WINNER OF ACS'S NATIONAL STUDENT WRITING COMPETITION

DONINGER V. NIEHOFF: AN EXAMPLE OF PUBLIC SCHOOLS' PATERNALISM AND THE OFF-CAMPUS RESTRICTION OF STUDENTS' FIRST AMENDMENT RIGHTS

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I. INTRODUCTION

The Supreme Court recently decided its first public school student free speech case in nearly twenty years.[1] In that nineteen-year period, the lower courts diverged greatly on the issue of off-campus student speech. Where one court might hold that Internet-related student speech should be restricted, another court looking at the same set of facts but applying a different standard might hold that the same Internet-related speech should be protected.[2] As a result of the increasing use and prevalence of digital technology, students are now being punished for expression that would have previously escaped

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1 The Court decided *Morse v. Frederick*, 551 U.S. 393 (2007), nineteen years after *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Although the exact parameters of student free speech rights are unclear, the rights of children are not necessarily coextensive with those of adults. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("It does not follow . . . 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."). The Supreme Court has consistently held that "the government has a right to protect children outside school from exposure to certain kinds of expression." Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1071 (2008); *see, e.g.*, Ginsberg v. New York, 390 U.S. 629, 638 (1968) (holding that it was constitutionally permissible for New York to restrict minors' access to sexual written or visual materials while allowing the same materials to be sold to adults).

2 *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 542 (2000) (describing inconsistent lower court opinions in the area of student free speech).

the attention of school officials.[3] Despite an amicus brief from the National Association of School Boards asking for the Court to provide guidance on how a public school should balance students' free speech rights with discipline, safety, and effective learning, the *Morse v. Frederick* decision shed little light on how far the school's authority extends beyond its borders.[4] Therefore, the important question of the constitutionality of a school's decision to punish a student for speech that does not occur on campus or at a school-sponsored event remains disturbingly unanswered.[5]

In the forty years since *Tinker v. Des Moines Independent Community School District*,[6] the Court's seminal free speech case regarding students, many courts have become increasingly deferential to the decisions of school administrators.[7] These courts routinely ignore or conduct a strained analysis of the standard articulated in *Tinker*, relying on overbroad readings of post-*Tinker* cases like *Bethel School District No. 403 v. Fraser*,[8] *Hazelwood School District v. Kuhlmeier*,[9] and now *Morse*.[10] In May 2008, the Court of Appeals for the Second Circuit handed down a strained interpretation of Supreme Court precedent in *Doninger v. Niehoff* (*Doninger II*).[11]

Part II of this Note discusses the few Supreme Court cases that have directly dealt with free speech in public schools to provide a framework for analysis of *Doninger II*. Part III discusses the *Doninger II* court's decision and rationale. Part IV argues that the decision presents a dangerous application of the case law that needs to be reassessed and clarified. Part IV argues that the Second Circuit misinterpreted and misapplied Supreme Court precedent and lower

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3 *See* Papandrea, *supra* note 1, at 1037 (commenting that a result of the digital age is that "adults can see what minors are saying much more easily").

4 *See* Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 46 (2008) (arguing *Morse* provided little guidance to school administrators and leaves many unanswered questions as to which viewpoints are permissible); *see also* Papandrea, *supra* note 1, at 1028 (arguing the *Morse* Court missed the opportunity to clarify whether public schools have the authority to restrict student speech off campus).

5 *See* Garnett, *supra* note 4, at 46 (describing the outcome and potential impact of *Morse*).

6 393 U.S. 503 (1969).

7 *See* Chemerinsky, *supra* note 2, at 528 (pointing out that since *Tinker*, "schools have won virtually every constitutional claim involving students' rights").

8 478 U.S. 675 (1986).

9 484 U.S. 260 (1988). Scholars have referred to these three cases—*Tinker*, *Fraser*, and *Kuhlmeier*—together as the "*Tinker* trilogy." Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 356 (2007). Dickler argues that the lower courts' confusion over the application of the *Tinker* trilogy "has caused many inconsistent opinions, and in some cases, arguably unconstitutional results." *Id.*

10 551 U.S. 393 (2007).

11 527 F.3d 41 (2d Cir. 2008), *aff'g* 514 F. Supp. 2d 199 (D. Conn. 2007).

court decisions by developing and relying upon an erroneous standard. The Part then discusses the problems that such a flawed decision creates due to its potential wide-ranging applications. Instead, all district courts should reject overbroad readings of the Supreme Court precedent because they essentially permit limitless restrictions on students' freedom of expression.

This Note concludes, in Part V, by advocating for courts to adopt a narrow, objective test for defining whether off-campus speech meets *Tinker*'s "substantial and material disruption" standard.[12] Such an objective test should place a rebuttable presumption of unconstitutionality on the school, thereby making the school prove that its punitive decisions were more than arbitrary or retaliatory. Because certain areas of this topic have been extensively explored elsewhere,[13] this Note will not delve into the problematic topic of off-campus speech that could be deemed cyber-bullying, harassing, or threatening to the health and welfare of other public school students or officials.

II. SUPREME COURT PRECEDENT: *TINKER* AND ITS NARROW EXCEPTIONS

Tinker, the typical starting point for any discussion of student speech, upheld the Tinker children's right to wear black armbands in

12 Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969).

13 For a discussion of these types of off-campus speech, see Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 740 (2000) (arguing that constitutional rights are routinely trampled in public schools, "largely out of a combination of fear, ignorance and self-preservation on the part of [school] administrators"); David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 MICH. ST. L. REV. 199, 201 (arguing that "[s]tudent Internet speech cases present the courts with an opportunity to safeguard the protections of the First Amendment in the face of vanishing student rights and a fear of new technology"); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1095 (2003) (concluding that while "student speech rights are under almost constant assault today, voices of reason still exist among the judiciary to check over-zealous educators in their efforts to quash violent, offensive and otherwise disagreeable expression"); Sandy S. Li, Note & Comment, *The Need For A New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65 (2005) ("Courts must ensure that Internet-related student speech will receive some form of protection, because the Internet is a unique medium . . . ."); Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 640 (2000) (addressing "student threats against teachers, schools, or fellow students, and the First Amendment issues that may arise as educators struggle to deal with these threats").

