SCHOOL ADMINISTRATORS AS CYBER CENSORS: CYBER SPEECH AND FIRST AMENDMENT RIGHTS

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I. INTRODUCTION

The First Amendment to the United States Constitution protects "freedom of speech,"[1] including freedom of "expression" (symbolic, written, or other nonverbal speech). This protection extends to students and teachers

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1. U.S. CONST. amend. I.

in public schools, who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] Even so, "in light of the special characteristics of the school environment,"[3] the expressive rights of public school students "are not automatically coextensive" with those of adults.[4] Therefore, school boards are given wide latitude to implement disciplinary policies that meet the needs of their district, and school administrators may be more restrictive of on-campus student speech than the government may be of citizens' speech in general. This authority has limits, however, and schools cannot prohibit student speech simply to avoid controversy or unpleasantness.[5] "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."[6]

The Supreme Court has been retreating from this expansive protection of student expression, and creating exceptions that circumscribe free speech. This Comment utilizes a two-part framework that encapsulates its jurisprudence on student speech in public schools.[7] This framework illustrates how the Court has attempted to balance protection of student speech against schools' ability to assure that the educational process is not disrupted in a way that interferes with other students' rights.[8] First, courts must look to the speech act itself, and whether school officials reasonably limited the expression based on legitimate pedagogical concerns.[9] If not, then the court must move on to the second inquiry, whether the speech act created an actual or foreseeable disruption of school functioning.[10]

The Supreme Court's student free speech jurisprudence is grounded in expressive activity that either occurs at, or makes a physical appearance on school grounds or at school sponsored events. Cyber speech, on the other

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

3. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (quoting *Tinker*, 393 U.S. at 506).

4. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

5. *Tinker*, 393 U.S. at 509.

6. *Id.* at 513.

7. I created this framework based on the Court's discussion in *Morse*, the Court's most recent decision on the issue of student speech in public schools. While the Court did not explicitly call it a two-part test, it provided a detailed explanation of the two levels of analysis that it has used. *Morse*, 127 S. Ct. at 2625-27.

8. *See id.*

9. *Id.* at 2626-27 (allowing reasonable restriction of speech that pertains to "the special characteristics of the school environment" even where there is not a substantial disruption).

10. *Id.* at 2627 (allowing restriction of "political" speech that causes "substantial disruption" within the school).

hand, is boundary-less, presenting a quandary for schools and students, and in turn, the district courts that adjudicate the issues. As a result, courts have applied the Supreme Court's two-part framework and modified it to incorporate an analysis of the nexus between off-campus student speech and associated on-campus disruption.

This Comment will provide an overview of judicial decisions on the issue of student electronic speech that implicate public schools, public school teachers, and administrators. The Comment will examine the test that courts are using to determine the extent of schools' power to censor students' electronic expression produced off school grounds. Next, the Comment will deconstruct *Layshock v. Hermitage School District*, a 2007 district court case concerning a MySpace parody profile of a high school principal.[11] The Comment will use the case to illustrate how the framework is being applied to protect instances of student off-campus cyber speech. Finally, the Comment will conclude with a discussion about the importance of this lower court jurisprudence, which is providing vital push-back to Supreme Court restrictions on First Amendment protection of student speech.

II. STUDENT FREE SPEECH FRAMEWORK

In a line of cases dating from 1969 to 2007, the Supreme Court has shaped a framework for evaluating constraints on student speech in public schools, differentiating between categorical restriction of speech that does not jibe with the educational mission of the public schools, and circumscription of otherwise unrestricted speech, because of its foreseeable or actual disruption of school activities.[12] The two-part analysis applies to speech that occurs on school grounds or at school sponsored events and can be broken into two stages. The first part entails an examination of the speech itself and whether it is protected by the First Amendment, given

11. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007). As of this writing, *Layshock* is the most recent published federal case on the topic.

12. *See infra* section II.B. In *Morse*, the Court differentiated a *Fraser*-type analysis, which permits school officials to categorically limit certain types of speech that pertain to the "special characteristics of the school environment," from a *Tinker*-type analysis, which allows school officials to constrain otherwise protected speech if it causes or may cause "substantial disruption." *Morse*, 127 S. Ct. at 2626-27; *see also Layshock*, 496 F. Supp. 2d at 596 (discussing the rule from *Morse* that "student speech cases must be resolved 'in light of the special characteristics of the school environment' " and "substantial disruption" is a separate inquiry) (citations omitted).

the institutional environment of the public school system.[13] If the speech is protected, then the second part of the analysis inquires into whether the speech can be permissibly restricted by the school if it substantially disrupts school activities[14] or if school administrators have a specific fear of disruption.[15]

A. Supreme Court Precedent

The foundational 1969 case, *Tinker v. Des Moines Independent Community School District*, created the initial rule that protects students' non-disruptive speech on public school campuses.[16] Amidst the heat and divisiveness of the Vietnam War, Mary Beth Tinker and two other Iowa teenagers wore black armbands to school in silent protest of United States' involvement in the war.[17] In response, school administrators who wished to avoid controversy suspended the students until they agreed to remove their armbands.[18] In its majority opinion, the Court upheld students' constitutional right to express themselves, particularly their communication of political views, so long as it does not "materially or substantially" interfere with school activities or "collid[e] with the rights of others."[19] *Tinker* thus shielded on-campus student speech from discipline, so long as it did not disrupt school activities.

