Cyberbullying: When is it "School Speech" and When is it Beyond the School's Reach?

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“It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”1

I. Overview

What responsibility do public school officials have to control off-campus internet speech that bullies other students? The answer—viewed through a constitutional lens—is none. Cyberbullying is a complex and tragic problem, but it is not necessarily the school’s problem to solve. The special considerations that exist in the school setting (such as the need to educate and protect students) justify a school’s regulation of speech only when it occurs on campus and during school-supervised activities. Outside of the school environment, those special considerations do not exist. Therefore, if bullying occurs outside the ambit of the school, there is no constitutional authority that supports a school’s exercise of its disciplinary arm.

The Supreme Court’s decisions in Tinker v. Des Moines Independent Community School District and three subsequent “school speech” cases describe the circumstances under which a school has the authority to regulate a student’s speech. In Tinker, the Supreme Court declared it permissible for schools to regulate students’ on-campus speech if the speech “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,” if the

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school can reasonably forecast that the speech will do so, or if the speech impinges on the rights of another.\(^2\) The Supreme Court has denied three petitions for writs of certiorari in recent months on the issue of the applicability of *Tinker* to off-campus internet speech.\(^3\) This article suggests that the better question to ask, rather than whether *Tinker* extends to off-campus internet speech, is simply “what is on-campus internet speech?” When can cyberbullying be characterized as school-supervised speech?

These tricky questions boil down to factual analyses of the character of speech in individual cases. A totality of the circumstances test should be used to determine if internet speech is school speech. Determining where internet speech occurs is almost as thorny an issue as determining when life begins. It is appropriate for the Supreme Court to task fact finders with sorting out whether a particular message is properly characterized as school speech. Where it is, *Tinker* and the other school speech cases apply and there is no unsettled legal question. Where it is not, the school should not reach outside its sphere to regulate otherwise protected speech.

School officials are uncertain how to respond to vicious and inappropriate internet speech. School administrators aware of cyberbullying activities must effectively balance the protection of bullied victims with the free speech rights of other students. On campus, it is a difficult task. Off campus, it is simply not the responsibility of school officials. School officials should not discipline bullies for off-campus internet speech, no matter how horrific and inappropriate the message. Those school administrators who do discipline students for posting bullying comments may face the wrath of the punished students’ parents. However, qualified immunity may shield individual school officials from suits for money damages in such instances.

This article will elaborate on three primary points. Part II of this article explores off-campus internet speech and the inability of public school officials to suppress the speech or discipline the stu-
dent without violating his or her First Amendment rights. Part III suggests that although it can be difficult to define where internet speech occurs, it is a question of fact that should be decided using a totality of the circumstances test. Finally, Part IV examines the possibility that school administrators who allegedly violate a student’s First Amendment rights may be shielded from liability by the doctrine of qualified immunity.

II. First Amendment Limitations On The Public School’s Regulation Of Students’ Internet Speech

Public school officials cannot suppress off-campus internet speech. It is outside their purview. If a court determines that the speech occurred off campus, the student’s First Amendment rights protect him or her from being disciplined by public school administrators, even for insulting and vulgar internet messages. The school’s power to regulate students’ speech comes from special considerations that are only present in the school setting, such as the school’s role in protecting and educating its students in an appropriate learning environment. The Supreme Court has declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Schools lack the absolute authority to repress students’ speech because “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” The only time when a school can abridge a student’s fundamental free speech right is when the speech is made in a school-supervised setting and meets one of the special exceptions, or tests, set out in the Supreme Court’s four major school speech cases.

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4 The presumption is in favor of freedom of speech. Only if those “special considerations” that have to do with maintaining a productive and orderly educational environment are implicated can a school regulate students’ speech. See Tinker, 393 U.S. at 505–06. Outside the school setting, those special considerations simply do not exist, and there is no justification for a school’s intervention in off-campus speech.

5 Id. at 506.

6 Id. at 511.

7 Id. at 503; Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
In the first of the well-known school speech opinions, *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that a public school can permissibly regulate students’ on-campus speech if the speech “materially and substantially” disrupts school activities, if the school can reasonably forecast that it will do so, or if the speech impinges on the rights of another.\(^8\) In *Tinker*, the Court overturned a school’s refusal to permit students to wear armbands in protest of the Vietnam War, stating that the expression of antiwar views was done peacefully and that it did not cause a substantial and material disruption of school activities.\(^9\)

The Supreme Court emphasized the importance of the educational process and announced a test for when schools can regulate students’ speech:

\[\text{the principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others. But conduct by the student, in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.}\(^10\)

The three post-*Tinker* school speech cases illustrate that schools can also restrict some student speech that does not materially disrupt school activities.\(^11\) The underlying concern in the next case, *Bethel*-

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8 *Tinker*, 393 U.S. at 509, 513.
9 *Id.* at 514.
10 *Id.* at 512–13 (citations omitted).
11 In all three post-*Tinker* cases, the Supreme Court upheld the school’s decision to discipline the student and regulate the speech. This regulatory authority was described in *Morse* and *Bethel*: “[S]chool boards have the authority to
el School District No. 403 v. Fraser, was that “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” The Supreme Court found that the school district did not violate a student’s First Amendment rights when it disciplined him for delivering a school elections speech loaded with sexual imagery in reference to an opposing candidate when the speech was delivered during a school assembly. The school’s duty to protect the youngsters entrusted to its care justified the suppression of speech deemed too lewd and vulgar for sensitive young listeners.

In the third school speech case, Hazelwood School District v. Kuhlmeier, the issue was whether the school district acted reasonably by suppressing an article in the student newspaper that divulged details about pregnant students or whether the students’ right to free expression protected their editorial control over the newspaper’s contents. Holding in favor of the school district, the Supreme Court declared that “[e]ducators are entitled to exercise greater control over” forms of student expression, such as the newspaper, that would “bear the imprimatur of the school.” Characterizing the school newspaper “as part of the school curriculum,” the Court permitted school officials to regulate its speech because their objectives were “reasonably related to legitimate pedagogical concerns.” The Court also indicated that the school administrators had a special interest in school-sponsored activities.

The Supreme Court concluded in its most recent school speech decision, Morse v. Frederick, that school officials did not violate a student’s First Amendment rights by confiscating his banner reading

determine ‘what manner of speech in the classroom or in school assembly is inappropriate.’ Morse, 551 U.S. at 404 (quoting Bethel, 478 U.S. at 683). Additionally, a school can regulate speech if the message is perceived to be school-sponsored and contrary to the school’s curriculum and mission. Hazelwood, 484 U.S. 260. Schools may also suppress students’ on-campus speech if it is vulgar and obscene or if it promotes illegal drug use. Bethel, 478 U.S. 675 (obscene speech); Morse, 551 U.S. 393 (speech promoting illegal drug use).

