in the lives of youth dictate that First Amendment rights receive strong protection in cyberspace;¹⁶¹ and (3) too often, schools impose excessive punishments for online speech, showing they are not impartial decision makers.¹⁶² Thus, the debate between exceptionalism and unexceptionalism is helpful, but not conclusive, in resolving whether *Fraser* applies to online student speech because both opponents and proponents of applying *Fraser* to online student speech can make exceptionalist arguments to support their respective positions. For purposes of this Article, the key point is that exceptionalism shows how regulation of cyberspace can result in a conflict of laws between jurisdictions, and resolution of this conflict must protect First Amendment rights.

Another subject of cyberlaw scholarship considers the use of metaphors and analogies to make the unfamiliar world of cyberspace familiar. Scholars consider the validity of analogizing cyberspace to physical space. Is Yahoo! "in" France merely because it is accessible from computers in France? Did a student "enter" school property merely by accessing the school's publicly available website from a home computer and copying a photo of the principal?¹⁶³ While some find physical space a relevant analogy for cyberspace,¹⁶⁴ others claim "any analogy to a physical

159. Post, *supra* note 146, at 1376–81 (arguing Internet activities are not functionally identical to similar activities in real space and "[d]ifferences in degree sometimes become differences in kind"). But see Goldsmith, *supra* note 149, at 479 ("Internet activities are functionally identical to these non-Internet activities.").

160. See *supra* Part II.A; *infra* Part III.B–D.

161. See *infra* Part IV.

162. See *infra* Part IV.B.

163. *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 259–60 (3d Cir. Feb. 4, 2010) (rejecting the School District's argument the student "entered" school property by accessing the school's publicly available website from home and copying a photograph of his principal to use on the parody profile webpage), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

164. See, e.g., Goldsmith, *supra* note 146, at 1244–50; Goldsmith, *supra* note 149, at 475.

space is a poor one.”¹⁶⁵ As this conversation evolved, an emerging consensus developed: analogy to physical space is helpful but of limited value, and the law should not get swept away in analyzing metaphors and analogies to the detriment of developing legal rules and normative analysis.¹⁶⁶

Regardless of metaphors or analogies between cyberspace and real space, when free speech rights are involved, our longstanding commitment to freedom of speech guides us to err in favor of protecting these rights. Online speech complicates the analysis, but that is precisely the point of adopting clear legal rules, when possible, that give sufficient notice as to the limits of jurisdiction over online speech.¹⁶⁷ When it comes to free speech rights, Congress and the Supreme Court have both provided strong

165. Daniel Benoliel, *Law, Geography and Cyberspace: The Case of On-Line Territorial Privacy*, 23 CARDOZO ARTS & ENT. L.J. 125, 129 (2005); see also Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 444 (2003) (positing that using metaphors of physical space results in negative consequence of “creating millions of splintered [private] rights . . . and these rights are destroying the commons-like character of the Internet that has previously led to extraordinary innovation”). Blue Mountain School District’s argument the student “entered” school property by accessing the school’s publicly available website from home exemplifies Hunter’s point that using metaphors of physical space could have the negative consequence of destroying the commons-like nature of the Internet because the school is using the metaphor to extend its jurisdiction over online student speech. See *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *2 (M.D. Pa. Sept. 11, 2008), *aff’d*, 593 F.3d 286 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

166. Julie E. Cohen, Essay, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 213 (2007) (“The important question is not what kind of space cyberspace is, but what kind of space a world that includes cyberspace is and will become.”); Hunter, *supra* note 165 at 443 (arguing a drawback of using the “cyberspace as place metaphor” is it confuses “the descriptive question of whether we think of cyberspace as a place with the normative question of whether we should regulate cyberspace as a regime independent of national laws”); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 542 (2003) (“The CYBERSPACE AS PLACE metaphor can be valuable. . . . [but] [c]ourts must also understand that metaphor is no substitute for legal analysis.”).

167. See *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 223 (D. Conn. 2009) (“First Amendment jurisprudence will need to evolve in order to address this new environment [of online speech].”); *Blue Mountain*, 2008 WL 4279517, at *7 n.5 (“[T]he line between on-campus and off-campus speech is blurred with increased use of the internet and the ability of students to access the internet at school, on their own personal computers, school computers and even cellular telephones.”); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863–64 (Pa. 2002) (“Moreover, the advent of the Internet has complicated analysis of restrictions on speech.” (citing *Ashcroft v. ACLU*, 2002 U.S. LEXIS 3421 (May 13, 2002))).

protections to online speech.

In enacting section 230 of the Communications Decency Act,¹⁶⁸ Congress provided immunity to interactive computer services—Craigslist,¹⁶⁹ MySpace,¹⁷⁰ America Online,¹⁷¹ and an individual's blog,¹⁷² for example—for content created by others but available on those services. This immunity departs from the real world rules of distributor and publisher liability.¹⁷³ One purpose of this legislation is to ensure the Internet remains “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁷⁴ Just as the rule set forth here, section 230 protects offensive

168. 47 U.S.C. § 230 (2006).

169. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668, 671–72 (7th Cir. 2008) (holding Craigslist was not liable for third-party content on its website that allegedly violated the Fair Housing Act by listing housing preferences based on race, religion, sex, or family status because Craigslist was not a “publisher” or “speaker” under the Communications Decency Act, a requirement for finding a violation of the Fair Housing Act); *see also* Fair Hous. Council v. Roommates.Com, LLC, 521 F.3d 1157, 1172 n.33 (9th Cir. 2008) (en banc) (distinguishing *Craigslist* by finding Roommates.com created or developed, in part, the allegedly discriminatory content). *Roommates.com* is an outlier among section 230 cases in finding an interactive computer service is subject to potential liability when a third party creates or develops content. The *Roommates.com* dissent provided persuasive analysis as to why section 230 immunity should apply to Roommates.com. *See id.* at 1176–89 (McKeown, J., concurring in part and dissenting in part).

170. *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). In *Doe*, the court held, based on section 230 immunity, MySpace was not liable for alleged negligence by allowing a nineteen-year-old male to communicate with a fourteen-year-old female. *Id.* at 416, 422. After communicating on MySpace, the two individuals met, and the male subsequently sexually assaulted the female. *Id.* at 416.

171. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334–35 (4th Cir. 1997).

172. The key to section 230 immunity is being an “interactive computer service” that does not create or develop, in whole or in part, the allegedly actionable content. *See* § 230(c)(1), (f)(2). An individual hosting a blog site is protected by this immunity just as business entities that host interactive websites are.

173. Congress specifically passed section 230, in part, to overrule a court decision that found the owner of a computer network liable as a publisher of content posted by a third party on one of the computer network's bulletin boards. H.R. REP. NO. 104-458, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 207, 208 (“One of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”).

174. § 230(a)(3).

speech. In *Zeran v. America Online*, the Fourth Circuit upheld America Online's immunity when an unidentified person falsely attributed the creation of tasteless T-shirts that concerned the bombing of the federal building in Oklahoma City to Kenneth Zeran and provided his contact information.¹⁷⁵ The court upheld America Online's immunity even though Zeran provided notice he did not post the information and had received death threats because of the posting.¹⁷⁶

This congressional decision to provide strong protection to online speech, regardless of the value of the speech, is consistent with the Supreme Court's understanding of online free speech rights. In *Reno v. ACLU*, the Court struck down legislation that sought to protect minors from sexually explicit speech and stated the Internet "is entitled to 'the highest protection from governmental intrusion.'"¹⁷⁷ Both Congress and the Court provide strong protection for online speech rights, even if the speech is offensive or exposes minors to sexually explicit content.¹⁷⁸ When speech rights are the issue, they should receive the strongest protection possible, especially in cyberspace.

Allowing schools to apply *Fraser* to online speech results in a monopoly by the school over student speech rights and the rights of others, a monopoly that restricts rights guaranteed by the Constitution.¹⁷⁹ A high school senior has a constitutional right to engage in protected, albeit offensive, online speech about his teacher. A high school junior class secretary has a right to engage in online speech to communicate with citizens and call school administrators "douchebags," if she chooses. Further, citizens have the right to receive such online speech.¹⁸⁰

The geographic location of the online speech is immaterial when applying *Fraser* because there is no captive audience online, even if the

175. See *Zeran*, 129 F.3d at 328–29.

176. *Id.*

177. *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996)).

178. See *id.* at 867, 869 (rationalizing protections by distinguishing the Internet from other forums because the "risk of encountering indecent material by accident is remote" due to the affirmative steps necessary to access such material).

179. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding school officials could prohibit "vulgar and lewd speech" without violating the First Amendment because it "undermine[d] the school's basic educational mission").

180. See *infra* Part IV.A (discussing a prison's inmate-correspondence rule that violated First Amendment rights of nonprisoners to receive correspondence from inmates).

student creates or accesses the online speech at school.¹⁸¹ Instead of focusing on the geographic location of online speech, another way to craft a rule as to the limits of school jurisdiction over *Fraser*-type speech is to “conceiv[e] of Cyberspace as a distinct ‘place’ for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the ‘real world.’”¹⁸² Although students may access online speech at school, online speech is not “within” the schoolhouse gate. Caselaw applying *Fraser* provides support for this rule.

III. *FRASER* DOES NOT APPLY TO ONLINE SPEECH, ON- OR OFF-CAMPUS.

Lower courts have found that *Fraser* does not apply to offline, off-campus speech.¹⁸³ This finding is consistent with: (1) Justice Brennan’s concurring opinion in *Fraser* in which he expressly stated *Fraser*’s speech would be protected outside the school environment¹⁸⁴ and (2) the *Morse* majority’s statement that *Fraser*’s speech “would have been protected” outside the school context.¹⁸⁵ But does *Fraser* apply to online, off-campus speech? What about online, on-campus speech?

Cases analyzing online, *Fraser*-type speech usually highlight the *off-campus* nature of the speech. Several cases have found that *Fraser* does not apply to online, off-campus speech,¹⁸⁶ but others reach the opposite conclusion.¹⁸⁷ In *Layshock*, a Third Circuit panel affirmed that *Fraser* does not apply to online, off-campus speech. On the same day, a different Third Circuit panel declined to apply the *Fraser* analysis to this issue in *Blue*

181. See *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002). The rule articulated in this Article does not prevent a school from disciplining a student for violating a school’s computer use policy, it merely prevents it from disciplining the student for the content created or accessed in violation of this policy. See Papandrea, *supra* note 34, at 1091 (“If schools are concerned about the mere use of digital media while students are in school, they can restrict access to the school computers or ban the use of cell phones and other electronic devices during school hours without running afoul of the First Amendment.”). If the content created or accessed is merely offensive and does not cause a substantial disruption, the discipline must be based on a violation of the school’s policy, not the content. *Id.* at 1093.

182. Johnson & Post, *supra* note 52, at 1378.

183. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir. 2001).

184. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

185. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

186. See *infra* Part III.B.

187. See *infra* Parts III.C–D.

Mountain, even though the district court found that *Fraser* does apply to online, off-campus speech. Because *Doninger* was before the Second Circuit in 2008 on an appeal from a denial of a preliminary injunction against the school, it had a chance to address whether a school may punish a student for inappropriate comments made off campus on a blog. The court stated, however, that it was not clear whether *Fraser* applies to off-campus speech and determined *Tinker* appropriately governed the case.¹⁸⁸ Because *Doninger* is currently before the Second Circuit on a certified question that directly addresses whether schools have jurisdiction over inappropriate online student speech and because *Layshock* and *Blue Mountain* are currently pending as a consolidated en banc rehearing before the Third Circuit, these courts will most likely directly address whether *Fraser* applies to online, off-campus student speech.

Analyzing these cases and earlier cases shows *Fraser* cannot be applied to online, off-campus speech without extending *Fraser* beyond the rule created by the Supreme Court. Moreover, the cases show that under a faithful application of *Fraser*, schools lack jurisdiction over online, *Fraser*-type speech regardless of whether it occurs on or off campus. Establishing this bright-line rule helps protect students' First Amendment free speech rights and provides notice to schools that they do not have jurisdiction over online student speech merely because it is offensive, or merely because students access or create the speech on-campus.

A. *Fraser Does Not Apply to Offline, Off-Campus Speech*

Cases involving off-campus, offline speech provide persuasive support for the rule that *Fraser* does not apply to online speech. *Saxe v. State College Area School District* is a Third Circuit opinion that involved a school's antiharassment policy.¹⁸⁹ Plaintiffs challenged the policy as overbroad because it could be read to prohibit them from expressing their religious belief that homosexuality is a sin.¹⁹⁰ Then-Circuit Judge Alito authored the opinion, holding the antiharassment policy violated the First Amendment on overbreadth grounds.¹⁹¹ The court rejected *Fraser* as a basis to sustain the policy because *Fraser* applies to "speech in school,"¹⁹²

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

189. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–03 (3d Cir. 2001).

190. *Id.* at 203–04. Plaintiffs also brought a void-for-vagueness challenge, but the court did not reach the merits of this claim, resting its holding on the policy being unconstitutionally overbroad. *Id.* at 214.

191. *Id.* at 202, 214.

192. *Id.* at 213 ("According to *Fraser*, then, there is no First Amendment

but the school's antiharassment policy lacked "any geographical or contextual limitations"¹⁹³ and "could even be read to cover conduct occurring outside of school premises."¹⁹⁴ The opinion even indicates that some on-campus speech is not subject to *Fraser*; speech in the hall between classes differs from speech before a captive audience at a school-sponsored assembly.¹⁹⁵ Then-Circuit Judge Alito's decision in *Saxe* weighs strongly in favor of finding *Fraser* inapplicable to online speech because it recognizes that *Fraser* does not even apply to on-campus speech when there is no captive audience.¹⁹⁶

Riggan v. Midland Independent School District also supports the finding that online speech is beyond the scope of *Fraser*. In *Riggan*, the plaintiff possessed two pictures taken off campus that depicted the principal's car parked on a public street in front of a teacher's house.¹⁹⁷ The principal had been under investigation for alleged sexual improprieties.¹⁹⁸ During the court proceedings, the principal alleged the student planned to use one of the photographs to make a T-shirt with the caption, "I never had sex with that woman," and the T-shirts would be distributed at graduation.¹⁹⁹ The court noted if evidence existed of the alleged plan to distribute T-shirts with the photo and the caption at graduation, the School District might have a claim under *Fraser*, but "there [was] no evidence at [that] point that any of [the student's] expressive conduct occurred as part of school sponsored activities."²⁰⁰ That such speech did not occur online makes no difference. Thus, *Riggan* shows *Fraser* does not apply to off-campus speech.²⁰¹

Finally, *Klein v. Smith* supports the position *Fraser* does not apply to online speech.²⁰² In *Klein*, the school suspended a student for ten days because he gestured the middle finger to a teacher while in a restaurant

protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school.").

193. *Id.* at 216.

194. *Id.* at 216 n.11.

195. *See id.* at 216.

196. *See id.*

197. *See Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 650 (W.D. Tex. 2000).