In 1983 the Supreme Court retreated from the broad protections provided by the Warren Court in *Tinker*, when the conservative majority in *Bethel School District Number 403 v. Fraser* sided with the school district to limit student speech.[20] In *Fraser*, Matthew Fraser, a student at Bethel High School in Washington, had been suspended for presenting a speech consisting of an extended sexual metaphor. The Court determined that his speech was not protected by the First Amendment.[21] The Court marked a

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13. *See Morse*, 127 S. Ct. at 2626-27 (explaining that, while the analysis in *Fraser* was "not entirely clear," its holding stood for the proposition that students' on-campus speech receives less protection than speech by adults in other settings, and because of the "special characteristics" of the school environment, some speech can be further restricted even if it does not disrupt school activities).

14. *See Morse*, 127 S. Ct. at 2626-27 (explaining that a court making a *Fraser*-type finding need not move on to the *Tinker* "substantial disruption" analysis).

15. *Layshock*, 496 F. Supp. 2d at 597 ("It is clear that school administrators need not wait until a 'substantial disruption' has already occurred prior to taking action.").

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

17. *Id.* at 504.

18. *Id.*

19. *Id.* at 512-13.

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

21. *Id.* at 685.

new exception to *Tinker*, such that schools could discipline students for "lewd" speech, free from First Amendment restraint.[22] Notably, the Court did not base its holding on the effect of the speech, meaning it did not point to a "substantial disruption," but rather the authority of the school to limit a special type of speech that would not be restricted outside of the school environment.[23] Further, the Court held that the definition of this special category of "lewd" speech rests with the school, as part of its "basic educational mission"[24] to teach the "boundaries of socially appropriate behavior."[25]

In *Hazelwood School District v. Kuhlmeier*, the Court refined the concept of "basic educational mission" described in *Fraser*.[26] The Court explained that "[a] school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards."[27] A school may refuse to disseminate the speech even if it is not disruptive of the school environment.[28] In *Kuhlmeier*, school administrators censored student articles involving issues of teen pregnancy and divorced parents.[29] The Court deemed this forum (a school newspaper) a "supervised learning experience" that comprised school sponsored speech.[30] The Court held for the school, allowing it to limit student speech that could be reasonably perceived as "bear[ing] the imprimatur of the school"[31] so long as the restriction is "reasonably related to legitimate pedagogical concerns."[32]

The Court's most recent restriction of the *Tinker* rule occurred in mid-2007 when it decided *Morse v. Frederick*.[33] Writing for the majority,

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22. *Id.*

23. *Fraser* created a conscribed category of "lewd" speech, reasoning that "schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683. The Court in *Morse* summarizes this reasoning, noting that in *Fraser*, it did not employ a "substantial disruption" analysis, but rather linked school discipline of "lewd" speech with its interest in upholding its educational mission. *See* Morse v. Frederick, 127 S. Ct. 2618, 2626-27 (2007).

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

25. *Id.* at 681.

26. *Id.* at 685. *Fraser* drew on dicta in *Tinker*, regarding the "special characteristics of the school environment." *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

27. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988).

28. *Id.* at 271.

29. *Id.* at 263.

30. *Id.* at 270.

31. *Id.* at 271.

32. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

33. Morse v. Frederick, 127 S. Ct. 2618 (2007).

Chief Justice Roberts etched a new exception into the realm of protected student speech; any speech on school grounds or during a school activity that advocates illegal drug use now falls outside the realm of protected speech.[34] Specifically, the Court withheld First Amendment protection from an 18-year-old student in Alaska who held up a "BONG HiTS 4 JESUS" banner during a school sponsored viewing of the 2002 Olympic Torch Relay.[35] The Court explained that *Tinker* was "not absolute," such that the "substantial disruption" analysis was not required when issues affecting the special characteristics of the school (such as "lewd" speech and "drug promoting" speech) were implicated.[36]

Thus, without calling it a "test," the Court in *Morse* explained its line of jurisprudence from *Tinker* to *Fraser* to *Kuhlmeier*[37] and implicitly separated student free speech analysis into two parts, where some "inappropriate" types of speech can be restricted even without evidence or reasonable fear of "substantial disruption" of the school environment.[38]

B. Two-Part Framework for Student Free Speech

This line of Supreme Court jurisprudence on student free speech falls neatly into a two-part framework (see Figure 1). The first part of the framework looks at the content of the speech or expression, and the second part looks at its effect (or foreseeable effect).

34. *Id.* at 2625.
35. *Id.* at 2622.
36. *Id.* at 2626-27.
37. *Id.* at 2625-28.
38. *See id.* (distinguishing between its analyses in *Fraser* and *Tinker*, and citing *Kuhlmeier* to explain that the analysis in *Fraser* rested on the school's educational mission to prohibit inappropriate sexual content, whereas *Tinker* was based on a substantial disruption analysis).

Fig. 1: FRAMEWORK FOR STUDENT EXPRESSION THAT OCCURS ON SCHOOL GROUNDS OR AT SCHOOL SPONSORED EVENTS

Part I:

Is the expression contrary to the school's educational mission within the "special characteristics of the school environment"?

Speech that is lewd, vulgar, obscene or plainly offensive.

→ *Not protected (Fraser)*

Speech advocating illegal drug use.

→ *Not protected (Morse)*

Speech that bears the imprimatur of the school.

→ *Not protected (Hazelwood)*

Part II:

Even though the expression is constitutionally protected, was it appropriate for the school to restrict speech or discipline the student?

Caused, or was reasonably likely to cause "substantial disruption" of school activities.