12 Bethel, 478 U.S. at 685.
13 Id.
14 Id. at 683–84.
15 484 U.S. at 264–66.
16 Id. at 271.
17 Id. at 271–73.
18 Id. at 271.
“BONG HiTS 4 JESUS” and suspending him from school. The Morse Court carefully tied the school’s act of suppressing the banner to its responsibility to educate its students about the particularly dangerous, harmful, and criminal activity of illegal drug use. 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.” The Supreme Court rejected the student’s claim that because his banner was displayed off-campus, his speech was outside the school’s reach. Instead, the Court characterized the student’s expression as school speech even though it did not occur on the school grounds. The student’s banner—unfurled on a public sidewalk during the Olympic torch parade—was displayed across the street from the school, during school hours, at a school-approved event, and in the presence of other students, teachers, and the school principal. Thus, the expression did occur during a school-supervised activity and was subject to the school’s regulation.

In short, the Supreme Court has held that schools may regulate several types of student speech when that speech occurs on campus or at school-sponsored events because of the special nature of the school setting. These four cases illustrate that “school speech” is that which is made by students in a school-supervised setting even if the expression was not made physically and literally on campus. It is this notion of the school-supervised setting that should be the first step of analysis in every case. When internet speech is generated off campus, however, the characterization of that expression becomes a tricky fact-based exercise. The pervasive use of social networking media by students has further complicated the question of whether the Tinker test should apply to off-campus internet speech that causes

19 551 U.S. 393, 403 (2007).
20 Id. at 407–08. The “special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse.” Id. at 408 (internal quotations and citations omitted).
21 Id. at 397.
22 Id. at 400–01.
23 Id. at 397, 400–01.
24 Schools are allowed to regulate student speech when the speech occurs on campus (as in Tinker and Bethel) or in a school-sponsored publication bearing “the imprimatur of the school” (as in Hazelwood) or during school hours at a school-approved event attended by the school’s students (as in Morse).
a substantial disruption on campus. The first question to ask, however, is simply “where did the internet speech actually occur?”

III. A Question Of Fact: What Is Off-Campus Internet Speech?

How does one characterize internet speech when it circulates widely instead of perching neatly in one geographic location? The courts have not framed the issue this broadly, but have narrowed the issue by asking whether Tinker applies to internet speech that is created off campus.25 In so doing, litigants and courts may be glossing over a critically important factual inquiry as to the locus of the speech, and may instead be assuming that simply because it originated off campus, it cannot be considered “school speech.”26

25 Litigants, too, have framed the question this way. See, e.g., Brief for Petitioner at i, Blue Mt. Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012) (mem.), denying cert. to 650 F.3d 915 (3d Cir. 2011) (No. 11-502), 2011 WL 5014761 at *i (“The questions presented are: 1. Whether and how Tinker applies to online student speech that originates off campus and targets a member of the school community, [and] 2. Whether and how Fraser applies to lewd and vulgar online student speech that originates off campus and targets a member of the school community.”). The second question is beyond the scope of this article, and this author would interpret the Supreme Court’s statement in Morse as having already resolved the second issue by declaring that Fraser’s lewd and vulgar speech would have been protected under the First Amendment had he delivered it off-campus. See Morse, 551 U.S. at 405.

26 The Fourth Circuit did not overlook this question in Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011), cert. denied, 132 S. Ct. 1095 (2012), calling it a “metaphysical question” as to where Kara’s speech was made. Id. at 573. The Court, however, did not actually answer the question, stating instead, “[w]e need not resolve, however, whether this was in-school speech . . . because the School District was authorized by Tinker to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive . . .” Id. (citing Tinker, 393 U.S. at 508, 513). This logic is flawed in that it assumes that Tinker could apply to any speech that substantially disrupts the school even though the Supreme Court has never even hinted that Tinker pertains to any speech other than on-campus speech. By applying Tinker without first determining whether Kara’s message could be deemed school speech, the Fourth Circuit failed to anchor its reasoning properly from the outset. Id. at 568. In terms of answering the metaphysical question, speech communication theorists have suggested that speech is more than a mere utterance. For there to be speech, there must be not only a speaker, there must be a recipient (or listener), and there must be actual receipt of the message. See Stephen E. Lucas, The Art of Public Speaking 28 (8th ed. 2004) (explaining that “[t]he speech communication process as a whole includes seven elements: speaker, message, channel, listener, feedback, inter-
As mentioned, during its October 2011 term, the Supreme Court denied three petitions for writs of certiorari where the question presented was whether *Tinker* should apply to students’ “off-campus internet speech.” Some commentators expected that the high court would clarify whether school officials can constitutionally regulate students’ off-campus speech at all, or whether school officials can do so if they first establish that there was a disruptive effect on campus, or whether it is sufficient for schools to “reasonably foresee” a substantial or material disruption based on the off-campus communication so as to properly regulate under the *Tinker* standard. The Supreme Court, however, has not taken up these questions.

The issuance of a comment, or the creation of an internet posting, may not constitute speech if it is not received by anyone. The speed and frequent access to social networking sites makes it highly unlikely that any internet posting would be received by no one, but it is still possible that it would not be viewed at school, as was the case in *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915, 921 (3d Cir. 2011). Messages like Kara Kowalski’s that originate off campus may become school speech when they are received on campus, although the parties did not raise this issue. A friend accessed Kara’s MySpace group and posted additional comments while at school. *Kowalski*, 652 F.3d at 568.


In keeping with its usual practice, the Supreme Court issued no explanatory opinions in its denials of the three petitions for writs of certiorari, leaving legal scholars and others to speculate as to the reasons.
A. Three Scenarios, Three Circuits, Three Petitions—Thrice Denied

Three petitions were filed; all three were denied. The underlying factual scenarios are summarized below.