198. *Id.*

199. *Id.* at 651.

200. *Id.* at 660–61.

201. *Cf. id.* at 660 (noting the student's only expressive activity that had occurred was the taking and possessing of photographs off campus).

202. *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986).

parking lot, even though the incident occurred during nonschool hours and was not in connection with any school activity.²⁰³ Although *Klein* was decided approximately one month before the Supreme Court issued *Fraser* and does not discuss *Fraser*, the court did address a school rule that prohibited vulgar conduct towards a staff member.²⁰⁴ The court reasoned any connection between the incident in the restaurant parking lot and orderly operation of the school was “far too attenuated to support discipline against Klein for violating the rule prohibiting vulgar or discourteous conduct toward a teacher.”²⁰⁵ *Klein*’s reasoning is consistent with Justice Brennan’s concurring opinion in *Fraser* and the *Morse* majority’s dicta that a school lacks jurisdiction if a *Fraser*-type speech is delivered outside the school environment.

Should it matter if the student gestures the middle finger in a restaurant parking lot or in an online forum? *Coy v. Board of Education of the North Canton City Schools* shows the result is the same if a depiction of the gesture occurs online.²⁰⁶

B. *Fraser Does Not Apply to Online, Off-Campus Speech*

In *Coy*, a student created a website at home that contained some profanity, pictures of boys gesturing the middle finger, and “a sentence describing one boy as being sexually aroused by his mother.”²⁰⁷ The school discovered that Coy accessed the website while at school in the computer lab.²⁰⁸ Initially, the school suspended Coy for four days, but then it expelled him for eighty days.²⁰⁹ After the board of education upheld the punishment, Coy’s parents filed suit against the School alleging it had violated Coy’s First Amendment rights.²¹⁰ The court expressly found *Fraser* inapplicable, even though the student accessed his website at school, because “Coy was not speaking or attempting to speak in front of a captive student audience.”²¹¹ Additionally, the *Coy* Court found the school policy

203. *Id.* at 1440–41.

204. *Id.* at 1441.

205. *Id.*

206. *See Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 795, 801 (N.D. Ohio 2002) (finding that in order to discipline Coy, the school must show an interference with school operations under *Tinker*).

207. *Id.* at 795.

208. *Id.* at 795–96.

209. *Id.* at 796.

210. *Id.* at 797.

211. *Id.* at 799–800 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675,

prohibiting “inappropriate” conduct unconstitutionally overbroad and impermissibly vague because the scope of the rule applied to speech outside school property or at non-school-sponsored events.²¹² *Coy* provides support for the rule that *Fraser* does not apply to online speech, even when accessed on-campus, because there is no captive audience.²¹³ Together, *Klein* and *Coy* establish consistent treatment of *Fraser* to both online and offline speech.

Killion v. Franklin Regional School District followed *Klein* in finding *Fraser* does not apply to off-campus speech.²¹⁴ In *Killion*, a student created a top-ten list that derided the school athletic director.²¹⁵ The student created this list on his home computer and emailed it to other students from home.²¹⁶ When the list was brought to the attention of school officials, the school suspended its creator for ten days because it contained offensive remarks and was found on school grounds.²¹⁷ The student filed suit against the school district, and the court granted summary judgment in his favor.²¹⁸ In analyzing *Fraser*, the court found that the case did not apply because the student created the list at home and the school lacked jurisdiction to punish him for this off-campus, online speech, despite another student bringing a copy of the top-ten list onto school grounds.²¹⁹ *Killion* shows a content creator cannot be punished when someone else is responsible for bringing a copy of the speech onto school grounds.²²⁰ Additionally, *Killion* followed *Saxe* and found that the school policy used to punish the student was unconstitutionally overbroad because it covered

683, 685 (1986)).

212. *Id.* at 801–03.

213. *See id.* at 799.

214. *See Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 456–58 (W.D. Pa. 2001).

215. *Id.* at 448.

216. *Id.*

217. *Id.* at 449.

218. *Id.* at 449, 458.

219. *Id.* at 456–58 (“Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech, like that in *Klein* and *Thomas*, occurred within the confines of [the student’s] home, far removed from any school premises or facilities.”).

220. *Id.* at 458. Although the court seemed willing to apply *Fraser* if the content creator *himself* brought the top-ten list onto school grounds, this dicta does not comport with the captive-audience requirement of *Fraser*. “Given the out of school creation of the list, absent evidence that [the content creator] was responsible for bringing the list on school grounds . . . defendants could not, without violating the First Amendment, suspend [him] for the mere creation of the . . . Top Ten list.” *Id.*

speech occurring outside the “school premises.”²²¹ *Killion* and *Saxe* demonstrate consistent treatment of school policies related to off-campus speech, regardless of whether it occurred online or offline, just as *Klein* and *Coy* exhibit consistent treatment of *Fraser* to middle-finger gestures, regardless of whether the speech occurred online or offline.

Emmett v. Kent School District suggests *Fraser* should not apply to online speech that occurs outside the school setting, even if it relates to the school.²²² Apparently inspired by a creative writing class assignment, a student posted mock obituaries of two friends on a website he created.²²³ A television news program aired a story about the student’s “tongue-in-cheek” webpage but missed the joke.²²⁴ The news program sensationalized the story by referring to the webpage as a “hit list”—possibly because visitors were allowed to vote on the subject of the next obituary—even though that phrase did not appear on the student’s webpage.²²⁵ As a result of this online speech, the school quickly expelled the student, but it later reduced the punishment to a suspension.²²⁶ The student filed suit against the school district, and the court granted his motion for a temporary restraining order.²²⁷

In analyzing the school’s jurisdiction over the student’s online speech, the court found that *Fraser* did not apply because the speech did not occur before a captive audience.²²⁸ Also, the court cited Justice Brennan’s concurring opinion in *Fraser* to show *Fraser* does not apply outside the school setting.²²⁹ The court rejected the idea that school jurisdiction existed over the online speech merely because the speech may come on campus or is directed toward the school community.²³⁰ It reasoned, “Although the intended audience was undoubtedly connected to Kentlake High School,

221. *Id.* at 459 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001)).

222. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (“Concurring, Justice Brennan pointed out that *Fraser* does not suggest that the student’s speech would be grounds for punishment if it was given outside the school setting.” (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986))).

223. *Id.* at 1089.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 1090.

228. *Id.* (“In the present case, Plaintiff’s speech was not at a school assembly, as in *Fraser* . . .”).

229. *Id.*

230. *See id.*

the speech was entirely outside of the school's supervision or control."²³¹ This finding is important because the school-defendants in *Layshock*, *Blue Mountain*, and *Doninger* seek to expand school jurisdiction over online speech when it relates to the school.

Requa v. Kent School District is unique because the school expressly declined to discipline the student for his online speech—posting a video on YouTube.²³² In *Requa*, students surreptitiously filmed their teacher in the classroom.²³³ The recording included sexually suggestive images, such as a closeup of the teacher's buttocks and one student gesturing a pelvic thrust toward the teacher while her back was turned.²³⁴ One of the students later posted the video on YouTube.²³⁵ After a local news channel discovered the video online, it contacted the school for comment.²³⁶ Upon learning of the video, the school board issued forty-day suspensions to all students involved.²³⁷ In determining the students' punishment, the school board expressly stated it based the punishment on the in-class conduct, "not for the purpose of regulating 'speech' created off-campus."²³⁸ Nonetheless, the student that posted a link to the video on YouTube filed suit for a temporary restraining order, claiming the school violated his First Amendment rights.²³⁹ In litigation, the School District maintained its position that it could not regulate the student's online speech: "His admitted free speech activities outside the classroom—posting a link to the YouTube video on the internet—are protected speech and the school district agrees that he may not be disciplined for this out-of-school expression of his viewpoint."²⁴⁰ The court denied the student's motion for a temporary restraining order, reasoning the student failed to demonstrate "that his punishment [was] for his protected free speech and not for the classroom conduct of which he [was] accused."²⁴¹

231. *Id.*

232. *Requa v. Kent Sch. Dist.* No. 415, 492 F. Supp. 2d 1272, 1274, 1277 (W.D. Wash. 2007).

233. *Id.* at 1274.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 1275. The school agreed to reduce the punishments to twenty days if the students wrote a research paper while suspended. *Id.*

238. *Id.* at 1276 (citation omitted).

239. *Id.* at 1273–74.

240. *Id.* at 1283.

241. *Id.*

Finally, *Bowler v. Town of Hudson* illustrates information specifying the online location of speech is not subject to *Fraser*, even when that information appears on posters displayed on school grounds.²⁴² In *Bowler*, high schoolers in the Conservative Club displayed posters in school to advertise their group.²⁴³ The posters included the website address for the national organization.²⁴⁴ The national organization's website contained links to websites with videos of hostage beheadings in Iraq and Afghanistan.²⁴⁵ The school removed the posters based on the graphic nature of the videos linked to the national organization's website.²⁴⁶ In rejecting the School's defense that it was permitted to censor such speech under *Fraser*, the court reasoned, "[B]ecause the graphic and arguably 'offensive' speech was not actually displayed at school, *Fraser* does not support the school's censorship."²⁴⁷

Other courts have also refused to apply *Fraser* to online speech.²⁴⁸ While these cases mainly focus on online, off-campus speech, they support a rule that prohibits school jurisdiction under *Fraser*, regardless of whether it occurs online or offline. *Requa* shows at least one school district acknowledged it did not have *Fraser*-jurisdiction over online speech.²⁴⁹ *Coy* shows merely accessing one's own website at school does not create *Fraser*-

242. *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 177–78 (D. Mass. 2007).

243. *Id.* at 171–73.

244. *Id.* at 173.

245. *Id.* at 171, 173. The court stated *Fraser* applies to speech that is "sexually explicit, indecent, or lewd." *Id.* at 176 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–84 (1986)). It acknowledged, "Several courts have read *Fraser* to support censorship of student speech that was not 'lewd, vulgar, or obscene' but that could reasonably be interpreted to promote illegal or 'immoral' activities, including suicide, murder and drugs." *Id.* at 179 (citations omitted). See also *supra* notes 110, 128, 130 (providing more examples of what type of speech is subject to *Fraser*).

246. *Bowler*, 514 F. Supp. 2d at 173.

247. *Id.* at 179 (citing *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002)).

248. See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1374, 1377 (S.D. Fla. 2010) (denying a principal's motion to dismiss and refusing to apply *Fraser* to a Facebook page a student created at home, and stating, "For the Court to equate a school assembly to the entire internet would set a precedent too far reaching"); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 700, 706 (W.D. Pa. 2003) (granting summary judgment in favor of the student, and holding the school policies were "unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity").

249. *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276–78 (W.D. Wash. 2007).

jurisdiction.²⁵⁰ *Killion* suggests when someone other than the creator of the online speech brings a physical copy of the speech on campus, the school cannot punish the content creator, absent other factors.²⁵¹ The court in *Bowler* held that displaying a website address on a poster in a school hallway did not create *Fraser*-jurisdiction based on the website's content.²⁵² *Emmett* demonstrates that a school does not have jurisdiction over online speech merely because the speech relates to the school.²⁵³

Because *Fraser* requires a captive audience and there are no captive audiences online, creating a jurisdictional border between cyberspace and real space is a legitimate, workable, and appropriate solution in the context of student-speech doctrine, at least under *Fraser*. Utilizing *Fraser* in online speech cases would require an expansion of that doctrine. In 2002, the Pennsylvania Supreme Court did expand *Fraser* by applying its standard to online, off-campus speech.²⁵⁴

C. *The Pennsylvania Supreme Court Concededly Expands Fraser-Jurisdiction over Online Speech*

J.S. v. Bethlehem Area School District involved an eighth-grade student that created a website entitled "Teacher Sux" at home during nonschool hours.²⁵⁵ The website, mainly describing the student's algebra teacher and principal, included the words, "F___ You Mrs. Fulmer. You Are A B___. You Are A Stupid B___," 136 times.²⁵⁶ The website also included a section entitled "Why Should She Die?" and asked readers to provide twenty dollars to help pay for the hitman, but it listed no address by which to provide funds to the student.²⁵⁷ The website included a disclaimer and a clickwrap agreement requiring visitors to agree they were not school-district "staff," and they would not inform school-district employees about the website.²⁵⁸ The student who created the website showed it to one other student while at school and told others who later

250. See *Coy*, 205 F. Supp. 2d at 799–800.

251. See *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454–58 (W.D. Pa. 2001).

252. *Bowler*, 514 F. Supp. 2d at 177–80.

253. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

254. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 867–69 (Pa. 2002).

255. *Id.* at 850–51.

256. *Id.* at 851.

257. *Id.* at 851, 859.

258. *Id.* at 851.

viewed it.²⁵⁹

Upon discovery of the website, the principal informed local police and the FBI, but these law enforcement agencies declined to file charges against the student after an investigation.²⁶⁰ The algebra teacher said the website frightened her and caused her injuries, including loss of sleep, loss of appetite, and anxiety.²⁶¹ She did not return to finish the school year.²⁶² Initially, the school suspended the student for three days, but then it later extended the suspension to ten days and eventually voted to expel the student.²⁶³ The school based its punishment on school-district policies that prohibited students from threatening and harassing teachers and principals, as well as making statements of disrespect that “result[ed] in actual harm to the health, safety, and welfare of the school community.”²⁶⁴

The student, through his parents, filed suit against the School District alleging it violated the student’s First Amendment rights.²⁶⁵ The trial court affirmed the punishment.²⁶⁶ In a two-to-one decision, the appellate court affirmed the trial court’s decision.²⁶⁷ The dissenting judge stated that the School failed to establish the existence of a true threat.²⁶⁸ On appeal, the Supreme Court of Pennsylvania applied both *Fraser* and *Tinker*, but stated it need not definitively decide which doctrine applied because the School District prevailed under either test, even though the student created the website off campus during nonschool hours.²⁶⁹

259. *Id.* at 852.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 852–53.

264. *Id.* at 853.

265. *Id.*

266. *Id.*

267. *Id.*

268. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 426–29 (Pa. Commw. Ct. 2000) (Friedman, J., dissenting), *aff’d*, 807 A.2d 847. Judge Friedman found no true threat because local authorities and the FBI decided not to press charges, and because the school itself did not perceive the website as a true threat. *Id.* at 426–27.

269. *Bethlehem Area Sch. Dist.*, 807 A.2d at 866–68 (“Yet, whether the facts before us are more aligned with the events in *Fraser* and governed by the lewd and plainly offensive speech analysis, or are more akin to the situation in *Tinker* and thus subject to review for substantial disruption of the work of the school, we need not definitively decide, for application of either case results in a determination in favor of the School District. Thus, we will first apply *Fraser*, and then *Tinker* to the facts *sub judice*.”).