→ *Permissible to restrict speech (Tinker)*

With some notable exceptions, almost any sort of verbal speech,[39] written speech,[40] or nonverbal conduct[41] in which a student expresses an opinion amounts to "speech" under the First Amendment. But the Court has observed that "political" speech "is at the core of what the First Amendment is designed to protect."[42] However, what constitutes "political" speech, and how this differs from expression of opinions that may or may not have political implications, is far from clear. For example, the Court considered the anti-war armband worn by Mary Beth Tinker to be "political" whereas the student government nomination speech given by Matthew Fraser was not.[43]

While the line between "political" and presumably "apolitical" speech is indistinct, the Court has made it clear that some sorts of speech are not

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

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

41. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

42. *See Morse*, 127 S. Ct. at 2626 (quoting Virginia v. Black, 538 U.S. 343, 365 (2003)).

43. *Compare Tinker*, 393 U.S. at 514 (finding Tinker wore the armband to show "disapproval of the Vietnam hostilities"), *with Fraser*, 478 U.S. at 685 ("Unlike the sanctions imposed . . . in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.").

protected by the First Amendment. Schools may place heightened limitations on "lewd" speech,[44] speech that could be perceived as school sanctioned or approved,[45] and speech that promotes illegal drug use.[46] All of these excepted areas of speech have been grouped under the rubric of "special characteristics of the school environment."[47] This nebulous catch-all could feasibly be used to restrict a wide swath of student speech, but for the purpose of practical application, schools may categorically prohibit student expression that falls within these "unprotected" realms as long as the restriction is reasonably related to the school's educational mission.[48]

Speech that is not "lewd," drug-promoting, or school-sponsored moves on to the second part of the test, which looks at the effect of the speech. Even if an instance of student expression is constitutionally protected, it may be restricted if it causes substantial disruption of school activities or impinges on the rights of other students.[49] Conversely, school officials' mere disagreement or discomfort with the message is not sufficient to show a substantial disruption. For example, a student athlete who complains in writing about the abusive tactics of his basketball coach is constitutionally protected.[50] But if the student "substantially disrupts school activity" by engaging in a last minute team-wide boycott of a varsity game, then school administrators could permissibly discipline him for his expressive conduct.[51]

Further, a school need not wait for actual disruption. If it can "point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."[52] Extrapolating from the example above, if the student athlete plans to distribute flyers at the varsity basketball game, and school administrators reasonably believe that the flyers could incite fights or vi-

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44. *See Fraser*, 478 U.S. at 685.

45. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

46. *See* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

47. *See, e.g.*, *id.* at 2629 ("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 illegal drug use.") (citations omitted).

48. Note that *Morse* stretches the school's educational mission to encompass a federal legislative mission to combat illegal drug use in schools. *Id.* at 2629.

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

50. Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 768 (9th Cir. 2006).

51. *Id.* at 769.

52. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001)).

olence, the principal's confiscation of the flyers and suspension of the student would likely pass constitutional muster.

III. HOW COURTS HAVE MODIFIED THIS FRAMEWORK TO APPLY TO "CYBER SPEECH"

Written speech that occurs on school grounds, including the hypothetical flyers described above, as well as comments posted on a website are subject to the same test as other forms of student speech. Even so, when out-of-school conduct has in-school implications, the web has created a new dimensional twist in the two-part analysis. For example, a comment published to a website while at home or a parodic profile created on a non-school computer may penetrate the literal and electronic "walls" of the public school. Therefore, such speech may be received as if it was created at school or distributed on school grounds. Increasingly, courts are being called upon to resolve students' claims that schools' censorship of cyber speech created off-campus has violated their First Amendment free speech rights.

In *Morse*, the Supreme Court acknowledged "some uncertainty at the outer boundaries as to when courts should apply school-speech precedents."[53] Unfortunately, even the most applicable Supreme Court case on which lower courts can rely, *Kuhlmeier*, pertained to in-school speech. *Kuhlmeier* involved the publication of student writing in a school newspaper, and the Court determined that school censorship of student articles was permissible.[54] Under this rubric of "school sponsored speech," it follows that if a student publishes something to the Internet (such as an offensive MySpace profile) as part of a computer class or school-sponsored project, it seems clear that the school has disciplinary discretion. But lower courts are being called upon to adjudicate instances of student expression that have merely penetrated school grounds after they were published. Perhaps the closest historical analogues to cyber speech disputes are cases concerning privately distributed, student published "underground newspapers."[55]

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53. *Morse*, 127 S. Ct. at 2623-24. The Pennsylvania Supreme Court also noted that "there is little case law" addressing the issue of student speech "that occurred *off of school premises* and was communicated to others via the Internet." J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 419 (Pa. 2000).

54. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274-76 (1988).

55. *See* Thomas E. Wheeler II, *Lessons from the Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 ED. LAW REP. 227, 231 (2007).