school to protest the Vietnam War.[14] The majority famously wrote that while students may not have the same rights as adults, they do not "shed their constitutional rights to freedom of speech and expression *at the schoolhouse gate*."[15] The opinion went on to warn that schools may not seek to impose conformity such that they become "enclaves of totalitarianism" bent on "foster[ing] a homogenous people."[16] In order to prevent such totalitarianism, absent a "specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[17] The Court found no "actual or nascent" evidence that the on-campus actions of the Tinker children interfered with "the schools' work or of collision with the rights of other students to be secure and to be let alone."[18] The Court held that only student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[19] In other words, the Court established a two-prong standard: schools can only abridge on-campus student expression if the activity materially or substantially interferes with—or is reasonably certain to interfere with—the work and discipline of the school or will result in substantial disorder or the invasion of the rights of others.[20]

While the Court did not define how or when its materially and substantially interfere test would be met, many commentators have written that the test is strictly limited to in-school activity.[21] For ex-

14 393 U.S. 503, 514 (1969). While *Tinker* is the typical starting point for student speech discussions, it was not the first Supreme Court case to address the issue. For example, in *West Virginia Board of Education v. Barnette,* the Court wrote that because schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S. 624, 637 (1943). However, before *Tinker,* it was not a foregone conclusion that public school students had any affirmative free speech rights. Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009) (citing Richard L. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 568–69, 580 (1970)).

15 *Tinker*, 393 U.S. at 506 (emphasis added).

16 *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

17 *Id.*

18 *Id.* at 508.

19 *Id.* at 513.

20 *Id.* at 512–13.

21 *See, e.g.*, Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 271 (2001) (arguing the *Tinker* Court never suggested a limitation to students' speech rights outside the school setting or that schools could punish off-campus expression that did not reach the confines of campus); Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First*

ample, the majority defined the purpose of schools in very narrow terms by stating that "[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities."[22] Commentators have criticized subsequent decisions for being poorly reasoned and for consistently siding with the schools,[23] thereby eroding many of the protections provided by *Tinker*.[24]

Nearly two decades after *Tinker*, the Supreme Court seemingly reversed course in *Fraser*.[25] Fraser's school suspended him and prevented him from speaking at graduation as a result of a sexual innuendo-filled speech given at a school assembly.[26] The majority narrowed the scope of students' constitutional rights by stating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[27] The Court noted, "[t]he 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."[28] After conducting such a balancing test of Fraser's right to freedom of expression with the school's duty to protect and teach civility to its students, the Court upheld the school's restriction of his speech.[29]

The Court's opinion stressed that unlike the Tinker children's armbands, Fraser's speech was not of a political nature.[30] Rather, the

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Amendment Standard to Protect Off-Campus Student Internet Speech, 36 CAP. U. L. REV. 129, 135 (2007) (arguing *Tinker* narrowly defined the purpose of schools and does not expressly extend to off-campus speech).

22 Markey, *supra* note 21, at 135 (citing *Tinker*, 393 U.S. at 512).

23 *See* Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 840 n.26 (2008) (listing law review articles discussing the confusing nature of Supreme Court precedent in this area).

24 Chemerinsky, *supra* note 2, at 528.

25 478 U.S. 675 (1986).

26 *Id.* at 677–78, 687. Fraser gave this speech in front of his fellow high school students. The speech was as follows:

> 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.

27 *Id.* at 682.

28 *Id.* at 681 (emphasis added).

29 *Id.* at 685.

30 *Id.*

Court looked to the importance of schools teaching students the proper bounds of socially acceptable "habits and manners of civility."[31] Chief Justice Burger wrote that "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education"[32] and that the objective of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."[33] To properly educate students on these fundamental values, the Court felt that schools needed the right to regulate and control student expression inconsistent with its basic mission.[34]

Although the Court did not overrule or alter the rule outlined in *Tinker*, the majority ignored *Tinker*'s contention that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[35] The opinion significantly shifted the burden by calling for courts to defer to the decision of administrators when deciding whether the questioned speech had caused or would cause a substantial and material disruption.[36] In other words, the *Fraser* opinion suggests that judges can and should make judgments about the relative importance of the speech at issue when deciding such cases.[37] The Court held that it was not only acceptable at times, but also highly appropriate, for public schools to "prohibit the use of vulgar and offensive terms in public discourse."[38] Significantly, under *Fraser*, the vulgarity and offensiveness of speech depends on the effect on the reader or hearer, rather than on the message as it is "objectively read or heard."[39]

However, Justice Brennan's concurrence significantly questioned the scope of the opinion.[40] In his concurrence, Justice Brennan emphasized that the Court's holding concerned only a school's authority to restrict a student's use of disruptive language in a speech given to a

31 *Id.* at 681.

32 *Id.* at 685–86.

33 *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

34 Robert E. Simpson, Jr., *Limits on Students' Speech in the Internet Age*, 105 DICK. L. REV. 181, 188 (2001).

35 Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969).

36 *Fraser*, 478 U.S. at 683.

37 *Id.* at 680-81; *see also* Denning & Taylor, *supra* note 23, at 839 (suggesting the Court distinguished *Fraser* from *Tinker* without explicitly altering or adding to *Tinker*'s holding).

38 *Fraser*, 478 U.S. at 683.

39 Paul J. Beard II & Robert Luther III, *A Superintendent's Guide to Student Free Speech in California Public Schools*, 12 U.C. DAVIS J. JUV. L. & POL'Y 381, 396 (2008).

40 *See Fraser*, 478 U.S. at 688–89 (Brennan, J., concurring).

school assembly.[41] In addition, Justice Brennan pointed out that the majority's opinion suggested, "[i]f [Fraser] 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."[42]

Two years later, in *Hazelwood School District v. Kuhlmeier,* the Court upheld a high school principal's decision to censor school-sponsored student newspaper stories dealing with topics such as teen pregnancy and the impact of divorce.[43] The decision made a distinction between a school's requirement to tolerate unpopular speech and a school affirmatively promoting a viewpoint with which it disagrees by again pointing out that the speech at issue was not political speech like that involved in *Tinker*.[44] Like *Fraser* and contrary to *Tinker*, the Court held that schools are not constrained by the First Amendment and may limit on-campus student speech, regardless of whether a substantial interruption is likely to occur, as long as the decision is "reasonably related to legitimate pedagogical concerns."[45]

However, the *Kuhlmeier* court qualified the scope of its holding by specifically stating that its application was limited to "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[46] The qualification of the holding specifically indicates that a school's decision to punish off-campus student speech does not fall under this narrow exception to *Tinker*. Therefore, schools must have a stronger rationale than merely the existence of a "reasonable rela-

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41 *Id.* (holding the government could not punish speech merely because it considered the speech inappropriate).