In analyzing *Fraser*, the Supreme Court of Pennsylvania reasoned that while the student created the website off campus, it became on-campus speech by his actions of: (1) accessing the website at school; (2) showing the website to another student; and (3) informing other students about the website.²⁷⁰ The court held, “[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”²⁷¹ While the *Bethlehem* Court considered the “on-campus” nature of the speech a “strong factor” in its analysis, it did not foreclose applying *Fraser* to a student’s purely off-campus, online speech.²⁷²

Even accepting the Pennsylvania Supreme Court’s finding that the student’s website became on-campus speech, its application of *Fraser* to online speech is tenuous because the court broadened the scope of *Fraser*. Unlike *Fraser*, *Bethlehem* did not involve a captive audience at a mandatory school assembly.²⁷³ Indeed, the *Bethlehem* Court acknowledged its expansion of *Fraser*: “[Q]uestions exist as to the applicability of *Fraser* to the instant factual scenario.”²⁷⁴ This conceded expansion of *Fraser* makes *Bethlehem* of limited value when considering whether *Fraser* applies to online speech, but it sets a dangerous precedent for the expansion of school jurisdiction over online student speech.

D. *Recent Second and Third Circuit Cases Consider Whether Fraser Applies to Online Student Speech*

An analysis of the three recent federal circuit cases involving *Fraser* shows it does not apply and should not be expanded to apply to online student speech; however, this rule is not yet clearly established.

270. See *id.* at 865.

271. *Id.*

272. *Id.* at 865 n.12 (“While the fact that J.S. personally accessed his website on school grounds is a strong factor in our assessment, we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.”).

273. See *Fraser v. Bethel Sch. Dist.* No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985), *rev’d and remanded*, 478 U.S. 675 (1986); *Bethlehem Area Sch. Dist.*, 807 A.2d at 850–52.

274. *Bethlehem Area Sch. Dist.*, 807 A.2d at 868.

1. *The Easy Case*

Regardless of the fundamental point that *Fraser* does not apply absent a captive audience where a school needs to disassociate itself from lewd or indecent sexual speech, *Doninger v. Niehoff* is a clear example of a court misapplying *Fraser*.²⁷⁵ *Doninger* is an easy case because it involves political speech.

In *Doninger*, a Connecticut high school prohibited a student—the junior class secretary—from running for senior class secretary based on comments she made online and off campus after school hours.²⁷⁶ The student, Avery Doninger, posted comments on her publicly accessible blog referring to school administrators as “douchebags in central office,” and she encouraged readers to contact the school superintendent “to piss her off more.”²⁷⁷ Doninger posted these comments in response to the school’s decision to cancel or reschedule the music festival and to influence members of the public to express their opposition to school officials.²⁷⁸

Prior to her blog post, Doninger and three student council members sent an email to a number of local taxpayers informing them of the music festival situation and requesting they contact the school superintendent.²⁷⁹

275. See *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008).

276. *Id.* at 43.

277. *Id.* at 45. The Second Circuit reproduced the following from Doninger’s blog post:

“[J]amfest is cancelled due to douchebags in central office. [H]ere is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for [J]amfest. [B]asically, because we sent it out, [the superintendent] is getting a TON of phone calls and emails and such. [W]e have so much support and we really appreciate [sic] it. [H]owever, she got pissed off and decided to just cancel the whole thing all together. [A]ndddd [sic] so basically we aren’t going to have it at all, but in the slightest chance we do it is going to be after the talent show on [M]ay 18th. [A]ndd..here [sic] is the letter we sent out to parents.

....

And here is a letter my mom sent to [the superintendent] and cc’d [the principal] to get an idea of what to write if you want to write something or call her to piss her off more. [I]’m down.”

Id.

278. See *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 205–07 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008).

279. *Id.*

The principal and superintendent decided “appealing directly to the public was not an appropriate means of resolving complaints the students had regarding school administrators’ decisions.”²⁸⁰ The principal met with Doninger prior to Doninger’s blog post and informed her that appealing to the public was not appropriate.²⁸¹ Later that night, Doninger posted the comments on her blog.²⁸²

School administrators did not discover Doninger’s blog until after the music-festival issue was resolved.²⁸³ However, the school still punished Doninger by prohibiting her from running for senior class secretary.²⁸⁴ The school admitted in an email to Avery’s mother that it punished Doninger because of her online, off campus comments and her failure to follow the principal’s prior instruction regarding the impropriety of contacting the public to resolve disagreements with school administrators.²⁸⁵

Doninger filed a lawsuit against the principal and superintendent for violation of her First Amendment free speech rights.²⁸⁶ She sought a preliminary injunction to force “the school to remove the current Senior Class Secretary” and allow Avery to run in a new election.²⁸⁷ Doninger argued the *Tinker* standard should apply, thus requiring the school to establish that Avery’s conduct created a substantial disruption on campus.²⁸⁸ The principal and superintendent argued *Fraser* should apply because of the vulgar and offensive nature of the speech.²⁸⁹ The district

280. *Id.* at 207.

281. *Id.* at 205.

282. *Id.* at 206.

283. *Id.* at 207.

284. *Id.* Principal Niehoff also instructed Avery to show the post to her mother, apologize to Superintendent Schwartz, and recuse herself from the senior class secretary race. *Id.* Avery agreed to the first two requests but declined to recuse herself from the class secretary race. *Id.* She won a plurality of the vote by write-in votes but was not permitted to take office. *Id.* at 208–09.

285. *Id.* at 209.

286. *Id.* at 211. Doninger claimed the school violated her First Amendment rights by refusing to let her: (1) run for class secretary; (2) wear a “Team Avery” T-shirt into the auditorium when students running for student government were giving campaign speeches; and (3) speak at the student government campaign-speech assembly. *Id.* Avery also brought an equal protection claim alleging the school treated her differently than other students who participated in an email to community members asking them to contact the school to help prevent the music festival from being canceled or rescheduled again. *Id.* at 219.

287. *See id.* at 210.

288. *See id.* at 212.

289. *Id.* at 212–13.

court denied the preliminary injunction because it found Doninger did not have a likelihood of success on the merits.²⁹⁰

In denying Doninger's motion for a preliminary injunction, the court first sought to distinguish both *Tinker* and *Fraser* based on the type of punishment Doninger received.²⁹¹ The district court unpersuasively reasoned that *Tinker* and *Fraser* did not apply because those cases involved suspensions from school, whereas here the school merely prohibited Doninger from participating in a voluntary, extracurricular activity.²⁹² The district court found that voluntary, extracurricular activities are a privilege, not a right; thus, the school could preclude her from participating in this activity without violating her rights.²⁹³ The court continued, however, by

290. *Id.* at 218.

291. *See id.* at 213–16.

292. *Id.* at 216 (“[Doninger] does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators.”). *Id.* In distinguishing between voluntary, extracurricular activities and suspensions, the court relied on *Lowery v. Euverard*. *Id.* at 215–16 (citing *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007)). This reliance is misplaced because *Lowery* applied *Tinker* and found a reasonable forecast of a substantial disruption to the high school football team based on a petition by some of the players to remove their head coach. *Id.* at 215. However, the district court in *Doninger* claimed it could preclude Doninger from running for student government because voluntary, extracurricular activities are a privilege, not a right. *Id.* (citing *Lowery*, 497 F.3d at 594). Thus, *Lowery* does not support the reasoning by the *Doninger* District Court. Whether the distinction between punishing a student via suspension or preclusion from voluntary, extracurricular activities provides a sound legal distinction for punishing a student based on her off-campus—or on-campus—speech is beyond the scope of this Article. That being said, if the speech at issue is constitutionally protected and not subject to any of the current student-speech doctrines, the type of punishment—whether it is a ban on extracurricular activity, suspension, or another form of discipline—should not matter. In any case, the school is still punishing a student for speech.

293. *Id.* at 213–14. The Second Circuit also reached the questionable conclusion that preventing a student from participating in a voluntary, extracurricular activity is materially different than suspension or expulsion, but not under a “privilege versus right” analysis. *Doninger v. Niehoff*, 527 F.3d 41, 52–53 (2d Cir. 2008). Rather, the Second Circuit considered the punishment permissible under *Tinker*. *Id.* The Second Circuit reasoned Doninger's speech risked: (1) disruption of the resolution of the music-festival-scheduling dispute and (2) “frustration of the proper operation of LMHS's student government and undermining of the values that student government, as an extracurricular activity, is designed to promote.” *Id.* (citing *Doninger*, 514 F. Supp. 2d at 215). It is difficult to understand how the Second Circuit used this distinction as a basis to support its substantial-disruption analysis. The school resolved the music-festival-scheduling issue prior to discovering the existence of Doninger's blog post. *Doninger*, 514 F. Supp. 2d at 207. Failing to discover the blog post prior to

discussing *Tinker* and *Fraser* and found that the facts more closely resembled *Fraser*.²⁹⁴

While the district court recognized that, unlike in *Fraser*, Doninger's speech occurred off campus, it provided three bases for applying *Fraser* to her online, off-campus speech. First, the court considered it material the speech "was purposely designed by [Doninger] to come onto the campus."²⁹⁵ Second, the court relied on a 2007 Second Circuit case that applied *Tinker* to online, off-campus speech.²⁹⁶ Third, the court relied on *Morse* as support for extending *Fraser* to prohibit vulgar and offensive language that occurs off campus.²⁹⁷ Each of these bases is questionable, especially relying on *Morse*.

First, the district court's reliance on *Morse* to deny the preliminary injunction in *Doninger* is highly questionable because it fails to consider the express limitations set forth in Justice Alito's concurring opinion,²⁹⁸ as well as the *Morse* majority's dicta on the limits of *Fraser*.²⁹⁹ The court in *Morse* held that during a school-sponsored event, a school may prohibit speech that could reasonably be interpreted to advocate illegal drug use.³⁰⁰ Unlike *Morse*, Doninger's speech did not occur at a school-sponsored

resolution of the scheduling issue leans heavily, if not dispositively, in favor of finding Doninger's blog post did not cause a substantial disruption to the school environment. Also, it strains reason to claim Doninger's blog post risked frustrating the purposes of student government, even assuming "frustration of the proper operation" of student government is sufficient to establish a substantial disruption or reasonable forecast of the same. *Doninger*, 527 F.3d at 52. Doninger won the election as a write-in candidate, and the record is devoid of evidence her participation in the race caused a substantial disruption or reasonable forecast of the same.

294. *Doninger*, 514 F. Supp. 2d at 216.

295. *Id.*

296. *Id.* (citing *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007)).

297. *See id.* at 217 ("*Fraser* and *Morse* teach that school officials could permissibly punish [Doninger] in the way that they did for her offensive speech in the blog, which interfered with the school's 'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse . . .'" (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986))).

298. *See Morse v. Frederick*, 551 U.S. 393, 423–25 (2007) (Alito, J., concurring).

299. *See id.* at 409 (majority opinion) ("*Fraser* should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some.").

300. *Id.* at 397 ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

event, let alone advocate illegal drug use.³⁰¹ Doninger created the blog post at home during nonschool hours.³⁰² Even the *Morse* majority noted that *Fraser* is limited to on-campus or school-sponsored events.³⁰³

Equally important, Justice Alito's concurring opinion in *Morse*, joined by Justice Kennedy, expressly limited the scope of the holding in at least two ways and made clear he did not support further extension of *Morse* to other categories of speech.³⁰⁴ First, Justice Alito stated the *Morse* holding is limited to speech that advocates illegal drug use, and he would not prohibit political or social commentary advocating against the war on drugs or in support of legalizing marijuana.³⁰⁵ Second, Justice Alito stated *Morse* does not support the position that schools may prohibit a student's speech simply because the speech may interfere with the school's educational mission.³⁰⁶ Such a broad, vague standard is likely to chill free speech. This analysis is consistent with then-Circuit Judge Alito's reasoning in *Saxe*, in which he expressed concerns that a school had interpreted an antiharassment policy to prohibit a student from expressing his religious belief that homosexuality is a sin.³⁰⁷ For Justice Alito and Justice Kennedy, *Morse*'s holding is specifically limited to speech that could reasonably be interpreted as advocating illegal drug use, and this rule is "standing at the far reaches of what the First Amendment permits."³⁰⁸

301. See *Doninger*, 514 F. Supp. 2d at 206, *aff'd*, 527 F.3d 41 (2d Cir. 2008).

302. *Id.*

303. See *Morse*, 551 U.S. at 405.

304. See *id.* at 422, 425 (Alito, J., concurring).

305. *Id.* at 422.

306. *Id.* at 423.

307. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 203, 214–17 (3d Cir. 2001).

308. *Morse*, 551 U.S. at 425 (Alito, J., concurring). Although Justice Alito's concurrence specifically limited the scope of *Morse*, some lower courts have already exceeded that scope by applying *Morse* to cases outside the context of speech that could reasonably be viewed as advocating illegal drug use. See, e.g., *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–72 (5th Cir. 2007) (applying *Morse* to a high school sophomore who penned a diary entry describing a Columbine-like shooting at his school); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 980–81, 984 (11th Cir. 2007) (applying *Morse* to a high school student who described killing her math teacher in her notebook); see also Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 6 (2008) ("The bottom line is that while some federal judges and courts acknowledge the narrow nature of the holding in *Morse*, others are expansively interpreting it by choosing to ignore both its idiosyncratic facts and Justice Alito's very precise, limiting language cited earlier." (citation omitted)).

Morse does not support the district court's analysis.

Second, the district court's reliance on *Wisniewski* is also questionable. Although *Wisniewski* involved online, off-campus speech, the Second Circuit applied *Tinker*, not *Fraser*, and found that the off-campus speech created a foreseeable risk of a substantial disruption on campus.³⁰⁹ In *Wisniewski*, an eighth-grade student electronically sent an image he created at home to his friends via instant messenger.³¹⁰ The image depicted one of his teachers and suggested the teacher be shot and killed.³¹¹ The school suspended the student for one semester, and the court upheld the suspension under *Tinker*.³¹² The court reasoned that the online, off-campus speech could create a reasonably foreseeable risk of substantial disruption at school once it became known to the teacher and other school officials.³¹³ As made clear by Justice Brennan's concurrence in *Fraser* and dicta by the majority in *Morse*, the *Fraser* test simply does not apply to off-campus speech—even if *Tinker* does—because there is no captive school audience.³¹⁴ *Wisniewski* is not relevant caselaw for a *Fraser* analysis, which requires a captive audience and the need for a school to dissociate itself from a student's lewd and indecent sexual speech.³¹⁵ Because these factors were not present in *Wisniewski*, it does not support extending *Fraser* to apply to online speech.

Third, although *Doninger* is not alone in considering whether online, off-campus speech is “purposely designed” or reasonably likely to “come onto campus,”³¹⁶ this factor alone is an insufficient basis to support punishing a student's off-campus speech, regardless of whether *Fraser* or *Tinker* applies.³¹⁷ The mere fact that speech “comes onto campus”

309. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

310. *Id.* at 35–36.

311. *Id.* at 36.

312. *Id.* at 37–40.

313. *Id.*

314. *See Morse v. Frederick*, 551 U.S. 393, 404–05 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 n.1 (1986) (Brennan, J., concurring).