A. Underground Newspaper Cases in Circuit Courts

Before the Internet, high school students who wanted to let off steam about their public school teachers or administrators produced "underground newspapers." These newspapers and magazines were written and published by students, off-campus, and they were privately distributed.[56] Although they were not produced at school, if students distributed them on campus and they disrupted school, this "speech" fell within the disciplinary purview of the school when the educational process was threatened.[57] In such cases, courts would side with schools, upholding their discipline of the responsible student or students.[58] Conversely, if the publication was about the school, but it was distributed "beyond the schoolhouse gate" and only minimally affected school functions, then it did not fall under the authority of the school.[59] The publication was treated as any other form of speech in a public forum—where only extreme forms of expression, such as obscenity, are stripped of constitutional protection because of their content.[60]

In *Thomas v. Board of Education*,[61] the Second Circuit upheld student expression via an off-campus newspaper. The court held that the high school students' newspaper did not form a sufficient connection with the school to pull it into the school's disciplinary reach.[62] The publication, modeled after *National Lampoon*, contained satire about "school lunches, cheerleaders, classmates, and teachers," as well as articles about prostitution and masturbation.[63] The students took pains to keep the publication separate from their school by writing articles in their homes and after school, paying to have it printed at a local business, and selling it at an off-campus general store.[64] Despite their efforts, a copy of the paper was

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56. *See* Jamin B. Raskin, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS 67 (2003).

57. *Id.* Court decisions in the 1970s disallowed school authorities from censoring privately produced and distributed publications, unless they could be foreseen to substantially disrupt the educational process.

58. *See id.*

59. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979).

60. *See, e.g., id.* at 1048 (citing several cases in which "we have excluded libel, obscenity, and incitement from the First Amendment's protective cloak").

61. *Id.*

62. *Id.*

63. *Id.* at 1045.

64. *Id.* at 1045.

found on-campus.[65] Subsequently, after determining that the newspaper's contents were inappropriate, their principal suspended them.[66]

In a strongly worded opinion, the circuit court expressed immense concern about the implications of allowing school administrators to control the content of students' off-campus speech where it bore little nexus with the school.[67] The court was "intentionally frugal in exposing expression to government regulation."[68] It upheld student free speech because the student publishers "diligently labored to ensure that [the newspaper] was printed outside the school, and that no copies were sold on school grounds."[69] Though some of the articles were transcribed on school typewriters and the finished product was stored in a teacher's closet, the court found that student's activity within the school was nonetheless *de minimis*.[70] Further, the school's punishment could not "withstand the proscription of the First Amendment" allowed for on-campus speech, because "school officials [had] ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith."[71]

An important component of this Second Circuit opinion is its clarification of the distinction between a student's speech as a "student," under the authority of the school, and her speech as a member of the general community. Because of the "unique requirements of the educational process," student speech that falls under a school's disciplinary authority may be held to the *Tinker* "substantial disruption" standard—a higher standard than speech that would ordinarily be protected.[72] But the authority of school officials encompasses the "power to punish one who sp[eaks] out of turn in class or who disrupt[s] the quiet of the library or study hall,"[73] not the power to police student's off-campus speech.[74] The court chastised the school for overreaching its authority and punishing what it deemed "obscene" speech without any grounding in the constitutional standard for such speech.[75] It also found that if the wholly off-campus student newspa-

65. *Id.* at 1045.
66. *Id.* at 1046.
67. *Id.* at 1050-53.
68. *Id.* at 1048.
69. *Id.* at 1050.
70. *Id.*
71. *Id.*
72. *Id.* at 1049.
73. *Id.*
74. The term "off-campus" speech does not include school-sponsored events or field trips that occur off-campus.
75. *Thomas*, 607 F.2d at 1051-52.

per truly fell within the "narrow categories of words that the state may punish" outside of the school environment, the judgment would have to be made by an impartial arbiter, not a school official with a "vested interest in suppressing controversy" for the sake of institutional decorum.[76]

The most recent decision regarding an underground newspaper came out of the Seventh Circuit Court of Appeals.[77] Here, the court sided against the student, Justin Boucher, who had authored an article entitled, "So You Want to Be a Hacker," in an off-campus publication.[78] The article explained how to "hack" into school computers, and the paper was distributed to students on campus.[79] Upon discovering the article the school board expelled Justin for one year, believing that the article posed a serious threat to school property.[80] The district court determined that the harm to Justin outweighed the harm to the school, and enjoined the school from imposing discipline.[81] The court of appeals agreed that a one-year expulsion was an unreasonable response, but it found that the school's substantiated fear of tangible harm to its computer systems warranted its choice to impose discipline.[82] Because the article was distributed on campus and advocated on-campus activity, the appellate court overturned the injunction against his school.[83]

This case provides an interesting bridge to cyber speech because it involved a student advocating a mild form of cyber terrorism. It is precisely because school administrators had a reasonable fear that students might be able to overwhelm their school's technological capabilities that the circuit court determined that the harm to the school outweighed the student's free speech rights. Further, even though the publication was produced off-campus, it was distributed on the school campus and advocated on-campus activity, which pulled it into the school's disciplinary authority.[84] Though the Seventh Circuit did not call this link a "nexus," it follows the reasoning used by other courts in similar underground newspaper disputes.[85]

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76. *Id.* at 1047, 1051.
77. Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998).
78. *Id.* at 823.
79. *Id.* at 822.
80. *Id.* at 823.
81. *Id.* at 826.
82. *Id.* at 826-27.
83. *Id.* at 829.
84. *Id.* at 828.
85. *See, e.g.*, Bystrom v. Fridley High Sch., 822 F.2d 747 (8th Cir. 1987) (allowing restriction of student speech, where underground newspaper was distributed on campus, and advocated vandalism and violence against teachers).

Today, instead of underground newspapers, students blow off steam by publishing their opinions in electronic formats, such as blogs and electronic profiles. Unlike newspapers, these electronic publications can be distributed instantaneously among many people at once. So even if the student has no intention of sharing his creation with classmates, it can still easily find its way into the classroom.[86] "*Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by [a student's] complex multi-media website, accessible to fellow students, teachers, and the world."[87] Further, once the blog or web profile is discovered in a school it can be very difficult for school administrators to erase its electronic imprint or block student access.[88] In response, lower courts are amassing a body of case-law on the extent to which schools can abridge First Amendment protection of students' off-campus cyber speech.