1. Doninger v. Niehoff in the Second Circuit

This case involved two types of speech: a student’s internet speech and her on-campus expression of wearing a controversial t-shirt. High school junior Avery Doninger and her fellow Student Council members became upset when a school event called Jamfest could not be held as originally scheduled, and they used the high school’s computer lab to send an email message urging students, parents, and friends to contact the school in protest.\(^\text{30}\) That night at home, Doninger created a blog post incorporating her earlier email message and urging people again to contact the “douchebags” in the school administration’s office and “piss her off more.”\(^\text{31}\) As punishment for the blog post, Principal Niehoff forbade Doninger from running for Senior Class Secretary.\(^\text{32}\) When the day of the election arrived, Doninger and several of her supporters attempted to wear homemade “Team Avery” t-shirts to the election assembly, but were not allowed to wear them.\(^\text{33}\) Avery’s mother filed suit, alleging that the school administration’s actions violated her daughter’s First Amendment rights.\(^\text{34}\)

Applying the Tinker “substantial and material disruption test,” the Second Circuit stated that it was “objectively reasonable for school administrators to conclude that Doninger’s posting was potentially disruptive to the degree required by Tinker” so as to justify their disciplinary actions.\(^\text{35}\) With regard to the t-shirts, the court indicated that “Niehoff may not have known with certainty that permitting the t-shirts into the assembly would cause students to disrupt those [election] speeches,” but nonetheless concluded that her assessment

\(^\text{31}\) Id. at 340–41.
\(^\text{32}\) Id. at 342.
\(^\text{33}\) Id. at 343.
\(^\text{34}\) Id. at 343–44.
\(^\text{35}\) Id. at 348–49.
of the disruption was reasonable even if a jury could have reached
the opposite determination.36 The Second Circuit ruled in favor of
granting qualified immunity to the school officials for their actions.37

2. Blue Mountain School District v. J.S. ex rel. Snyder
(consolidated with Hermitage School District v. Layshock)
in the Third Circuit

These two similar cases involved students disciplined for cre-
ating fake MySpace profiles of their school principals.38 In J.S. ex rel.
Snyder v. Blue Mountain School District, J.S. and her friend K.L. used the
Snyders’ computer at home on a Sunday evening to create a bogus
MySpace profile of their school principal, describing his general in-
terests as: “detention, being a tight ass, riding the fraintrain, spending
time with my child (who looks like a gorilla), baseball, my golden
pen, fucking in my office, hitting on students and their parents.”39
The profile also stated, “HELLO CHILDREN[.] yes. it’s your oh so
wonderful, hairy, expressionless, sex addict, fagass, put on this world
with a small dick PRINCIPAL.”40 The next day, J.S. made the profile
“private” and granted access only to about twenty-two of her fellow
students.41 Because the School District’s computers blocked access
to MySpace on campus, no one was able to view the online profile at
school, but the principal heard about the profile and requested that a
print-out be brought to him.42 After seeing the fake profile, the prin-
cipal suspended J.S.43

The Snyders sued the school district, alleging among other things
that the suspension violated J.S.’s First Amendment rights.44 The Dis-
trict Court granted summary judgment in favor of the School District
on this claim, and the Snyders appealed.45 The Third Circuit wrestled

36 Id. at 355.
37 Id. at 339. See discussion infra Part IV.
38 Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011),
39 Snyder, 650 F.3d at 920.
40 Id. at 921.
41 Id.
42 Id.
43 Id. at 922.
44 Id. at 923.
45 Id. at 923–24.
with whether the case should be decided under the *Tinker* standard, ultimately using the *Tinker* analysis without expressly holding that it was applicable to off-campus speech.\(^\text{46}\) The Blue Mountain School District contended that it could reasonably forecast that substantial disruption would occur, thus satisfying the *Tinker* test.\(^\text{47}\) The Third Circuit concluded, however, that the Blue Mountain School District’s forecast of a disruption was not reasonable, noting that on-campus access to MySpace was restricted and, moreover, the MySpace profile was so obviously a joke that no one would take it seriously enough to cause a substantial disruption of school activities.\(^\text{48}\)

The other Third Circuit case, consolidated with *J.S.*, was *Layshock ex rel. Layshock v. Hermitage School District*, which involved another student who created a fake MySpace profile of his school principal.\(^\text{49}\) Using his grandmother’s computer at her house, Justin Layshock made the profile by copying the principal’s photograph from the

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\(^\text{46}\) In *J.S.*, eight of the fourteen judges sitting *en banc* joined the majority opinion written by Judge Chagares. Joining in the majority were Chief Judge McKee and Judges Sloviter, Ambro, Fuentes, Smith, Hardiman, and Grennaway, Jr. The majority dodged the ultimate issue stating: “The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s (social networking) speech in this case.” *Id.* at 926 (emphasis added). Interestingly, five of those eight judges also joined in a separate concurrence written by Judge Smith, stating: “I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.” *Id.* at 936 (Smith, J., concurring) (emphasis added). Finally, the remaining six of the fourteen judges dissented because they disagreed with the majority’s application of the rule to the facts, but they agreed with “the apparent adoption of the rule that off-campus speech can rise to the level of a substantial disruption.” *Id.* at 941 (Fisher, J., dissenting, joined by Scirica, Rendell, Barry, Jordan, and Vanaskie, JJ.). In short, five judges on the Third Circuit believe that *Tinker* does not apply to off-campus speech, three think that the prudent approach is to apply it, and six believe that it should apply.

\(^\text{47}\) *Id.* at 928; see *Tinker*, 393 U.S. at 513. This interpretation of the “forecast” prong of *Tinker* is consistent with other circuits’ opinions cited by the *Snyder* Court, including Doninger v. Niehoff (*Doninger II*), 527 F.3d 41, 53 (2d Cir. 2008); Lowery v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007); and LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

\(^\text{48}\) “[T]he profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.” *Snyder*, 650 F.3d at 929.

school district’s website and posting false comments about the principal’s activities.\textsuperscript{50} He used a theme of “big”—listing things such as “big steroid freak,” “big whore,” “big fag,” “number of drugs I have taken: big,” and so forth.\textsuperscript{51} As punishment, the school suspended him for ten days.\textsuperscript{52} Justin’s parents brought an action alleging that his free speech rights had been violated by the school district, and the district court granted summary judgment in favor of the Layshocks.\textsuperscript{53} The Third Circuit affirmed.\textsuperscript{54} In holding that Justin’s act of obtaining the principal’s photograph from the school district’s website did not amount to entering school grounds, the court characterized the fake profile as “off-campus” speech and thus, outside the scope of the school’s authority.\textsuperscript{55}

3. Kowalski v. Berkeley County Schools in the Fourth Circuit

Kara Kowalski, a high school senior, was at home when she created a MySpace webpage aimed at humiliating a classmate.\textsuperscript{56} The page, called S.A.S.H. (“Students Against Sluts Herpes”), accused the other girl of being a slut and having herpes.\textsuperscript{57} One of Kowalski’s friends accessed the page while at school, where he added photographs and posted comments using the targeted girl’s name, Shay.\textsuperscript{58} Other students also commented.\textsuperscript{59} The victim’s parents complained to the school principal and Shay left school that day because she felt uncomfortable around her classmates.\textsuperscript{60} As punishment for violating the school’s policy against harassment and bullying, Kowalski was banned from being on the cheerleading squad, barred from certain school events, and suspended for five days.\textsuperscript{61}

\textsuperscript{50} Id. at 207–08.
\textsuperscript{51} Id. at 208.
\textsuperscript{52} Id. at 209.
\textsuperscript{53} Id. at 210–11.
\textsuperscript{54} Id. at 219. Since there was no disruption of school activities, the \textit{en banc} panel did not have to decide whether \textit{Tinker} would actually have applied to this particular instance of off-campus speech.
\textsuperscript{55} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 568.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 569. (the original ten-day suspension was reduced to five days).
The Kowalskis sued the school district on several grounds, including free speech violations. The district court granted summary judgment in favor of the school and the Fourth Circuit affirmed, stating that the school permissibly disciplined Kowalski because she orchestrated an internet attack on a classmate and “did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech which ‘materially and substantially interferes with the . . . operation of the school.”