315. *See Fraser*, 478 U.S. at 685–86.

316. *See, e.g., J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 301 (3d Cir. Feb. 4, 2010) (“[O]ff-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.”), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

317. *See Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (“Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or

certainly does not satisfy the *Tinker* test because it fails to consider whether a substantial disruption occurs or is reasonably forecast to occur.³¹⁸ Indeed, the court in *Coy* ruled that the student could not be punished merely for accessing a website at school if such access did not create a substantial disruption.³¹⁹ Chief Justice Zappala, concurring in *Bethlehem*, also cautioned that merely accessing online speech at school does not automatically transform it into on-campus speech.³²⁰ As noted, *Fraser* is limited to captive audiences at school or school-sponsored events. There is no captive audience in the context of accessing one's own website at school.³²¹ Even if a person receives a text message, an e-mail, or some other form of digital communication while at school, that recipient is not a captive audience like the one in *Fraser* because the recipient can delete the communication, usually without viewing it.

Doninger appealed the denial of her preliminary injunction motion, and the Second Circuit affirmed the lower court's decision, but not under *Fraser*.³²² The Second Circuit expressly refrained from deciding whether *Fraser* applied to off-campus speech.³²³ Instead, the court applied *Tinker* and held that the school met its burden of establishing "a foreseeable risk of a substantial disruption."³²⁴ On remand, the parties filed cross-motions for summary judgment.³²⁵ Although the Second Circuit applied *Tinker* and expressly declined to address whether *Fraser* applied to online, off-campus speech, the district court reiterated its position that *Fraser* does apply to such speech, or at least that the defendants were entitled to qualified immunity because Doninger's constitutional right to such speech had not

control.").

318. See *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 801 (N.D. Ohio 2002) (finding accessing a website did not "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

319. *Id.* (disallowing summary judgment for either party because a material issue of fact existed as to whether accessing the website at school caused a substantial disruption under *Tinker*).

320. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 870 (Pa. 2002) (Zappala, C.J., concurring).

321. *Coy*, 205 F. Supp. 2d at 799–800 (holding *Fraser* does not apply to a website a student created off campus but accessed at school because, in part, no captive audience existed).

322. *Doninger v. Niehoff*, 527 F.3d 41, 49–50, 54 (2d Cir. 2008).

323. *Id.* at 49.

324. *Id.* at 50–53.

325. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 214 (D. Conn. 2009).

been clearly established.³²⁶ Thus, on the First Amendment claim related to the blog post, the district court granted summary judgment to the defendants based on qualified immunity.³²⁷

The Second Circuit has another chance to address whether *Fraser* applies to online speech. Subsequent to granting summary judgment to the *Doninger* defendants based on qualified immunity and finding that *Fraser* applied to Doninger's online speech, the district court certified the following question to the Second Circuit: "Whether a school may discipline a student for inappropriate comments made off campus on a blog, or whether school officials have qualified immunity in such situations, presents controlling questions of law regarding the First Amendment."³²⁸ In certifying this question, the district court reasoned there is "substantial ground for difference of opinion" as to whether *Fraser* applies to off-campus, online speech because the question remains undecided by the Second Circuit, and lower courts are in "disarray" when analyzing such speech.³²⁹

In answering the certified question, the Second Circuit should consider the following. First, the Second Circuit should look to its 1979 decision, *Thomas v. Board of Education*, for guidance. *Thomas* involved an off-campus newspaper that focused on sexual satire.³³⁰ Although the students produced the publication off campus, copies were stored on-campus in a classroom closet with a teacher's consent.³³¹ After being suspended, the students sued the school board and administrators, alleging the punishment violated their First Amendment rights.³³² The Second

326. *Id.* at 221 ("To be sure, the fact that the Second Circuit declined to address *Fraser* in its decision might have been intended to gently telegraph to the Court that it erred in its analysis of *Fraser*. However, even if *Fraser* does not apply to off-campus speech, the Court believes that Defendants would still enjoy qualified immunity because the constitutional right at stake was not clearly established at the time the alleged violation occurred.").

327. *Id.* at 224.

328. *Doninger v. Niehoff*, No. 3:07CV1129 (MRK), 2009 WL 1364890, at *2 (D. Conn. May 14, 2009).

329. *Id.* (quoting 28 U.S.C. § 1292(b) (2006)).

330. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979).

331. *Id.*

332. *Id.* at 1046. Initially, the principal and superintendent agreed to take no action against the students based on the publication. *Id.* at 1045–46. When the school board president learned about the publication from her son, she expressed dissatisfaction with the inaction of the principal and the superintendent. *Id.* at 1046. Based on the school board president's dissatisfaction, the principal initiated an

Circuit held *Tinker* did not control because the speech here “was deliberately designed to take place beyond the schoolhouse gate.”³³³ While the Second Circuit decided this case years before the facts giving rise to *Fraser* occurred, *Thomas* provides support for the position that schools do not have jurisdiction to regulate indecent speech that occurs off campus. Judge Newman, however, concurred in the judgment, stating, “The extent to which school authority might be asserted for off-campus activities need not be determined, since the school has disclaimed such power.”³³⁴ He seriously doubted schools lacked jurisdiction to discipline students for distributing vulgar material near the schoolhouse gate.³³⁵ Nonetheless, the majority expressly disagreed with Judge Newman’s belief that schools could regulate vulgar, off-campus speech, even if such expression may come onto school grounds.³³⁶

Thomas shows that arguments made by the principal and superintendent in *Doninger* are insufficient to create jurisdiction over the off-campus blog.³³⁷ On appeal, the principal and superintendent argue the school has jurisdiction over Doninger’s blog post because it “was purposely

investigation, invited the students’ parents to a school board meeting, and eventually imposed the following punishments based on consultation with the superintendent and the board of education:

- (1) five-day suspensions to be reduced to three days if the student prepared an essay on “the potential harm to people caused by the publication of irresponsible and/or obscene writing”; (2) segregation from other students during study hall periods, throughout the month of February and possibly longer if an acceptable essay were not submitted; (3) loss of all student privileges during the period of suspension; and (4) inclusion of suspension letters in the students’ school files.

Id. The differing reactions between the principal and superintendent, on the one hand, and the board of education president, on the other, exemplifies that even school administrators disagree about the proper response to offensive, off-campus student speech.

333. *Id.* at 1050.

334. *Id.* at 1058 (Newman, J., concurring).

335. *Id.* at 1058 n.13.

336. *Id.* at 1053 n.18 (majority opinion) (“Moreover, we have difficulty with Judge Newman’s footnote suggesting that school officials can regulate allegedly ‘indecent’ expression by students in the general community. . . . Nevertheless, we believe that this power is denied to public school officials when they seek to punish off-campus expression simply because they reasonably foresee that in-school distribution may result.”).

337. *Id.* at 1051–52.

designed by [Doninger] to come onto the school campus.”³³⁸ Under *Thomas*, schools do not have jurisdiction over lewd and indecent speech merely because it may come onto campus.³³⁹

Second, the court should not limit its holding to off-campus, online speech. The court should create a border between cyberspace and the physical world by holding that *Fraser* does not apply to online speech, regardless of where it is created or accessed. This rule would be consistent with the Supreme Court’s holding in *Fraser* because of the lack of a captive audience or the need for the school to disassociate itself from the speech.³⁴⁰

Third, even if the Second Circuit were to mistakenly hold that *Fraser* applies to online, off-campus speech, *Fraser* does not apply to this particular blog post. Under the Second Circuit’s *Guiles v. Marineau* precedent, the content of Avery’s blog post is not the type of speech subject to *Fraser*.³⁴¹ The single use of the term “douchebag” and the phrase “piss her off more” is not equivalent to the sexual innuendo in *Fraser*. *Guiles* requires more.³⁴²

Finally, *Doninger* is an easy case compared to the speech at issue in the subsequently discussed cases. Although Doninger used the term “douchebag” and the phrase “piss her off more,” she engaged in political speech by soliciting public support to save the music festival from being rescheduled for a fourth time or being canceled altogether. Doninger’s “purpose in writing a public journal about Jamfest was to encourage taxpayers in the school district to contact the school’s administration and express support for the event”³⁴³ Not only did she engage in political speech, Doninger directed her online speech to a nonstudent audience.³⁴⁴ Thus, *Doninger* involves the First Amendment rights of nonstudents—the right of citizens to receive political speech about a public high school music festival.

338. Supplemental Response and Reply Brief of Defendants-Appellants/Cross-Appellees, *supra* note 157, at 36.

339. See *Thomas*, 607 F.2d at 1051–52.

340. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986).

341. See *Guiles v. Marineau*, 461 F.3d 320, 327–29 (2d Cir. 2006) (permitting the school to censor only “student speech that is ‘lewd,’ ‘vulgar,’ ‘indecent,’ or ‘plainly offensive’” (citations omitted)).

342. See *id.* at 329–30; see also *supra* note 110 and accompanying text.

343. Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, *supra* note 29, at 10 (citation omitted).

344. See *id.* at 10 n.2.

2. *A Harder Case on the Facts, Not the Law*

While *Doninger* involves political speech that clearly has value, *J.S. v. Blue Mountain School District* involves speech that one could reasonably find has little or no value.³⁴⁵ Regardless, under *Fraser* and well-established First Amendment doctrine, offensive speech receives constitutional protection.³⁴⁶ That the speaker is a student does not change this result absent a captive audience and a need for the school to disassociate itself from the speech.³⁴⁷ Perhaps recognizing the limits of *Fraser*, the Third Circuit *Blue Mountain* panel applied *Tinker* to uphold the lower court's decision that the School had jurisdiction to punish online, off-campus student speech.³⁴⁸ The *Blue Mountain* panel reached this conclusion even though: (1) the district court applied *Fraser* to regulate the speech³⁴⁹ and (2) it agreed with the district court that no actual substantial disruption occurred.³⁵⁰ The Third Circuit's approval of school jurisdiction rested merely on the purported foreseeable risk of a substantial disruption.³⁵¹

In *Blue Mountain*, a student and her friend created a parody profile of their principal that referred to him as a "sex addict" and included language such as "fucking," "bitch," "fagass," and "dick head."³⁵² The district court found the website had effects on campus because the day after the students created it, other students were discussing the website at school, one of the content creators told five to eight students about the website, and "there was a general 'buzz' in the school" concerning the website.³⁵³ The student received a ten-day suspension for creating the website.³⁵⁴

Although the district court noted the facts did not support finding a

345. See *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 291 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

346. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–83 (1986); *supra* Part II.

347. See *Fraser*, 478 U.S. at 685–86 (holding a school district may sanction students using "offensively lewd and indecent speech" in order to disassociate itself from the conduct).

348. *Blue Mountain*, 593 F.3d at 298–300.

349. See *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at *5–6 (M.D. Pa. Sept. 11, 2008), *aff'd*, 593 F.3d 286 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

350. *Blue Mountain*, 593 F.3d at 299.

351. See *id.* at 301–02.

352. *Id.* at 291.

353. *Blue Mountain*, 2008 WL 4279517, at *1 (citation omitted).

354. *Id.* at *2.

substantial disruption under *Tinker*,³⁵⁵ this conclusion mattered little to the court because it believed *Tinker* did not apply.³⁵⁶ *Fraser*, however, did apply.³⁵⁷ The court reasoned that the School could punish the student because the website contained “vulgar, lewd, and potentially illegal speech that *had an effect on campus*.”³⁵⁸ The *Blue Mountain* district court opinion is similar to *Bethlehem* because it applied *Fraser* to an online, off-campus website that “came onto” campus. The two cases are different, however, because the court in *Blue Mountain* expanded *Fraser* further than *Bethlehem*—there is no evidence the website creator in *Blue Mountain* accessed or showed the website to others while at school.³⁵⁹ One interpretation is that the district court faithfully applied *Tinker* but wanted to punish the speech and sought to expand *Fraser* to achieve the desired result.

In part, the court relied on a 1976 case from the United States District Court for the Western District of Pennsylvania, *Fenton v. Stear*.³⁶⁰ In *Fenton*, the court upheld the punishment of a student who called a teacher a “lewd and obscene name” in a public place not connected with a school activity.³⁶¹ The court reasoned that prohibiting schools from punishing such off-campus behavior “could lead to devastating consequences in the school.”³⁶² The *Blue Mountain* district court’s reliance on *Fenton* is questionable for at least two reasons. First, *Fenton* was decided prior to *Fraser*. Thus, *Fenton* is no longer good law because *Fraser* requires a captive audience, as expressed by Justice Brennan’s concurring opinion in *Fraser* and the *Morse* majority’s dicta.³⁶³ The *Blue Mountain* Court provided no analysis on *Fraser*’s captive-audience factor.³⁶⁴ In *Fenton*,

355. *Id.* at *4–5.

356. *Id.*

357. *Id.* at *5–6.

358. *Id.* at *6 (emphasis added).

359. *See id.* at *1–3.

360. *Id.* at *7.

361. *Fenton v. Stear*, 423 F. Supp. 767, 769, 772 (W.D. Pa. 1976). The student called the teacher a “prick.” *Id.* at 769.

362. *Id.* at 772.

363. In *Blue Mountain*, counsel for the student made a very similar argument, but they went even further by questioning whether *Fenton* was ever good law. Reply Brief of Appellants at 10, *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010) (No. 08-4138) (“*Fenton*, if it was ever good law, is clearly supplanted by the Supreme Court’s express limitation, set forth in *Fraser* and *Morse*, on the ability of school officials to sanction student speech that occurs away from school.”).

364. *See Blue Mountain*, 2008 WL 4279517, at *6–7, *aff’d*, 593 F.3d 286 (3d Cir.

there was no captive audience.³⁶⁵ Thus, *Fenton* is not valid support for punishing a student's lewd or indecent off-campus speech. The *Blue Mountain* district court failed to address this factor.

Second, merely because a student website may have an "effect" on-campus is an insufficient basis to assert jurisdiction over a student's First Amendment activity. As far as the off-campus nature of the speech, the *Blue Mountain* district court noted that other courts have reached different conclusions regarding school jurisdiction to punish off-campus, online speech,³⁶⁶ but such decisions were not binding,³⁶⁷ or alternatively, the content in those cases was much less egregious.³⁶⁸

Blue Mountain illustrates the reason courts must limit *Fraser*'s applicability to captive audiences at school. The court found that no actual substantial disruption occurred on campus as a result of the student's website.³⁶⁹ Additionally, no evidence suggested the student accessed the website at school, let alone forced other students to view it at school.³⁷⁰ A school applying *Fraser* to online speech improperly extends its jurisdiction over the speech rights of minors and nonstudents. That the speech in *Blue Mountain* is not praiseworthy is beside the point. Offensive speech receives First Amendment protection,³⁷¹ and schools cannot put cyberspace

Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

365. See *Fenton*, 423 F. Supp. at 769–71.

366. *Blue Mountain*, 2008 WL 4279517, at *7–8 (discussing cases where courts held schools did not have jurisdiction to punish student speech); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007) (finding a student's off-campus creation of a MySpace profile was not subject to school's jurisdiction), *aff'd*, 593 F.3d 249 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9 2010); *Latour v. Riverside Beaver Sch. Dist.*, No. Civ. A. 05-1076, 2005 WL 2106562, at *2–3 (W.D. Pa. Aug. 24, 2005) (holding rap songs recorded off campus were not subject to school jurisdiction); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 705–06 (W.D. Pa. 2003) (holding a student handbook unconstitutionally overbroad because it was not geographically limited); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455–58 (W.D. Pa. 2001) (holding a school did not have jurisdiction over speech created off campus absent evidence it was brought on campus).