B. Notable Lower Court Decisions on Cyber Speech

In a 1998 case, *Beussink v. Woodland R-IV School District*, a Missouri district court found that a high school student, Brandon Beussink could not be punished for his off-campus cyber speech.[89] Using his home computer during non-school hours, Brandon created a website that criticized his school, including his teachers, principal, and the school webpage.[90] Brandon did not intend his website to be viewed at school, but a friend saw it on Brandon's home computer, and later brought it to the attention of school administrators.[91] Upset by the contents of the site, Brandon's principal suspended him for ten days.[92] In response, Brandon sought a court-ordered injunction.[93] Despite his use of vulgar language, the court upheld Brandon's free speech rights.[94] The court blocked the school district from imposing the suspension and restricting Brandon from reposting the page,

86. *See, e.g.*, Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (noting that a student showed his website to a friend who, after a subsequent falling out, showed the website to a teacher).

87. J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638, 665 (2002).

88. *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591-93 (W.D. Pa. 2007) (noting that it took more than a week for the school to block student access to parody MySpace profiles of school principal, and the district had been attempting to block access to MySpace for approximately two months).

89. *Beussink*, 30 F.Supp.2d at 1177.

90. *Id.*

91. *Id.* at 1177-78.

92. *Id.*

93. *Id.* at 1177.

94. *Id.*

noting that schools may not limit student speech merely because they dislike the content of the speech or are upset by it.[95] The court determined that this electronic posting did not form a nexus with the school and did not materially or substantially interfere with school discipline.[96]

Another 2001 Pennsylvania district court case, *Killion v. Franklin Regional School District*, reiterated the principle that disliking or being upset by privately produced student speech that is nonthreatening and nondisruptive is insufficient justification for discipline.[97] Here, the school suspended a student for an email he produced on his own time and on his home computer, but which he sent to a list of friends.[98] The email contained a "Top Ten List" of disparaging comments about the school's athletic director, including statements about the size of his genitals.[99] Like Brandon Beussink, this student did not distribute the list at school, but rather, another "undisclosed student" printed out the list and brought it to campus where it was discovered by school administrators.[100] The district court held that the school district violated the First Amendment by punishing the student for "mere creation" of a web-based list, in the absence of school disruption, and where the student had created the list while in the privacy of his home.[101]

Though not a district court case, *J.S. v. Bethlehem Area School District*, decided by the Pennsylvania Supreme Court in 2002, is illustrative of what it takes to form a nexus between a student's off-campus speech and a resulting school disruption.[102] Like *Beussink*, *J.S.* involved a student who created a website from his home computer.[103] However, the website in this case, entitled "Teacher Sux," contained threatening graphic depictions.[104] The student's algebra teacher was shown with her head severed and dripping with blood, and her face morphing into that of Adolph Hitler.[105] The site also contained a page purportedly devoted to soliciting donations in order to hire a hit man to kill her.[106] In this instance, the court held that the

95. Brandon had voluntarily removed the page after receiving disciplinary notice from his school. *Id.* at 1179.

96. *Id.* at 1181.

97. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001)

98. *Id.* at 448.

99. *Id.*

100. *Id.* at 449.

101. *Id.* at 458.

102. J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638 (2002).

103. *Id.* at 643.

104. *Id.* at 644.

105. *Id.* at 645.

106. *Id.*

school district was justified in disciplining the student.[107] The algebra teacher suffered physical and emotional distress, had to take an extensive leave of absence after viewing the page, and her classes had to be taught by substitute teachers.[108]

Because of the effect on both the teacher and the school community,[109] the *J.S.* court agreed with the school that the website, while created off-campus, had substantially disrupted school activities, and had been accessed on-campus.[110] In this iteration of the substantial disruption test, actual disruption or targeting the specific audience of the school and its teachers is a precursor to the nexus analysis.[111] Pursuant to this reasoning, a student website, which was created off-campus and designed to harass a teacher, would not qualify for discipline by school authorities *per se.* However, if the website is accessed at school and brings about its desired effect of frightening the teacher or riling up the school community, then a court would likely find that the student's website was sufficiently connected to on-campus disruption.[112] A sufficient nexus can be found, even if the website was only accessed once on-campus by a student.[113] In coming to this conclusion, the court focused on the fact that the website had threatened a teacher.[114]

Off-campus cyber speech, or any speech for that matter, is not protected by the First Amendment if it moves beyond parody or criticism and poses a "true threat" to personal safety.[115] A "true threat" is a written or oral statement that could be reasonably perceived as a "serious expression of an intention to inflict bodily harm upon or take the life of" the target of

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107. *Id.* at 643.

108. *Id.* at 646.

109. *Id.* ("[C]omparable to the . . .death of a student or staff member.")

110. *Id.* at 673.

111. *See id.* at 668.

112. *See id.* at 673-74

113. *See* Wheeler, *supra* note 55, at 235 (describing the "J.S. approach" as "[i]f the website is accessed by students at school then the speech will be deemed to have taken place on-campus and the school will be able to regulate it").

114. *J.S.*, 569 Pa. 638, 674 ("The most significant disruption caused by the posting of the website to the school environment was direct and indirect impact of the emotional and physical injuries [to the teacher].").

