Not Another Tween Tweet: Social Media, Schools, And a Return to Tinker

Benjamin P. Schroff
NOT ANOTHER TEEN TWEET: SOCIAL MEDIA, SCHOOLS, AND A RETURN TO TINKER

BENJAMIN P. SCHROFF*

I. Introduction .................................................................................................................. 604
II. Background .................................................................................................................. 606
   A. Constitutional Rights and Schools ........................................................................ 606
      1. Tinker ................................................................................................................... 606
      2. Tinker Exceptions ............................................................................................. 606
   B. Third Circuit Precedent and Student Rights ....................................................... 608
   C. Fifth Circuit Precedent and Administrative Deference .... .......................... 611
III. Analysis ....................................................................................................................... 615
   A. The Fifth Circuit’s Approach Encroaches on Tinker
      Because Its Deference to School Officials Reverses the
      Protections Provided in Tinker ............................................................................ 615
      1. The Fifth Circuit’s Shift of the Burden to Students
         Rather Than School Administrators Clearly Violates
         Tinker’s Placement of the Burden on Those
         Administrators .................................................................................................. 619
      2. The Fifth Circuit’s Prevention of School Shooting Basis
         for Off-Campus Speech Regulations is Compelling But
         Overbroad ......................................................................................................... 620
   B. The Third Circuit’s Approach Should be Adopted Because
      It Is Closer to Tinker’s Holding .......................................................................... 623
IV. Policy Recommendation .............................................................................................. 626
   A. The Department of Education Should Issue a Guidance on
      Student Free Speech on Social Media .................................................................. 626
   B. The Supreme Court Should Adopt the Third Circuit’s

* Benjamin Schroff is a Juris Doctor candidate at American University Washington College of Law. He received his B.A. in Social Relations & Policy and Comparative Cultures & Politics from Michigan State University in 2017. Ben would like to thank his editor, Jessica, for all of her support and help, as well as professors, family, & friends who work in schools for sparking his interest in Education Law. He would also like to thank all staffers for their guidance, edits, and support.
I. INTRODUCTION

In May 2017, a high school student received the news that she made the junior varsity cheerleading squad for her sophomore year.1 The student then learned that an incoming freshman placed on the varsity squad over her.2 In response to this, the student posted a picture of herself and a friend on Snapchat, displaying their middle fingers and saying “f school, f softball, f cheer, f everything.”3

Soon after the student’s post, the coaches of the cheer squad suspended the student for one year, citing the school’s Cheerleading Rules.4 After the school board refused to get involved, the student’s father filed suit in the District Court for the Middle District of Pennsylvania, alleging a violation of the student’s First Amendment rights because the student’s speech occurred off-campus.5 The District Court ruled in favor of the student because the student’s speech occurred off-campus and could not have created a substantial disruption to the school environment under the standard established in Tinker v. Des Moines Independent Community School District.6


3. See id. (citing Levy ex rel. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019)) (explaining that the student and her friend were not on campus at the time she made this statement, but rather out in the community in front of a local store).


5. See id. (explaining the background of the case and the Court’s grounds for its previous temporary restraining order and preliminary injunction in favor of the student).

6. See id. at 441 (citing Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 504 (1969)) (holding that the school district’s admission that the speech occurred off-campus is all but fatal to their argument).
School administrators have struggled to adapt to the Internet and social media, especially in regard to students’ speech rights. The Supreme Court has yet to fully adapt First Amendment precedent as it applies to students’ off-campus speech and the Internet. This confusion surrounding the Internet and students’ off-campus speech rights leads to inconsistency in the application of students’ speech rights under the First Amendment.

In Part II, this Comment will explain the general background of the First Amendment as well as Tinker and its various exceptions. Further, Part II will explain the current legal ground in the Third Circuit that favors student speech. Part II will also explain the Fifth Circuit’s precedent that gives deference to school administrations.

Part III will explain that the Fifth Circuit’s precedent parts from Tinker. Part III will then explain why the Third Circuit’s jurisprudence correctly protects students’ free speech rights under Tinker and its exceptions.

Part IV will suggest policy proposals to preserve students’ First Amendment rights in the form of a Department of Education guidance and the Supreme Court resolving the circuit split in favor of the Third Circuit. Finally, Part V concludes by reiterating that the Third Circuit’s holdings that students are free from school regulation in their off-campus speech is true to


8. See Morse v. Frederick, 551 U.S. 393, 400-01 (2007) (paring the difference between off-campus speech as part of a school event and off-campus speech generally).


10. See infra Part II (explaining that Tinker provides First Amendment rights for students and articulates a test upholding limits on speech only in cases where student speech would disturb the learning environment and discussing further precedent that provides narrow exceptions to Tinker).

11. See infra Part II (explaining Third Circuit precedent that holds that off-campus student speech is an area that school administrators cannot regulate).

12. See infra Part II (explaining Fifth Circuit’s deferential precedent to school administrations based on reasonableness factors).

13. See infra Part III (comparing Fifth Circuit’s deferential precedent with the Tinker standard that provides an affirmative right to free speech for students).

14. See infra Part III (discussing the Third Circuit’s precedent and its close reading of Tinker’s holding that students maintain First Amendment free speech rights).

15. See infra Part IV (recommending a regulatory and legal method to preserve students’ free speech rights).
the original holding in *Tinker.*

II. BACKGROUND

A. Constitutional Rights and Schools

1. *Tinker*

In *Tinker v. Des Moines Independent Community School District*, a number of students decided to wear black armbands to protest the Vietnam War. When school administrators learned that students would be carrying out this protest, they implemented a policy that prohibited the demonstration. Students would be suspended from school until they came back without the armbands. Despite this, students wore the armbands in protest and, as a result, were suspended from school.

In *Tinker*, the Supreme Court held that disciplining the students for wearing the armbands in protest violated their First Amendment rights. The Court reasoned that students’ free speech rights are not left “at the schoolhouse gate” and if the speech did not materially disrupt classwork or involve substantial disorder or invasion of the rights of others, it could not be disciplined.