42 *Id.* at 688 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

43 484 U.S. 260, 260, 263 (1988).

44 *Id.* at 270–71. Some commentators disagree with the assertion that *Kuhlmeier* narrowed the holding of *Tinker*. For example, Bruce C. Hafen argues that "rather than weakening the Court's commitment to the constitutional rights of students, [*Kuhlmeier*] seeks to strengthen students' fundamental interest in the underlying principles of free expression: the right to develop their own educated capacity for self-expression." Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 685. While Hafen's argument may have been what the Court intended at the time, lower courts have not applied the holding in this manner in the intervening two decades. *See infra* Parts III, IV.

45 *Kuhlmeier*, 260 U.S. at 272–73.

46 *Id.* at 271. Further evidence of the Court's intention to narrow the scope of its holding is its statement that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Id.* at 266 (citation omitted).

tion to legitimate pedagogical concerns" for punishing such off-campus speech.[47]

The confusing nature of the Court's holdings dealing with public school speech remained until *Morse v. Frederick*.[48] In *Morse*, a high school punished Frederick for unfurling a seemingly nonsensical banner stating "BONG HiTS 4 JESUS" at a school-sponsored outing to watch the passing of the Olympic torch.[49] Although this case presented the Court with its first opportunity to allow freedom of student expression off campus, it declined to limit the scope of schools' authority to the "schoolhouse gate."[50] Instead, the Court specifically rejected Frederick's contention that the speech occurred off campus and therefore should not have been restricted.[51] Most significantly for other instances of student expression that occur outside of the schoolhouse gate, the Court also rejected the school's assertion that schools are broadly allowed to punish speech they deem offensive.[52] The majority rejected such an expansive reading because it "stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"[53]

Instead, the Court analyzed the facts of the case and held that the speech at issue could be restricted because it occurred at a school-sponsored event, could reasonably be attributed to the school, and, most significantly, advocated use of illegal drugs. The Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"[54] because such a message is "clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."[55]

However, Justice Alito's concurrence, which Justice Kennedy joined, significantly narrowed the Court's holding to speech concerning non-political and non-social issues.[56] Justice Alito wrote that the opinion did not authorize any restrictions on student speech other

47 *Kuhlmeier*, 260 U.S. at 273.
48 551 U.S. 393 (2007).
49 *Id.* at 397–98.
50 *Id.* at 405–06.
51 *Id.* at 400.
52 Denning & Taylor, *supra* note 23, at 855.
53 *Morse*, 551 U.S. at 409; *see also* Denning & Taylor, *supra* note 23, at 856; Markey, *supra* note 21, at 139.
54 *Morse*, 551 U.S. at 397.
55 *Id.* at 399.
56 *Id.* at 422 (Alito, J., concurring). The *Morse* decision was narrowed because the majority needed Alito and Kennedy's votes to obtain a majority.

than those of the *Tinker* trilogy and certainly did not warrant censorship of any student speech "that interferes with a school's 'educational mission.'"[57] Although the concurrence allowed censorship of Frederick's message because it advocated illegal drug use, Justice Alito made explicitly clear that such regulation "stand[s] at the far reaches of what the First Amendment permits."[58]

None of these Supreme Court cases discusses the amount of deference that lower courts should give to schools' increasingly frequent decisions to punish a student's "offensive" comments that are initially made off campus but eventually find their way on to campus. Courts' rulings on this issue continue to vary.[59] Unfortunately, strained interpretations of the Constitution and precedent have appeared with increasing frequency in recent years.[60] These cases misapply precedent and often improperly extend the application of *Fraser* and *Tinker* by relying on a paternalistic approach to minors.

III. *DONINGER V. NIEHOFF* FACTS AND COURT OPINIONS

A. Facts

On April 24, 2007, Avery Doninger, a junior at Lewis Miller High School (LMHS) in Connecticut, and other members of the LMHS Student Council fought with school administration over the third rescheduling of "Jamfest," an annual battle of the bands extracurricular event.[61] In response to the rescheduling, Doninger and three other Student Council members sent an email from a school computer to members of the community asking for help in convincing the administration to hold the event as originally scheduled.[62] The email stated that "[r]ecently the Central Office decided that the Student Council could not hold its annual Jamfest/battle of the bands in the audito-

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57 *Id.* at 423. Justice Alito worried about the application of the Court's holding because

> [t]he "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Justice Alito specifically stated that such broad applications of the Court's opinion should be rejected. *Id.*

58 *Id.* at 425.

59 *See infra* Parts III & IV.

60 *See infra* Parts III & IV.

61 Doninger v. Niehoff (*Doninger II*), 527 F.3d 41, 44 (2d Cir. 2008), *aff'g* 514 F. Supp. 2d 199 (D. Conn. 2007).

62 *Id.* at 44.

rium" and asked that the recipients "forward [the email] to as many people as [they] can."[63] Specifically, the email requested that the recipients contact Paula Schwartz, the district superintendent.[64] Thereafter, Karissa Niehoff, the Principal of LMHS, had a discussion with Doninger regarding her disappointment that the students had not come to her with their concerns.[65] The district court found that the influx of emails and calls that resulted from the students' mass email caused Niehoff and Schwartz to miss or be late to several school-related activities on April 24th and April 25th.[66]

On the evening of April 24, 2007, Doninger posted a blog message on an independently operated, publicly accessible website that was in no way affiliated with LMHS.[67] The post began as follows:

> [J]amfest is cancelled due to douchebags in central office. here [sic] 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 jamfest [sic]. basically [sic], because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we [sic] have so much support and we really appreciate [sic] it. however [sic], she got pissed off and decided to just cancel the whole thing all together. anddd [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 may [sic] 18th. andd..here [sic] is the letter we sent out to parents.[68]

The blog post attached the letter the four student council members sent to members of the community earlier in the day.[69] The post then reproduced an email that Doninger's mother sent to the school administration in order to give others an "idea of what to write if you want to write something or call her to piss her off more. im [sic] down."[70] Other LMHS students responded to the post by calling Schwartz a "dirty whore" and calling for a "sit-in."[71]

The following morning, members of the school administration received more phone calls and emails and called a meeting with the students who had sent the original email.[72] During this meeting, administrators and the student council amicably resolved the dispute

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63 Doninger v. Niehoff (*Doninger I*), 514 F. Supp. 2d 199, 205 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

64 *Doninger II*, 527 F.3d at 44.