115. *See id.* at 652 ("A 'true threat' is a certain class of speech that the United States Supreme Court has determined is beyond the protective ambit of the First Amendment."). In *J.S.*, the court found, the "lack of immediate steps taken directly against J.S., and the lack of immediate notification of his parents about the web site, for the extended time period that passed in this case, strongly counters against a conclusion that the statements made in the web site constituted true threats." *Id.* at 658-59.

the statement.[116] Courts use a "reasonable person" standard to determine if an expressive act constitutes a "true threat."[117] If student cyber speech does pose a threat, it is not constitutionally protected. In such a case, analysis under the on-campus "substantial disruption" portion of the student free speech test would be irrelevant. Only speech that would be ordinarily protected moves on to the second half of the test.

A 2002 Michigan case, *Mahaffey v. Aldrich*, provides a good example of the application of the interaction between "true threat" and "substantial disruption."[118] In *Mahaffey*, a district court determined that a student's off-campus contribution to a website, "Satan's web page," was an obvious parody that neither posed an actual threat nor disrupted school.[119] Though the site included a list of "people I wish would die," it contained no direct threats, and it was only one of several lists, including "people that are cool," "movies that rock," and "music I hate."[120] Further, the student had created it "for laughs" without showing it to anyone, and had even included a disclaimer: "PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?"[121] Accordingly, the court determined that a reasonable person could not view this site as a serious expression of intent to harm the people on the list.[122] The court then applied the second part of the test for student speech, and because the school officials had no evidence of school disruption, found that their discipline of the student was unconstitutional.[123]

Another cyber speech case addressing both "true threat" and "substantial disruption" was *Emmett v. Kent School District No. 415*.[124] Here, the court sided with a student that had created a mock version of his high school's webpage, finding that his publication of faux obituaries did not pose a true threat or disrupt school.[125] The page included disclaimers that

116. Mahaffey v. Aldrich, 236 F. Supp. 2d, 779 785 (E.D. Mich. 2002) (quoting United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir. 1972)).

117. *See* Wheeler, *supra* note 55, at 240 (discussing courts diverging applications of the reasonable person standard—some use the view of the speech-maker and others use the view of the subject of the speech).

118. *Mahaffey*, 236 F. Supp. 2d at 782.

119. *Id.* at 784.

120. *Id.* at 782.

121. *Id.* at 786.

122. *Id.*

123. *Id.*

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

125. *Id.* at 1090.

the page was for entertainment and not sponsored by the school.[126] It also included "tongue-in-cheek" obituaries of two of the student's friends, and an opportunity to vote for the subject of the next "obituary."[127] The court acknowledged that, in the face of school shootings, "[w]eb sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people."[128] But where the school had "presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever," and where "the speech was entirely outside of the school's supervision or control," it could not suspend the student.[129]

C. Cyber Speech Modifications to the Supreme Court's Student Free Speech Framework

As the cases above illustrate, lower courts have only allowed school authorities to discipline off-campus cyber speech in limited circumstances. In essence, the framework described in Part II has been amended to include two modifications (see Figure 2). The first modification applies to the first part of the student free speech test—the writing itself. When a website or blog is created off-campus the court does not apply the *Fraser*, *Kuhlmeier*, or *Morse* exceptions, but it still must decide whether the speech would "ordinarily" be protected by the First Amendment. Therefore, schools do not have special authority to categorically censor "lewd" or drug-promoting speech that is created off-campus.[130] For example, in *Killion*, the court agreed that the student's "Top Ten List" contained "lewd and vulgar" statements but since the email was created at the student's home, "far removed from any school premises or facilities," and not "associated in any way with his role as a student," the fact that it was "lewd" was irrelevant to the court's analysis.[131]

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126. *Id.* at 1089.

127. *Id.* ("The obituaries were written tongue-in-cheek, inspired, apparently, by a creative writing class last year in which students were assigned to write their own obituary.").

128. *Id.* at 1090.

129. *Id.*

130. *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) ("[B]ecause . . . *Morse* involved school-related speech, *Morse* is not controlling of the instant matter.").

131. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001).

Fig. 2: FRAMEWORK FOR ELECTRONIC ("CYBER") SPEECH CREATED OFF SCHOOL GROUNDS & WITHOUT SCHOOL RESOURCES

Part I:

Is the expression ordinarily protected by the First Amendment?

Poses a "true threat" (or is obscene or libelous).

→ Not protected

Part II:

Even thought the expression occurred off-campus, did it form a nexus with the school?

Student brought it to school or it was accessed at school.

→ Nexus formed and Part III applied

Part III:

Because of this nexus, was it reasonable for the school to discipline the student?

Speech caused, or was reasonably likely to cause "substantial disruption" of school activities.

→ Permissible to restrict speech

Instead, courts apply traditional free speech analysis, which tends to be highly protective of individual rights, but with more limited exceptions for speech that is obscene, libelous, or meant to incite harm.[132] More specifically, student cyber speech cases often focus on the "true threat" exception to ordinary free speech.[133] In *Thomas*, the court explained, "we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone."[134] Accordingly, the bar for a "true threat" is high. But even in the absence of this finding, a court might still determine that the emotional toll of the threat (on the algebra teacher in *J.S.*, for example) amounts to a substantial disruption of school activities, and it might thereby uphold school discipline.

Therefore, if cyber speech originates outside of school, it is not subject to a school's disciplinary authority unless it causes or is reasonably likely to cause a substantial disruption. Thus, the second modification that lower courts have applied is an additional analytic step inserted between the con-

132. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1048 (2d Cir. 1979).