2. *Tinker* Exceptions

In the years after *Tinker*, the Supreme Court delineated various exceptions to the *Tinker* test, granting school administrators greater deference in limited circumstances. The Court first recognized an exception to *Tinker* in *Bethel v. Fraser*.
School District v. Fraser, allowing school administrators to punish a student’s obscene speech.\textsuperscript{24} In Fraser, a student gave a speech that was sexually explicit in nature to a school wide assembly.\textsuperscript{25} As a result, the school district temporarily suspended the student.\textsuperscript{26} The Court held that this punishment was permissible because school administrators had an interest in preventing obscene speech in the learning environment.\textsuperscript{27}

The second exception comes in Hazelwood School District v. Kuhlmeier, allowing school administrators to regulate student newspapers because the school itself is the sponsor and controller of the speech.\textsuperscript{28} In Hazelwood, students sought to publish articles about student pregnancy and the impact of divorce on students.\textsuperscript{29} When the school refused to publish the material, the students sued in U.S. District Court under the First Amendment.\textsuperscript{30} On appeal, the Supreme Court held that the school itself was the sponsor of the speech and that the speech was tied to a scholastic purpose, allowing the school to regulate the speech.\textsuperscript{31}

Finally, the exception under Morse v. Frederick allows punishment for students whose speech promotes the use of illegal drugs.\textsuperscript{32} In Morse, students held up a sign saying “BONG HiTS [sic] 4 JESUS” during a parade

\textsuperscript{24} See Fraser, 478 U.S. at 686 (holding that schools may punish a student’s obscene speech).

\textsuperscript{25} See id. at 677-78 (explaining that students were required to attend an assembly where most of the students were fourteen years old and Fraser referred to his candidate with a graphic and explicit sexual metaphor).

\textsuperscript{26} See id. at 685 (holding that a two-day suspension is not an unreasonable form of punishment).

\textsuperscript{27} See id. (holding that a two-day suspension is not an unreasonable form of punishment).

\textsuperscript{28} See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that schools may exercise control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns).

\textsuperscript{29} See id. at 565 (explaining that although these articles used false names, students could be readily identified through the text).

\textsuperscript{30} See id. at 264 (highlighting that the district court denied an injunction).

\textsuperscript{31} See id. at 271 (holding educators are within their limits to regulate student speech when the student newspaper is a course that encourages student participation and to ensure that the views of the individual speaker are not erroneously attributed to the school).

\textsuperscript{32} See Morse v. Frederick, 551 U.S. 393, 403 (2007) (explaining that preventing student drug use provides a compelling interest).
that went by the school.\textsuperscript{33} The Court held that school administrators have a compelling interest in ensuring that speech aimed at promoting illegal drug use be banned from the school environment.\textsuperscript{34}

\textbf{B. Third Circuit Precedent and Student Rights}

The Third Circuit construes \textit{Tinker} and students’ speech rights broadly in favor of students.\textsuperscript{35} In \textit{Saxe v. State College Area School District}, the school district enacted an anti-harassment policy that prohibited any speech that would offend, denigrate, or belittle any student with certain characteristics.\textsuperscript{36} David Saxe, guardian of the student plaintiffs, filed suit arguing that the student plaintiffs were devout Christians who had a right to state their opinion that homosexuality was sinful and had harmful effects.\textsuperscript{37}

In its opinion, written by then Judge Alito, the Third Circuit held that harassment was not a categorical exception to the protections under the First Amendment.\textsuperscript{38} The court went on to explain that \textit{Tinker} required a specific and concrete threat of disruption to the school’s learning environment.\textsuperscript{39} On application of the \textit{Tinker} test, the court held that the policy was overbroad.\textsuperscript{40}

After this \textit{Tinker} formulation, the Third Circuit discussed off-campus

\begin{itemize}
  \item \textsuperscript{33} \textit{See id.} at 397 (highlighting that even though the students were across the street from the school, the sign could have been easily read by the students lined up on school property).
  \item \textsuperscript{34} \textit{See id.} at 407-08 (holding that student drug use is an issue in American schools and Congress has declared that a part of a school’s job is educating students about the dangers of illegal drug use).
  \item \textsuperscript{35} \textit{See generally} Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that there needed to be extenuating circumstances to discipline a student for off-campus speech); J.S. \textit{ex rel. Snyder} v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (holding that because the Myspace profile was created off-campus and was not brought on campus, the student could not be disciplined); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001) (holding that a policy was overbroad on application of the \textit{Tinker} test).
  \item \textsuperscript{36} \textit{See Saxe}, 240 F.3d at 202 (describing specific characteristics such as race and sexual orientation).
  \item \textsuperscript{37} \textit{See id.} at 203 (alleging that the student plaintiffs felt compelled by their religion to speak out but felt threatened by the new policy).
  \item \textsuperscript{38} \textit{See id.} at 204 (holding that the policy further prohibits speech that would not be considered harassment under federal or state law).
  \item \textsuperscript{39} \textit{See id.} at 211 (citing \textit{Tinker} v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 504 (1969)) (explaining that mere speech cannot be regulated but only speech that causes substantial disturbance of the learning environment).
  \item \textsuperscript{40} \textit{See id.} at 216 (explaining that the policy does not prohibit merely lewd or vulgar speech, but also regular speech that refers to certain characteristics).
\end{itemize}
speech in *J.S ex rel. Snyder v. Blue Mountain School District*.\(^{41}\) In *J.S*, a student and her friend created a profile on a social media platform, Myspace, that used lewd language to ridicule the principal of their school.\(^{42}\) Initially, the profile was available to public view, but was later listed as private which allowed the student to limit its viewing to certain audiences.\(^{43}\) The principal discovered the existence of the profile, but was unable to find the profile due to its privacy restrictions.\(^{44}\) Later, a different student told the principal who created the profile and printed out a copy of the webpage at the principal’s request.\(^{45}\)

The principal classified the creation of the profile as a high level violation of student conduct policy, stating that it made false accusations about school staff and violated the copyright of the school through use of the principal’s picture.\(^{46}\) As a result, the principal suspended the student for ten days and banned her from attending school dances.\(^{47}\) Additionally, the school district asserted that the student’s Myspace profile caused disruption to the school.\(^{48}\)

The Third Circuit held that no substantial disruption occurred.\(^{49}\) The court stated that *Tinker* could not be applied because the student created the profile as a joke and limited the viewship to her friends only.\(^{50}\) Further, students could not access the profile at school and the only copy brought into school

\(^{41}\) *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (explaining that the digital age creates a new realm of analysis for student speech).

\(^{42}\) *See id.* at 920 (stating that the lewd language included juvenile nonsense humor as well as profane attacks on both the principal and his family).

\(^{43}\) *See id.* at 921 (stating that the student changed the privacy setting due to other students approaching her at school to tell her they found the profile humorous).

\(^{44}\) *See id.* (highlighting the principal’s efforts to identify who created the profile: he contacted Myspace directly to discover who created the profile but they would not release that information without a court order; and later asked another student to bring him a copy of the profile to school).

\(^{45}\) *See id.* (explaining that this student was called to the office on an unrelated matter).