367. *Blue Mountain*, 2008 WL 4279517, at *8 ("To the extent that *Killion* stands for the proposition that a school can never discipline a student for lewd and vulgar speech made off of the school campus, we simply disagree, and *Killion* is not binding on this court.").

368. *Id.* (noting that compared to *Layshock*, "the facts of our case include a much more vulgar and offensive profile").

369. *Id.* at *6–7.

370. See *id.* at *1–2.

371. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000).

within the schoolhouse gate merely because the speech has an “effect” on, or is “aimed at,” the school.³⁷²

On appeal, the Third Circuit *Blue Mountain* panel expressly declined to address whether *Fraser* applied to online, off-campus speech.³⁷³ The court expressly agreed with the district court that no actual substantial disruption occurred in the school environment.³⁷⁴ Nonetheless, a majority of the panel affirmed the School’s right to assert jurisdiction over the online, off-campus speech because the School could *reasonably forecast a potential* substantial disruption.³⁷⁵ The majority found the School could reasonably forecast a substantial disruption because the vulgar nature of the speech raised questions about the principal’s “fitness to hold his position,”³⁷⁶ the speech could cause worry among parents, and the School would need to take action to alleviate these concerns.³⁷⁷

The dissenting *Blue Mountain* judge, Judge Chagares, offers two reasons the majority’s “holding vests school officials with dangerously overbroad censorship discretion.”³⁷⁸ First, forecasting a substantial disruption based on the online, off-campus profile—especially while

372. See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 261, 263 (3d Cir. Feb. 4, 2010) (holding a student’s speech on MySpace was afforded First Amendment protection even though it was aimed at the school district community), *vacated, reh’g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

373. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298 (3d Cir. Feb. 4, 2010) (“We decline today to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus because we conclude that the profile at issue, though created off campus, falls within the realm of student speech subject to regulation under *Tinker*.”), *vacated, reh’g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

374. *Id.* at 299 (“[W]e would have no trouble concluding, as the District Court did, that these incidents did not amount to a substantial disruption of the [m]iddle [s]chool [environment] . . .”). The incidents not amounting to an actual substantial disruption were: (1) two teachers quieting their respective classes when students were discussing the profile; (2) a counselor needing to proctor an exam because the original proctor attended a meeting regarding the profile; and (3) two students decorating the lockers of the plaintiff and her cohort upon their return from suspension. *Id.* at 293–94.

375. *Id.* at 290 (“Because we believe school authorities could reasonably have forecasted a substantial disruption of or material interference with the school as a result of the MySpace profile . . . we conclude that the School District did not violate J.S.’s First Amendment free speech rights by disciplining her for creating the profile.”).

376. *Id.* at 308 (“[A]llud[ing] to [the principal’s] interest or engagement in sexually inappropriate behavior and illegal conduct . . . threatened to substantially disrupt the [school] . . .”).

377. *Id.* at 303.

378. *Id.* at 308 (Chagares, J., concurring in part and dissenting in part).

conceding no actual substantial disruption occurred—is inconsistent with the high standard set forth in *Tinker*.³⁷⁹ In *Tinker*, the Supreme Court found no reasonable forecast of a substantial disruption when students wore black armbands at school to protest the highly controversial Vietnam War.³⁸⁰ In *Blue Mountain*, the majority found a reasonable forecast of a substantial disruption based on an online profile that, “though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously”³⁸¹ If *Tinker*’s armband would not create a reasonable forecast of a substantial disruption, then neither can the student’s online profile in *Blue Mountain*.³⁸²

Judge Chagares expressly disagreed with the majority that the School could reasonably forecast a substantial disruption merely because the content involved statements about the principal’s sexual behavior,³⁸³ especially because no one took the outrageous profile seriously.³⁸⁴ The principal even agreed the profile did not make accusations about him.³⁸⁵ If no one took the profile seriously, it is not reasonable to forecast a substantial disruption based on the prediction the school will need to alleviate the worry of parents as to the principal’s fitness for his job.

Second, the majority conflated *Fraser* and *Tinker*.³⁸⁶ While the majority asserted it relied on the vulgar nature of the language as a factor to support a finding of a reasonable forecast of a substantial disruption,³⁸⁷ the dissent noted the majority’s analysis “sounds like an application of the *Fraser* standard rather than the *Tinker* standard.”³⁸⁸ Because the majority emphasized the vulgar nature of the profile several times,³⁸⁹ the dissent was

379. *See id.* at 315–16.

380. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

381. *Blue Mountain*, 593 F.3d at 315 (Chagares, J., concurring in part and dissenting in part) (citation omitted).

382. *Id.* at 316 (citing *Tinker*, 393 U.S. at 514).

383. *Id.*

384. *Id.* at 315 (citation omitted).

385. *Id.*

386. *Id.* at 303 (majority opinion) (stating that “based on the profile’s nature and its threat of substantial disruption of the [school]” environment, the School District did not violate the student’s First Amendment rights (emphasis added)).

387. *Id.* at 301 n.8 (rejecting the dissent’s characterization, the majority conflated *Fraser* and *Morse* by arguing vulgarity is one reason why a reasonable forecast of a substantial disruption exists).

388. *Id.* at 317 (Chagares, J., concurring in part and dissenting in part).

389. *Id.* at 301 (majority opinion) (“We thus cannot overlook the context of

rightfully concerned this focus on the vulgarity of online student speech would “allow the *Fraser* exception to swallow the *Tinker* rule.”³⁹⁰ Whereas the district court appeared to engage in an unfaithful *Fraser* analysis—or at least expanded *Fraser*—by allowing the School to punish the student for off-campus speech, a majority of the *Blue Mountain* appellate panel appeared to engage in a less-than-faithful application of *Tinker* to reach an outcome-determinative result.³⁹¹

In dissent, Judge Chagares concluded *Fraser* does not apply to online, off-campus speech.³⁹² “*Fraser*’s ‘lewdness’ standard cannot be extended to justify a school’s punishment of J.S. for the use of profane language outside the school, during non-school hours.”³⁹³ Thus, Judge Chagares would have reversed summary judgment in favor of the School and granted the student’s summary judgment motion because the School violated the student’s First Amendment rights when it asserted jurisdiction over his online, off-campus speech.³⁹⁴ Combining Judge Chagares’s *Blue Mountain* dissent with the *Layshock* panel,³⁹⁵ at least four judges in the Third Circuit find *Fraser* inapplicable to online, off-campus speech. The pending en banc consolidated cases of *Layshock* and *Blue Mountain* should provide further insight on the Third Circuit’s overall First Amendment jurisprudence in the context of online student speech rights.

3. *The Court that Got It Right*

On the same day the *Blue Mountain* Court declined to consider whether *Fraser* applies to online, off-campus speech, another Third Circuit panel comprised of different judges unanimously affirmed in *Layshock v.*

the lewd and vulgar language contained in the profile, especially in light of the inherent potential of the Internet to allow rapid dissemination of information.”); *id.* at 308 (“[A]llud[ing] to [the principal’s] interest or engagement in sexually inappropriate behavior and illegal conduct . . . threatened to substantially disrupt the [school] . . .”); *id.* (“[T]he Constitution allows school officials the ability to regulate student speech, where, as here, it reaches beyond mere criticism to significantly undermine a school official’s authority in challenging his fitness to hold a position by means of baseless, lewd, vulgar, and offensive language.”).

390. *Id.* at 317 (Chagares, J., concurring in part and dissenting in part).

391. *See id.* (arguing the majority applied “the *Fraser* standard rather than the *Tinker* standard”).

392. *Id.* at 317–18.

393. *Id.* at 318.

394. *Id.* at 318–19.

395. *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

Hermitage School District that *Fraser* does not apply to online, off-campus speech.³⁹⁶

In *Layshock*, a student, Justin Layshock, created a parody profile of his high school principal on MySpace.³⁹⁷ The profile contained some offensive statements such as “big whore” and “big fag.”³⁹⁸ The student created this parody profile at his grandmother’s home during nonschool hours and invited other students to view it by sending them online invitations to be “friends” of the parody profile.³⁹⁹ Other students then created and posted similar parody profiles of the principal on MySpace.⁴⁰⁰ All of these other profiles were “more vulgar and more offensive than” Layshock’s parody profile.⁴⁰¹

The school learned of Layshock’s profile only after another student—the principal’s daughter—brought one of the other profiles to the attention of the school principal.⁴⁰² Upon discovery of the profile, the school suspended Layshock for ten days because the online speech included vulgar and harassing language about the principal.⁴⁰³ Although the district court denied the student’s motion for a temporary restraining order, it subsequently granted summary judgment in his favor because no substantial disruption occurred on campus.⁴⁰⁴ In analyzing the School’s claim that *Fraser* applied due to the nature of the website content, the court expressly found *Fraser* does not apply to off-campus speech: “[B]ecause *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech.”⁴⁰⁵

On appeal, the *Layshock* panel unanimously affirmed the district court.⁴⁰⁶ At oral argument, the School District’s counsel conceded it relied solely on the creation of the online profile as the basis for punishing the

396. *Id.*

397. *Id.* at 252.

398. *Id.* at 252–53.

399. *Id.*

400. *Id.* at 253.

401. *Id.*

402. *Id.*

403. *Id.* at 254.

404. *Id.* at 255, 258.

405. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007), *aff’d*, 593 F.3d 249 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010).

406. *Layshock*, 593 F.3d at 264–65.

student.⁴⁰⁷ In analyzing whether *Fraser* applies to online, off-campus speech, the court followed the Third Circuit's *Saxe* precedent, relied on the Supreme Court's *Morse* decision, and adopted the Second Circuit's rationale in *Thomas* for limiting school jurisdiction over off-campus speech.⁴⁰⁸ First, the court found *Saxe* clearly applies only to in-school speech.⁴⁰⁹ Second, the court cited the *Morse* dicta acknowledging the limits of *Fraser*.⁴¹⁰

Finally, the *Layshock* court relied on rationale in the Second Circuit's *Thomas* decision. *Thomas* reasoned a court's deference to a school's incursion on a student's First Amendment rights "rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."⁴¹¹ *Thomas* did not permit school jurisdiction over students that published an offensive, off-campus magazine even though students occasionally wrote articles on campus and a teacher allowed them to store copies of the magazine in a classroom closet.⁴¹² The *Layshock* Court found the School's assertion of jurisdiction over an online, off-campus profile "far more attenuated than in *Thomas*" and found the school does not have jurisdiction over the student's online, off-campus speech.⁴¹³ To hold otherwise "would be an unseemly and dangerous precedent" that allows schools to expand their jurisdiction over free speech rights beyond the schoolhouse gate.⁴¹⁴

While *Layshock* and *Blue Mountain* did not create an explicit intra-circuit conflict, the conflation of *Fraser* and *Tinker* in *Blue Mountain* and the conflicting result in *Layshock* left the disarray and uncertainty as to the limits of school jurisdiction over online speech that existed before these cases. Will vulgar or offensive, online speech always create a foreseeable risk of a substantial disruption, even when no actual substantial disruption

407. *Id.* at 263.

408. *Id.* at 260–63.

409. *Id.* at 261 n.16.

410. *Id.* at 260 (citing *Morse v. Frederick*, 551 U.S. 393, 403–04 (2007)); see *supra* Part II.A.

411. *Id.* at 263 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979)).

412. See *Thomas*, 607 F.2d at 1052–53.

413. *Layshock*, 593 F.3d at 260 ("Here, the relationship between Justin's conduct and the school is far more attenuated than in *Thomas*, and we will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school.").

414. *Id.*

occurs? If the en banc panel in these consolidated cases follows the reasoning in *Blue Mountain* that found a reasonable forecast of a substantial disruption based merely on the vulgar nature of the speech, then online student speech could be punished—even when the parties agree no actual substantial disruption occurred.⁴¹⁵ *Layshock* alone does not preclude this outcome because it distinguished cases in which courts found a reasonably foreseeable substantial disruption based on online, off-campus speech.⁴¹⁶ Thus, the en banc consolidated rehearing should be helpful in clarifying the Third Circuit’s jurisprudence concerning online student speech rights.

In the en banc consolidated rehearing in the Third Circuit, as well as in *Doninger* in the Second Circuit, these courts can clarify this uncertainty by both creating a bright-line rule that *Fraser* does not apply to online speech and by not resorting to tortured applications of *Tinker* to reach an outcome-determinative result that restricts First Amendment free speech rights merely because speech is vulgar or offensive. As set forth above, caselaw shows a faithful application of *Fraser* does not create school jurisdiction over online speech—regardless of whether it is created or accessed on or off campus—because there is no captive audience and no need for a school to disassociate itself from the speech.

IV. SELF-REALIZATION THEORY AND STUDENT SPEECH

Not only does existing legal doctrine show *Fraser* is inapplicable to online speech, a normative principle underlying this legal rule is self-realization. Generally, speech is important in and of itself because it helps define who we are as individuals.⁴¹⁷ Specifically, Martin Redish’s articulation of self-realization theory influences this analysis of online speech because it creates a unified theory of the First Amendment and helps protect against further erosion of students’ First Amendment rights caused by schools’ unwarranted expansion of jurisdiction into cyberspace.⁴¹⁸

415. See *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298–99 (3d Cir. Feb. 4, 2010), *vacated, reh’g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010).

416. See *Layshock*, 593 F.3d at 261–63. Although *Layshock* did not mention *Blue Mountain*, it distinguished *Bethlehem*, *Wisniewski*, and *Doninger* because those cases ostensibly found an actual substantial disruption or a reasonably foreseeable one. See *id.* (citations omitted).

417. See PALFREY & GASSER, *supra* note 54, at 17 (noting speech helps form a person’s personal and social identities).

418. Redish, *supra* note 44, at 594 (concluding “all forms of expression that

According to Redish, all free speech theories derive from the underlying premise that speech is important to an individual's personal development and ability to control one's own destiny.⁴¹⁹ Self-realization is the umbrella theory other First Amendment theories serve. If one accepts Redish's view, one need not reject the marketplace of ideas, the democratic process, individual autonomy, or other theories of the First Amendment.⁴²⁰ They are "subvalues" that all serve self-realization.⁴²¹ Self-realization includes the right to receive and engage in speech that is of little or no value, such as indecent or offensive speech.⁴²² Unification of First Amendment theory is important because it allows valuable First Amendment theories to maintain legitimacy and usefulness in our First Amendment jurisprudence. Individual development depends upon several free speech values and the self-realization theory allows multiple First Amendment theories to coexist peacefully.⁴²³

A. Self-Realization Theory in Supreme Court Caselaw

Self-realization theory has played an influential role in the Supreme Court's First Amendment jurisprudence, if not its holdings. Self-realization theory in Supreme Court caselaw stems from Justice Brandeis's 1927 concurring opinion in *Whitney v. California*.⁴²⁴ At least one

further the self-realization value . . . are deserving of *full* constitutional protection" (emphasis added)).