133. *See* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 785 (E.D. Mich. 2002).

134. *Thomas*, 607 F.2d at 1048.

tent and effect of the speech. This step pertains to the "nexus" between the creation of the speech and the extent to which it correlates with a substantial disruption of school functioning. School officials must have actual evidence of substantial on-campus disruption caused by the off-campus speech, or a reasonable fear of potential disruption to justify disciplining students for such cyber speech. Nevertheless, the nexus between off-campus cyber speech and any real or feared disruption may be established through mere on-campus access of that webpage or blog posting. The discussion of *Layshock v. Hermitage School District*, below, will illustrate the application of the modified student free speech test.

IV. APPLICATION OF THE STUDENT "CYBER SPEECH" FRAMEWORK IN *LAYSHOCK V. HERMITAGE SCHOOL DISTRICT*

In July 2007, the Pennsylvania district court heard *Layshock v. Hermitage School District*, a case similar to *Killion*. Again, the court upheld the student's free speech rights. Specifically, it held that a school district could not discipline a student, Justin Layshock, for posting a parody profile of his principal, Eric Trosch, on MySpace.[135]

MySpace is a hosted community of users, which advertises itself as "a social networking service."[136] MySpace allows users to create blogs and fill-in-the-blank profiles, which can only be removed by the user or a MySpace administrator. Justin created a profile of Trosch in which he prefaced most answers with "big."[137] For example, in response to the profile question, "in the past month have you smoked?" Justin wrote "big blunt"; and to the question, "in the past month have you gone on a date?" Justin answered "big hard-on."[138]

Justin's was not the only MySpace profile of Trosch, though. During the period of time in which students were able to access Justin's profile (approximately 5-9 days), students and teachers could also view three other parodies of Eric Trosch, all of which were more vulgar and offensive than Justin's.[139] When administrators discovered the profiles, they spent several days attempting to block access to the profiles, as well as seeking out the students who created them.[140] After Justin admitted that he had

135. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007).
136. MySpace, http://www.myspace.com (last visited Dec. 10, 2007).
137. *Layshock*, 496 F. Supp. 2d at 591.
138. *Id.*
139. *Id.*
140. *Id.* at 592-93.

created a Trosch profile, the administrators suspended him for ten days, placed him in an alternative learning program at school, barred him from participating in school events or activities, and prohibited him from attending his graduation.[141]

The court looked to the case-law for an applicable framework for deciding the issue. It found that the most recent Supreme Court decision, *Morse*, was not controlling because it applied only to school-sanctioned and school-supervised events, as well as school-related speech.[142] The court also listed several recent cases decided in the Western District of Pennsylvania, including *Killion*, which found that schools could not punish students for speech originating outside of school.[143] It explained that student free speech cases involving off-campus expression must be treated differently than instances of restricted on-campus speech.[144] While courts "must defer to school administrators' determinations regarding whether student behavior within their supervision merits punishment,"[145] they may not defer to schools regarding the initial "jurisdictional" question of whether the school even has such supervisory authority over a student's off-campus expression.[146] "The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web."[147]

Consequently, school authority to censor web content or other speech generated off-campus must derive from the extent to which that expression is connected or linked to an actual or potential on-campus disruption.[148] The court applied this "appropriate nexus" test in order to determine the reach of the school's disciplinary authority.[149] It found that Justin only accessed the website once and showed it to others before their class started, which "in theory, might support the punishment issued by the administration," but there was "no evidence from which a reasonable jury could conclude that this incident caused a material and substantial disruption of school operations."[150]

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141. *Id.* at 593-94.
142. *Id.* at 595.
143. *Id.*
144. *Id.* at 596.
145. *Id.* at 597.
146. *Id.* at 599.
147. *Id.* at 597.
148. *Id.* at 599.
149. *Id.*
150. *Id.* at 600-01.

While there was technically a "nexus" between Justin's off-campus speech and his on-campus activity, there was no evidence of substantial disruption, so it was not an "appropriate nexus" to justify school punishment.[151] Similar to the student in *Killion*, Justin had neither created the "writing" while on school grounds nor had he used school resources. He had used his grandmother's computer during nonschool hours.[152] He had accessed the profile once while at school but it had caused no classroom disruption.[153] Further, Justin's was only one of four similar profiles that students could access on school computers, and the school had no evidence that his specific profile had caused any disruption.[154] The Court weighed the minimal disruption in this case against the more substantial disruption in *Thomas* (which the Second Circuit deemed *de minimis*) and concluded that the "school administration lacked authority to punish Justin for his off-campus creation of a Trosch profile."[155]

Layshock demonstrates that even if school administrators can reasonably foresee that off-campus student publications might find their way onto campus, such expression is protected by the First Amendment unless it can be demonstrably tied to substantial on-campus disruption.[156] The *Layshock* court also touched on an important policy issue, specifically the danger that schools overreach their authority and encroach on the supervisory rights of parents and others.[157] "Public schools are vital institutions, but their reach is not unlimited."[158] A school's reach is limited to conduct within the scope of school activities.[159]

V. CONCLUSION

While lack of guidance from the Supreme Court has created some uncertainty among the lower courts, its silence is not necessarily a bad thing. Whereas the Supreme Court has been busy creating limiting "exceptions" to protected student speech, lower courts have clung to *Tinker*; and more

151. *Id.*
152. *Id.* at 591.
153. *Id.* at 591-92.
154. *Id.* at 600.
155. *Id.* at 601.
156. *Id.* at 598.
157. *Id.* at 597.
158. *Id.*
159. *Id.*

often than not, they rely on *Tinker* to uphold student rights.[160] Upholding students' free speech rights is a real demonstration that the Constitution is alive and applies to all of us,[161] and it is important that "cyber speech" remains a realm in which students can criticize the governmental institutions (primarily, public schools) that control their lives. "Students in school as well as out of school are 'persons' under our Constitution"[162] with the undoubted right to question governmental authority. So, if we truly value First Amendment protection of speech, including inculcation of such values into the learning experience of public school students, the lower courts' more flexible interest balancing approach is preferable to the Supreme Court's bright-line "exceptions" to protected student speech.