\(^{46}\) *See id.* (noting that the principal stated he did not believe the profile contained any actual allegations, contradicting previous statements).

\(^{47}\) *See J.S.,* 650 F.3d at 922 (stating that the students were suspended for ten days and describing the student’s verbal and written apologies to the principal and his wife).

\(^{48}\) *See id.* at 922-23 (stating that multiple teachers reported that their students were discussing the profile in class, despite returning to work when they were told).

\(^{49}\) *See id.* at 928 (noting that the parties did not contest that there was not a substantial disruption).

\(^{50}\) *See id.* at 929 (stating that the speech was not pervasive in the school environment under the *Tinker* standard).
was at the principal’s request. The court further stated that because the profile was so outrageous and juvenile, the statements could not be believed, and as a result, there could be no reasonably foreseeable disruption.

On the same day as *J.S.*, the Third Circuit also decided *Layshock v. Hermitage School District* on similar grounds. A student created a Myspace profile of his principal. The student listed other students as friends to the profile and soon after, most students at school had access to it. After the success of the first profile, other students created more profiles of the principal using more vulgar posts. Eventually, the principal discovered the existence of the profiles.

Shortly after, the student and his mother were called to a meeting with administrators. Despite this, the administrators took no disciplinary action at that time. Weeks later, the school district sent the student a letter of notice for an informal hearing, after which the student received a ten day suspension, placement in an alternative education program, a ban from extracurricular activities, and a ban on participating in the school’s graduation ceremony.

The Third Circuit held that there was no extenuating circumstance that

51. *See id.* (stating that the only disruptions caused were minor grumblings and the minor shifting of some officials rearranging their schedules).

52. *See id.* at 930 (explaining that the school district argued that the profile was accusatory in nature, but that no reasonable person would have found the profile to be serious).

53. *See Layshock, v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (Jordan, J., concurring)* (explaining that the *en banc* decisions were similar in fact and both decided on the same day).

54. *See id.* at 207-08 (explaining that the “parody profile” was created to ridicule the school principal).

55. *See id.* at 208 (stating that the profile “spread like wildfire” causing the student to be approached by classmates during school hours).

56. *See id.* (explaining that three other students created more profiles of the principal and that more students began to discuss the profiles).

57. *See id.* (stating that the principal also informed the co-principal and superintendent, while also asking the Technology Director to block the website on school grounds).

58. *See Layshock, v. Hermitage Sch. Dist., 650 F.3d 205, 209 (3d Cir. 2011) (en banc)* (stating that the student admitting to creating the profile).

59. *See id.* at 209-210 (following the school’s investigation into which students accessed Myspace on school computers to punish those responsible).

60. *See id.* (stating further that the school considered expelling the student and that he was the only student who had apologized for creating one of the profiles and was also the only student to be punished).
allowed the school district to punish the student for his off-campus speech.61 The Court stated that the student could not be punished for what constituted off-campus speech because the student had merely created a profile that made fun of the principal and that profile did not cause any kind of disruption at the school.62 The court held that the social media profile constituted speech that was entirely off-campus and the creation of it could not create a foreseeable substantial disruption to the school’s environment.63

C. Fifth Circuit Precedent and Administrative Deference

The Fifth Circuit takes an opposing view to the Third Circuit and advocates for an administrative deference rather than students’ free speech rights.64 In Burnside v. Byars, the principal of the school learned that students planned on wearing freedom buttons and decided to prohibit them because of potential disruption to the learning environment caused by students asking what the buttons were for.65 However, some students decided to wear the buttons anyway.66 Over the course of a few days, students continued to wear the buttons at school and were suspended.67

The parents brought suit against the school on First Amendment grounds.68 The Fifth Circuit held that students are protected from unreasonable rules set by school authorities.69 Because education is a field

61. See id. at 219 (holding that the school district conceded at oral argument that the student’s conduct caused no disruption at school, which was fatal to their argument).
62. See id. (holding that students found humor in the profile, but it did not interfere with their studies).
63. See id. (explaining that the case is utterly unremarkable because the rule is well known).
64. See generally Longoria ex rel. M.L v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267-68 (5th Cir. 2019) (holding that there are no clear standards for regulating off-campus speech; see also Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (holding that speech directed at the school community is available for regulation by school authorities).
65. See Burnside v. Byars, 363 F.2d 744, 746-47 (5th Cir. 1966) (explaining that the buttons were called “freedom buttons”); see also CIVIL RIGHTS TEACHING, https://www.civilrightsteaching.org/desegregation/blackwell-issaquena (last visited July 27, 2020) (explaining that “freedom buttons” were buttons supporting the Student Nonviolent Coordinating Committee and the Civil Rights Movement).
66. See id. at 747 (stating that this was in contravention of the principal’s announcement).
67. See id. (stating that the principal gathered those students in his office to discipline them).
68. See id. (filing a suit for injunctive relief for a violation of constitutional rights).
69. See id. at 747-48 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624,
that requires an orderly environment, the court reasoned that rules to maintain order are necessary. 70

The Fifth Circuit’s reasoning in Blackwell v. Issaquena City Board of Education was similar to its reasoning in Burnside, but with a different result. 71 In Blackwell, students similarly wore freedom buttons to school. 72 It was reported that the students were talking noisily in the hallway when they were supposed to be in class, and the principal told students to remove the buttons. 73 A week later, more students began wearing the buttons, handed them out to other students, and attempted to pin a button on another student without their approval, leading to a general disruption in the school’s educational environment. 74

The administration brought all students into the gym and told them that if they wore the buttons in the future, they would be suspended. 75 The day after, the students arrived with the buttons again and were sent home. 76 However, some of the students went back into the school building to hand out more buttons, convince other students to leave, and throw buttons into the school building through the windows. 77

The Fifth Circuit restated its rule from Burnside and reasoned that the students’ conduct was disruptive to the learning environment. 78 The court

637 (1943)) (explaining that citizens are protected from all state entities).

70. See id. at 748 (holding that maintaining public schools is a compelling government interest).

71. Compare Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966) (finding a wide disruption at the school due to the buttons) with Burnside, 363 F.2d at 748 (holding that there was only mild interest in the buttons with no disruption of any school functions).

72. See Blackwell, 363 F.2d at 750 (identifying the buttons as “freedom buttons”); see also CIVIL RIGHTS TEACHING, https://www.civilrightsteaching.org/desegregation/blackwell-issaquena (last visited July 27, 2020) (explaining that the buttons were part of a drive to get African Americans registred to vote).

73. See Blackwell, 363 F.2d at 751 (stating that the principal explained to the students that no one would be allowed to create a disturbance).