419. See *id.* at 593.

420. *Id.* at 594; see DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 42–47 (2009–2010 ed. 2008) (reviewing First Amendment theories including the absolutist theory, ad hoc balancing theory, preferred position balancing theory, access theory, and Meiklejohnian theory).

421. Redish, *supra* note 44, at 594.

422. *Id.* at 627–28 ("If two consenting individuals wish to engage in a conversation consisting of little more than a stream of obscenities, assuming no harm to others, it is dangerous to provide the state with the power to prohibit such activity on the ground that such discourse is not 'valuable.'" (citing *Cohen v. California*, 403 U.S. 15 (1971))); see also N. Douglas Wells, *Thurgood Marshall and "Individual Self-Realization" in First Amendment Jurisprudence*, 61 TENN. L. REV. 237, 271 (1993) ("Protection of expression which is indecent or sexually explicit is wholly supportable as advancing the self-realization value.").

423. See Redish, *supra* note 44, at 625 ("Once one recognizes that the primary value of free speech is as a means of fostering individual development and aiding the making of life-affecting decisions, the inappropriateness of distinguishing between the value of different types of speech becomes clear.").

424. *Whitney v. California*, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring); see *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1183 (3d Cir. 1986) (Gibbons, J., dissenting) ("Professor Emerson expressed the same thought [as

commentator posits that Justice Thurgood Marshall's First Amendment jurisprudence exhibits an application of self-realization theory similar to that of Redish, with self-realization at the top of a hierarchy of free speech values and other free speech values being "subservient or derivative."⁴²⁵ Most recently, Justice Stevens invoked self-realization in his dissenting opinion in *Citizens United v. FCC* and specifically cited Redish.⁴²⁶ Self-realization theory arises in a variety of contexts, including student speech. The invocation of this theory in a variety of contexts lends support to the position that self-realization is the umbrella theory under which various First Amendment subvalues arise and, further, that this theory applies to minors.

In *Police Department of the City of Chicago v. Mosley*, Justice Marshall relied on self-realization theory to support Mosley's right to engage in peaceful picketing on the sidewalk in front of a high school, regardless of the subject matter.⁴²⁷ Mosley picketed the high school because it practiced "black discrimination."⁴²⁸ A Chicago city ordinance prohibited all peaceful picketing within 150 feet of school buildings during school hours, except peaceful picketing involving a school labor dispute.⁴²⁹ In holding the Chicago ordinance unconstitutional, Justice Marshall wrote: "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to

Justice Brandeis in *Whitney*] when he wrote that freedom of expression is essential as a means of assuring individual self-realization." (citing THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970)); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 444-45, n.7 (1998) (discussing how the self-realization theory has its Supreme Court roots in Justice Brandeis's concurring opinion in *Whitney* was explicitly referenced in Justice Marshall's opinion in *Police Department v. Mosley*, and influenced Justice Souter's opinion in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*).

425. Wells, *supra* note 422, at 240 (analyzing opinions written by Justice Marshall in a variety of free speech contexts to show he followed self-realization theory).

426. *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing free speech "facilitates the value of 'individual self-realization'" (quoting Redish, *supra* note 44, at 594)).

427. *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972). The Court analyzed the ordinance under the Equal Protection Clause of the Fourteenth Amendment because it differentiated between labor picketing and other peaceful picketing, but it acknowledged the claim was "closely intertwined" with the First Amendment. *Id.*

428. *Id.* at 93.

429. *Id.* at 94.

express any thought, free from government censorship.”⁴³⁰

While the Court acknowledged the city’s legitimate interest in preventing school disruption, it quoted *Tinker* for the position that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁴³¹ The Court recognized the proximity of Mosley’s speech to the school had an intended purpose—to affect the school’s practices—and this purpose would be negated under the ordinance’s 150-foot-perimeter requirement.⁴³² *Mosley* illustrates the existence of self-realization theory in Supreme Court caselaw and provides support for limiting school jurisdiction over off-campus speech, even when that speech is intended to affect the school. *Mosley*’s guidance—speech intended to affect the school environment receives First Amendment protection—is important when considering the arguments made by the school districts in *Layshock*,⁴³³ *Blue Mountain*,⁴³⁴ and *Doninger*.⁴³⁵ The school districts argue they have the right to regulate offensive online, off-campus speech when it “reach[es] the school campus and com[es] to the attention of school officials,”⁴³⁶ has a “sufficient nexus” to the campus,⁴³⁷ or has “an effect on the school and the educational mission of the District.”⁴³⁸ These arguments are insufficient to allow schools jurisdiction over offensive, online student speech. Indeed, *Tinker*’s substantial-disruption test proves such arguments fail, and the *Fraser* exception logically cannot apply to online speech absent a captive audience.

Eighteen years after *Mosley*, Justice Marshall cited *Mosley* in his

430. *Id.* at 95–96.

431. *Id.* at 100–01 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). Because the ordinance permitted peaceful picketing on labor disputes, the Court reasoned the city itself had determined peaceful picketing does not substantially disrupt the school. *Id.*

432. *Id.* at 93 n.1. The Court quoted Mosley’s testimony from the lower court hearing where he testified, “[W]hen I was across the street from the school, 150 feet away, you cannot hardly see me.” *Id.* In other words, that speech can—and is intended to—have an effect on a school does not equate to substantial disruption. This point undercuts the argument that schools can regulate online, off-campus speech meant to be present on campus or have an effect on campus.

433. See Brief of Appellant/Cross-Appellee, *supra* note 36, at 28–29.

434. See Brief of Appellee, *supra* note 36, at 19–24.

435. Supplemental Response and Reply Brief of Defendants-Appellants/Cross-Appellees, *supra* note 157, at 16–18.

436. *Id.* at 22.

437. Brief of Appellant/Cross-Appellee, *supra* note 36, at 13.

438. Brief of Appellee, *supra* note 36, at 7.

concurring opinion in *Board of Education of the Westside Community Schools v. Mergens*.⁴³⁹ *Mergens* involved the rights of a religious student club at an Omaha, Nebraska, high school to meet on campus.⁴⁴⁰ The Court held the Equal Access Act⁴⁴¹ prohibited the school from denying a Christian club the right to meet on school premises during noninstructional time because it permitted nonreligious clubs to hold such meetings.⁴⁴² *Mergens* is particularly applicable to student speech rights because, according to Justice Marshall, “That the Constitution requires toleration of speech over its suppression is no less true in our Nation’s schools.”⁴⁴³ This comment by Justice Marshall both supports the rule that schools cannot punish offensive online speech that is created or accessed on campus and highlights another subvalue of the self-realization theory—toleration of speech.⁴⁴⁴ Even if school administrators find vulgar online parody profiles or being called “douchebags” in a dispute about rescheduling a musical

439. Bd. of Educ. v. Mergens, 496 U.S. 226, 262 (1990) (Marshall, J., concurring) (citing Police Dep’t v. Mosley, 408 U.S. 92, 95–96 (1972)).

440. *Id.* at 262–63.

441. Equal Access Act, 20 U.S.C. §§ 4071–74 (2006).

442. *Mergens*, 496 U.S. at 247. Because the Court ruled on statutory grounds, it expressly refrained from deciding whether the First Amendment requires the same result. *Id.* A plurality, however, did express their belief that the high school’s action did not violate the Establishment Clause. *Id.* at 247–48 (plurality opinion). The plurality relied primarily on *Widmar v. Vincent*. *Id.* at 248 (citing *Widmar v. Vincent*, 454 U.S. 263, 271–75 (1981)). In *Widmar*, the Court held a state university regulation violated the Free Speech Clause of the First Amendment because the regulation did not provide equal access to university facilities for religious worship and teaching when it provided such access for other student uses. *Widmar*, 454 U.S. at 265, 269. Justice Marshall, joined by Justice Brennan, did not join the plurality in *Mergens* because they believed the plurality’s reliance on *Widmar* was misplaced and such reliance raised serious Establishment Clause concerns. *See Mergens*, 496 U.S. at 266 (Marshall, J., concurring). Justice Marshall’s concern arose from the high school’s failure to disassociate itself from the club’s activities. *Id.* at 266. Justice Stevens’s dissenting opinion also concluded *Widmar* was not analogous. *Id.* at 273 (Stevens, J., dissenting). Justice Stevens found *Widmar* inapplicable because the forum involved in that case was materially different than the forum in the Omaha high school. *Id.* These analyses, however, do not negatively impact the position of this Article because, unlike in the case of a school club, there is no risk schools will be associated with the off-campus speech of students.

443. *Id.* at 263 (Marshall, J., concurring) (citations omitted).

444. *See, e.g.,* LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 164–65 (1986); *cf.* TOMAIN, *supra* note 50, at 121 (“In modern liberal democracies committed to tolerance of a variety of religious, moral, and political points of view, there can be no single viewpoint that can or should take precedence over others.”).

festival offensive, that reaction does not create jurisdiction over online speech. Schools must tolerate offensive, online speech, just as citizens tolerate a lot of “shabby” speech the First Amendment protects.⁴⁴⁵

Self-realization theory arose in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, a case involving broadcasters’ rights to refuse editorial advertisements.⁴⁴⁶ The Democratic National Committee argued broadcasters violated either the Federal Communications Act of 1934 or the First Amendment when they refused to accept editorial advertisements.⁴⁴⁷ The Court held that broadcasters need not accept editorial advertisements under the public-interest requirement of the Federal Communications Act.⁴⁴⁸ In his dissenting opinion, Justice Brennan cited *Mosley* as support for requiring broadcasters to accept some editorial advertisements.⁴⁴⁹

Justice Brennan stated, “[I]t is imperative that we take special care to preserve the vital First Amendment interest in assuring ‘self-fulfillment [of expression] for each individual.’”⁴⁵⁰ Justice Brennan’s reliance on self-realization provides support for the *Fraser* rule articulated here in two ways. First, an overarching value of the First Amendment is protecting an individual’s ability to develop and control her own destiny, and this includes students.⁴⁵¹ Second, this opinion, expressed in 1972, presciently recognized that protecting self-realization through speech rights in “electronic media” is essential in our “age of technology.”⁴⁵²

445. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000). The point, however, is not to categorize speech of religious clubs as “shabby.” Rather, the point is the First Amendment requires citizens to tolerate speech in many instances.

446. See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

447. *Id.* at 97–98 (plurality opinion).

448. *Id.* at 130–31. The Court’s First Amendment analysis resulted in dicta because only a plurality found broadcast licensees could not be viewed as state actors. *Id.* at 120–21. This Article takes no position on whether this case reached the correct holding in analyzing the public interest requirements of broadcasters under the Federal Communications Act of 1934. The purpose of citing this case is to show self-realization theory plays a role in our Supreme Court’s First Amendment jurisprudence.

449. *Id.* at 198–99 (Brennan, J., dissenting).

450. *Id.* at 193 (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)).

451. *Id.* (“But freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a *schoolroom*, a town meeting hall, a soapbox, or a radio and television frequency.” (emphasis added)).

452. *Id.* at 201 (“The First Amendment values of individual self-fulfillment

Justice White invoked self-realization theory in *First National Bank of Boston v. Bellotti*, a case involving the rights of corporations and banks to make political expenditures.⁴⁵³ In *Bellotti*, the majority held that a Massachusetts criminal law prohibiting banks and corporations from making expenditures on referenda not materially affecting their respective businesses violated the First Amendment rights of these business entities.⁴⁵⁴ In his dissenting opinion, Justice White acknowledged that corporations do possess some First Amendment rights, but he asserted they are not coextensive with the First Amendment rights of individuals.⁴⁵⁵ The opinion stated, “Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”⁴⁵⁶ Although a narrow majority of the Court continues to eviscerate Justice White’s position on corporate speech,⁴⁵⁷ self-realization theory remains alive in Supreme Court caselaw.⁴⁵⁸ Self-realization is no less important to children than to adults. When a junior class secretary uses an online forum to communicate with taxpayers about the possible cancellation of a public school music festival, her use of the

through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media.”).

453. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting).

454. *Id.* at 767 (majority opinion).

455. *Id.* at 804 (White, J., dissenting) (“There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.”).

456. *Id.* at 804–05 (citations omitted).

457. *See Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). Not only did *Citizens United* undercut Justice White’s analysis in *Bellotti*, it misinterpreted the limited scope of *Bellotti* and relied on this misinterpretation to reach its holding. *Id.* at 958 (Stevens, J., concurring in part and dissenting in part) (“The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority’s position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that ‘our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.’” (quoting *Bellotti*, 435 U.S. at 788 n.26)).

458. *See id.* at 972.

term “douchebag” does not justify violating her First Amendment rights.

In *Branzburg v. Hayes*, the majority held that requiring journalists to appear and testify before grand juries does not violate the First Amendment rights of freedom of speech and freedom of the press.⁴⁵⁹ Justice Stewart’s dissenting opinion, however, recognized that a free and vibrant press helps “enhance” self-realization.⁴⁶⁰ Justice Stewart’s use of self-realization theory in the context of press freedom is consistent with the Student Press Law Center’s concern that extending *Fraser* to online student speech “poses a serious threat to the First Amendment rights of student journalists.”⁴⁶¹ Thus, the rule advanced here protects more than offensive, juvenile speech; it also protects political speech and student press freedom.

Finally, self-realization theory appeared in Justice Marshall’s concurrence in *Procunier v. Martinez*, a case involving inmate correspondence.⁴⁶² The Director of the California Department of Corrections promulgated rules that allowed censorship of correspondence where inmates “‘unduly complain,’” “‘magnify grievances,’” or write “‘inflammatory political, racial, religious or other views.’”⁴⁶³ The majority

459. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

460. *Id.* at 726–27 (Stewart, J., dissenting) (“Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.”).

461. Brief of *Amicus Curiae* Student Press Law Center in Support of Plaintiff-Appellee–Cross-Appellant, *supra* note 39, at 1.

462. *Procunier v. Martinez*, 416 U.S. 396, 427–28 (1974) (Marshall, J., concurring), *overruled in part by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). *Martinez* required intermediate-scrutiny analysis regarding the right of prison officials to censor inmate correspondence. *Id.* at 413–14. Under *Thornburgh*, *Martinez* now applies only to outgoing mail from inmates, and the right of prison officials to censor incoming mail to inmates is subject to a reasonableness standard. *Thornburgh*, 490 U.S. at 413. Specifically, prison officials may censor incoming mail to inmates if it is “‘reasonably related to legitimate penological interests.’” *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In support of distinguishing between incoming and outgoing inmate correspondence, the Court reasoned, “The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials.” *Id.* *Martinez* supports the contention that nonstudents have a right to receive online communications from students, and by punishing students for offensive online speech that does not cause a substantial disruption of the school environment, schools violate these nonstudents’ First Amendment rights.