65 *Id.* at 45.

66 *Doninger I*, 514 F. Supp. 2d at 206.

67 *Doninger II*, 527 F.3d at 45.

68 *Id.* at 45.

69 *Id.*

70 *Id.*

71 *Id.* at 51.

72 *Id.* at 45.

and settled on a date for Jamfest.[73] To notify students and parents of the dispute's resolution, Niehoff published the new date of Jamfest in the school newsletter, and the four student council students notified recipients of the email sent on April 24, 2007.[74]

Weeks later, well after the dispute had already been settled, the school administration found out about Doninger's blog post.[75] In fact, during court testimony, Schwartz admitted that "some days after the meeting," her adult son found the blog post while conducting an Internet search for Avery Doninger.[76] Schwartz's son made the discovery and gave it to his mother, who alerted Niehoff to the finding on May 7, 2007.[77]

On May 17, 2007, Niehoff called a meeting and confronted Doninger with a hard copy of the blog post.[78] At the meeting, Niehoff asked Doninger to apologize to Schwartz, show the entry to her mother, and "recuse herself from running for reelection" as class secretary.[79] Doninger readily complied with the first two requests, but refused to withdraw her candidacy. The administration thus declined to endorse Doninger for the position and refused to put her name on the ballot.[80] Niehoff testified that she punished Doninger for three reasons: (1) her use of vulgar language; (2) her "failure to accept [her] prior suggestions regarding the proper means of expressing disagreement with administration policy and seeking to resolve those disagreements,"[81] and (3) her decision to provide the blog's readers with inaccurate information about Jamfest.[82]

Despite not being on the ballot, Doninger garnered a plurality of the votes in the election through the write-in process.[83] However, the administration barred Doninger from taking her position and from speaking at graduation.[84] In response, Doninger's mother alleged a violation of her daughter's First Amendment right to free speech and sought an injunction voiding the election.[85]

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73 *Id.*
74 *Id.*
75 *Id.* at 46.
76 *Id.*
77 *Id.*
78 *Doninger I*, 514 F. Supp. 2d 199, 207 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).
79 *Id.*
80 *Id.*
81 *Id.* at 208.
82 *Id.*
83 *Doninger II*, 527 F.3d 41, 46 (2d Cir. 2008), *aff'g* 514 F. Supp. 2d 199 (D. Conn. 2007).
84 *Id.*
85 *Id.* at 46–47.

B. The Strained Interpretations of the District Court and the Second Circuit

The district court began its opinion by discussing *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*.[86] The court then looked at precedent and analogized the facts of *Lowery v. Euverard*[87] to those of the *Doninger* case.[88] In *Lowery*, a group of football players circulated a petition calling for the removal of their coach and were subsequently suspended from the team.[89] The players contested their exclusion from the team.[90] The *Lowery* court held that "[p]laintiffs' regular education has not been impeded, and, significantly, they are free to continue their campaign to have Euverard fired. What they are not free to do is continue to play football for him while actively working to undermine his authority."[91] The district court quoted the above passage with approval and stated that, "Avery 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."[92]

The court then went on to state that while it believed the facts to be closer to those of *Fraser* than *Tinker*,[93] it looked at and applied the Second Circuit's recent precedent of *Wisniewski v. Board of Education*.[94] *Wisniewski* involved an eighth-grade student who sent instant messages from his home computer to a number of school friends that contained an image of a pistol firing a bullet at the head of their English teacher, Mr. VanderMolen, and stating "Kill Mr. VanderMolen."[95] The icon came to the attention of school officials when a student, who had not received a message from Wisniewski, pointed out the icon to the administration.[96] Subsequently, the police and school psychologist both determined that Wisniewski had no intention of carrying out any such threat and only meant the icon as a joke.[97] Despite these findings, the superintendent suspended Wisniewski for one semester for the violation of a student handbook provision that

86 *Doninger I*, 514 F. Supp. 2d at 211–15.
87 497 F.3d 584, 586 (6th Cir. 2007).
88 *Doninger I*, 514 F. Supp. 2d at 215–16.
89 *Id.* at 215 (citing *Lowery*, 497 F.3d at 599–600).
90 *Lowery*, 497 F.3d at 600.
91 *Id.* (emphasis omitted).
92 *Doninger I*, 514 F. Supp. 2d at 216.
93 *Id.*
94 494 F.3d 34 (2d Cir. 2007).
95 *Id.* at 36.
96 *Id.*
97 *Id.*

forbade threats against school teachers and for creating a disruption of the school environment.[98]

The *Wisniewski* court agreed with the school's punishment and found that Wisniewski's actions created a substantial and material disruption of the school environment.[99] Although the speech at issue occurred off campus, the court ruled that Wisniewski was not immune from school punishment because it was "reasonably foreseeable" that the speech would find its way to the school, come to the attention of the authorities, and substantially and materially disrupt the administration of the school.[100] The court went on to find it irrelevant that the icon was determined to be a joke because schools "have significantly broader authority to sanction student speech than the [Supreme Court's] standard allows."[101] Because the speech did, in fact, reach the school, the court did not rule on whether it was reasonably foreseeable that the speech would come to the attention of school officials.[102]

The *Doninger I* district court then rejected Doninger's contention that the holding of *Wisniewski* should be limited to the *Tinker* framework and not *Fraser*.[103] The court found that the blog constituted on-campus speech and could be punished under the exception outlined in *Fraser* because its content "was related to school issues, and it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it."[104] The district court then ruled against Doninger on the merits.[105]

On appeal, Doninger argued that the school could not regulate her speech because it occurred squarely within the confines of her own home and did not create a reasonably foreseeable risk of substantial disruption of the school environment.[106] The school, on the other hand, asserted that in *Wisniewski,* the Second Circuit had implicitly affirmed that schools can punish off-campus speech that they deem offensive if the speech is likely to come to school authorities' attention.[107]

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98 *Id.* at 37.
99 *Id.* at 38–39.
100 *Id.* at 39.
101 *Id.* at 38.
102 *Id.* at 40.
103 *Doninger I*, 514 F. Supp. 2d 199, 216 n.11 (D. Conn. 2007), *aff'd*, 527 F.3d 41, 47 (2d Cir. 2008).
104 *Id.* at 217.
105 *Doninger II*, 527 F.3d 41, 47 (2d Cir. 2008), *aff'g* 514 F. Supp. at 199.
106 *Id.* at 49.
107 *Id.* at 50.