74. See id. (stating that a younger child began crying when another student attempted to pin the button on them and that the activity caused a general state of confusion).

75. See id. (highlighting that the principal explained to the students that banning the buttons was to maintain order and to prevent them from disrupting class time and other students).

76. See id. at 751-52 (explaining that classes were disrupted when the students who left encouraged other students to join them).

77. See Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 752 (5th Cir. 1966) (highlighting that more students attempted to pin buttons on students who did not ask for them, causing greater disturbance).

78. See id. at 753 (holding that the issue in Burnside and Blackwell are the same but
held that because the buttons were causing wide disorder, undermining the school authority and a lack of decorum, the regulation was justified to maintain order and decorum in the academic environment.\footnote{See id. (arguing that this regulation was necessary to properly instruct students and prevent disorder at school).} Similarly, in \textit{Bell v. Itawamba County School Board}, the Fifth Circuit considered the case of a student who posted a recording of a rap song he created with lyrics that directly accused the school coaches of sexual misconduct and even threatened them.\footnote{See \textit{Bell v. Itawamba Cty. Sch. Bd.}, 799 F.3d 379, 383-84 (5th Cir. 2015) (explaining that three versions of the rap recordings were introduced at trial, each of which referenced a gun in the coach’s mouth).} The student posted the recording on his Facebook page, making it viewable to the general public.\footnote{See id. at 385 (explaining that this was evidenced by a screenshot entered into the record and the public privacy setting was important to show the student’s intent).} Later, one of the coaches received a text from his wife regarding the recording. As a result, the coach asked the student about its content and later reported the video to the principal who in turn reported it to the superintendent.\footnote{See id. (stating that the coach immediately reported the recording to the school’s principal after listening to it on a student’s smartphone).} The next day, school administrators questioned the student about the recording.\footnote{See id. (explaining the seriousness of the allegations he included in his rap and the veracity of the claims).} The student created a finalized version of the recording and uploaded it to the online video channel, YouTube.\footnote{See id. (highlighting that the student posted this new version after discussing the original with school officials and the new version still including the allegations against the coaches).} The next school day, the school administration suspended the student, pending a disciplinary hearing, as to whether the student harassed, threatened, or intimidated coaches.\footnote{See \textit{Bell v. Itawamba Cty. Sch. Bd.}, 799 F.3d 379, 385 (5th Cir. 2015) (explaining that school policy considered this to be a “severe disruption”).} At the school’s disciplinary hearing, the student stated that the Facebook version of the recording was for people to listen to locally and that the YouTube version of it was intended for music labels to discover.\footnote{See id. at 386 (stating that the student acknowledged that he posted the rap recording on Facebook knowing that students would find it). When asked about a specific line in the lyrics of his rap that discussed putting a gun in the coach’s mouth, the student stated that he did not mean to shoot

the facts are distinguishable in that the students in \textit{Blackwell} created great disturbance in the school).
someone, and he was just foreshadowing an occurrence. The disciplinary committee upheld the student’s suspension and all appeals at the administrative level failed, causing the student to bring the lawsuit in district court.

The Fifth Circuit refused to adopt a rule regarding off-campus speech. Further, the court stated that the student expected people to listen to his rap recording, and given that all students had access to Facebook, the Court reasoned that the student was directing his recording specifically at the school community. Additionally, the Court held that Tinker applied and gave deference to the school’s administration by applying a standard of reasonableness. The Court also explained that this deference is needed in a time of school shootings, and that administrators need only a foreseeable school shooting to satisfy the foreseeable substantial disruption requirement.

Most recently, the Fifth Circuit decided Longoria v. San Benito Independent Consolidated School District. There, a student became the head varsity cheerleader at her school and was required to sign the Cheerleading Constitution, which had a social media policy. Shortly after this promotion, the student was dismissed from the team due to a buildup of demerits from her Twitter activity. The court listed ten sexually explicit tweets the student had interacted with, each of which constituted a demerit. The student’s account explicitly stated that she was a member of the school’s cheer squad; the only direct link between the student’s account and the

87. See id. (providing another version of the rap at his hearing that did not match the others).
88. See id. at 387 (including an appeal to the school board which was immediately denied).
89. See id. at 394 (holding that the Court did not have to adopt a general rule because cases like these could be decided on a case-by-case basis).
90. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (holding that the student did not deny this fact).
91. See id. at 397 (holding that reviewing issues such as these is delegated to a “neutral corner of reasonableness”).
92. See id. at 399-400 (explaining that events like Columbine must be prevented).
93. See Longoria ex rel. M.L v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 261 (5th Cir. 2019) (having been decided on November 4, 2019, showing that the court factually distinguished each case).
94. See id. (explaining the duration of the student’s period as head cheerleader: remainder of the present school year and the entirety of the next school year).
95. See id. at 261-62 (stating that both the student and her mother were called to a meeting with the two coaches of the squad to discuss behavioral issues).
96. See id. at 262.
school.\textsuperscript{97}

The Fifth Circuit held that there is no clear standard as to students’ off-campus speech rights and school discipline, especially extracurricular discipline.\textsuperscript{98} The court also mentioned that both the student and her mother signed the Cheerleading Constitution, that the student mentioned the cheer squad in her Twitter bio, and that the student was suspended from an extracurricular activity rather than the school itself.\textsuperscript{99} The court deferred to the school on this issue because there was no general rule subscribed to the court.\textsuperscript{100}

III. ANALYSIS

A. The Fifth Circuit’s Approach Encroaches on Tinker Because Its Deference to School Officials Reverses the Protections Provided in Tinker.

The Fifth Circuit’s pre-\textit{Tinker} precedent drew the line between student speech and administrative regulation by distinguishing that student speech that did not disrupt the classroom would be allowed.\textsuperscript{101} This framework bears strong similarities to the \textit{Tinker} test that was later adopted by the Supreme Court.\textsuperscript{102} \textit{Tinker} broadly held that students maintain their free speech rights while on campus grounds.\textsuperscript{103}

Since \textit{Tinker}, however, the Fifth Circuit has developed a system of deference for school administrators, especially regarding off-campus speech

\textsuperscript{97} See id. (stating that the account said she identified herself as a member of “San Benito Varsity Cheer”).

\textsuperscript{98} See Longoria \textit{ex rel. M.L} v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267-68 (5th Cir. 2019) (holding that their precedent is uncertain and sends “inconsistent signals” because there is no clear rule).

\textsuperscript{99} See id. at 268-69 (explaining that these facts heavily distinguished the case from both \textit{Bell} and Supreme Court precedent such as \textit{Tinker} and \textit{Morse}).