B. The Threshold Question: Was it School Speech? A Factual Determination Should be Made Using a Totality of the Circumstances Test

One good reason for the Supreme Court to have declined to review the decisions in these cases is that the real issue was not a question of law. The fundamental issue boils down to a question of fact—was the student’s internet communication “school speech?” The finder of fact is in the best position to evaluate and characterize the internet speech as either on-campus or off-campus. The factual determinations have become exceedingly complicated due to technological advances. If the speech is determined to be school-supervised speech (or “on-campus” speech), then the relevant legal tests for regulating the speech are already defined and do not need

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62 Id. at 570.
63 Id. at 567.
64 Under Supreme Court Rule 10, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” SUP. CT. R. 10. To be clear, in these petitions the asserted error was not a challenge to the lower court’s factual findings. Rather, it was couched as a question of law. In actuality, however, the underlying source of confusion stems from the factual characterization of internet messages as being off-campus and not “school speech.” The law is clear; the Tinker test is well-established. The misunderstanding comes from the failure to make a correct initial factual determination about where the speech occurs.
65 See Doninger v. Niehoff (Doninger III), 594 F. Supp. 2d 211, 223 (D. Conn. 2009) (“Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting ‘send.’ A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.”).
to be readdressed by the Supreme Court. Conversely, if the student’s internet speech is characterized as off-campus communication, the rule is equally clear that the school’s authority does not extend to such speech. In short, the essential determination is a factual question about the nature of the speech in each individual case; it is not a question of law.

School speech—and particularly internet speech—cannot be narrowly defined by reference to purely geographical boundaries. Reference to physical dividing lines between on-campus and off-campus is an outdated way of characterizing speech. The Fourth Circuit said in *Kowalski* that surely the metaphysical question of where speech is made cannot be determined by reference to where the computer keys were first pressed. The Third Circuit has also stated, “[f]or better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.” Additionally, Judge Smith of the Third Circuit wrote in his concurrence in *J.S.* that the determination “cannot turn solely on where the speaker was sitting when the speech was originally uttered” because “such a standard would fail to accommodate the somewhat ‘everywhere at once’ nature of the internet.”

School officials may ask, then, how to determine whether a student’s internet speech is on-campus speech. The appellate courts have applied a variety of legal tests. The Supreme Court, however,

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66 *Kowalski*, 652 F.3d at 573. Others may contend that the speech is literally made where the keys are pressed, and the fact that it can be read elsewhere and is posted in an intangible location on the internet simply refers to where the speech is “heard.” For discussion of the rebuttal point that speech is not made until it is communicated, see Lucas, *supra* note 26, at 28.


69 Courts have used different approaches, but have not labeled the approach as a totality of the circumstances test. The test has been called other things such as a foreseeability test or a sufficient nexus test (as in *Kowalski*, 652 F.3d at 574) or a “speech that comes on campus” test (as a test not met in *Layshock*, 650 F.3d at 219) or an intent or “aimed at” test (as in *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007), but rejected as not being a “bright line test” in *Doninger IV*, 642 F.3d 334, 347–48 (2d Cir.), *cert. denied*, 132 S. Ct. 499.
has already provided a framework for deciding whether the off-campus speech is actually “school speech.” It is noteworthy that the Supreme Court itself abandoned the strict use of geographical boundaries in characterizing the school speech in Morse. In Morse, the Court recited a litany of facts in determining that Frederick’s display of his banner on a public sidewalk—not on school grounds—was nonetheless “school speech.” The Supreme Court carefully listed the facts that it relied on in deciding that the display of the banner was school speech even though it was located outside of the schoolhouse gates. The Court noted that the event occurred during normal school hours; was sanctioned by Principal Morse as an approved class trip; teachers and administrators were interspersed among the students and charged with supervising them; and Frederick stood across the street from the school and aimed his banner toward the school. Taking all these facts together, the Court held that Frederick’s expression was school speech. In short, if one looks at the Supreme Court’s analysis in the 2007 Morse decision, it becomes apparent that it is appropriate to apply a totality of the circumstances test.

(2011)). Some courts have even leapfrogged right over the threshold question of whether the internet message is “school speech” and have jumped into an analysis of whether the speech substantially or materially disrupted school activities. In other words, they have applied Tinker to the speech without first determining whether Tinker should apply. See, e.g., Kowalski, 652 F.3d at 573–74.

70 Morse v. Frederick, 551 U.S. 393, 400–01 (2007).
71 Id.
72 During the Olympic torch parade, Frederick, a student, displayed a banner saying “Bong HiTS 4 Jesus.” Id. at 397. The principal made him take it down, and the student argued that the school violated his First Amendment rights by suppressing his speech when it did not occur on campus. Id. at 400–01.
73 Id.
74 Id.
75 Id. at 401.
76 A totality of the circumstances test has been applied in several types of legal analysis, including constitutional questions. An example in the Fourth Amendment area is Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (“The question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”) (emphasis added). Lower courts have followed the same test in other Fourth Amendment cases. See, e.g., United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011). In the field of employment discrimination, the Supreme Court has also applied a totality of the circumstances test, stating that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” Harris v.
Without using the exact terminology of “totality of the circumstances,” some federal courts have nonetheless been taking that approach in school speech cases. In each of the cases where the Supreme Court has denied a petition for writ of certiorari, school officials had examined the circumstances to determine whether the internet speech could be characterized as school speech. When the answer was “yes,” the speech was permissibly regulated by the school officials, and when it was “no,” the court determined that it was a violation of the student’s rights to discipline him or her for the speech.

For example, the Third Circuit, in concluding that J.S.’s internet speech was not school speech, recited a list of facts leading to that conclusion:

J.S. created the [MySpace] profile as a joke, and she took steps to make it ‘private’ so that access was limited to her and her friends. Although the profile contained [the principal’s] picture from the school’s website, the profile did not identify him by name, school, or location. . . . Also, the School District’s computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. And, the only printout of the profile that was ever brought to school was one that was brought at the [principal’s] express request.”

Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (emphasis added). The Harris Court continued, “[t]hese may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id. Additionally, also in the employment law area, the Sixth Circuit has clearly described the totality of the circumstances test: “In determining whether the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment under the Harris standard, it is well-established that the court must consider the totality of circumstances.” Williams v. Gen. Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (emphasis added) (citations omitted). As a final example, drawn from bankruptcy law, the federal court stated “[f]irst, the statute itself states clearly that abuse can be found either if the court finds the petition is filed in bad faith (Section 707(b)(3)(A)) or that the totality of the circumstances of the debtor’s financial situation demonstrates abuse (Section 707(b)(3)(B)).” In re Moutousis, 418 B.R. 703, 708 (Bankr. E.D. Mich. 2009) (second emphasis added). In the school speech context, the Supreme Court’s Morse approach to determining that Frederick’s banner was “school-supervised” speech can properly be characterized as a totality of the circumstances test.

In his concurrence, Judge Smith implicitly reinforced this totality of the circumstances application, stating that:

In any event, this case does not require us to precisely define the boundary between on- and off-campus speech, since it is perfectly clear that J.S.’s speech took place off campus. J.S. created the Myspace profile at home on a Sunday evening; she did not send the profile to any school employees; and she had no reason to know that it would make its way onto campus. In fact, she took steps to limit dissemination of the profile, and the Myspace website is blocked on school computers. If ever speech occurred outside of the school setting, J.S.’s did so.\(^78\)

In the other Third Circuit case, the en banc court looked at the fact that Justin Layshock created the fake MySpace profile at his grandmother’s house and he used her computer during non-school hours.\(^79\) Although the school argued that his mock profile began as “school speech” since he copied the principal’s photograph from the official school website,\(^80\) the appellate court rejected that view, concluding, “[w]e need only hold that Justin’s use of the District’s website does not constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct . . .”\(^81\)

The Fourth Circuit in Kowalski listed several facts about the MySpace page that Kara Kowalski had created at home in the evening and found that her speech was sufficiently connected to the school to justify the school official’s regulation of it.\(^82\) The court’s approach,

\(^{78}\) Id. at 940 (Smith, J., concurring).


\(^{80}\) Id. at 214 (quoting the School District’s brief for the argument that Justin’s “‘speech’ initially began on-campus [because] Justin entered school property, the School District web site, and misappropriated a picture of the Principal.”).

\(^{81}\) Id. at 219.

\(^{82}\) It is troubling that the court avoided the threshold question as to where the speech occurred and jumped into an analysis of the Tinker test, stating “[w]e need not resolve, however, whether this was in-school speech and therefore whether Fraser could apply because the School District was authorized by Tinker to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it ‘interfer[ed] . . . with the schools’ work [and] colli[ded] with the rights of other students to
though not labeled as such, amounted to a totality of the circumstances test. The pertinent facts, as recited by the court, were that Kara knew that the electronic response could . . . reach the school or impact the school environment. She also knew that [a] dialogue would . . . take place among [her fellow students] . . . and that the fallout from her conduct and the speech . . . would be felt in the school itself. Indeed, the [MySpace] group’s name was “Students Against Sluts Herpes” and a vast majority of its members were students . . .

Also, the victim “and her parents took the attack as having been made in the school context, as they went to the high school to lodge their complaint.”

Another example of the totality of the circumstances approach is found in the Second Circuit’s review of the facts surrounding Avery Doninger’s blog post, which was created at home, at night, using a website unaffiliated with the high school. The blog post did not even come to the attention of the school administration until two weeks after it was created. It was treated as off-campus speech, but Doninger was disciplined nonetheless for failing to demonstrate good citizenship and for violating the handbook’s policies governing class

be secure and to be let alone.” Kowalski, 652 F.3d at 573–74 (quoting Tinker, 393 U.S. at 508, 513).

The Fourth Circuit did not describe the approach as a totality of the circumstances test, but that is how the court analyzed the speech at issue. Unfortunately, the court avoided deciding whether the facts rendered the expression “school speech.” Instead, the court rushed into an application of Tinker. A more grounded approach would have been predicated on first determining, as a factual matter, whether Kowalski’s speech was on-campus or off-campus for purposes of applying the relevant legal test.

Id.

Id. (stating also that “the creation of the ‘S.A.S.H.’ group forced Shay N. to miss school in order to avoid further abuse.”). The court continued, “Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in ‘copycat’ efforts by other students or in retaliation for the initial harassment.” Id.


Id. at 342.
officers. Interestingly, no one argued that the blog post itself was “school speech” even though it incorporated the earlier email that Doninger and three friends had written on campus in the school’s computer lab during the school day, in violation of the high school’s email policy. That mass email also included specific references to the school, such as the telephone number of the district’s office, and expressly urged people to contact the office.

In summary, even though the findings were not always expressively stated, these federal courts were examining the facts and subtly making determinations as to whether the internet speech was “school speech.” Courts should follow this approach more systematically and explicitly by stating that the threshold question of fact is whether the internet speech is school speech. That determination should be made using a totality of the circumstances test. The important point is that as soon as it is determined whether the cyberbullying speech falls within the school’s purview, the limits on a school official’s authority can be more easily assessed. If a student’s cyberspeech is characterized as school speech, there is no need for more guidance from the Supreme Court as there are already four tests applicable to different types of school speech. Cyberspeech will likely fit into the existing categories depending on its content, its aim, and the school’s interests in regulating it. The school can then apply the correct test from *Tinker*, *Bethel*, *Hazelwood*, or *Morse* depending on how it is properly characterized.

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88 *Id.* As punishment, she had to “apologize to [Superintendent] Schwartz, show the blog post to her mother, and withdraw her candidacy for Senior Class Secretary.” *Id.*

89 *Id.* at 339–40.

90 *Id.* Principal Niehoff expressed disappointment that Avery had republished the mass email containing misinformation about the cancellation of Jamfest, but did not claim that the republication was, itself, school speech. *Id.*

91 For example, lewd and vulgar speech would fall under the *Fraser* standard. If the speech appears to advocate illegal drug use, *Morse* would govern. *Hazelwood* would apply when the speech bears the imprimatur of the school, appears to be school-sponsored, or when the speech interferes with the school’s educational mission. *Tinker*, as previously stated, would apply to speech that materially or substantially disrupts school activities, can be foreseen to cause such disruption, or impinges on the rights of another.
C. Other Possible Considerations Underlying the Supreme Court’s Decision Not to Grant Certiorari

There are undoubtedly other reasons why the Supreme Court did not grant certiorari in these cases.92 It is possible that the circuit courts of appeal have already reached the right result by permitting school authorities to punish students who post internet messages when those messages either have already caused or will foreseeably cause a material and substantial disruption at school. Although the circuits have applied the *Tinker* test in varying ways and expressed uncertainty over the applicability of *Tinker* in each case, they still managed to apply the *Tinker* standard.93 This author disagrees with that approach because it includes off-campus speech and fails to address the underlying problem: there are no special considerations outside the school setting to justify a school’s infringement of a student’s First Amendment rights. Nonetheless, it is conceivable that this extension of *Tinker* is an acceptable result and there is no urgent need for judicial review.