The court of appeals rejected a bright-line territorial approach and implicitly relied heavily upon Fraser's ruling against plainly offensive speech.[108] The court then rejected the school's broad reading of *Wisniewski*, yet affirmed that a student may be disciplined for off-campus speech that "foreseeably create[s] a risk of substantial disruption within the school environment" when the speech may also foreseeably reach campus.[109] The court reasoned that if Doninger's speech had occurred on campus, the language chosen would have fallen squarely within *Fraser,* and authorities could have prohibited the speech to discourage the future use of similar inappropriate language.[110]

The court of appeals held that the case's facts satisfied *Tinker* and *Wisniewski* for three reasons. First, Doninger's choice of words satisfied *Fraser*'s "plainly offensive" standard and disrupted efforts to resolve the ongoing dispute.[111] The court cited other students' reactions to the post, placing special emphasis on the student who called Schwartz a "dirty whore," as evidence that Doninger's "efforts to recruit could create a risk of disruption."[112]

Second, the court asserted that the "at best misleading and at wors[t] false" information provided by Doninger in the blog post led to a substantial disruption in the form of a "deluge of calls and emails" that caused Niehoff and Schwartz to be late to school-related activities.[113] The court stated that Doninger's blog post posed a "substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities."[114]

Finally, the court stated that extracurricular activities are a privilege and attempted to justify the school's actions by analogizing the facts to those of *Lowery*.[115] In the Second Circuit's estimation, the school's actions could be understood as upholding school policy that a "student who does not maintain a record of [good] citizenship may not represent [the student body]."[116]

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108 *Id.* at 49.
109 *Id.* at 48 (citing Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)).
110 *Id.* at 49.
111 *Id.* at 50–51.
112 *Id.* at 51.
113 *Id.*
114 *Id.*
115 *Id.* at 52.
116 *Id.*

IV. ANALYSIS

There are three main problems with the Second Circuit's opinion in *Doninger II*. First, the opinion improperly, implicitly extends *Fraser* to off-campus speech. Second, the Second Circuit rests heavily on flawed reasoning, misstatements of precedent, and faulty analogy to support its proposition that *Tinker* does not require an actual showing of disruption. Third, the application of the decision could have wide-ranging effects in other off-campus student speech cases. This section concludes by discussing the need for a clearer framework for cases involving off-campus Internet speech and the problematic application of cases like *Doninger*.

A. An Improper Application and Extension of Fraser

While Doninger's blog post may be characterized as plainly offensive by some, such language was not threatening and is often heard on primetime television shows.[117] In fact, Merriam-Webster's Collegiate Dictionary defines "douchebag," the ostensibly offensive language used by Doninger, as a slang term for "an unattractive or offensive person."[118] Assuming arguendo that such speech is vulgar, it still cannot be subjected to school sanction because the speech was created and accessed off campus.[119]

In addition, like the *Fraser* Court, the *Doninger II* court rationalized that the school is responsible for teaching students the boundaries of socially appropriate behavior.[120] The Second Circuit used *Fraser* to justify the punishment because of that opinion's suggestion that judges can and should make judgments about the relative importance of the speech at issue when deciding such cases.[121] In *Fraser*, Chief Justice Burger wrote that "vulgar speech and lewd conduct is

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117 Popular teenage shows, such as *Family Guy* and *South Park*, routinely air such language. For example, *South Park* aired an episode entitled "Douche and Turd" before the 2004 presidential election. *South Park: Episode 119* (Comedy Central television broadcast Oct. 27, 2004). In the 2006 season of Family Guy, the term was often used, including in the season finale, where the President of the United States' name was "Douchebag." *Family Guy: Episode 30* (FOX television broadcast May 21, 2006).

118 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 348 (10th ed. 1993).

119 Brief of Amicus Curiae, ACLU of Connecticut, in Support of Plaintiff's Motion for a Temporary Restraining Order/Preliminary Injunction, Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) (No. 3: 07-cv-1129).

120 *Doninger II*, 527 F.3d at 48.

121 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680–81 (1986); *see also* Denning & Taylor, *supra* note 23, at 840 (arguing the Supreme Court suggested administrators and judges can make judgments about the relative importance of speech when it distinguished the Tinkers' political acts from Fraser's speech).

wholly inconsistent with the 'fundamental values' of public school education" and that the objective of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."[122] The Second Circuit, however, broadened the scope of *Fraser* beyond the Court's intent of allowing schools to punish on-campus speech that is threatening or highly offensive. Nowhere in the *Fraser* opinion does the majority extend a school's right to punish students for offensive and lewd behavior to non-disruptive off-campus speech, regardless of its lewdness or vulgarity.[123] Rather, the opinion's emphasis on venue[124] implies the exact opposite.[125]

Moreover, the Second Circuit failed to cite or adhere to Justice Alito's concurrence in *Morse*, which clarifies that school officials do not have "unfettered latitude to censor student speech under the rubric of 'interference with the educational mission' because that term can be," and indeed was in Doninger's case, "easily manipulated."[126] Furthermore, it is inappropriate to have judges "who are removed from popular teen culture" decide what off-campus speech can be considered lewd or indecent, as these standards constantly evolve.[127]

The notion that schools play an important social role in protecting minors from sexually explicit, indecent, or lewd speech does not apply to a blog that is written and accessed exclusively off campus. Such a rationale cannot be used for punishment because it fails under all three of *Tinker*'s narrow exceptions. Unlike Fraser's speech, Doninger's blog post occurred off campus and did not take place at a school assembly. Unlike Kuhlmeier's newspaper, members of the general public could not reasonably perceive the blog post to bear the school's imprimatur. Unlike Morse's banner, the blog post did not promote the use of illegal drugs. These exceptions are the only ones carved out of the *Tinker* standard by the Supreme Court and stand at the "far reaches of what the First Amendment permits."[128] All

122 *Fraser*, 478 U.S. at 681, 685 (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)); *see* Garnett, *supra* note 4, at 52–53.

123 Brief of Amicus Curiae, *supra* note 119, at 4.

124 The statement "[a] high school assembly or classroom is no place for a sexually explicit monologue" implies a geographic limitation to the *Fraser* holding. *See Fraser*, 478 U.S. at 685.

125 Brief of Amicus Curiae, *supra* note 119, at 4 (arguing the Supreme Court did not intend for *Fraser* to apply to off-premises speech).