\textsuperscript{100} See id. at 269 (holding that because there was no general rule provided by case law, the Court would abstain from declaring a First Amendment violation).

\textsuperscript{101} Compare Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966) (holding that there was wide disruption at the school due to the buttons) \textit{with} Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966) (holding that there was only mild interest in the buttons).

\textsuperscript{102} See \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside, 363 F.2d at 749) (holding that without a substantial disruption school officials cannot regulate student speech and a mere desire to avoid discomfort is not enough to regulate student speech).

\textsuperscript{103} See id. at 508 (explaining that the case at bar involved speech similar to pure speech).
and social media. The Fifth Circuit reasons that without a clear, general rule, administrators should be given deference to ensure an orderly school environment. Despite this reasoning, the Tinker test clearly provides a framework for student speech and implies that off-campus student speech follows regular free speech regulation under the First Amendment. Even if Tinker did not provide a standard for student speech, it is the job of the judiciary to clarify these constitutional rules under its own precedent for administrators to follow.

This deference fundamentally shifts the burden from administrators to students. Tinker directly placed this burden on school administrators to show that they were reasonably disciplining students for speech that substantially disturbed the school environment. By stating that there is no clear rule for off-campus speech, and by extension, speech on social media, the Fifth Circuit undermines the protections that Tinker provides to students. This shifting of the burden is impermissible because students hold First Amendment rights and restricting those rights can only occur if there is a substantial disruption. This is a high bar that can only be met in limited circumstances.

104. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397, 400 (5th Cir. 2015) (allowing school administrators large latitude through the application of a reasonableness test for administration action and regulation).
105. See Longoria, 942 F.3d at 269 (holding that administrators are not on notice and cannot be held to a nonexistent standard).
106. See Tinker, 393 U.S. at 506 (holding that students do not lose their free speech rights at the schoolhouse gate, implying that students have clear free speech rights outside of the school setting).
107. See Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that it is the job of the judiciary to say what the law is).
108. See Longoria, 942 F.3d at 269 (holding that administrators cannot be held to a standard that does not exist); Bell, 799 F.3d at 397 (highlighting a reasonableness test for school administrators in student speech discipline).
110. Compare id. (stating a rule that there needs to be a substantial interference with the school environment for administrators to punish students for speech); with Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 269 (5th Cir. 2019) (holding that administrators’ decisions cannot be overturned without a clear rule).
111. See Tinker v. Des Moines Indep Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (stating that student First Amendment rights exist in the school setting, but with a different context in the special environment a school entails).
112. See Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that if a school could discipline students based on a broad education mission
Schroff: Social Media, Schools, And a Return to Tinker

Tinker’s exceptions also follow this framework of preventing school administrators from regulating off-campus speech.113 The Fifth Circuit instead allows school administrators to regulate off-campus social media speech if that speech is likely to reach the school environment and potentially cause a disruption.114 This contradicts Tinker in its purest form.115 Tinker allows regulation of in-school speech only when the speech is substantially likely to cause a disruption in the learning environment.116 In dictum, the Court also stated that student speech rights do not end “at the schoolhouse gates;” it follows that full First Amendment rights apply to students off-campus.

Further, the exceptions to Tinker make it clear that they are narrow decisions about very specific categories of speech.118 The broad rulings of the Fifth Circuit open the door for school administrators to not only regulate any kind of student speech, but also allows administrators to regulate speech in any location.119 Even though extracurricular activities offered through schools provide a special context, removal from a team for a student’s speech violates Tinker.120 There is no narrow category in the Fifth Circuit’s statement then the school could conceptually punish any speech).

113. See Morse v. Frederick, 551 U.S. 393, 403 (2007) (explaining that the principal was regulating speech at a school event rather than merely off-campus speech); see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (allowing administrators to regulate obscenity during a school rally).

114. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 395, 397 (5th Cir. 2015) (reasoning that a student’s intent matters in a Tinker analysis, that the student intended the rap to reach the school, and that the 5th Circuit will defer to administrators’ interpretation of “substantial disturbance”).

115. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that student speech may only be regulated if there is foreseeable substantial disruption).

116. See id. at 509 (explaining that schools can ensure proper discipline).

117. See id. at 506 (highlighting that students and teachers do not “shed” speech rights).

118. See Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that student speech regarding illegal drugs may be regulated, even if off-campus but at a school event); see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 294, 271 (1988) (holding that school newspapers are an arm of the school and thus can be regulated by the school); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (holding that lewd speech by students can be regulated).

119. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (holding that any off-campus speech aimed at the school is available for discipline).

120. Compare Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 268-69 (5th Cir. 2019) (explaining that both student and parent had signed the Cheerleading Constitution and understood what it said); with Levy ex rel. B.L. v.
precedent of off-campus speech because the current precedent applies a reasonableness standard to off-campus speech rather than the \textit{Tinker} substantial disruption rule.\textsuperscript{121}

The Supreme Court has held that students in extracurriculars, namely on athletic teams, are role models for other students.\textsuperscript{122} Even if student athletes have this role model effect, their speech cannot be regulated off-campus just because of their place as a student athlete.\textsuperscript{123} \textit{Tinker} makes no distinction between student speech and student athlete speech.\textsuperscript{124} The special context of extracurriculars is evidenced by the extra contract and rules that students must abide by.\textsuperscript{125} However, there is a split on whether these extra burdens can extend to further curtailing student speech.\textsuperscript{126}

This split is entirely without merit because the Supreme Court has not severed student athlete speech rights from student speech rights generally.\textsuperscript{127} Holding that student athletes are subject to lesser constitutional free speech protections further shifts the burden from school administrators to justify their regulations to students to justify why their speech is protected.\textsuperscript{128}

---

\textsuperscript{121} \textit{Mahanoy Area Sch. Dist., No. 19-1842, 2020 WL 3526130, at *12 (3d Cir. June 30, 2020)} (holding that the \textit{Tinker} test does not apply to off-campus speech and the school district’s punishment violated the First Amendment).

\textsuperscript{122} \textit{Compare} Morse v. Frederick, 551 U.S. 393, 409 (2007) (explaining that the Court’s ruling is a narrow one); \textit{with} Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267 (5th Cir. 2019) (highlighting the necessity to defer to administrators).

\textsuperscript{123} \textit{See} Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995) (holding that if student athletes are subject to random drug testing, the athletes would not do illegal drugs and the role model effect would be dispersed).

\textsuperscript{124} \textit{Compare} Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 268-69 (5th Cir. 2019) (explaining that the student was bound to the Cheerleading Constitution that she signed); \textit{with} Levy ex rel. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 442-43 (M.D. Pa. 2019) (explaining that a school cannot punish a student athlete based solely on their speech).