463. *Martinez*, 416 U.S. at 399 (quoting regulations promulgated by the Director of the California Department of Corrections).

held these correspondence rules violated the First Amendment because they failed to further a substantial governmental interest unrelated to the suppression of expression.⁴⁶⁴ The majority based its decision on First Amendment rights generally, not inmates' rights.⁴⁶⁵ The correspondence rules violated the rights of non-inmates to receive speech.⁴⁶⁶ Although the majority opinion focused on First Amendment rights generally, Justice Marshall's concurring opinion reached the issue of prisoners' rights.⁴⁶⁷ Justice Marshall expressly recognized an individual's "quest for self-realization" does not end "when the prison gates slam behind" the prisoner.⁴⁶⁸ Similarly, a student's quest for self-realization does not end when the student steps through the schoolhouse gates or steps into cyberspace.

Schools restrict more than just students' rights when they assert jurisdiction over online speech. Just as the *Martinez* Court considered the impact on non-inmates' free speech and associational rights when it held inmate correspondence rules violated the First Amendment, courts considering students' online free speech rights must also consider how school jurisdiction over online speech restricts the rights of nonstudents.⁴⁶⁹ When a school seeks to punish a student for online speech that requests taxpayers and citizens contact the school to save a school music festival, the school violates the rights of the taxpayers and citizens, as well as those of the student.

Collectively, these cases demonstrate the Supreme Court has considered self-realization theory in the contexts of picketing in front of high schools, student clubs, parades, public-interest requirements on broadcasters, corporate speech, the reporter's privilege, and inmate correspondence. Lower courts have also incorporated self-realization theory in caselaw.⁴⁷⁰

464. *Id.* at 415.

465. *Id.* at 409.

466. *Id.* at 408–09.

467. *Id.* at 422–28 (Marshall, J., concurring).

468. *Id.* at 428.

469. *See id.* at 409 (majority opinion).

470. *See Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 379 (5th Cir. 1989). The Fifth Circuit cited self-realization as perhaps having some role in our First Amendment jurisprudence when it held the city violated a firefighter's First Amendment rights by disciplining him for making comments to the press about staffing problems after one fireman died of a heart attack and another suffered serious injuries in a fire. *Id.*

Traditionally, "free speech is protected because it has values; it springs from

Although self-realization theory mostly appears in concurring or dissenting opinions and is not the dominant First Amendment theory, majorities' theories change as time progresses. History shows today's dissent may become tomorrow's majority opinion.⁴⁷¹ *Citizens United* shows Redish's vision of self-realization remains influential in our Supreme Court's First Amendment jurisprudence.⁴⁷² As Justice Brennan noted, dissents are more than pleas.⁴⁷³ Dissents preserve the integrity of the judicial process by holding the majority accountable for their decisions.⁴⁷⁴ Further, they provide a mechanism for dialogue to occur across time and thereby facilitate the revision of law when visions of forward-thinkers of

the age of enlightenment out of which the spirit of the American Revolution came. The values include truth-seeking and knowledge-advancement, as a societal object, as well as to a lesser degree perhaps, self-fulfillment on the part of the individual speaker [autonomy and individual dignity]."

Id. (quoting James L. Oakes, *Tolerance Theory and the First Amendment*, 85 MICH. L. REV. 1135, 1137 (1987)). See also *Grossart v. Dinaso*, 758 F.2d 1221, 1231 (7th Cir. 1985) ("A functioning democracy and individual self-realization within such a political system require free expression."); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 272 n.13 (D.C. Cir. 1974) (Bazelon, C.J., concurring) ("While the 'market place of ideas' justification for unrestricted speech is the most consistently applied, other justifications for unrestricted speech are also persuasive. As Professor Emerson has suggested, unrestricted speech is inextricably bound up in an individual's search for self-fulfillment and truth." (citing THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970))); *Johnson v. Fed. Express Corp.*, 147 F. Supp. 2d 1268, 1276 (M.D. Ala. 2001) ("The First Amendment fundamentally protects individual self-realization."); *Gordon v. Griffith*, 88 F. Supp. 2d 38, 40-42 (E.D.N.Y. 2000) (holding a state legislator did not violate the First Amendment rights of a former political aide after firing her for comments the aide made about police brutality, but recognizing "[c]onsiderations of personal fulfillment also support freedom to speak" (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion))); *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 584 (S.D. Fla. 1990) ("Free speech plays a critical role in furthering self-government, in encouraging individual self-realization, and fostering society's search for truth via exposure to a 'marketplace of ideas.'"), *rev'd*, *Luke Records, Inc. v. Navarro*, 960 F.2d 130 (11th Cir. 1992).

471. Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 645-46 (2007) (discussing how a majority of the Court adopted Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928), almost four decades later in *Katz v. United States*, 389 U.S. 347 (1967)).

472. *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting) (noting free speech "facilitates the value of 'individual self-realization'" (citing Redish, *supra* note 44, at 594)).

473. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

474. *Id.*

the past become mainstream views of the present.⁴⁷⁵ Self-realization theory has played a role in the Supreme Court's First Amendment jurisprudence—as well as in the lower courts'—and provides a normative basis for the rule articulated here.

B. *Self-Realization Theory in the Context of Student Speech*

Self-realization theory is particularly appropriate in the context of student speech. In *Chess v. Widmar*, for example, the Eighth Circuit held that a public university violated the Establishment Clause by excluding religious groups from conducting religious activities in university-owned buildings that were open for use by nonreligious student groups.⁴⁷⁶ The court began its opinion by referencing a university policy that expressly cited “self-realization” as one benefit of student organizations.⁴⁷⁷ *Chess* is consistent with *Mergens*—a case involving a high school—in prohibiting schools from discriminating against religious groups when schools allow nonreligious groups to use the same school facilities to conduct meetings.⁴⁷⁸ Taken together, *Chess* and *Mergens* show self-realization is important to both high school and college students.

If we desire a society in which children grow up equipped to make life-affecting decisions and develop as individuals, they must be allowed to exercise their First Amendment rights outside the schoolhouse gate and in cyberspace. To be sure, students' free speech rights are not unlimited. A minor cannot purchase pornography, though he can view it with parental consent.⁴⁷⁹ A student cannot give an “offensively lewd and indecent” speech before a mandatory school assembly,⁴⁸⁰ though he can give the same speech outside the school environment.⁴⁸¹ A school can punish a student for the on-campus conduct of surreptitiously video-recording his teacher's

475. *Id.* at 437 (“Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations.”); Wells, *supra* note 422, at 287 (discussing Justice Brennan's *In Defense of Dissent* article, and commenting that “as new Justices are appointed to the Court, perhaps some will come to regard the paths urged by Justice Marshall's First Amendment jurisprudence as wise guidance”).

476. *Chess v. Widmar*, 635 F.2d 1310, 1320 (8th Cir. 1980), *aff'd*, *Widmar v. Vincent*, 454 U.S. 263 (1981).

477. *Id.* at 1312 n.1.

478. *See id.* at 1313; *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

479. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

480. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

481. *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007).

buttocks in class while another student makes pelvic-thrusting gestures behind her back, but the school cannot punish the student for posting the video online.⁴⁸²

Certainly, deciding whether to treat students as adults or as children is a delicate task at times.⁴⁸³ Both self-realization theory and free speech rights have limits in the context of minors,⁴⁸⁴ as well as adults.⁴⁸⁵ The purpose of this Article is to emphasize the importance of minimizing limitations on students' free speech rights by providing a bright-line rule that prohibits school jurisdiction over *Fraser*-type student speech in cyberspace. Constitutional precedent supports this rule, even when taking account of the unique considerations involved in analyzing student speech.

Historically, our youth have played an important role in exercising "subvalues" of the First Amendment.⁴⁸⁶ Mary Beth Tinker and others engaged in democratic participation when they protested the Vietnam War by wearing black armbands at school, but this is not the only example of students engaging in political speech and realizing their ability to effect societal change. At a 2009 symposium on *Tinker*, Mary Beth reflected on several examples of students realizing their ability and exercising their right to effect change through speech and action.⁴⁸⁷ Mary Beth cited "Claudette Colvin, a fifteen-year-old black student in Montgomery, Alabama, [who] refused to give up her seat on a bus" as an example of a minor exercising her free speech rights in furtherance of democracy.⁴⁸⁸ Recent examples of

482. *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1283 (W.D. Wash. 2007).

483. *See Mergens*, 496 U.S. at 275 (Stevens, J., dissenting) ("The need to decide whether to risk treating students as adults too soon, or alternatively to risk treating them as children too long, is an enduring problem for all educators.").

484. *See, e.g., Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) (plurality opinion) ("[T]o assure self-fulfillment for each individual, our people are guaranteed the right to express any thought free from government censorship." (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972))). Despite self-realization and free speech concerns, the Court upheld an ordinance prohibiting adult movie theatres from being within 1,000 feet of a school. *Id.* at 72-73.

485. *See, e.g., Saxbe v. Wash. Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting) ("In its usual application . . . the First Amendment protects important values of individual expression and personal self-fulfillment."). But, the Court upheld a prison rule limiting press access to inmates for face-to-face interviews because "these individualistic values of the First Amendment are not directly implicated." *Id.*

486. Redish, *supra* note 44, at 594.

487. *See Mary Beth Tinker, Foreword: Reflections on Tinker*, 58 AM. U. L. REV. 1119 (2009).

488. *Id.* at 1122 (noting Rosa Parks, who later "had her own sit-down strike,"

students engaging in democratic participation directly related to education include: (1) students protesting an Arizona law banning ethnic studies in public schools⁴⁸⁹ and (2) students using a social networking website to organize a school walkout in protest of New Jersey's education budget cuts.⁴⁹⁰ Students play an important role in exercising free speech rights, and these rights should be protected because they help fulfill youths' development of self-realization.⁴⁹¹

While democratic participation is important, it is not the only "subvalue" of self-realization. The First Amendment also protects lower-value speech, as evidenced by Justice Marshall's dissent in *Fraser*.⁴⁹² Justice Marshall dissented because Fraser's speech, filled with sexual innuendo, did not substantially disrupt the school environment.⁴⁹³ That dissent does not mean Justice Marshall applauded Fraser's speech. Rather, his dissent shows the self-realization theory protects a wide range of speech from government regulation and does not rest on the value of the speech to society or the democratic process.⁴⁹⁴

The importance of self-realization theory increases in the online context because of the power cyberspace provides individuals to receive and express speech. In *Reno v. ACLU*, the Supreme Court recognized Internet content "is as diverse as human thought," content regulation is likely to interfere with the free exchange of ideas, and "[t]he interest in encouraging freedom of expression in a democratic society outweighs any

worked at the NAACP office that took Colvin's case).

489. Amy Goodman, *Arizona Students Protest New Law Banning Ethnic Studies Classes*, DEMOCRACY NOW! (May 14, 2010), http://www.democracynow.org/2010/5/14/arizona_students_protest_new_law_banning.

490. Winnie Hu, *In New Jersey, a Civics Lesson in the Internet Age*, N.Y. TIMES, Apr. 28, 2010, at A19, available at <http://www.nytimes.com/2010/04/28/nyregion/28jersey.html?>.

491. See Papandrea, *supra* note 34, at 1077 ("[P]olitical arguments minors make can have much more influence on the democratic process than other forms of adult speech that receive full constitutional protection" (citing Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 380)). Although Papandrea discussed free speech rights under a democratic process theory, this argument is consistent with a self-realization argument because the democratic process is one "subvalue" of the self-realization theory.

492. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 690 (1986) (Marshall, J., dissenting).

493. See *id.*

494. See Wells, *supra* note 422, at 260–61 (discussing Justice Marshall's dissent as evidence of his use of self-realization theory in First Amendment jurisprudence).

theoretical but unproven benefit of censorship.”⁴⁹⁵ *Reno* is particularly relevant to the rule articulated here for four reasons.

First, *Reno* held that the Internet is a medium that receives “the highest protection from governmental intrusion.”⁴⁹⁶ *Reno* weighs against school jurisdiction over online student speech. Second, the Court held that the challenged provisions of the Communication Decency Act seeking to prohibit the transmission of “indecent” material to persons under eighteen were overbroad.⁴⁹⁷ The holding in *Reno* indicated the Court will tolerate speech that could potentially be harmful to minors when assessing First Amendment rights.⁴⁹⁸ Third, like *Martinez*, *Reno* recognized the rights of others to receive speech and held that the challenged provisions violated the rights of adults to receive constitutionally protected speech.⁴⁹⁹ Finally, in *Reno*, Justice O’Connor cited *Ginsberg v. New York* as support for the decision.⁵⁰⁰ In *Ginsberg*, the Court upheld a ban on the sale of “girlie” magazines to minors under seventeen years old because “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.”⁵⁰¹ Unlike the statute in *Ginsberg*, the challenged provisions of the Communications Decency Act invaded the rights of parents to allow their children to receive protected speech, including speech that some may find inappropriate for minors.⁵⁰² Thus, *Reno* provides support on several levels for prohibiting school jurisdiction over online, *Fraser*-type speech, and it is consistent with self-realization theory because the decision allows individuals to decide whether to create or receive speech that may reasonably be considered of little or no value and recognizes the importance of robust First Amendment protection for online speech.⁵⁰³

Scholars and psychologists note that individuals, especially youth, experiment with and form identity in online interactions.⁵⁰⁴ This individual

495. *Reno v. ACLU*, 521 U.S. 844, 852, 885 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

496. *Id.* at 863 (quoting *Reno*, 929 F. Supp. at 883 (Dalzell, J., concurring)).

497. *Id.* at 884–85.

498. *See id.*

499. *See id.* at 876.

500. *Id.* at 889 (O’Connor, J., concurring in part and dissenting in part) (citing *Ginsberg v. New York*, 390 U.S. 629, 634 (1968)).

501. *Ginsberg*, 390 U.S. at 629, 631, 639.

502. *See Reno*, 521 U.S. at 878.

503. *See id.* at 867.

504. *See, e.g.,* PALFREY & GASSER, *supra* note 54, at 3–6; Papandrea, *supra*

experimentation and development is harmed when schools impose punishments for online speech. Online activity is difficult, if not impossible, to separate from the lives of today's youth. The First Amendment protects offensive speech.⁵⁰⁵ This legal protection does not mean no consequences result from offensive speech, but allowing schools to restrict online free speech rights teaches the wrong lesson. Law is not the only force that shapes individual behavior⁵⁰⁶ and it "is rarely the right answer."⁵⁰⁷ Social norms also regulate behavior.⁵⁰⁸ Punishing students for exercising constitutional rights is not as beneficial as educating students that discretion is the better part of valor and legal does not inherently equal right.⁵⁰⁹ Moreover, sometimes schools punish constitutionally protected speech,⁵¹⁰ and this error is problematic even if a court later remedies the First Amendment violation because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."⁵¹¹

note 34, at 1030; Brad Stone, *The Children of Cyberspace: Old Fogies by Their 20s*, N.Y. TIMES, Jan. 10, 2010, at WK5, available at http://www.nytimes.com/2010/01/10/weekinreview/10stone.html?_r1.