126 Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007) (discussing Morse v. Frederick, 551 U.S. 393 (2007)).

127 Li, *supra* note 13, at 101.

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

other restrictions of student speech should be presumptively unconstitutional. Even accepting the school's premises for punishment as truth, in this instance only Doninger's parents should have the right to punish her for inappropriate language and non-constructive means of resolving a dispute because Doninger wrote the "offensive" post entirely off campus and did not access the site using school property.

Lastly, the facts of this case are more analogous to *Tinker* because the blog post—while arguably containing inappropriate language—was essentially political speech made while off campus. The blog post can be characterized as political speech in that it criticized the actions of those in authority, the school administrators, for a governance decision, the postponement of Jamfest. Unlike the sophomoric assembly speech given by Fraser, Doninger's blog post regarding her disagreement with school administration is essentially political speech and cannot and should not be equated with cases dealing with vandalism[129] and threats to school personnel.[130]

Arbitrary actions such as those of Niehoff and the school administration instead accomplish the exact opposite of their intent. One commentator notes that "[a]llowing the marketplace of ideas to flourish at school and on the Internet helps prepare students to be participants in democracy that cherishes the free exchange of ideas and diversity of viewpoint."[131] The administration's voiding of a democratic school election, which Doninger won through a write-in campaign, teaches students never to voice their opinion, never to attempt to mobilize their peers around what they may see as an erroneous or unjust administrative decision, and never to disagree with authority figures in any manner. Such a message is contrary to the spirit of *Fraser* in that it does not inculcate the "fundamental values necessary to the maintenance of a democratic political system."[132]

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129 *See, e.g.*, Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821 (7th Cir. 1998) (denying injunction to student expelled for publishing an article on how to hack into the school's computers in an underground school newspaper).

130 *See, e.g.*, Wisniewski v. Bd. of Educ. of Weedsport, 494 F.3d 34 (2d Cir. 2007) (upholding the school's decision to punish a student for creating and transmitting a drawing depicting the shooting of a teacher).

131 Papandrea, *supra* note 1, at 1078.

132 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

B. Faulty Analysis of Tinker's *"Material and Substantial Disruption Test"*

This case and others like it improperly extend the bounds of *Tinker* beyond what was intended by the Supreme Court. A student does not abandon her First Amendment rights merely by attending public school and discussing school-related topics or activities while off campus. *Tinker* was not meant to apply outside of the schoolhouse gate, as its holding readily indicates. However, even if *Tinker* did apply that broadly, Doninger's blog post did not satisfy *Tinker's* requirement for a material and substantial disruption of the school environment.[133]

Contrary to the statements of administrators, the blog post did not threaten to disrupt ongoing efforts to resolve the dispute because the dispute was resolved the very next day. In fact, the blog post may have helped speed up the resolution of the dispute. One could argue that the increased number of calls and emails received from concerned parents and students—that may or may not have been a result of the blog post—could have led to a more rapid resolution of the issue than would have otherwise occurred. This "undifferentiated risk" of possible disruption of the school environment never rose to the level of being "substantial" because the school did not cancel any classes and did not have to expend any additional resources to investigate any sort of threat, and no student undertook disruptive action or behavior in response to either the blog post or email. Like *Tinker*, although the students were a bit "riled up," no sit-in took place and no other disruptive behavior occurred. Rather, in order for a reasonable jury to find a material and substantial disruption, "the disruption would have to be so severe as to cause, or to threaten to cause, consequences such as class cancellations, widespread disorder, violence, or student disciplinary action, or to render teachers 'incapable of teaching or controlling their classes.'"[134] Doninger's blog post did nothing of the sort and therefore fails under *Tinker*.

The court also failed to address a major inconsistency in Doninger's situation. Although the school punished Doninger for the blog post, the majority of the disturbance occurred as a result of the on-campus email. While the school could clearly punish Doninger and the other students for their initial email because of the use of school equipment,[135] she received no repercussion for this action. Instead,

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133 *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969).

134 Brief of Amicus Curiae, *supra* note 119, at 10 (citing Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001)).

135 *Doninger II*, 527 F.3d 41, 44 (2d Cir. 2008), *aff'g* 514 F. Supp. 2d 199, 206 (D. Conn. 2007).

the school punished her exclusively for the blog posting. The court realized the weakness of this argument and attempted to justify this position on the basis that Niehoff and Schwartz were late to a few meetings.[136] However, receiving calls from parents and other concerned citizens on a matter of both school and community importance is an essential part of a school administrator's position. The court should not have allowed this poor excuse to justify the school's punishment of a student expressing views that the Court did not support.

In addition, Doninger should not have been punished for the words used and actions threatened by other students. If Doninger had used the word "douchebag" to describe a student, rather than the administration at large, it is highly unlikely that she would have been stripped of her nomination to run for student council. Schwartz's actions suggest that she and her son were on the hunt for Avery Doninger and no one else. The court conveniently ignored the fact that the dispute had been easily defused and resolved weeks prior to Doninger's punishment.[137] In this light it becomes clear that Doninger's punishment was an act of retribution. Such a witch hunt should not be sanctioned and justified by the judicial system on false pretenses. Instead, had the court conducted a proper *Tinker* analysis, it would have found that the blog post did not substantially disrupt classroom activities and that Niehoff was merely punishing Doninger because she did not like what Doninger had posted on the website. Such an action is an inappropriate and unacceptable justification for limiting student speech under *Tinker*, *Beussink v. Woodland R-IV School District*,[138] *Layshock v. Hermitage School District*,[139] and Justice Brennan's concurring opinion in *Fraser*.[140]

Furthermore, both the district court and the Second Circuit twist and misconstrue the holdings of other courts to support the proposition that *Tinker* does not require an actual showing of disruption. The cases cited by the Second Circuit do not support its argument in that the cases deal with speech that occurs or is disseminated at school or school-sponsored extra-curricular activities,[141] or involve an

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136 *Doninger I*, 514 F. Supp. 2d 199, 206 (D. Conn. 2007), *aff'd*, 527 F.3d at 41.

137 *See Doninger II*, 527 F.3d at 45.

138 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (holding that a student could not be punished for a website created off campus).

139 496 F. Supp. 2d 587 (W.D. Pa. 2007) (holding that a student's free speech rights were violated when he was suspended for creating an online parody of the school's principal).

140 478 U.S. at 688–89 (Brennan, J., concurring).