\textsuperscript{125} \textit{See} Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding broadly that students have First Amendment rights on campus).

\textsuperscript{126} \textit{See} Longoria, 942 F.3d at 268-69 (explaining that the student took on the extra burdens by signing the Cheerleading Constitution).

\textsuperscript{127} \textit{See} Tinker, at 511. (holding that all students have First Amendment speech rights).

\textsuperscript{128} \textit{Compare} Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 270-71 (5th Cir. 2019) (holding that punishing the student was reasonable under the Cheerleading Constitution); \textit{with} Levy ex rel. B.L. v. Mahanoy Area Sch. Dist., 376 F.
I. The Fifth Circuit’s Shift of the Burden to Students Rather Than School Administrators Clearly Violates Tinker’s Placement of the Burden on Those Administrators

The shift in the Fifth Circuit’s precedent from a student rights focus to administrative deference is especially shocking considering that the Supreme Court used the Fifth Circuit’s reasoning in deciding Tinker.129 The dissent in Tinker foresaw issues in the burden placed on school administrators, seeing the majority as placing the burden on the challenging party rather than the school.130 However, the majority in Tinker held that the administrators can only punish a student if the speech causes a substantial disruption, and that a “mere desire” to prevent unpopular ideas from surfacing in the school environment is not enough to prevent a student’s “pure speech.”131

The Fifth Circuit relies on the fact that the Supreme Court has not yet ruled on off-campus speech as it relates to social media.132 Because of this, the Fifth Circuit has decided that deference to school administrators is the closest way to follow the Tinker standard.133 However, this is a misguided line of reasoning, as the Supreme Court has made it clear that students have First Amendment protections, even at school, and that only very narrow exceptions apply to those protections.134

Supp. 3d 429, 442-43 (M.D. Pa. 2019) (holding that a student could not be punished solely on the basis of being an athlete).

129. Compare Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (explaining that student speech that does not harm the learning environment must be permitted); with Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (explaining that schools cannot forbid speech they merely do not want to deal with)).


131. See id. at 509 (holding that unpopular views can be seen as unpleasant).

132. See Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 269 (5th Cir. 2019) (highlighting that the student’s rights were debatable due to the lack of a rule).

133. See id. (holding that student off-campus speech rights are not clear); see also Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) (holding that off-campus speech directed at the school is punishable); Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966) (holding that schools may punish disruptive conduct on campus).

134. See Morse v. Frederick, 551 U.S. 393, 408 (2007) (holding that student speech about illegal drugs can be punished); see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that school newspaper regulations are valid); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (holding that lewd student speech can be punished).
The Court has held that student speech rights at school are less than they would be off-campus.\(^{135}\) However, this does not aid the Fifth Circuit’s approach because if so, student off-campus social media speech would be afforded even greater protection.\(^{136}\) Deference in these cases would go against these constitutional protections because the educational nexus is missing.\(^{137}\) The Supreme Court has held that an educational nexus allows \textit{Tinker} to come in to play, but \textit{Tinker}’s test would still require a substantial disruption to the learning environment.\(^ {138}\) Holding that a student’s off-campus social media use aimed at disappointment for not making an extracurricular team is sufficient for an educational nexus defeats the Fifth Circuit’s reasoning that extracurriculars are a privilege rather than a guarantee of the school.\(^{139}\)

2. \textit{The Fifth Circuit’s Prevention of School Shooting Basis for Off-Campus Speech Regulations is Compelling But Overbroad}

The prevalence of school shootings over the years makes them a compelling concern for school administrators.\(^{140}\) While the planning and communication of these shootings generally occur off-campus, this should not protect that speech from discipline when brought to the attention of school administrators.\(^{141}\) However, the Fifth Circuit’s ruling that administrators may punish this speech is the exception that swallows the

\(^{135}\) \textit{See} Morse v. Frederick, 551 U.S. 393, 396-97 (2007) (quoting Bethel Sch. Dist. V. Fraser, 478 U.S. 675, 682) (explaining that student speech rights in public schools are not coextensive with those of adults in other settings)).

\(^{136}\) \textit{See} Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that administrators can only punish a student under \textit{Tinker} or its exceptions if the student’s off-campus expressive conduct caused a substantial disruption in school, as if the conduct had occurred there).

\(^{137}\) \textit{See id.} at 216 (citing Morse v. Frederick, 551 U.S. 393, 404 (2007)) (explaining that a student’s conduct on social media outside of school can only be available for punishment unless there is foreseeable substantial disruption at the school itself).

\(^{138}\) \textit{See Morse v. Frederick,} 551 U.S. 393, 400-01 (2007) (holding that this is a school speech case because it was a school sanctioned activity and occurred on school property and across the street from the school).

\(^{139}\) \textit{Compare} Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 270 (5th Cir. 2019) (holding that there is no rule that would put administrators on notice that extracurricular activities would have the same protection as other school discipline); \textit{with} Morse v. Frederick, 551 U.S. 393, 400-01 (2007) (holding that school discipline can be based on school sanctioned events and activities).

\(^{140}\) \textit{See} Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) (explaining that new technologies increase threats).

\(^{141}\) \textit{See id.} (highlighting that the Internet allows this communication from any location).
rule. 142

_Tinker_ exceptions carve out exceptions to student speech rights to maintain an orderly school environment. 143 _Morse_ even specifically notes that administrators are able to protect their students from illegal activity, or the promotion of illegal activity. 144 While school administrators cannot generally regulate off-campus student speech, the nexus between off-campus speech and the school cannot be parsed when the speech discusses a plan to carry out a school shooting. 145

There is no difficulty in distinguishing between harmless student speech that would have not cause harm on the school environment and speech aimed at harming the school environment. 146 However, certain kinds of speech are open to misinterpretation due to hyperbole, such as the artistic expression in _Bell_. 147 Because _Bell_ concerned a rap created by a student, and the student claimed that the rap merely made artistic hyperbole, the court analyzed the intent of the student. 148 In doing so, the court looked to objective factors both inside and outside the school. 149

The student himself stated that he wanted the rap to be viewed by students at the school, and that it foreshadowed what could come to pass. 150 This language in and of itself speaks to a very specific action that would

142.  _See id._ at 394 (holding that school administrators could punish a student for his off-campus rap that explicitly discussed shooting a coach).

143.  _See Morse v. Frederick_, 551 U.S. 393, 404 (2007) (explaining that administrators must be able to keep order).

144.  _See id._ at 394 (holding that a principal may restrict student speech when it is “reasonably viewed as promoting illegal drug use”).