Another plausible explanation as to why the Supreme Court has not opted to resolve the confusion is that the appellate courts’ decisions may satisfactorily reflect current political and societal values. The current administration has made the curtailment of cyberbullying a priority. President Barrack Obama encouraged the creation of the Department of Health and Human Services’ antibullying website and has drawn national attention to the issue.94 The desired result of these political actions is to suppress hate speech, bullying speech, and pernicious forms of cyberbullying by one student against another or by students against school administrators. An environment that is conducive to learning does not include bullying. Schools are best

92 Due to the large number of petitions, the Supreme Court can only address a fraction of the issues presented each year. Some court-watchers anticipated that the Supreme Court would review one of these cases last year.

93 See, e.g., J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012) (“The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”)

able to fulfill their educational missions if both students and administrators are untroubled and undistracted by menacing messages. At the extreme end of the spectrum, some may argue that even if First Amendment rights are being trampled, there is a perceived countervailing benefit in allowing school districts to take a harsh stance against cyberbullies.

Moreover, the nasty speech that some students have engaged in is not the type of speech that anyone would be eager to support or promote. The focus, however, should not be on the content of the speech, but rather, on the student’s right to make such comments, however rude they may be. Therefore, the analysis should turn on whether the speech would have been protected had it not been deemed to affect the school environment. Various types of speech such as fighting words, true threats, and some obscenity and pornography are not entitled to constitutional protection. A school official could regulate those types of speech without violating the First Amendment because such speech would not be protected in the first instance. Most of the students’ messages fall short of these exceptional categories, and most of the speech at issue would be protected if made outside the school context.

95 An example of undesirable speech is found in J.S. ex rel. Snyder, 650 F.3d at 921, where J.S. posted on MySpace that her principal had a “small dick”, that he enjoyed sex with children, and that he liked to ride the “fraintrain” (an obvious reference to his wife, whose last name was Frain). Similarly, the MySpace page in Kowalski, 652 F.3d at 568 involved photographs of a fellow female student with captions indicating that she was a slut and that she had herpes, an allegation that was not true.

96 Virginia v. Black, 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (stating that “true threats include those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”); see also R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 393-94 (1992) (stating that “fighting words” that communicate ideas in a threatening manner are not protected speech but a cross burning ordinance that singles out only certain “messages of racial, gender, or religious intolerance” cannot be constitutionally valid because it “handicap[s] the expression of ideas”); United States v. Williams, 553 U.S. 285, 299 (2008) (holding that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment”); Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that a state may constitutionally proscribe the possession and viewing of child pornography”).

97 A thorough discussion of true threats and other unprotected speech is outside the scope of this article.
Although the premise of this article is that schools simply cannot constitutionally regulate speech outside the scope of school-supervised activities, some would say that the judgment call is best left to school administrators. Justice Breyer foresaw this issue, writing in *Morse* that “[s]tudents will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special.”

School officials are searching for ways to make their campuses safer and to punish cyberbullying that affects their students.

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98 Deference to school officials’ judgment is a theme reflected in some Supreme Court school cases, as was noted in the Petition for Writ of Certiorari filed on October 18, 2011 in *Snyder*, where attorneys representing the school district wrote: “To second-guess and hamstring school officials like this [by not supporting the school official’s actions] vitiates the recognition by this Court, from *Tinker* forward, that school officials must retain sufficient authority to keep order, and that courts should respect the reasonable educational judgments of school officials.” Petition for Writ of Certiorari, *Blue Mountain Sch. Dist. v. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502) (citing *Tinker* v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 507, 514 (1969) and *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

99 *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part). Justice Breyer continued, “[y]et no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.” *Id.* This expression of support for the discretionary judgment of school officials may also be an underlying reason why the Supreme Court did not grant any of the three petitions for writs of certiorari this term.

100 Recent school violence and the much-publicized suicides resulting from internet bullying have also drawn national attention to the problem. One of many tragic examples is Jamey Rodemeyer, a 14-year old who fell victim to gay insults online after he told friends he was bisexual. *See* Sarah Anne Hughes, *Jamey Rodemeyer, Bullied Teen Who Made ‘It Gets Better’ Video Commits Suicide*, *Washington Post*, *BlogPost* (Sept. 21, 2011, 9:27 AM), http://www.washingtonpost.com/blogs/blogpost/post/jamey-rodemeyer-bullied-teen-who-made-it-gets-better-video-commits-suicide/2011/09/21/glQAVVzkkK_blog.html. One anonymous internet poster even said that everyone would be happier if Jamey would just kill himself. *Id.* Jamey reached out, also using the internet, and posted a YouTube video called “It Gets Better.” *Id.* Sadly, the help of family members, guidance counselors, and therapists was not enough. *Id.* Jamey took his own life in 2011. *Id.* Another bullied teen, J.D. Lane, opened fire in February 2012 at Chardon High School in Ohio. Michael McLaughlin, *T.J. Lane, Chardon High School Shooting Suspect, Was Described As Outcast*, *The Huffington Post*, (Feb. 29, 2012, 7:01 PM), http://www.huffingtonpost.com/2012/02/28/tj-lane-chardon-high-school-suspect_n_1306511.html. At 7:30 AM in the cafeteria, the shooter aimed at a table of boys, including one
School administrators are shouldering a huge burden in this regard.\textsuperscript{101} One federal court has observed that “teachers and administrators in today’s world are expected to undertake greater responsibilities than what the one-room schoolhouse teacher shouldered. Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities.”\textsuperscript{102} In a school where the written policies require intervention in bullying or cyberbullying incidents, the role of the school administrator becomes almost impossible to fulfill because there is no clear way to reconcile the conflicting demands of the various directives, statutes, policies, and the First Amendment.

If a school official decides that a student’s internet speech is “school speech” based on the totality of the circumstances, and that official disciplines the student who posted the message, then the parents of that student may sue alleging a violation of the student’s First Amendment rights. Given that this area of the law is confusing and unclear, a school administrator who violates a student’s free speech rights may be shielded from a suit for money damages by the doctrine of qualified immunity.