505. See *Miller v. California*, 413 U.S. 15, 44 (1973) (discussing protections for offensive publications).

506. Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507–09 (1999) (stating four modalities—law, social norms, markets, and architecture—regulate our behavior in real space and cyberspace).

507. PALFREY & GASSER, *supra* note 54, at 12 ("The law is rarely the right answer, but we should not hesitate to use it when it could do more good than harm."). Using the law to punish offensive online speech would do more harm than good because such speech, without more, is constitutionally protected. Schools cannot be permitted to expand their jurisdiction over online speech merely because it is offensive, lewd, or indecent.

508. Lessig, *supra* note 506, at 507.

509. Papandrea, *supra* note 34, at 1098 ("[T]he primary approach that schools should take to most digital speech is not to punish their students, but to educate their students about how to use digital media responsibly.").

510. See, e.g., *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 260–63 (3d Cir. Feb. 4, 2010), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010); see also *supra* Part III.A–B (discussing the application of *Fraser* and progeny).

511. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)); accord *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 849, 858–59 (E.D. Mich. 2003) (holding a school prohibiting a student from wearing a T-shirt with then-President George W. Bush's photograph and the phrase, "International Terrorist," to school likely violated the student's First Amendment rights and "may well constitute irreparable harm").

Not only can schools punish speech that may be constitutionally protected, the punishments can be extreme.⁵¹² Excessive school punishments for online student speech are too common to ignore.⁵¹³ For this analysis, cases applying either *Tinker* or *Fraser* provide relevant examples. A divided Eighth Circuit en banc panel upheld the expulsion of a student based on two letters he wrote at home that only made it onto school grounds because a friend stole the letters from his house and brought them to school.⁵¹⁴ The Second Circuit upheld the one-semester suspension of a student based on an online drawing of his teacher being shot, even though both a police investigator and psychologist believed the student created this online, off-campus drawing as a joke without violent intent or actual threat.⁵¹⁵

In *Mahaffey v. Aldrich*, the principal recommended expulsion for a student who contributed to a website created by another student entitled “Satan’s web page.”⁵¹⁶ Although the website mentioned killing people, it also stated the website had no purpose and contained the disclaimer: “NOW THAT YOU’VE READ MY WEB PAGE PLEASE DON’T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?”⁵¹⁷ In *Coy v. Board of Education of North Canton City Schools*, the school expelled a student for a website he created at home, which, according to the court, had little objectionable content.⁵¹⁸ In *M.K. v. Three*

512. See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781–83 (E.D. Mich. 2002) (considering a challenge from a student who contributed to, and may have used school computers to help create, a website called “Satan’s web page,” which stated “[s]chool sucks,” and who was subsequently suspended and recommended for expulsion).

513. See *id.*; see also *M.K. v. Three Rivers Local Sch. Dist.*, No. 1:07CV1011, at 2–3 (S.D. Ohio Dec. 28, 2007) (order granting temporary restraining order) (noting the school district suspended the students for ten days and expelled them for an additional eighty days).

514. *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619–20, 627 (8th Cir. 2002) (en banc).

515. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36, 40 (2d Cir. 2007).

516. *Mahaffey*, 236 F. Supp. 2d at 781–82. The First Amendment claim was validated because the evidence failed to establish the website was disruptive to the school or created on school property. *Id.* at 786, 790. The court cited Justice Brennan’s concurrence in *Fraser* as support for the position that schools cannot punish off-campus speech simply because it could punish similar speech during a school assembly. *Id.* at 784 n.3 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688–89 (1986) (Brennan, J., concurring)).

517. *Id.* at 782.

518. *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002) (“Most

Rivers Local School District, the school expelled three students for eighty days based on a parody profile they created of one of their teachers that listed “Pedophile” as the response to a question about the teacher’s position at the school.⁵¹⁹

Justice Brennan most likely would have found these punishments unconstitutional. In *Fraser*, the school suspended Fraser for three days—he served two—and precluded him from speaking at graduation.⁵²⁰ Justice Brennan considered this punishment “somewhat severe.”⁵²¹ Imagine how Brennan would describe the punishments in the preceding cases. “Draconian” is one possible way to describe them.⁵²²

To be clear, school administrators may not be acting in an intentionally malicious way. Administrators may truly believe they are acting in the best interests of the school and the students. Regardless, this good faith belief does not overcome human nature,⁵²³ especially when the school administrator has a natural inclination to protect the school and its administrators from unsavory speech.⁵²⁴ The problem of biased decision making is compounded when school administrators who are the targets of online speech are also the individuals that make decisions on whether and how severely to punish a student—their judgment may be clouded by the

objectionable was a sentence describing one boy as being sexually aroused by his mother.”).

519. *M.K. v. Three Rivers Local Sch. Dist.*, No. 1:07CV1011, at 2 (S.D. Ohio Dec. 28, 2007) (order granting temporary restraining order).

520. *Fraser*, 478 U.S. at 678–79 (majority opinion).

521. *Id.* at 690 n.3 (Brennan, J., concurring).

522. *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 635 (8th Cir. 2002) (en banc) (Heaney, J., dissenting) (“The board’s draconian punishment is unprecedented among the school threat cases across the nation.”).

523. *See Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”).

524. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (“[A school official’s] intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy. Accordingly, ‘[u]nder the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail.’” (quoting *James v. Bd. of Educ.*, 461 F.2d 566, 575 (2d Cir. 1972))).

content aimed at them.⁵²⁵ Because a school administrator is both “prosecutor and judge”⁵²⁶ when punishing student speech, as well as the alleged injured party in many instances, there are valid reasons for limiting their jurisdiction over online student speech. First, they may punish protected speech. Second, even if they punish unprotected speech, the excessive punishments noted above provide a supporting normative reason to limit school jurisdiction over online student speech.

While this Article advocates for strong protection against school jurisdiction over online speech, it recognizes society’s legitimate and reasonable concerns about the content of much of the speech at issue in these cases. Schools are not without power. Schools can and do limit access to Internet activity at school by utilizing school computer-use policies or blocking access to certain websites. Parents can and do limit access as well. School administrators may bring individual defamation actions,⁵²⁷ contact the police for concerns about possible true threats, or notify parents if they have concerns about student speech activity that may not be punishable under *Fraser*, *Tinker*, or other student speech doctrines.⁵²⁸ Moreover, schools can use examples of unkind Internet activity to teach students about the possibility of negative consequences accompanying such activity, even though the activity is ultimately legally permissible. The solution, however, is to refrain from punishing online speech, especially merely offensive speech, when it does not cause a substantial disruption or cannot be fully considered a true threat.

525. See *id.* at 1048 (“We recognize the realities of life. Thus, when those charged with evaluating expression have a vested interest in its regulation, the temptation to expand the otherwise precise and narrow boundaries of punishable speech may prove irresistible.”).

526. *Id.* at 1051.

527. The principal in *Layshock* did bring a defamation suit against Layshock and three other students based on the content of the parody profiles. *Trosch v. Layshock*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/threats/trosch-v-layshock> (last visited Nov. 21, 2010) (providing information on this defamation lawsuit). The principal dismissed his claims against all of the students except Layshock. *Id.*

528. Papandrea, *supra* note 34, at 1100–01 (restricting school jurisdiction over online student speech does not leave schools powerless or save students from criminal prosecution or civil liability under appropriate circumstances); see also Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62–63 (2009) (analyzing the possibility of civil rights claims arising from online speech).

V. CONCLUSION

Accepting *Fraser* as a legitimate regulation of student speech within the schoolhouse gate restricts the First Amendment constitutional rights of students. Erring in favor of students' constitutional rights over asserted claims of the need to maintain order and discipline within a school—particularly in light of the extreme punishments often imposed by schools regarding online student speech—leads to the conclusion that concerns surface when an authority asserts jurisdiction in cyberspace to restrict the constitutional right to free speech.

If First Amendment protection is at its “zenith” off campus,⁵²⁹ it must also be at its zenith in cyberspace where the First Amendment deserves the highest degree of government protection.⁵³⁰ While the Supreme Court has not addressed whether *Fraser* or any other student speech test applies online or outside school or school-sponsored events, trends in the lower courts allow school jurisdiction over online speech.⁵³¹ This trend violates the constitutional rights of students. The Third Circuit's holding in

529. *Thomas*, 607 F.2d at 1050 (“[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”).

530. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997).

531. *See, e.g., J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290 (3d Cir. Feb. 4, 2010) (upholding a school's punishment of a student who created a MySpace profile for her principal that included “profanity-laced statements insinuating that he was a sex addict and pedophile”), *vacated, reh'g en banc granted*, No. 08-4138 (3d Cir. Apr. 9, 2010); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 37 (2d Cir. 2007) (allowing a school to suspend an eighth-grade student for sharing, via the Internet, a drawing that depicted a teacher being shot); *Requa v. Kent Sch. Dist.* No. 415, 492 F. Supp. 2d 1272, 1273–74 (W.D. Wash. 2007) (upholding the suspension of a student who helped create and distribute a video showing a teacher's buttocks). *But cf. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 251–53 (3d Cir. Feb. 4, 2010) (affirming the district court's finding a student who created an online profile of his principal was not within the school), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 700 (W.D. Pa. 2003) (finding the school did not have jurisdiction over a student who posted messages about a school volleyball game on an Internet message board); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (holding the school's “regulation of [the student's] speech on [a Satanism] website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of [the student's] First Amendment rights”); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1089–90 (W.D. Wash. 2000) (enjoining a school from suspending a student who created an “unofficial” homepage for the school from his home computer because he did not have a captive audience in the school environment).

Layshock, which found that *Fraser* does not apply to online, off-campus speech,⁵³² was a step in the right direction because it robustly protects First Amendment rights by creating a bright-line rule limiting school's jurisdiction over online student speech. With the consolidated en banc rehearing of *Layshock* and *Blue Mountain*, the Third Circuit has an excellent opportunity to set a strong precedent that protects students' free speech rights. Such a result would be consistent with then-Circuit Judge Alito's strong protection of such rights in the Third Circuit's *Saxe* decision, as well as his concurrence in *Morse*. The Second Circuit has a second chance to address *Fraser* in the context of online student speech rights based on the certified question pending before it in *Doninger*. Further, a recent decision by the United States District Court for the Southern District of Florida helps stem the tide of schools asserting jurisdiction over online, off-campus *Fraser*-type speech.⁵³³ This jurisdictional limitation, however, should not be limited to off-campus speech.

Absent a substantial disruption, schools do not have jurisdiction over offensive online speech, regardless of whether it is created or accessed on or off campus.⁵³⁴ To hold otherwise violates First Amendment rights and provides school officials with too much discretion to punish speech.⁵³⁵ This rule is consistent with factors in *Fraser*, which makes it an exception to *Tinker*.⁵³⁶ Because a logical application of *Fraser* supports this rule, determining schools have no jurisdiction over offensive online speech represents an incremental and sound first step into the development of student-speech doctrine in cyberspace. More complicated questions, such as if and when *Tinker* applies to online, off-campus speech, may wisely come next, after a foundation has been laid under *Fraser*.

Expanding school jurisdiction to cover online, *Fraser*-type speech would merely address the symptoms and not the causes of offensive

532. *Layshock*, 593 F.3d at 263.

533. *See Evans v. Bayer*, 684 F. Supp. 2d 1365, 1371–74 (S.D. Fla. 2010) (denying a high school principal's motion to dismiss a student's claim that the school violated her First Amendment rights when it suspended her from school and removed her from the advanced placement classes because of comments she made on a social networking website).

534. *See Papandrea*, *supra* note 34, at 1069–70.

535. *See id.* at 1070 (“The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students’ expression.”).

536. *Id.*

juvenile speech.⁵³⁷ The costs of allowing schools to expand jurisdiction over online, *Fraser*-type speech are heavy because: (1) we risk losing important speech,⁵³⁸ as was the case in *Doninger*;⁵³⁹ (2) we allow self-interested, nonimpartial decision makers to issue punishments that may be excessive, as was the case in *Layshock* and *M.K. v. Three Rivers Local School District*;⁵⁴⁰ and (3) we erode students' understanding of the importance of free speech in our constitutional structure and in their individual quests for self-realization.⁵⁴¹ Thus, the judiciary should hold

537. See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 631 (8th Cir. 2002) (en banc) (Heaney, J., dissenting) ("Today's teenagers witness, experience, and hear violence on television, in music, in movies, in video games, and for some, in abusive relationships at home. It is hardly surprising that such violence is reflected in the way they express themselves and communicate with their peers, particularly where adult supervision is lacking."). Further, offensive juvenile speech may simply be a fact of life for some youth as they develop, mature, and form their respective identities. Schools may educate students about the negative effects of such speech, but they may not impose punishment when such speech occurs online.

538. See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1048 (2d Cir. 1979) ("Indeed, we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone. To avoid the chilling effect that inexorably produces a silence born of fear, we have been intentionally frugal in exposing expression to government regulation.").

539. See *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 211 (D. Conn. 2007) (finding the student had adequately established a chilling effect sufficient to show irreparable harm), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

540. See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. Feb. 4, 2010) (affirming a grant of summary judgment to a student suspended for a MySpace profile), *vacated, reh'g en banc granted*, No. 07-4465 (3d Cir. Apr. 9, 2010); *M.K. v. Three Rivers Local Sch. Dist.*, No. 1:07CV1011, at 4-8 (S.D. Ohio Dec. 28, 2007) (order granting temporary restraining order) (enjoining a school district from enforcing the remainder of an expulsion for an offensive Facebook profile); see also *Thomas*, 607 F.2d at 1051 ("It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us."). The court in *Thomas* was referring to a school that punished students for publishing and distributing a lewd and indecent satirical magazine off campus. The dangers of school jurisdiction over offensive, online speech are exponentially increased because of the accessibility of online content regardless of geographic location. Contrary to arguments made by school officials, offensive, online speech deserves more protection from expansive school jurisdiction, not less. See *supra* Part IV.B.

541. See *Thomas*, 607 F.2d at 1047 ("Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking if all ideas, discoveries, and points of view are before the citizenry for its consideration. Accordingly, we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections." (citations omitted)).

Fraser does not apply to online speech, and it must exercise closer scrutiny when schools punish student speech because the judiciary is “the one institution of government intentionally designed to render dispassionate justice.”⁵⁴²

542. *Id.* at 1048 (citations omitted); see Papandrea, *supra* note 34, at 1067 (“Unfortunately, most courts that apply the *Tinker* standard are far too deferential to the schools’ claims that the speech at issue caused a reasonable fear of a substantial disruption.” (citations omitted)).