145.  _See Bell v. Itawamba Cty. Sch. Bd._, 799 F.3d 379, 392 (5th Cir. 2015) (highlighting that the Internet creates new considerations with threats to schools).


147.  _See Bell v. Itawamba Cty. Sch. Bd._, 799 F.3d 379, 391 (5th Cir. 2015) (explaining that the administrators could have reasonably foreseen a substantial disruption).

148.  _See id._ at 393 (holding that threats and harassment intentionally directed at the school community are issues administrators need to be able to handle quickly and efficiently).

149.  _See id._ at 396 (explaining the student’s admitted intent and dictionary definitions).

150.  _See id._ at 386 (claiming that he himself would not shoot someone but that the shooting might happen).
substantially disrupt the education environment. Under the Tinker test, school administrators are allowed to punish student speech when there is a foreseeable substantial disruption to the learning environment. A foreseeable shooting is enough to satisfy this burden.

Overall, the Court has held that the Morse exception to Tinker allows school administrators to punish student speech when it promotes illegal drug use. The illegality of school shootings and the massive disruption shootings bring to the school environment preclude this area of off-campus student speech from protection. Students’ rights to off-campus speech are not absolute, just as an adult’s free speech rights are not absolute.

The wide holding in Bell allowed administrators to prevent a potential school shooting, but when explained in Longoria, the court reasoned that Bell was a case that did not create a rule. However, the use of the same deference in Longoria as used in Bell can hardly be seen as protecting students from school shootings, as it claimed to do. The Fifth Circuit’s broad application of deference to school administrators allows this protective rule to apply to an unlimited amount of student speech.

151. See id. at 382 (holding that threats to teachers could create a foreseeable substantial disruption).

152. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507, 513 (1969) (holding that student speech rights are not coextensive with adults and that administrators must be allowed to maintain the learning environment).

153. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 393 (5th Cir. 2015) (holding that school shootings make fast and efficient administrator responses mandatory).

154. See Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that administrators can restrict speech promoting illegal drug use).

155. Compare Morse v. Frederick, 551 U.S. 393, 403 (2007) (explaining that administrators can prevent student speech that promotes illegal drug use); with Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) (explaining that the Internet creates problems with student speech because it can occur anywhere).

156. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-07 (1969) (holding that students do not shed their First Amendment rights when they enter school, but they are subject to the authority of school administrators to some extent).


158. See Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 271 (5th Cir. 2019) (explaining the lack of a clear law protecting the student’s rights meant the administrators were not liable).

159. See id. at 270 (rebuffing Bell as a rule but applying the same level of deference).
B. The Third Circuit’s Approach Should be Adopted Because It Is Closer to Tinker’s Holding.

There is a lack of clear standards when it comes to regulating off-campus student speech. However, with Tinker’s clear demarcation between students in the school environment and students in society, the issue becomes more complicated due to the Internet’s influence. Courts have admitted to the difficulty in parsing between off-campus speech and administrator interests when it comes to Internet speech.

The Third Circuit’s approach to student off-campus speech on social media holds tight to the Tinker test in assuming that Tinker applies. Exceptions to Tinker allow for regulation of off-campus regulation of speech. However, this regulation is tied to the learning environment, and the specific exception that allowed off-campus regulation was tied to a specific nexus. In fact, the Third Circuit has gone further to expressly disclaim the idea that the geographical bounds of school administrator power is without limitation.

Recent developments in the realm of social media have again tested Third Circuit precedent. B.L. explicitly explained that a school district admitting


162. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) (explaining that the Internet creates new questions with regard to student speech).

163. See Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (affirming the district court’s conclusion that the student’s punishment was impermissible under Tinker because there was no nexus between the student’s speech and a disruption in the learning environment of the school).

164. See Morse v. Frederick, 551 U.S. 393, 400-01, 403 (2007) (holding that a principal can regulate student speech at a school event that promotes illegal drug use even if not directly on school property).

165. See id. at 400-01 (explaining that the students were across the street from the school and were there as part of the school’s viewing of a parade).

166. See Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (holding that the school yard concept has boundaries).

that a student’s speech occurred off-campus is unavailable for punishment. Social media is a forum that can be mobile and even brought into the school, but the mobility of social media does not allow for off-campus speech to become on-campus speech based solely on where the social media is viewed. The Third Circuit’s broad rule protecting student off-campus speech follows the spirit of Tinker and its exceptions by limiting the administration rather than students.

The Third Circuit has widely held that the burden is on the school administrators to justify their punishments for student speech. This line of precedent flows from Tinker and its exceptions and upholds their essential First Amendment interpretations. The narrowness of the Tinker exceptions show an unwillingness from the Court to provide a blank check to school administrators in limiting student free speech rights. The Court has rather explicitly stated that these exceptions are meant to be narrow in order to preserve as much speech as possible.

The Third Circuit’s precedent follows this narrowness. The Circuit


169. See Levy ex rel. B.L. v. Mahanoy Area Sch. Dist., No. 19-1842, 2020 WL 3526130, at *5 (3d Cir. June 30, 2020) (holding that the school district’s argument fails because the speech was not on campus).


171. See generally Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (holding that because there was no disruption caused by the student’s speech he could not be punished); Snyder ex rel. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011) (holding that the student could not be disciplined because the school principal could not show that it negatively impacted the school environment).

172. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-13 (1969) (holding that students are entitled to First Amendment protections unless their speech disrupts the school); see also Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that schools may prevent student speech that promotes illegal drug use); see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686 (1986) (holding that schools may regulate and prohibit obscene speech).

173. See Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that allowing a school to regulate speech based on its educational mission would give schools a “license” to suppress speech).

174. See id. (stating approval over the Court’s narrow holding).

175. Compare Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011)
often ensures the rights of students to speak because it holds to the substantial disruption test in *Tinker* rather than any standard of reasonableness. When deciding novel cases regarding student speech in the digital age, courts must draw from Supreme Court precedent rather than deferring to school officials. To hold otherwise ignores precedent and narrow rules aimed at preserving constitutional rights.

Finally, the Third Circuit upholds that there must be a foreseeable threat to the learning environment for student speech to be regulated. The location of the speech is important for this analysis. However, issues with establishing where the speech occurs on the Internet is a difficult question. Unlike the Fifth Circuit, the Third Circuit has held that there must be a sufficient nexus between the Internet speech and the school for punishment to be available.

The Third Circuit’s precedent follows *Tinker* and its exceptions’ by providing wide latitude to student speech and requiring school administrators to show a foreseeable substantial disruption to the school environment for punishing a student’s speech. The Circuit widely assumes that off-campus

(explaining that the student’s speech occurred off-campus and did not constitute significant disruption on campus); with *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that if a school could discipline students based on a broad education mission statement then the school could conceptually punish any speech).