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who was dating the shooter’s prior girlfriend. \textit{Id}. Three students died. \textit{Id}. The shooter, who was shy and targeted by bullies, was from a troubled and violent family. \textit{Id}.
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\textsuperscript{101} The U. S. Department of Education issued two “Dear Colleague” letters reminding public school administrators of their obligation to address bullying, cyberbullying, and sexual harassment. \textbf{Russlynn Ali, U.S. Dep’t of Educ., Dear Colleague Letter: Harassment and Bullying} (2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [hereinafter \textit{Ali} \textit{2010}]; \textbf{Russlynn Ali, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence} (2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter \textit{Ali} \textit{2011}]. The primary point of the October 26, 2010 letter was to alert school officials that some misconduct – in addition to violating a school’s antibullying policy – might also violate federal antidiscrimination laws. \textit{Ali} \textit{2010}, \textit{supra} at 1., The letter was sent to public schools in the United States and indicated that a “school is responsible for addressing harassment incidents about which it knows or reasonably should have known.” \textit{Id}. \textit{at} 2. The second letter, issued April 4, 2011, stated that if a student files a complaint with the school, then “[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity.” \textit{Ali} \textit{2011}, \textit{supra} at 4.
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\textsuperscript{102} \textbf{Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.}, 306 F.3d 616, 635 (8th Cir. 2002) (en banc).
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IV. A School Official Who Disciplines A Cyberbullier May Be Shielded From Liability By The Doctrine Of Qualified Immunity.

Many state officials—in their individual capacities—are immune from liability for money damages for their official actions based on the doctrine of qualified immunity. Qualified immunity traditionally involved two inquiries: (1) whether the facts show that the actions of the [school] official violated a constitutional right; and (2) whether that right was clearly established at the time of the official’s alleged misconduct. In *Saucier v. Katz*, the Supreme Court had declared that the first inquiry had to be addressed first, but in 2009, the Court abolished mandatory sequencing and held that courts may address the two prongs of the test in either order.

The Court emphasized in *Pearson v. Callahan* that “qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” In April 2012, the Supreme Court held that qualified immunity would even shield a private lawyer who worked for the government on a particular assignment.

In fact, the Court affirmed the viability and importance of the doctrine of qualified immunity four times in the October 2011 term, deciding in four significant cases that those who do the work of the government are entitled to protection from lawsuits if they act reasonably. Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and “protects

**Notes:**


105 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (“Adherence to *Saucier*’s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . .’”).

106 *Id.* at 231.


108 See *id.* (holding that a private attorney who performed an investigation for the government was entitled to qualified immunity); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012) (holding that police detectives who relied on an overbroad search warrant that had been approved by a magistrate were shielded by qualified immunity); *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (holding that police officers who entered a house without a warrant acted reasonably under the circumstances and were entitled to qualified immunity); *Reichle v. Howards*, 132 S. Ct. 2088 (2012) (holding that when an arrest was
'all but the plainly incompetent or those who knowingly violate the law.'”

In 2007, Justice Breyer had urged the majority to apply the doctrine of qualified immunity in Morse, stating, “[i]n order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of ‘qualified immunity.’”

Pointing out that the Supreme Court’s decision would have been unanimous if based on the question of qualified immunity (since even the dissent in Morse conceded that Principal Morse should not be held liable for confiscating Frederick’s banner), Justice Breyer emphasized the “longstanding principle that courts should ‘not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.’”

A discussion of qualified immunity in the school speech context can be found in the most recent Second Circuit opinion in Doninger v. Niehoff. That court addressed whether the principal and superintendent were entitled to qualified immunity for allegedly violating student Avery Doninger’s First Amendment rights in two instances: first, by preventing her from running for Senior Class Secretary as punishment for a blog post; and second, by preventing her and other students from wearing “Team Avery” t-shirts at the election assembly.

The Second Circuit turned first to the off-campus blog post and discussed whether the school officials had violated a clearly established constitutional right (the second prong of the Saucier test). In deciding that the right was not clearly established, the court stated, “Doninger has identified no case—and we are aware of none—that

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109 Messerschmidt, 132 S. Ct. at 1244–45 (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011)).
110 Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part). It should be noted that the majority proceeded to decide the First Amendment issue. Id. at 410.
111 Id. at 431 (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).
113 Id. at 346, 351.
114 In Pearson v. Callahan, 555 U.S. 223, 242 (2009), the Court held that the prongs can be addressed in any order, so a court is not required to examine the first prong before turning to the second one. See also Saucier v. Katz, 533 U.S. 194, 205 (2001).
Susan S. Bendlin

enunciates her supposedly bright-line principle strictly limiting the regulation of off-campus speech to *Tinker*-style circumstances or otherwise demonstrating a clearly established rule applicable to the specific circumstances of this case.”\(^{115}\) Moreover, the court indicated that the absence of a clearly established right was reinforced by the uncertainty as to whether *Fraser* applies “to plainly offensive off-campus speech.”\(^{116}\) This statement, left unexplained, seems contrary to the Supreme Court’s explicit statement that Fraser’s lewd and vulgar speech, if made off campus in a public arena, would have been protected speech.\(^{117}\) Nonetheless, based on uncertainty as to whether *Tinker* and *Fraser* apply to speech such as the blog post, the Second Circuit indicated that the school officials, Niehoff and Schwartz, did not violate a right that was “clearly established,” and were entitled to qualified immunity for their act of disciplining Avery for her blog post.\(^{118}\)

The Second Circuit’s determination that the right was not “clearly established” was dispositive.\(^{119}\) The court could have relied simply on its conclusion that the regulation of online speech is a confusing area, unaddressed by the Supreme Court, and even if the actions of Niehoff and Schwartz amounted to mistakes, those mistakes were reasonable because the law is unclear. However, the court went on to apply the *Tinker* “substantial and material disruption standard” to the off-campus blog post. The court concluded that it was “objective-

\(^{115}\) *Doninger IV*, 642 F.3d at 347–48. This author agrees that the applicability of *Tinker* to off-campus speech has become murky and unclear, but contends that *Tinker* applies only to speech that is characterized as school-supervised speech. Rather than launching immediately into an analysis of whether disruption was foreseeable, as the Second Circuit did, the first inquiry should have been whether the speech itself fell within the school’s purview.

\(^{116}\) *Id.* at 348.

\(^{117}\) Morse v. Frederick, 551 U.S. 393, 405 (2007) (stating that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected”).

\(^{118}\) *Doninger IV*, 642 F.3d at 351.