141 *See Doninger II*, 527 F.3d 41, 51–52 (2d Cir. 2008) (citing Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008)), *aff'g* 514 F. Supp. 2d 199, 206 (D. Conn.

explicit or implicit threat to a student or faculty member.[142] The district court's opinion, for example, cites four cases for the proposition that the school committed no violation of the student's First Amendment rights under *Tinker*.[143] Ironically, all four of these cited cases hold the exact opposite. Although all of the cases apply *Tinker* to off-campus speech, the cited cases all failed *Tinker's* material and substantial disruption test, and these courts overturned the students' punishments.[144]

Finally, both the district court and court of appeals used a false analogy between the facts of *Doninger* and *Lowery*.[145] In *Lowery*, the players circulated a petition and specifically brought and intended the petition itself to come onto campus.[146] Doninger's speech, on the other hand, occurred entirely off campus, and the language used in the blog—at the very least, one factor for which the school punished Doninger—was not designed to come on to campus. Therefore, the language used in the post should not have been used as a factor—in fact, it seemed to be the strongest factor—in Doninger's punishment.

If the administration had truly punished Doninger for the blog post's use of inappropriate language, her punishment should have been the same as if she had said the same word while on campus. Although the post advocated on-campus action, the language itself was not designed to come onto campus and represents the real reason for Doninger's punishment. It is highly doubtful that use of one foul word permanently strips a student of school privileges, especially in light of the fact that the case does not mention that the school doled

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2007); Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007) (discussing article printed in a student newspaper and distributed at school); Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821, 828 (7th Cir. 1998) (discussing petition circulated by members of the football team while at school).

142 *See Doninger II*, 527 F.3d at 51 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)).

143 *Doninger I*, 514 F. Supp. 2d 199, 216–17 (D. Conn. 2007), *aff'd*, 527 F.3d at 41.

144 *See Layshock*, 496 F. Supp. 2d at 600 (holding that there was no nexus between the speech and any substantial disruption of the school environment because no classes were cancelled, no widespread disorder occurred, and the only in-school conduct was the showing of the website to other students); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (holding that the punishment was unconstitutional because there was no evidence that the speech interfered with the work of the school or impinged on the rights of students); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 458 (W.D. Pa. 2001) (holding that a document did not disrupt school or interfere with anyone's substantial rights); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (awarding preliminary injunction where punishment for derogatory language on a personal website likely demonstrated First Amendment harm).

145 *See Doninger II*, 527 F.3d at 52; *Doninger I*, 514 F. Supp. 2d at 215–16.

146 *Lowery*, 497 F.3d at 585–86.

out any punishment to the student who called Niehoff a "dirty whore."[147] Although Niehoff listed other, pedagogical reasons for denying Doninger the right to run for student council,[148] such reasoning came from the benefits of hindsight and legal coaching. It is much more plausible that Doninger received punishment merely because the administration disagreed with and took offense to her blog post. Such capricious actions by school officials merely because they dislike a student's speech should not be judicially condoned.

The *Doninger* court's reasoning also rests on a flawed analogy in that the *Lowery* court wrote that the players were free to continue their campaign to have Euverard fired, but were not free to play football for him *while* actively seeking to undermine his authority.[149] Doninger, on the other hand, was not "engaging in uncivil and offensive communications regarding school administrators"[150] at the time of her punishment. Rather, as Niehoff requested, she had already apologized for the language used and any disturbance caused and had discussed the situation with her mother by the time the student council election took place. Unlike the situation in *Lowery*, where Euverard reinstated the football players who apologized to him,[151] Niehoff refused to allow Doninger to run for student council despite the apology.[152] As a result, the Second Circuit not only applied, but rather extended the holding of out-of-circuit precedent as one of the strongest rationales for its denial of Doninger's First Amendment rights. The use of this out-of-jurisdiction precedent relying on a flawed analogy suggests that the court was merely looking for a rationale to justify the school's punishment of Doninger.

C. The Reason to Care: The Potential Wide-Ranging Effects of the Decision

The *Doninger* case raises the question of how this important, albeit flawed, decision will be applied by public secondary schools and universities. The *Doninger* decision implies that any criticism or foul language that occurs off campus is punishable once, and no matter how, it is communicated to the school administration. This decision sets a dangerous precedent by essentially permitting administrators to conduct limitless, "random" Internet searches whose results can be used

147 *See Doninger II*, 527 F.3d at 51.
148 *Id.* at 46.
149 *Lowery*, 497 F.3d at 600.
150 *Doninger I*, 514 F. Supp. 2d at 216.
151 *Lowery*, 497 F.3d at 586.
152 *See Doninger I*, 514 F. Supp. 2d at 207.

to punish students who have voiced their displeasure with school administration while off campus. If this holding is not clarified or reigned in, other courts could reasonably interpret *Doninger* as allowing school officials to randomly search the Internet for evidence that could be used to justify punishment any time that a school official has a problem with a student.[153] While schools are not to be totalitarian enclaves "bent on foster[ing] a homogeneous people,"[154] decisions such as *Doninger* make it difficult to discern the difference because they allow schools to punish students for any speech that the school deems as creating even a remote risk of disruption.

In addition, the decision presents a new, problematic way of looking at the Internet as a weapon rather than a positive teaching tool. Most importantly, the current forms of digital expression that occur via email, text message, and instant message are no different from the protected speech that occurs at malls, movie theaters, or other public venues where students congregate.[155] However, the court essentially disregarded the territorial argument (in-school versus out-of-school) and allowed school administration to successfully claim that the Internet is always "in-school" and disruptive if its content is communicated to the school in any manner whatsoever. This interpretation of *Doninger* poses extremely wide-ranging effects because such a broad definition of on-campus speech would erase any boundary between on-campus and off-campus speech. Such a distinction would deter students from making any reference to school administration, teachers, or fellow students.[156] Moreover, by affirming retributive actions by school administration, students learn to be apathetic to decisions of the administration, for voicing one's opinion results only in punishment and loss of privileges. The increased tattling, retaliation, and petty disturbances that would result from such an application of *Doninger* would detract much more from the schools' educational missions than the use of a single inappropriate word used in a blog post.

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153 Similarly, Papandrea criticizes the *Wisniewski* decision for many of the same reasons, stating that:

> [p]ermitting school officials broad authority to punish student speech whenever it comes to their attention would grant them the power to punish students who engage in a political protest in the town square, write a letter to the editor in the local newspaper, or simply speak to their friends while walking around the mall.

Papandrea, *supra* note 1, at 1092.