177. *See generally Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 390, 392 (5th Cir. 2015) (highlighting that *Tinker* exceptions are essential to deciding a novel issue regarding social media punishment); *see also Snyder ex rel. J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (explaining that an essential part of determining the legal standard is interpreting *Tinker* and its exceptions).


179. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 214 (3d Cir. 2011) (explaining that speech that merely enters the school environment is not enough).


181. *See id.* (holding that student Internet speech can reach into a school and cause issues).

182. *See Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (explaining that just because speech reaches into the school does not mean that there is a substantial disruption).

183. *See generally Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that because there was no substantial disruption caused by the student’s
speech remains an area where the school has no power of discipline, following closely to Tinker’s tie to the “schoolhouse gates.”\textsuperscript{184} This precedent shows a sound reading of Tinker and its exceptions and preserves the rights of students to speak.\textsuperscript{185}

Ultimately, the Third Circuit’s precedent on off-campus student speech correctly follows Tinker and its exceptions.\textsuperscript{186} The Circuit maintains the broad proposition of Tinker and the narrowness of Tinker’s exceptions.\textsuperscript{187}

IV. POLICY RECOMMENDATION

A. The Department of Education Should Issue a Guidance on Student Free Speech on Social Media

The Department of Education releases guidance about vast areas of student interest and welfare.\textsuperscript{188} However, the Department of Education only has one guidance about the First Amendment and student speech.\textsuperscript{189} This guidance merely assures schools that the Department’s regulations are not meant to curtail student speech rights rather than applying any affirmative protections for students.\textsuperscript{190}

\textsuperscript{184} See generally Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that because there was no disruption caused by the student’s speech he could not be punished); Snyder ex rel. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011) (holding that the school principal could not punish the student because he could not show that it negatively impacted the school environment).

\textsuperscript{185} See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1968) (holding that students have First Amendments rights as long as they do not interfere with the learning environment); see also Morse v. Frederick, 551 U.S. 393 (2007) (holding that student speech involving illegal drug use is not protected); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that lewd speech remains unprotected).

\textsuperscript{186} See Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (holding that administrators must have a substantial reason to curb student speech).


\textsuperscript{188} See generally Gerald A. Reynolds, FIRST AMENDMENT: DEAR COLLEAGUE, U.S. DEP’T OF EDUC. (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html (explaining the Department’s dedication to working within constitutional restraints).

\textsuperscript{189} See id. (confirming the Department’s policy position).

\textsuperscript{190} See id. (explaining that while the Department will enforce statutes that prohibit discrimination, none of those regulations should be taken to mean that the Department...
In order to more effectively protect student rights before administrators violate their rights, the Department of Education should adopt a guidance that provides examples of how to treat student speech. These examples can be taken from case law across the country and provide a reminder about Tinker and its exceptions. Off-campus student speech rights could be its own section within this guidance. Because social media is a new area of the law, the guidance can get ahead of infringements of student rights.

B. The Supreme Court Should Adopt the Third Circuit’s Formulation of Off-Campus Student Speech Rights

B.L. was recently decided by the Third Circuit, holding specifically that school administrators may not regulate offf campus student speech. The school district petitioned for certiorari and the Supreme Court should grant it in this case to resolve the circuit split between the Third and Fifth Circuits and provide a clear rule for off-campus student speech.

By resolving a circuit split, the Supreme Court allows for uniformity of federal law. Uniformity is especially important when it comes to Constitutional rights. The Fifth Circuit specifically cites to the lack of a clear rule from the Supreme Court regarding off-campus student speech. The Third Circuit does not see this lack of a rule. If the Supreme Court grants certiorari, this split can be remedied.

Further, the Supreme Court should adopt the Third Circuit’s precedent.

will curtail First Amendment rights).

191. See id. (describing multiple ways that the Department will protect speech).

192. See id. (explaining which schools regulations affect and how).

193. See id. (showing different sections of enforcement).

194. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 392 (5th Cir. 2015) (explaining the novelty of the Internet and the lack of guidance).


196. See generally Petition for Certiorari Mahanoy Area School District v. B.L., (No. 20-255) (stating that the Supreme Court has not ruled on the issue of student off-campus speech, the circuits would apply a reasonableness standard).

197. See generally Martin v. Hunter’s Lessee, 14 U.S. 304, 347-48 (1816) (holding that uniformity of the laws is an important federal interest).

198. See id. (holding that uniformity of the Constitution is paramount).

199. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397 (5th Cir. 2015) (explaining that there is no clear rule on student off-campus speech).

As argued above, the Third Circuit closely follows current Supreme Court precedent. The Supreme Court has noted that limits on student speech should be narrow. The Third Circuit’s precedent follows in that line of precedent and holds closely to the Tinker test.

V. CONCLUSION

Tinker was decided to protect student free speech from unreasonable discipline from school administrators. Exceptions to Tinker follow this broad constitutional goal by providing narrow circumstances where administrators are able to regulate speech. Social media complicates this student friendly precedent because it allows off-campus student speech to permeate onto the school’s campus.

However, Tinker’s broad constitutional goal remains. The Fifth Circuit turns the Tinker analysis on its head by shifting the burden from the administrators to the students. This defeats the purpose of the First Amendment and student speech rights in the first place.

Conversely, the Third Circuit maintains that the burden remains on the school administrators to show a substantial cause for discipline when a student’s speech is involved. Off-campus social media speech remains

201. See, supra, Part III-B.
202. See Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (stating that it is important that the Court’s decision is narrow).
203. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (explaining that students have First Amendment rights and administrators need to foresee a substantial effect on the school environment to regulate it).
204. See Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that schools may punish student speech that promotes illegal drug use); see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988) (holding that schools may censor student publications because the school controls and manages it); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686 (1986) (holding that schools may punish and prohibit obscene speech).
205. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 399 (5th Cir. 2015) (explaining that the student’s rap had been viewed and discussed on campus).
206. See Morse v. Frederick, 551 U.S. 393, 396 (2007) (reaffirming Tinker and explaining that its holding remains important).
207. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 397 (5th Cir. 2015) (allowing school administrators to regulate student speech through reasonableness).
off-campus even though social media is transient in nature. To rule otherwise is to disregard *Tinker* and First Amendment rights for students.

210. See *id.* (explaining that the student’s speech on Snapchat was clearly off-campus).

211. See *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (explaining that allowing a school to regulate speech based on its educational mission would give schools a “license” to suppress speech).