In cyber speech cases, district courts have, for the most part, applied the core premise of *Tinker*—that students and teachers do not shed their rights at the schoolhouse gate. These courts are charged with, and best equipped for assessing the facts of each case by balancing the actual instance of student speech against valid factually supported instances of school disruption. They have used this balancing test to uphold students' off-campus cyber expression unless it is outweighed by the countervailing rights of teachers or other students. For example, school discipline will be upheld if a student's off-campus cyber speech poses a "true threat" to a teacher's safety or incites on-campus disruption, but the student's free speech rights will be upheld if he merely posts unflattering comments about his teacher or uses vulgar language on the Internet.

Even in cases that do not involve cyber speech, lower courts have been loath to apply the Supreme Court's exceptions to protected student speech. They have already interpreted both *Fraser* and *Morse* as creating only limited, narrow exceptions to *Tinker*'s interest balancing approach.[163] For example, the Ninth Circuit decision in *Fraser* would have protected the student's speech, because there was no evidence that it actually infringed

160. *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454-55 (W.D. Pa. 2001) ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*.").

161. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1182 (E.D. Mo. 1998) ("The public interest is not only served by allowing [the student's] message to be free from censure, but also by giving the students . . . this opportunity to see the protections of the United States Constitution and the Bill of Rights at work.").

162. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

163. DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d, 633, 638-39 (D.N.J. 2007); Lowry v. Watson Chapel Sch. Dist., 508 F. Supp. 2d 713, 722 n.3 (E.D. Ark. 2007); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595-96 (W.D. Pa. 2007).

on other students' rights or disrupted school functioning.[164] Also, even though the Supreme Court did not consider his speech "political," Fraser himself viewed the speech as such. He was subjected to a harsh lesson in constitutional interpretation when, despite the factual findings of the lower court, his nondisruptive political speech was deemed unworthy of constitutional protection by the highest court in the land.

Fraser's personal experience points to the broader societal interest in preserving our constitutional rights and limiting government imposed thought control. By restricting speech, the government, especially a student's public school, exerts a dangerous chilling effect on speech. "[A] school official acts as both prosecutor and judge when he moves against student expression," because the "short duration of most sanctions" makes "the promise of judicial review . . . an empty one."[165] *Tinker* warned that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[166] But public school administrators have a special role as both state actors and quasi-caregivers to students, with the ability to "mete out punishment without incurring the costs of procedural safeguards."[167] Therefore, courts must act as gatekeepers, preserving student free speech rights. Barring substantial disruption or dangerous threats, students must be allowed to express opinions about the things that matter to them, even if the messages themselves or the ways they are communicated seem distasteful.

The chilling effect of punishing student speech merely because it is unpleasant or disagreeable threatens the foundations of democracy. "Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking if all ideas, discoveries, and points of view are before the citizenry for its consideration."[168] The fact that our Constitution is designed to limit governmental censorship of citizens' opinions is what differentiates us from nondemocratic countries. A student criticizing the U.S. government while standing in Central Park is protected by our Constitution in a way that a student protesting the Chinese government while standing in Tiananmen Square is not. It follows that discouraging students from engaging in discourse and critical thinking, even if it is juvenile or silly, is antithetical to a healthy democracy.

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164. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356 (9th Cir.1985), *rev'd*, 478 U.S. 675 (1986).

165. Thomas v. Bd. of Educ., 607 F.2d 1043, 1051-52 (2d Cir. 1979).

166. *Tinker*, 393 U.S. at 511.

167. *Thomas*, 607 F.2d at 1052.

168. *Id.* at 1047.

Therefore, courts "must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections."[169]

Clearly, there are some limits to free speech, where lives are endangered or a student truly hijacks the educational environment to disrupt other students' ability to learn. But the danger of allowing public schools to become "enclaves of totalitarianism,"[170] allowed to suppress students' off-campus speech, is far greater. The court in *Thomas* stated it well:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, *our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.*[171]

When the school day ends, electronic communication provides an outlet for students who may not have any other comfortable venue in which to express their thoughts and criticize their schools. It provides a "breathing space in which expression may flourish"[172] and provides a balance to restrictions on expression that may be imposed within the confines of her school.

By disallowing schools from unduly extending their disciplinary authority to smother students' off-campus cyber speech, district courts are preserving not just student free speech rights, but freedom of expression in general.[173] These students are the voters, policy-makers, and school administrators of the future. We can only preserve their faith in democracy and ask for their buy-in as future voters and politically astute citizens by demonstrating that the Constitution works to protect their rights.

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169. *Id.*

170. *Tinker*, 393 U.S. at 511.

171. *Thomas*, 607 F.2d at 1052 (emphasis added).

172. *Id.* at 1048.

173. *Id.* at 1047 ("At the heart of the First Amendment is the ineluctable relationship between the free flow of information and a self-governing people.").