154 Garnett, *supra* note 4, at 53 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).

155 Papandrea, *supra* note 1, at 1036–37.

156 *See* Denning & Taylor, *supra* note 23, at 882.

In our current, digital age, such situations will likely arise with increasing frequency. Instead of condoning actions like those of LMHS, courts need to understand that digital technology plays a vital and critical role in the social and cultural development of teenagers in that it allows and fosters self-expression, self-realization, and self-reflection.[157] Rather than classifying Internet-related student speech as always occurring on campus, courts should ensure that such speech receives some form of protection because "the Internet is a unique medium, offering anonymity and allowing people to easily exchange ideas at the click of a button."[158] In today's increasingly technological age, teachers and administrators should expect to read and hear student criticisms of their actions and should not punish the opinions unless they truly cause a material and substantial disruption of the school environment. The expansion of school jurisdictional authority that *Doninger* represents is disturbing because fundamental, constitutional rights are at issue. Although extracurricular activities may be a privilege, they should not be arbitrarily taken away by thin-skinned administrators because such punishment represents another form of censorship.

Most importantly, free speech is a core value of our democratic society and should be protected at all costs. The *Beussink* court correctly highlighted the importance of this issue by reasoning that:

> One of the core functions of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging . . . .
>
> Indeed, it is provocative and challenging speech . . . which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.
>
> Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.
>
> The public interest is not only served by allowing [such] message[s] to be free from censure, but also by giving the students . . . [an] opportunity to see the protections of the United States Constitution and the Bill of Rights at work.[159]

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157 *See* Papandrea, *supra* note 1, at 1032–34.

158 Li, *supra* note 13, at 67.

159 Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 1175, 1181-82 (E.D. Mo. 1998) (citation omitted) (internal quotation marks omitted).

Given the increasing prevalence of cases like *Doninger*, the Supreme Court should clarify some of the underlying assumptions of *Tinker* and *Fraser* and restrict their application to speech conducted in school or at school-related or school-sponsored events. Failure to uphold free speech outside of public schools leaves students with no adequate means of preventing a violation of their First Amendment rights by school personnel.

V. CONCLUSION: *DONINGER* HIGHLIGHTS THE NEED FOR A CLEARER FRAMEWORK

The problems and inconsistencies of the *Doninger* opinion and its possible far-ranging effects make evident that the courts need a clearer standard to determine when a student can be punished for off-campus Internet speech. While other commentators have proposed solutions to the problem, none of the proposals go far enough to unequivocally cover speech such as Doninger's. For example, Sandra Li advocates that "[t]he *Tinker* standard is the most applicable standard for internet-related student speech cases that do not involve school sponsorship, because it is both broad and flexible enough to balance the needs of a student's right to self-expression and the school's need to maintain an orderly and safe educational environment."[160] The *Doninger* opinion, however, highlights the need for a more protective standard by showing just how willing courts are to bend *Tinker* in such a way as to justify a school's action.

Justin Markey proposes a slightly different standard to determine whether speech should be classified as on-campus or off-campus speech, thereby determining the amount of constitutional protection afforded the expression.[161] Markey believes that Internet speech should be classified as off-campus if it was created "independent of school activities, independent of the school's resources, and [it] is not a true threat."[162] He argues that a school district should not be constitutionally allowed to punish the student for such speech "unless the student intentionally or recklessly caused the speech to be distributed on campus."[163] While fitting for the majority of cases, this standard does not go far enough in that it may not afford Doninger's speech any protection.

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160 Li, *supra* note 13, at 102.

161 Markey, *supra* note 21, at 149–50.

162 *Id.* at 150.

163 *Id.*

Off-campus criticism of school officials and administrative decisions, even using vulgar and profane language, should be constitutionally protected unless the student intentionally causes the vulgar language itself to be distributed on campus. That is, a student should not be punished merely for calling a teacher or administrator a vulgar name on the Internet. In addition, students should not be punished merely because the administration finds out about the post and the advocated action occurred on campus. Such an action would discourage all active and inactive disagreement with school administrators.

Rather, while it is necessary to balance the competing interests of the school with the free speech rights of the student,[164] the courts should place a presumption of unconstitutionality on the censorship of off-campus student speech even before conducting a *Tinker* analysis. Similar to Markey's standard, the first question that should be asked in situations involving the censorship of student Internet speech is whether the speech occurred on or off campus. If the speech itself occurred or was distributed on campus, courts should then proceed with a *Tinker* analysis. However, if the speech occurred off campus, the final inquiry should be whether the speech at issue constituted a threat. If so, courts should continue to defer to the decisions of school administration in order to protect students and foster a positive learning environment. However, if the speech cannot be said to be a threat, the next inquiry should be whether the speech itself was designed to substantially and materially disrupt the school or interfere with the rights of other students at school. If not, then the questioned speech cannot constitutionally be censored. This final step is of utmost significance because if courts proceed directly to *Tinker*, as Markey proposes, situations like *Doninger* can easily be manipulated post hoc by the school to justify their punishment of any student for voicing displeasure with administrative decisions.

Therefore, as long as no threats are made and no harassment occurs that could reasonably spill over and result in substantial disruption within the school environment, Internet use at home should be beyond the reach of school regulation regardless of the offensive nature of the language used. A rebuttable presumption of unconstitutionality should result for non-threatening, non-harassing speech that is created off campus on the student's own property, not during school hours, and for which there exists no evidence that the material was accessed on school property, regardless of the type of punish-

164 *Id.* at 151.

ment meted out by school administration.[165] Schools should only be able to rebut this presumption by affirmatively proving a material and substantial disruption under *Tinker*. Undifferentiated fears cannot and should not qualify to disregard a student's constitutional rights. Judges should not merely defer to and affirm the decisions of school administrators. While a school district's motive to prevent disruption of the school environment that would hinder the learning process is clearly a legitimate goal, it does not outweigh students' off-campus constitutional rights. In this manner both interests can be met; schools can ensure the safety of their students and the spirit of the Constitution can be fully respected to prevent schools from becoming "enclaves of totalitarianism" bent on "foster[ing] a homogenous people."[166]

165 Not all commentators agree that off-campus speech should not be subject to school censorship. *See, e.g.*, Renee L. Severance, Comment, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1215 (2003) (examining and criticizing the use of the "geographic distinction of speech—that is whether the speech occurred on campus or off campus—as a bright-line boundary to school jurisdiction with respect to Internet speech").

166 Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).