\(^{119}\) Case Note, *First Amendment – Student Speech – Second Circuit Holds that Qualified Immunity Shields School Officials Who Discipline Students for Their Online Speech – Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), cert. denied, No. 11-113, 2011 WL 3204853 (U.S. Oct. 31, 2011), 125 HARV. L. REV. 811, 815–16 (2012) (stating that the Second Circuit addressed only the second prong, and that it would have sufficed to have stated that “no Supreme Court or Second Circuit cases were close to being on point . . . [t]herefore, the law was not clearly established,” but that the court “waded into a detailed discussion of First Amendment doctrine . . .”).
ly reasonable” for the school officials to have foreseen disruption of
the school’s functions based on, for example, Avery’s plea for others to contact the “douchebags” in the office and “piss [them] off.”\textsuperscript{120} Therefore, the court reinforced its conclusion that qualified immunity was proper because, even if the school officials were mistaken, they acted reasonably and should be protected from suit.\textsuperscript{121}

As to the second allegation in \textit{Doninger}, that the officials violated her First Amendment right by preventing her from wearing a “Team Avery” t-shirt at the school assembly, the Second Circuit again concluded that the school administrators were shielded by qualified immunity.\textsuperscript{122} The court stated, “[w]e again focus on the second prong of the qualified immunity inquiry—whether, assuming that Doninger had a right to wear her t-shirt at the assembly, this right was clearly established.”\textsuperscript{123} “There was no question as to whether the expression occurred on campus; it was during a school assembly. The question was whether Avery’s constitutional right to express herself by wearing the shirt was clearly established.”\textsuperscript{124} The court analyzed whether the wearing of the t-shirts would foreseeably cause material and substantial disruption under the \textit{Tinker} standard. The court opined that even if Principal Niehoff misjudged the amount of disruption or misunderstood the legal standard, it was a reasonable mistake—“the very sort of mistake for which the qualified immunity doctrine exists to shield officials against unwarranted liability.”\textsuperscript{125}

That aspect of the \textit{Doninger} decision underscores the point that a school official can reach an incorrect conclusion but still be protected from suit if his or her decision or action was reasonable. If reasonable school administrators could disagree about whether it is constitutionally permissible to discipline a student in a given situation, then there is no “bright line”—there is no clearly established

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\item \textsuperscript{120} \textit{Doninger IV}, 642 F.3d at 348.
\item \textsuperscript{121} \textit{Id.} at 350–51.
\item \textsuperscript{122} \textit{Id.} at 351.
\item \textsuperscript{123} \textit{Id.} at 353.
\item \textsuperscript{124} \textit{Id.} at 354 (stating that “the mode of analysis set forth in \textit{Tinker} is not absolute” and the Supreme Court has not ruled out “the possibility that some such hitherto unrecognized grounds of regulation may exist”). The court, while indicating that \textit{Fraser}, \textit{Hazelwood}, and \textit{Morse} would not apply to this factual scenario, speculated as to whether \textit{Tinker} necessarily applies to all other types of school speech. \textit{Id.} Put differently, the query was whether various types of school speech could be regulated under any new or yet-to-be announced rule.
\item \textsuperscript{125} \textit{Id.} at 355.
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right. The test is not a subjective inquiry into what that particular school official thought at the time; rather, it is an objective standard as to whether reasonable school officials could disagree.\textsuperscript{126} Qualified immunity protects government officials when they make reasonable mistakes about the legality of their actions, and applies regardless of whether the error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions or law and fact.”\textsuperscript{127}

Offering qualified immunity in these situations does not, however, resolve the dilemma faced by school officials.\textsuperscript{128} Compassionate and competent administrators struggle to make the correct choices in tough situations, and the mere notion that they may be absolved from having to pay money damages is small comfort.

The courts’ resolution of whether qualified immunity applies can also be time-consuming, thereby sapping the resources of the school district and the individual while the litigation proceeds.\textsuperscript{129} In Doninger, for example, Principal Niehoff disciplined Avery Doninger in the spring of 2007, and Avery’s mother filed suit for injunctive relief shortly thereafter, claiming that the principal had violated Avery’s First Amendment rights.\textsuperscript{130} The federal district court acknowledged

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\item[126] Id. at 345-46.
\item[128] Id. (stating that qualified immunity protects government officials from liability for civil damages while it “balances two important interests—the need to hold public officials accountable while they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).
\item[129] Doninger III, 594 F. Supp. 2d 211, 220 (D. Conn. 2009) (“It is ‘an immunity from suit rather than a mere defense to liability’’ and “[a]s a result, the Supreme Court and the Second Circuit ‘repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’” (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) and Hunter v. Bryant, 502 U.S. 224, 227 (1991))).
\item[130] Doninger’s initial complaint was filed in Connecticut Superior Court, but defendants had it removed to the United States District Court for the District of Connecticut, which denied Doninger’s motion for a preliminary injunction asking the court to void the election results and require a new student council election. Doninger I, 514 F. Supp. 2d 199 (D. Conn. 2007). Doninger appealed, and the Second Circuit affirmed the denial. Doninger II, 527 F.3d 41, 54 (2d Cir. 2008). When Avery reached the age of majority, she was substituted for her mother as a plaintiff, but since the need for an injunction had been mooted by her graduation from high school, she pursued her claim for money damages. Both parties filed motions for summary judgment, and the federal district court denied Doninger’s motion and granted the school officials’ motion in part, but denied it in part. Doninger III, 594 F. Supp. 2d 211 (D. Conn. 2009). The
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that it was important to resolve immunity issues quickly, stating that “qualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’” Nonetheless, three years elapsed before the Second Circuit concluded that Principal Niehoff and Superintendent Schwartz were entitled to qualified immunity and could not be held liable for money damages.

In short, qualified immunity may protect school officials who discipline students for their cyberbullying speech, but it is not a satisfactory solution to the school administrator’s plight. It does not prevent aggrieved parents from initiating suits, nor does it protect school districts from the time-consuming and expensive preparation for litigation that they will face. The doctrine shields the individual only from money damages, does not apply to suits for declaratory or injunctive relief, and can take years before the court issues a definitive ruling.

V. Conclusion

Cyberbullying is all too often connected to tragedies that end up in the headlines. School administrators are called upon to police bullying and to maintain discipline during school-supervised activities, but the problem of cyberbullying extends far beyond the purview of public school officials. Only if the internet speech is determined to be “school speech” (based on a factual assessment of the totality of the circumstances) can school officials become actively involved in suppressing the messages and disciplining the speakers. Otherwise, it is up to other stakeholders such as parents, police, internet service providers, social workers, churches, psychologists, support groups, and legislators to create positive change and effective solutions. Nonetheless, if a school official, acting reasonably, mistakenly violates a student’s First Amendment rights, that administrator may

school officials appealed the partial denial on the issue of qualified immunity, and Doninger was granted to leave to appeal the partial grant of summary judgment to the defendants. Doninger IV, 642 F.3d at 344. The Second Circuit reviewed the partial grant and partial denial of summary judgment de novo, and held that the school officials were entitled to qualified immunity on the issue of punishing Avery for her blog post, and also on the issue of banning the wearing of “Team Avery” t-shirts. Id. at 344, 351.


132 Doninger IV, 642 F.3d at 338.
ultimately be shielded from litigation by qualified immunity. Such immunity from suit for money damages is not a satisfactory solution to the conflicting pressures that school administrators face, but it is a small piece of a remedy to a much larger problem.